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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LONG BEACH COUNCIL OF CLASSIFIED EMPLOYEES, LOCAL 6108, Plaintiff and Appellant, v. LONG BEACH COMMUNITY COLLEGE DISTRICT, Defendant and Respondent.	B275840 (Los Angeles County Super. Ct. No. BS144470)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Bush Gottlieb, Hope J. Singer, Ira L. Gottlieb and Lisa C. Demidovich for Plaintiff and Appellant.

Parker & Covert, Spencer E. Covert and Steven Montanez for Defendant and Respondent.

Long Beach Council of Classified Employees, Local 6108 (Local 6108) appeals from a judgment entered after the trial court denied its petition for a writ of mandate seeking to compel the Long Beach Community College District (District) to recognize the classified service status of nonacademic temporary employees and student workers the District hired following significant employee layoffs in 2012. In its petition, Local 6108 also sought to compel the District to reinstate and pay compensation and benefits to all former employees who were terminated as a result of their exclusion from the classified service.

Local 6108 contends the District violated its ministerial duty under Education Code section 88004[1] to classify all employees by assigning classified service work to temporary employees and student workers. Local 6108 also contends the District violated its ministerial duty under the Education Code by employing temporary workers who did not fall within an exemption from the classified service and student workers who displaced classified employees.

We conclude the District had a ministerial duty to classify all nonacademic employees and positions that did not fall within an exemption to classification. However, the limited-term and provisional employees hired by the District under sections 88105 and 88106 on a temporary basis were classified employees under the Education Code. Further, the student workers hired by the District were exempt from the classified service under section 88076, subdivision (b), and the Education Code did not bar the

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[1] All undesignated statutory references are to the Education Code.

District from assigning classified service work to student workers, so long as they did not displace classified employees. Finally, Local 6108's evidence does not compel a finding as a matter of law that student workers displaced classified employees. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

The District is a public entity that operates community colleges in the City of Long Beach. The District employs both academic and nonacademic personnel. This case concerns the employment by the District of nonacademic personnel. The Education Code requires the District to "'classify'" nonacademic employees and their positions, with limited exceptions. (§ 88076, subd. (a).) Class specifications, or job descriptions, describe the required work of classified employees.[2] The District's classified employees are employed in a "merit system" (see § 88060 et

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[2] Section 88001, subdivision (a), defines "'Classification'" to mean that "each position in the classified service shall have a designated title, a regular minimum number of assigned hours per day, days per week, and months per year, a specific statement of the duties required to be performed by the employees in each such position, and the regular monthly salary ranges for each such position." Further, "'[t]o classify' shall include, but not be limited to, allocating positions to appropriate classes, arranging classes into occupational hierarchies, determining reasonable relationships within occupational hierarchies, and preparing written class specifications." (§ 88076, subd. (a).)

seq.).[3] Employees in the classified service of a merit system community college district have specified rights and benefits with respect to, inter alia, vacancies, promotions, layoffs, reemployment after layoffs, suspensions, demotions, dismissals, and appeals of employment actions to the personnel commission. (§§ 88060, 88091, 88100, 88117, 88121, 88123, 88124, 88127.) Local 6108 is the exclusive representative of the District's classified employees.

The District employs most of its classified employees on a 12-month work year, but some classified employees whose duties primarily relate to students or classroom instruction work in 10-month positions that exclude a January or summer "intersession" break. The District sometimes hires temporary employees during the intersession break. The temporary employees include both 10-month District employees on break and individuals who are not regular District employees.

Beginning in 2009, the State of California significantly reduced funding for community college districts, reducing the District's budget by approximately $10 million. In June 2012, the District eliminated numerous classified service positions, resulting in the layoff of 37 classified employees, and reduction of work hours for 79 other classified employees. The District also laid off faculty and management employees and reduced its course offerings.

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[3] A merit system is a civil service system designed to select and advance employees based on merit rather than political or other considerations. (*Sonoma County Bd. of Education v. Public Employment Relations Bd.* (1980) 102 Cal.App.3d 689, 694-695 [discussing public school merit systems under § 45240 et seq.].)

After the layoffs, the District rehired some of the laid-off classified employees as temporary workers and gave additional temporary work to classified employees whose hours had been reduced. The District considered temporary employees to be "limited-term" employees, as that phrase is used in section 88105. The temporary employees substituted for employees who were absent, filled vacancies while the District went through the recruitment process, and addressed other temporary needs of the District. The District also hired part-time student workers to take on various low-level assignments.

B. *The Petition for a Writ of Mandate*

On August 12, 2013 Local 6108 filed a verified petition for a writ of mandate (Code Civ. Proc., § 1085) against the District. On December 30, 2013 Local 6108 filed a first amended petition alleging the District violated its ministerial duty to designate all nonacademic employees as classified employees unless a specific exemption applied. Local 6108 alleged there were 12 instances in which the District violated its ministerial duty by using temporary employees and student workers to perform classified work, and that it treated its classified employees unfairly.

Local 6108 sought a peremptory writ of mandate ordering the District to recognize the classified service status of all employees who were wrongfully excluded from the classified service, including positions in 116 specified areas and departments. Local 6108 also sought the reinstatement and payment of compensation and benefits to all former employees who were terminated or laid off as a result of their improper exclusion from the classified service.

C. *The Parties' Briefing and the Trial Court's Ruling on the Petition*

On April 2, 2015 Local 6108 filed a brief in support of its petition, arguing that 10 of the 37 workers laid off by the District were rehired as temporary workers with limited benefits, performing work that should have been assigned to permanent classified employees. Local 6108 also argued the District hired classified employees whose hours had been reduced to perform temporary work. Finally, Local 6108 contended the District improperly hired student workers to perform work previously performed by classified employees. Local 6108 asserted that the District's actions in replacing classified employees with temporary employees and student workers were unfair, resulting in some classified employees working two jobs and others having to compete with temporary and student workers. Local 6108 filed declarations from its counsel and from current and former District employees, as well as exhibits in support of its petition.

The District argued in opposition that after the layoffs it exercised its discretion in rehiring and assigning work, and that it had no ministerial duty with respect to assignment of work for temporary employees and student workers. The District asserted it properly hired laid-off former employees, current classified reduced-hour employees, and student workers to perform temporary work pursuant to sections 88076, 88105, and 88106, and that student workers did not displace any classified employees. The District also contended Local 6108 had a plain, speedy, and adequate remedy at law under the parties' collective bargaining agreement and before the Public Employees Relations Board (PERB), and thus mandamus was not available. The District filed declarations from its counsel, human resources

officers, and administrators, as well as exhibits, in support of its opposition.

On March 25, 2016 the trial court conducted a hearing on the merits of the petition and took the matter under submission. On March 28, 2016 the court filed a proposed statement of decision in which it denied the petition, subject to any party's objection under California Rules of Court, rule 3.1590(c)(1)). No objections were filed. In its statement of decision, the trial court found the petition did not assert claims relating to a collective bargaining agreement or any matter within PERB's exclusive jurisdiction. The trial court noted that Local 6108's briefing did not focus on the District's alleged failure to perform a ministerial duty, but instead complained of the District's failure to plan intelligently for the impact of layoffs, which was beyond the scope of any ministerial duty.

The court found "that the requirement that non-academic and non-exempt positions be classified and be included in the classified service constitutes a ministerial duty." However, the court concluded Local 6108 failed to show the temporary employees hired by the District were not exempt from classification under section 88076, subdivision (b)(6) (exemption for temporary employment of professional experts), or subdivision (b)(3) and (4) (exemptions for student workers), and therefore failed to show the District violated its ministerial duty. The court found, "[Local 6108] has failed to establish that the [District] has failed to observe its ministerial duty to classify all non-academic and non-exempt employees under . . . [section] 88004. While [Local 6108's] brief addresses the [District's] use of temporary employees, subject to the exemption found at [section] 88076[, subdivision] (b)(6), and student workers, subject to the

exemptions found at [section] 88076[, subdivision] (b)(3) and (4), the opening brief does not introduce any evidence which suggests that these non-classified workers' duties or tenure were somehow outside the scope of the specified exemptions, such that the ministerial duty at [section] 88004 would operate to compel classification. Therefore, the [c]ourt denies the petition."[4]

On April 28, 2016 the trial court entered a judgment denying the petition.

D. *Local 6108's Motion for a New Trial*

Local 6108 moved for a new trial on the grounds the trial court's decision was "against law" (Code Civ. Proc., § 657, subd. (6)) and the court had committed an "[e]rror in law" (*id.*, subd. (7)). Local 6108 again argued the District had a ministerial duty to assign classified service work only to classified employees and violated that duty by reassigning duties previously performed by classified employees to temporary employees and student workers outside of the classified service. Local 6108 also argued the exemption under section 88706, subdivision (b)(6), for the temporary employment of professional experts was inapplicable, and sections 88105 and 88106 did not authorize the hiring of former classified employees as temporary workers.

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[4] The court also found Local 6108 had not shown the District's violation of a ministerial duty with respect to its alleged failure to conduct a formal implementation analysis before the layoffs, its use of former and current classified employees to perform in temporary positions, imposition of excessive work on classified employees after the layoffs, and requiring laid-off classified employees to compete with temporary nonclassified employees.

Finally, Local 6108 asserted the District had a ministerial duty under section 88076, subdivision (b), not to reassign the work of classified employees to student workers. The District opposed the motion.

On June 24, 2016 the trial court conducted a hearing on Local 6108's motion for a new trial, and took the matter under submission. That same day, the court filed a minute order denying the motion, stating, "[Local 6108] has made an insufficient showing that an 'error of law' was made by the court, notwithstanding the fact that the court interpreted the law differently than [Local 6108]."

Local 6108 timely appealed from the judgment.

DISCUSSION

A. *Traditional Mandamus and the Standard of Review*

Code of Civil Procedure section 1085, subdivision (a), provides a 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, as a duty resulting from an office, trust, or station . . . ." "To obtain relief, a petitioner must demonstrate (1) no 'plain, speedy, and adequate' alternative remedy exists (Code Civ. Proc., § 1086); (2) "'a clear, present . . . ministerial duty on the part of the respondent'"; and (3) a correlative "'clear, present and beneficial right in the petitioner to the performance of that duty.'" [Citations.]"[5]

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[5] The trial court in its statement of decision found Local 6108 had no plain, speedy, and adequate remedy at law because its allegations fell outside the exclusive initial jurisdiction of PERB. Local 6108's appeal does not raise this issue nor whether Local

(*People v. Picklesimer* (2010) 48 Cal.4th 330, 340; accord, *Hayes v. Temecula Valley Unified School Dist.* (2018) 21 Cal.App.5th 735, 746 (*Hayes*).) ""A ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment."' [Citation.]" (*Hayes*, *supra*, at p. 746; accord, *Cape Concord Homeowners Assn. v. City of Escondido* (2017) 7 Cal.App.5th 180, 189.)

In addition, to obtain a writ of mandate, Local 6108 must establish that the District "failed to perform an act despite having a clear and present ministerial duty to do so." (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 460; see *Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 139, fn. 12 ["to obtain issuance of a writ of mandamus, a petitioner must demonstrate, among other things, that the respondent has failed to act on a clear ministerial duty to perform an act specifically required by law"].)

"In reviewing a judgment granting or denying a writ of mandate petition, . . . [o]n questions of law, including statutory interpretation, the appellate court applies a de novo review and makes its own independent determination." (*Hayes*, *supra*, 21 Cal.App.5th at p. 746 [affirming denial of writ petition challenging the removal and reassignment of a public school principal]; accord, *Today's Fresh Start Charter School v. Inglewood Unified School Dist.* (2018) 20 Cal.App.5th 276, 281 [performing independent review of Education Code provisions, affirming trial court's denial of writ petition challenging the

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6108 had a beneficial right to performance of the District's argued ministerial duty.

school district's failure to approve a material revision to a school charter]; *California Assn. of Professional Scientists v. Department of Finance* (2011) 195 Cal.App.4th 1228, 1236 [performing de novo review of statutes governing whether the Department of Finance had a ministerial duty to seek an appropriation from the Legislature to implement state salary adjustments where there were no disputed facts].)

We generally apply the substantial evidence standard of review to the court's factual findings. (*Hayes*, *supra*, 21 Cal.App.5th at p. 746; *Fry v. City of Los Angeles* (2016) 245 Cal.App.4th 539, 549.) However, "'where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.]" (*Valero v. Board of Retirement of Tulare County Employees' Retirement Assn.* (2012) 205 Cal.App.4th 960, 966 [on appeal from denial of petition for writ of mandate, court concluded the appellant had not presented sufficient evidence that his disability was related to his service to compel a finding in his favor as a matter of law]; accord, *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 734 [concluding the employer failed to meet its "'almost impossible'" burden to show the evidence compelled a finding that its accommodation of employees' disabilities would cause undue hardship]; *Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 844 [concluding evidence presented by petitioner was "not sufficient to compel a finding in favor of [the] plaintiff as a matter of law"]; see also *In re R.V.* (2015) 61 Cal.4th 181, 201 [because minor was presumed competent and bore the burden of proving incompetency, "the inquiry on appeal is whether the weight and

character of the evidence of incompetency was such that the juvenile court could not reasonably reject it"].)

Under this standard, the party with the burden of proof must show on appeal that its evidence was "(1) ""uncontradicted and unimpeached"" and (2) ""of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."" [Citations.]" (*Atkins v. City of Los Angeles*, *supra*, 8 Cal.App.5th at p. 734; accord, *Dreyer's Grand Ice Cream, Inc. v. County of Kern*, *supra*, 218 Cal.App.4th at p. 838.) "The appellate court cannot substitute its factual determinations for those of the trial court; it must view all factual matters most favorably to the prevailing party and in support of the judgment. [Citation.] "'All conflicts, therefore, must be resolved in favor of the respondent." [Citation.]' [Citation.]" (*Dreyer's Grand Ice Cream, Inc.*, *supra*, at p. 838.)

B. *Applicable Provisions of the Education Code*

Section 88004 provides in relevant part as to merit system districts, "Every position not defined by the regulations of the board of governors as an academic position and not specifically exempted from the classified service according to the provisions of Section 88003 or 88076 shall be classified as required by those sections and shall be a part of the classified service. These positions may not be designated as academic by the governing board of a district nor shall the assignment of a title to any such position remove the position from the classified service."[6] (See

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[6] "'Academic position' includes every type of service, excluding paraprofessional service, for which minimum qualifications have been established by the board of governors pursuant to Section 87356." (§ 87001, subd. (b).) Section 87356,

California School Employees Assn. v. Del Norte County Unified Sch. Dist. (1992) 2 Cal.App.4th 1396, 1403 (*Del Norte*) [the similar statutory scheme applicable to public elementary and secondary school districts "has been interpreted to mandate that all persons, including supervisors, who are regularly employed by school districts and are not specifically exempted by the statutes are part of the classified service"].)

The Supreme Court has described the classification system under the Education Code in the context of college instructors: "The essence of the statutory classification system is that continuity of service restricts the power to terminate employment which the institution's governing body would normally possess. Thus, the Legislature has prevented the arbitrary dismissal of employees with positions of a settled and continuing nature, i.e., permanent and probationary teachers, by requiring notice and hearing before termination. [Citations.] Substitute and temporary teachers, on the other hand, fill the short range needs of a school district, and may be summarily released absent an infringement of constitutional or contractual rights. [Citations.] Because the substitute and temporary classifications are not guaranteed procedural due process by statute, they are narrowly defined by the Legislature, and should be strictly interpreted."

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subdivision (a), requires the board of governors to establish "minimum qualifications for service as a faculty member teaching credit instruction, a faculty member teaching noncredit instruction, a librarian, a counselor, an educational administrator, an extended opportunity programs and services worker, a disabled students programs and services worker, an apprenticeship instructor, and a supervisor of health." It is undisputed that the positions at issue here are not academic positions.

(*Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 826 [concluding part-time instructor should have been classified as a probationary instructor, not a temporary employee, because he worked for more than three months his first year and was then hired for a full year].)[7] As this district similarly held in *Neily v. Manhattan Beach Unified School Dist.* (2011) 192 Cal.App.4th 187 in the context of elementary and secondary school districts, "As we understand the Education Code's classification scheme, a school district may not classify a person as a temporary employee unless the position in which he or she is employed is 'a position the law defines as temporary.' [Citation.]" (*Id.* at p. 195 [§ 44919, subd. (b), provided for classification of high school baseball coach as temporary employee if he was "'employed to serve in a limited assignment supervising athletic activities of pupils,'" italics omitted].)

The exemptions under section 88003 "apply only to districts not incorporating the merit system" (*id.*, final par.), and therefore do not apply here. Notably, section 88003 provides that certain "[s]ubstitute and short-term employees . . . shall not be a part of the classified service." Section 88076, subdivision (a), applicable to districts that have adopted the merit system, does not have a comparable broad exception for substitute or short-term employees. Rather, section 88076, subdivision (a), provides in relevant part that merit districts "shall classify all employees and

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[7] With respect to academic instructors, the Education Code specifically provides for classification of instructors as temporary employees. (§ 44920 [the governing board of a school district may employ a certified instructor as a teacher, and under specified conditions concerning the length of service, "may classify such person as a temporary employee"].)

positions within the jurisdiction of the governing board or of the commission, except those which are exempt from the classified service, as specified in subdivision (b). The employees and positions shall be known as the classified service."

The exemptions in section 88076, subdivision (b), as relevant here, include an exemption from the classified service for "(6) [p]ositions established for the employment of professional experts on a temporary basis for a specific project by the governing board or by the commission when so designated by the commission." Section 88076, subdivision (b), also provides exemptions from the classified service for "(3) [f]ull-time students employed part time" and "(4) [p]art-time students employed part time in any college work-study program or in a work experience education program conducted by a community college which is financed by state or federal funds."[8] However, "[e]mployment of either full-time or part-time students in any college work-study program, or in a work experience education program shall not result in the displacement of classified personnel or impair existing contracts for services." (*Ibid.*) Further, "No person whose contribution consists solely in the rendition of individual personal services and whose employment does not come within the scope of the exceptions listed above shall be employed outside the classified service." (*Ibid.*)

Sections 88105 and 88106 authorize the hiring of limited-term and provisional employees. Section 88105 provides in

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[8] Section 88076, subdivision (b), defines a "part-time position" as "one for which the assigned time, when computed on an hourly, daily, weekly, or monthly basis, is less than 87½ percent of the normally assigned time of the majority of employees in the classified service."

relevant part, "Whenever the appointing power requires the appointment of a person to a position, the duration of which is not to exceed six months, or, in case of an appointment in lieu of an absent employee, is not to exceed the authorized absence of that employee, he or she shall submit a request in which the probable duration of the appointment is stated."[9] Section 88106 provides in relevant part, "When no eligibility list exists for a position in the classified service, an employee may receive provisional appointments which may accumulate to a total of 90 working days. A 90-calendar-day interval shall then elapse during which the person will be ineligible to serve in any full-time provisional capacity. . . ."

C. *Local 6108 Has Not Established the District's Violation of a Ministerial Duty*

1. *Temporary Employees*

Local 6108 argues the District improperly hired temporary employees "outside of the classified service" to perform classified service work. The District maintains the temporary employees it hired were limited-term employees under section 88105 and provisional employees under section 88106, and that limited-term and provisional employees are part of the classified service.

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[9] Section 88105 also provides as to limited-term employees that "[e]ligible persons shall be certified in accordance with their position on the appropriate employment list and their willingness to accept appointment to such a position as limited-term employees. Limited-term employees shall be subject to those conditions affecting status and tenure during and after the employment as the commission may by rule determine."

We independently review whether limited-term and provisional employees are part of the classified service. (*Hayes*, *supra*, 21 Cal.App.5th at p. 746; *Today's Fresh Start Charter School v. Inglewood Unified School Dist.*, *supra*, 20 Cal.App.5th at p. 281.) Sections 88105 and 88106 authorize the hiring of limited-term and provisional employees, but do not state that those employees are exempt from classification. In contrast, section 88003, applicable to nonmerit community college districts, expressly states that "[s]ubstitute and short-term employees, employed and paid for less than 75 percent of a college year, shall not be a part of the classified service." Notably, section 88004 provides that all nonacademic positions that are not specifically exempted under section 88003 or 88076 shall be classified.

The absence of language in sections 88105 and 88106 stating that limited-term and provisional employees are exempt from the classified service, in contrast to the explicit language creating an exemption in section 88003 for nonmerit system short-term employees, supports our conclusion the Legislature intentionally did not exclude limited-term and provisional employees from the classified service. (See *Rashidi v. Moser* (2014) 60 Cal.4th 718, 726 [""Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed""]; accord, *People v. Arriaga* (2014) 58 Cal.4th 950, 960 [lack of requirement that a defendant obtain a probable cause certificate before appealing denial of postjudgment motion to vacate a conviction as compared to requirement for certificate to appeal prejudgment order evidenced a different legislative intent]; *Innes v. Diablo Controls, Inc.* (2016) 248 Cal.App.4th 139, 144 [fact that

Corporations Code provisions required bylaws and shareholder records to be kept in the corporation's principal business office showed legislative intent not to impose similar requirement on other corporate records where the applicable Corporations Code section had no similar requirement].) We conclude that limited-term and provisional employees hired under sections 88105 and 88106 are not exempt from classification, and must be classified.

Local 6108 failed to present any evidence in the trial court showing the temporary employees hired by the District were not classified. On appeal, Local 6108 cites to examples of temporary employees who were not former or current District employees at the time they were hired as temporary employees. For example, Karen Clay stated in her declaration that she was an associate teacher in the Child Development Center who previously worked during intersession breaks. However, after the 2012 layoff Clay was not given intersession work, although the District hired non-District employees as temporary employees during the break. Clay also stated that Alegre Willhite and Rebecca Smith, who "were not permanent employees but rather LTEs," worked with Clay in the Child Development Center as temporary employees. However, this evidence only showed that the District used temporary employees, not that they were not classified. Indeed, Clay's use of the term "LTEs" tracks the language of section 88105, which refers to limited-term employees.

A second example Local 6108 provides is that in the School of Allied Health, Science & Mathematics the District hired Liz Alejandrino as a temporary employee to fill the position of Academic Administrative Assistant. Yet according to Local 6108's evidence, Alejandrino was hired as "an LTE" for six months in 2013. This evidence is consistent with the hiring of a

limited-term employee under section 88105 for up to six months. Local 6108 presented no evidence that Alejandrino's position was not classified.

To the contrary, Julie Kossick, the District's Director of Human Resources during the relevant time period, testified in her deposition that former employees who returned to work for the District in temporary positions "would come back and work in temporary capacity in classifications that they hadn't previously worked in" and "in classifications that they did not have seniority in." The District also filed a declaration from Mary Olsen Bell, a human resources specialist, explaining the reasons for hiring as limited-term and provisional employees numerous individuals identified in Local 6108's brief in support of its petition. Local 6108 does not contend the District's hiring of any of the individuals in Bell's declaration did not comply with sections 88105 or 88106.

Local 6108 has not shown that the District hired unclassified temporary employees, and therefore has not shown that the District violated its ministerial duty to classify all nonacademic and nonexempt positions.[10]

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[10] The trial court found that Local 6108 failed to show the temporary employees hired by the District were not exempt from classification as professional experts under section 88076, subdivision (b)(6), and did not address sections 88105 and 88106, other than stating generally that there was no basis for writ relief for the District's use of limited-term temporary employees. However, the District never contended in the trial court that the limited-term and provisional employees it used on a temporary basis were exempt from classification as professional experts. We must affirm the judgment on any ground supported by the record regardless of the trial court's stated reasons. (*Mayer v. C.W.*

Finally, Local 6108 argues the rehiring of permanent classified employees as temporary employees under sections 88105 and 88106 violated the employees' reemployment rights under section 88117, and unfairly deprived them of legal protections and job benefits to which they were entitled as permanent classified employees. Section 88117 provides that an employee who is laid off because of lack of work or lack of funds has preference for reemployment over new applicants for a period of 39 months, and has the right to participate in promotional examinations within the district during that period of time. (*Id.*, subd. (a).)

As a threshold matter, Local 6108 forfeited this argument by raising it for the first time in its motion for a new trial, and then on appeal—Local 6108 did not argue a loss of reemployment rights under section 88117 in its first amended petition, its brief in support of issuance of a writ, or its reply brief, nor did it present evidence to support its theory in the trial court.[11] "'A party may not for the first time on appeal change its theory of relief.' [Citation.]" (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 944 [the plaintiff forfeited argument that she was retaliated against based on a protected activity where she

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Driver (2002) 98 Cal.App.4th 48, 64 ["A fundamental principle of appellate review is that a judgment correct in law will not be reversed merely because given for the wrong reason; we review the trial court's judgment, not its reasoning"].)

[11] The only mention of section 88117 in Local 6108's first amended petition was in its prayer for relief, in which it requested reinstatement of employees excluded from the classified service, and listed section 88117 among the Education Code provisions cited.

failed to raise the argument in the trial court]; accord, *Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 621 [the appellant forfeited argument not raised in its writ petition, noting that "'it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal'"].) As the court held in *Retzloff v. Moulton Parkway Residents' Assn., No. One* (2017) 14 Cal.App.5th 742, "'It is the general rule that a party to an action may not, for the first time on appeal, change the theory of the cause of action. [Citations.] There are exceptions but the general rule is especially true when the theory newly presented involves controverted questions of fact or mixed questions of law and fact. If a question of law only is presented on the facts appearing in the record the change in theory may be permitted. [Citation.]' [Citation.]" (*Id.* at p. 747.)

Even if we were to consider this argument, Local 6108 has not cited any legal authority to support its position that section 88117 creates a ministerial duty by the District to rehire former permanent employees only as permanent, not limited-term or provisional employees. Nor has it presented any evidence that the District failed to give priority to former permanent employees in its rehiring. To the contrary, Kossick testified, "we worked really diligently to get any folks that were affected by the implementation of reductions and driving them to positions that were coming open." Further, when there was a temporary opening, the District notified all the former employees on the rehire and layoff lists by email of the temporary positions.

Bell also described in her declaration how many of the employees who were laid off or suffered reduced hours in 2012, including Michelle Ary, Debra Garcia, Robert Ha, Cynthia Jackson, Roberta Maroney, Keishon Martin, Bradley Moore,

Anthony Pearson, Sonja Voskanian, Mary Aja, Ruben Amador, Michael Birong, Douglas Daniels, Dario DeSantiago, Sean Dominguez, Demetre Dovalis, Sylvia Garcia, Gloria Gonzales, Juan Herrera, Patricia Johnson, Kristy Lutz, Alejandro Rodriguez, Bunseth Thip, and Lizbeth Zuniga, were hired as limited-term or provisional employees, then later were rehired as permanent employees (part-time or full-time) or had their hours restored.

2. *Student Workers*

a. *Section 88076, Subdivision (b), Does Not Bar the District From Assigning Classified Work to Exempt Student Workers*

Local 6108 contends the District had a ministerial duty not to assign classified service work to student workers, citing the statutory prohibition in section 88076, subdivision (b), that "[e]mployment of either full-time or part-time students in any college work-study program, or in a work experience education program shall not result in the displacement of classified personnel or impair existing contracts for services." Local 6108 argues the District violated this ministerial duty by assigning duties previously performed by classified employees to student workers.

We independently determine the existence and scope of the District's ministerial duty under the relevant statutes with respect to employment of student workers. (*Hayes*, *supra*, 21 Cal.App.5th at p. 746; *Today's Fresh Start Charter School v. Inglewood Unified School Dist.*, *supra*, 20 Cal.App.5th at p. 281.) We conclude that Local 6108's framing of the District's ministerial duty is not, as a matter of law, supported by the

Education Code. Section 88076 exempts from the classified service specified student workers. (*Id.*, subd. (b)(3), (4).) While the District may not employ student workers in a manner that results in the displacement of classified employees or impairs existing contracts for services (*id.*, subd. (b)), nowhere in the Education Code does it provide that the District may not assign work ordinarily handled by classified employees to employees who are exempt from classification.

Local 6108 cites *Del Norte*, *supra*, 2 Cal.App.4th 1396, and *California School Employees Assn. v. Kern Community College Dist.* (1996) 41 Cal.App.4th 1003 (*Kern*) for the proposition that merit system districts have a ministerial duty to assign classified service work only to classified employees. However, the court in *Del Norte* held that the district could not contract out positions within the classified service, not that an exempt employee cannot be assigned classified service work. (*Del Norte*, *supra*, at p. 1404.)

Del Norte involved a merit system public school district governed by section 45104, requiring classification of employees without certification (i.e., nonteachers) in the same manner that section 88004 requires classification of postsecondary nonacademic employees. (*Del Norte*, *supra*, 2 Cal.App.4th at pp. 1402-1403.) An employee union filed a petition for writ of mandate challenging the school district's contract with an outside company to provide supervision of maintenance and custodial workers in district schools. (*Id.* at p. 1401.) The district argued the contract was lawful because the supervisory positions were exempt from classification as "[p]ositions established for the employment of professional experts . . . for a specific project" under section 45256, subdivision (b). (*Id.* at p. 1403.) The court

rejected this argument, stating, "we conclude that [the] district's contract . . . was invalid insofar as it authorized [the contractor] to provide regular supervision of maintenance and custodial employees. These positions fall within the classified service and the district's merit system. Regular supervisors are not professional experts, whatever skills [the contractor's] personnel may bring to the job." (*Id*. at p. 1404.)

In contrast, the court in *Kern*, involving a nonmerit community college district, held that the Education Code did not prohibit the contracting out of groundskeeping services. (*Kern*, *supra*, 41 Cal.App.4th at pp. 1005, 1013.) The court in *Kern* distinguished *Del Norte* on the ground that *Del Norte* involved a merit system district, stating, "[m]erit districts are subject to additional statutory provisions and language expressly limiting their ability to utilize services of individuals who are not classified employees, provisions not applicable to nonmerit districts." (*Kern*, *supra*, at p. 1012.) Contrary to Local 6108's argument, *Kern* did not hold that a merit system district has a ministerial duty to assign classified service work only to classified employees.[12]

Local 6108's interpretation of the Education Code would render the exemption from classification for student workers under section 88076, subdivisions (b)(3) and (4), meaningless—if

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[12] Local 6108 also cites the prohibition in section 88004 barring "the assignment of a title to any [nonacademic classified] position [to] remove the position from the classified service." However, this provision does not bar the District from assigning classified service work to exempt student workers. Nor has Local 6108 presented any evidence that positions were removed from the classified service and renamed as student worker positions.

student workers could only be assigned non-classified work, there would be no need for an exemption from classification. "'Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.'" (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 719; accord, *City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 724 ["'Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary'"].) Further, we must construe the statute in a manner that harmonizes the two provisions within section 88076 governing student workers to the extent possible. (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1135 ["We construe terms in context, harmonizing the statutes both internally and with each other to the extent possible"]; accord, *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805 ["'A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions'"].) We conclude the prohibition against employing student workers in a manner that results in displacing classified employees does not impose a ministerial duty not to assign classified service work to student workers.

b. *Local 6108's Evidence Does Not Compel a Finding That Student Workers Displaced Classified Employees*

Local 6108 contends in the alternative that the District "displac[ed] classified service employees from being reemployed" by assigning student workers tasks previously performed by classified employees. We agree that section 88076, subdivision (b), specifically prohibits the displacement of classified workers.

Thus, for example, the District cannot lay off a classified employee, then replace the position with the work of two part-time student workers. However, substantial evidence supports the trial court's finding that Local 6108 failed to meet its burden to show that student workers, by assuming classified work, displaced classified employees, whether current or prior employees who were laid off in 2012.

Local 6108 cites the declaration of Wendy Slater, an Academic Administrative Assistant in the School of Allied Health, Science & Mathematics, in which she stated the District hired Marc Smith as a student assistant in 2013, and during the spring break the dean's out-of-office automatic reply email referred matters to Smith. The email, attached to the declaration, stated the dean was out of the office and further, "Please contact Marc Smith if you have an urgent matter [Smith's email address]. He will be able to direct your call or request." In response, the District filed a declaration by Paul Creason, the Dean of the School of Health, Science & Mathematics.[13] Slater worked in Creason's department as an academic administrative assistant under his supervision. Creason stated that Smith worked as a student assistant before he was hired as a permanent classified employee. Creason acknowledged he should have listed Slater as well as Smith as points of contact in his absence, and noted that Slater was available to assist in his absence although she was located in a different building.

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13 According to the District organization chart, the Dean of the School of Health, Science & Mathematics oversees several programs, including the School of Allied Health, Sciences & Mathematics.

Local 6108 also relies on a declaration from Jonathan Eckman, a former Custodial Supervisor II in the Facilities Department, who was "bumped down" to Aquatic Facilities Technician in the same department as part of the 2012 layoffs. Eckman stated that administrative assistant Shirley Brown performed the task of dispatch in the facilities department prior to the layoffs, with assistance from three other employees. The dispatcher communicated with staff in the field to resolve issues as they arose. As part of the layoffs, however, Brown's position was eliminated, and she was moved to a counseling position. According to Eckman, after the layoff student workers began doing dispatch work. Eckman stated the students were not familiar with the campus layout or the jobs performed by the custodial staff, which could have had serious consequences in an emergency.

In response, the District filed a declaration from Tim Wootton, Director of Facilities. Wootton stated that student workers had assisted with dispatch since 2007, and were trained to do the work. He added that the students learned job skills while they worked, performed simple tasks, and were under the supervision of department staff. There were no problems with the students' performance. Student workers did not displace any classified employees, and the department at the time of his declaration had two administrative assistants who were full-time classified employees.

Local 6108 next cites a declaration from Corinne Magdaleno, a Senior Administrative Assistant in Counseling and Support Services. Magdaleno stated that after one of the two telephone switchboard operators was laid off and the other retired in lieu of being laid off, the District relied on other

employees to operate the switchboard, but after six to eight months the student workers started to staff the switchboard. Magdaleno added the students were untrained and unprofessional.

In response, the District filed a declaration from Diane Bangs, Interim Assistant Vice President for Human Resources. Bangs stated that since 2000 the District used an automated phone system, and that the volume of calls had declined with the increasing use of email and smart phones. Therefore, the switchboard operator answered only when the caller dialed "0." Bangs stated that after the last switchboard operator retired on June 30, 2012, the position was not filled. According to Bangs, the "occasional calls" that required assistance were answered by staff members in the Human Resources Department, with assistance from student workers. Since the fall of 2014, however, calls needing assistance have been sent to a call center in the Admissions and Records Department.

Local 6108 also relies on a declaration from Julie Weeks-Braden, a Senior Administrative Assistant in Extended Opportunity Programs and Services. Weeks-Braden stated that in lieu of being laid off, she assumed the role of Senior Administrative Assistant for three programs, as well as accounting responsibilities. She stated that she could not complete her work because of the added responsibilities, and some of her tasks were given to another senior administrative assistant. She also hired a limited-term employee to assist with her filing, scheduling, and administrative duties. She added that the "program assistant" positions were cut and replaced with an additional "office assistant," who was assisted by student

workers. Because the office assistants could not complete all their work, the student workers performed the same tasks.

In response, the District filed a declaration from Dr. Eric Borin, Director of Categorical and Special Programs. Dr. Borin was Weeks-Braden's direct supervisor. He administered the budget for the programs he oversaw, and stated that Weeks-Braden performed only data entry work for those budgets. Further, the program had a dedicated accountant. Dr. Borin stated that Weeks-Braden had sufficient time to complete her duties as a senior administrative assistant, although she occasionally worked voluntary overtime. He added that there was greater clerical support than Weeks-Braden described, including three 90-percent-time office assistants, two technicians, and four student workers who served as service aides. The work of the two former program assistants was replaced by the office assistants. According to Dr. Borin, the student workers performed only "basic tasks," such as making appointments for staff to see students and checking in students for appointments. Student workers did not perform the same work as office assistants and did not displace any classified employees.

Finally, Kossick testified in her deposition that student workers only performed "extremely low-level" tasks, and "[t]hey were not assigned classification duties." Kossick testified that student workers did not displace or replace classified employees or otherwise take over classified duties, and that "students did not take classified work."

The evidence presented by Local 6108 does not compel a finding as a matter of law that student workers displaced classified employees. (See *Valero v. Board of Retirement of Tulare County Employees' Assn.*, *supra*, 205 Cal.App.4th at

p. 966.) Instead, the evidence supports the trial court's finding that "[w]hile [Local 6108's] brief addresses the [District's] use of . . . student workers, subject to the exemptions found at [section] 88076[, subdivision] (b)(3) and (4), the opening brief does not introduce any evidence which suggests that these non-classified workers' duties or tenure were somehow outside the scope of the specified exemptions, such that the ministerial duty at [section] 88004 would operate to compel classification." Although Local 6108 submitted declarations that were in part inconsistent with the evidence submitted by the District, """[A]ll conflicts in the written evidence are resolved in favor of the *prevailing* party . . . ."" (*Hayes*, *supra*, 21 Cal.App.5th at p. 746; accord, *Dreyer's Grand Ice Cream, Inc. v. County of Kern*, *supra*, 218 Cal.App.4th at p. 838.)

DISPOSITION

The judgment is affirmed. The District is entitled to costs on appeal.

FEUER, J.*

We concur:

ZELON, Acting P. J. SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.