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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

AMERICAN FEDERATION OF
TEACHERS GUILD, LOCAL 1931, SAN
DIEGO AND GROSSMONT-CUYAMACA
COMMUNITY COLLEGES,

Plaintiff and Appellant,

v.

SAN DIEGO COMMUNITY COLLEGE
DISTRICT et al.,

Defendants and Respondents.

D061047

(Super. Ct. No. 37-2011-00083074-
CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

Law Office of Robert J. Bezemek, Robert J. Bezemek, Patricia Lim and David Conway for Plaintiff and Appellant.

Best Best & Krieger and Alison D. Alpert for Defendants and Respondents.

INTRODUCTION

This appeal from a judgment dismissing a petition for a writ of mandate following the court's sustaining of a general demurrer without leave to amend, involves a disagreement between plaintiff American Federation of Teachers Guild, Local 1931, San Diego and Grossmont-Cuyamaca Community Colleges (the Guild) and defendants San Diego Community College District and San Diego Community College District Board of Trustees (together the District) regarding the District's exclusion of six categories of current and former nonacademic employees from the District's classified service—which confers certain statutory rights and benefits to classified employees—based on two exemptions set forth in the Education Code (undesigned statutory references will be to the Education Code unless otherwise specified).

Specifically, the District excluded from its classified service (1) lifeguards, tutors, art models, accompanists, and interpreters for the deaf under the personal services contracting exemption set forth in section 88003.1, subdivision (b)(7) (hereafter section 88003.1(b)(7)), under which such exclusion is permissible when the services "are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under the community college district's regular or ordinary hiring process would frustrate their very purpose"; and (2) employees of the District's KSDS Jazz88.3 radio station under the professional experts exemption set forth in section 88003, which provides that "professional experts employed on a temporary basis for a specific project, regardless of length of employment, shall not be a part of the classified service."

A. *The Guild's Petition*

The Guild filed a verified petition for writ of mandamus (Code Civ. Proc., § 1085) and complaint for declaratory judgment and injunctive relief (hereafter the petition), alleging in count 1 ("Petition for Writ of Mandamus") that it had standing under Government Code section 3543.8 (discussed, *post*) to represent the District's "improperly categorized and excluded" current and former employees "working in positions in any of the bargaining units the [Guild] represents, regardless of whether . . . the employees . . . are or were members of the [Guild] itself"; and that the District had a "ministerial duty" under section 88000 et seq. "to employ and classify within its classified service, and provide the benefits of classified service, including probationary and permanent employment . . . , to all non-academic employees and positions except those specifically exempted from classified service." The Guild further alleged in count 1 that the District had "an ongoing, continual and mandatory duty to properly classify, and to correct the mis-classification . . . of[,] its employees, including those employees and former employees the [Guild] represents." It also alleged that "[i]n violation of the Education Code, the District has and is improperly excluding many non-academic employees working in positions that require classification, and in positions represented by the [Guild], from its classified service," and "[i]n doing so, the District has failed to identify any legitimate exemption from the classified service for these employees."

In count 2 ("Abuse of Discretion") of the petition, the Guild alleged that, "[t]o the extent the District retained any discretion in electing to include the employees and former employees of the [Guild] represented in this action in its classified service, the District

abused that discretion by the actions complained of herein," and it "denied those employees the benefits and protections of inclusion in the District's classified service."

In its prayer for relief, the Guild sought, in addition to related declaratory and injunctive relief,¹ a peremptory writ of mandate directing the District to (among other things) "[r]ecognize the classified service status" of the affected employees, "[r]einstatement of any former employee of the District improperly excluded from its classified service," and "[r]etroactively compensate and make whole all employees and former employees of the District who were improperly excluded from its classified service for all lost wages, benefits, leaves, holidays, seniority credits and other emoluments of employment, plus interest thereon"

B. Judgment of Dismissal and the Guild's Contentions on Appeal

The Guild appeals from the judgment dismissing the petition, which the court entered after it sustained without leave to amend the District's general demurrer based on three findings: (1) The Guild lacked standing to bring this action because "the relief requested requires the participation of individual members in the lawsuit"; (2) as a matter of law, the District does not have a ministerial duty to include the subject nonacademic

¹ In count 3 ("Complaint for Declaratory Judgment"), the Guild requested that the court declare "(1) what rights the employees and former employees represented by the [Guild] in this action have to inclusion in and with respect to the District's classified service." In count 4 ("Complaint for Injunctive Relief"), the Guild sought "the issuance of a preliminary injunction and a permanent injunction forbidding the District its officers, agents and representatives, and anyone acting on its behalf, from henceforth denying its employees and former employees inclusion in its classified service and denying its employees and former employees the benefits and protections of inclusion in its classified service."

employees within its classified service; and (3) the court lacked jurisdiction to hear this matter since the allegedly wrongful exclusion of the employees from the District's classified service should be remedied through the Public Employees Relations Board (PERB), but the Guild failed to exhaust its PERB administrative remedies.

1. *Contentions*

The Guild contends the judgment of dismissal should be reversed with directions that the court overrule the District's demurrer for three principal reasons: (1) The District has a ministerial duty under section 88004² "to include all of its non-academic employees, for whom no exemption exists, in its classified service," and the petition alleges facts "that, if proven, are enough to support issuance of a writ" because they show the District "wrongly excluded" from its classified service (a) the District's KSDS Jazz 88.3 radio station employees under the professional experts exemption (§ 88003), and (b) lifeguards, tutors, art models, accompanists, and interpreters for the deaf under the personal services contracting exemption (§ 88003.1(b)(7)); (2) the Guild "has standing to represent these employees pursuant to Government Code section 3543.8"; and (3) the Guild "has properly exhausted its administrative remedies, since PERB does not have jurisdiction over the Education Code violations." For reasons we shall explain, we affirm the judgment.

² Section 88004 provides that "[e]very 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 these sections and shall be a part of the classified service."

BACKGROUND

A. *Factual Background*³

The San Diego Community College District is a nonmerit system community college district organized under the laws of the State of California, including the Education and Government Codes. The District includes San Diego City College, Mesa College, Miramar College, and other District campuses. The District's affairs are administered by the San Diego Community College District Board of Trustees.

The Guild has been the exclusive representative of most of the District's nonmanagerial, nonsupervisory employees, representing academic and classified employees in several bargaining units. The nonacademic, nonclassified employees (hereafter sometimes referred to as NANCEs) that are the subjects of this appeal—lifeguards, tutors, art models, accompanists, interpreters for the deaf, and employees of the District's KSDS Jazz88.3 radio station—were not included within these units until late June 2008, when the Guild became the exclusive representative of a bargaining unit of "residual" nonacademic employees.

The District thereafter announced a new policy for hiring NANCEs—including professional experts and personal services contract employees (among others)—outside of its classified service, as well as its determination that lifeguards, tutors, art models,

³ For purposes of our review of the judgment of dismissal that followed the court's sustaining of the District's demurrer without leave to amend, we must assume the truth of the pertinent and properly pleaded or implied factual allegations set forth in the petition. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

accompanists, and interpreters for the deaf would be hired under the personal services contracting exemption set forth in section 88003.1(b)(7) (discussed, *ante*), rather than as classified service employees.⁴ Specifically, the District determined under section 88003.1(b)(7) that, due to their "urgent" and "unpredictable nature," these five categories of personal services contract NANCE positions were of such an urgent, temporary, or occasional nature that the delay experienced in their implementation under the District's regular or ordinary hiring process would frustrate their very purpose.

The District's radio station, KSDS Jazz88.3, is operated out of San Diego City College. The District has hired KSDS Jazz88.3 employees outside of its classified service under the professional experts exemption set forth in section 88003 (discussed, *ante*) for NANCEs employed on a temporary basis for a specific project regardless of the length of employment. These employees work as broadcasters and hosts, work in the radio station library, and provide cataloguing and other services.

B. Procedural Background

1. District's demurrer

The District filed a general demurrer challenging the legal sufficiency of the Guild's petition. The District argued that (1) the Guild lacked standing to bring this action; (2) the court lacked jurisdiction because the PERB had initial jurisdiction in this matter, and the Guild failed to exhaust its administrative remedies by failing to file an

⁴ We need not, and do not, summarize the petition's factual allegations concerning the District's exclusion of these employee categories under the District's prior hiring practices.

unfair practices claim with the PERB; (3) the Guild was not entitled to a writ under Code of Civil Procedure section 1085 because the District does not have a ministerial duty to include in its classified service the categories of employees at issue in this matter; (4) the Guild failed to sufficiently allege an abuse of discretion because the Guild only alleged in paragraph 119 of the petition that the District "abused that discretion by the actions complained of herein"; (5) the Guild was barred from bringing this action based on laches; (6) employee claims for back pay must be brought in an ordinary civil action for damages; and (7) the Guild's claim for damages for back pay for more than a year prior to the tort claim was barred by failure to timely file a tort claim.

2. The Guild's opposition and the District's reply

The Guild opposed the District's demurrer on five asserted grounds: (1) Government Code section 3543.8 (see fn. 1, *ante*) confers standing on an employee organization, such as the Guild, to bring any action as a representative on behalf of its bargaining unit members; (2) the PERB has no jurisdiction over this matter, as the alleged conduct at issue in this case concerns violations of the Education Code and does not implicate the Education Employment Relations Act (EERA)⁵ (Gov. Code, § 3540 et seq.); (3) the Guild met the legal standard for bringing this action for a writ of mandamus because (a) the District "has a clear, present and ministerial duty" under section 88004 to ensure that every position not exempted under the Education Code is included in the

⁵ California Code of Regulations, title 8, section 32000 provides: "'EERA' means the Educational Employment Relations Act as contained in Chapter 10.7 of Division 4 of Title 1 of the Government Code (commencing with Section 3540)."

District's classified service, and (b) the District has no discretion in deciding when the relevant criteria set forth in the professional expert and personal services contracting exemptions (§§ 88003 & 88003.1(b)(7), respectively) apply to a specific District employee or position; (4) the petition properly alleged that the District abused its discretion, to the extent it had any, because its actions in attempting to utilize sections 88003 and 88003.1(b)(7) to justify its exclusions was "pretextual"; and (5) the alleged facts do not support a showing of laches.

The District's reply reiterated the District's earlier arguments. In support of its argument that it does not have a ministerial duty to include the subject categories of employees in the classified service, the District relied on *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495 and argued that "[t]he determination of whether the employees or positions fit within the exceptions provided for in Section 88003 and 88003.1(b)[(7)] requires discretion." The District asserted that it "must determine, for example, in its discretion, whether due to the nature of the position the regular hiring process would frustrate the very purpose of the services, and whether the services are of an urgent, temporary or occasional nature."

3. *Court's ruling*

Following a hearing on the demurrer, the court issued a two-page minute order sustaining, without leave to amend, the District's general demurrer based on three findings: (1) The District "lacks standing to bring the claims asserted on the grounds that the relief requested requires the participation of individual members in the lawsuit," citing *Hunt v. Washington State Apple Advertising Commission* (1977) 432 U.S. 333

(*Hunt*); (2) the District "does not have a ministerial duty to designate non-academic employees within its classified service under [] sections 88003 and 88003.1," citing *Rodriguez v. Solis, supra*, 1 Cal.App.4th 495; and (3) the court "lacks jurisdiction to hear this matter since the alleged wrongs arguably constitute unfair employment practices," such practices are "remedied through the [PERB] and the matter should be resolved by PERB," and the District "failed to exhaust its administrative remedies before PERB." The court thereafter entered the judgment of dismissal from which the Guild appeals.

LEGAL PRINCIPLES

A. *Writs of Mandate Generally*

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" (Code Civ. Proc., § 1085, subd. (a)) in cases "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law" (*id.*, § 1086).

"The availability of writ relief to compel a public agency to perform an act prescribed by law has long been recognized." (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539.) A petitioner seeking writ relief must show: "(1) A clear, present and usually *ministerial duty* on the part of the respondent . . . ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty" (*Id.* at pp. 539-540, italics added.) Thus, traditional mandamus under Code of Civil Procedure section 1085 generally "may only be employed to compel the performance of a

duty which is *purely ministerial* in character." (*Rodriguez v. Solis, supra*, 1 Cal.App.4th at p. 501, italics added.)

"Although mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion. [Citation.] In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799; see also *Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 315.)

A general demurrer to a petition for a writ of mandamus is properly sustained where no mandatory duty on the part of the respondent agency to perform the act the petitioner seeks to compel is shown to exist. (*Wilson v. Board of Retirement of the Los Angeles County Employees Retirement Association* (1957) 156 Cal.App.2d 195, 213.)

B. *General Demurrers and Standard of Appellate Review*

"A demurrer tests the legal sufficiency of factual allegations in a complaint." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 42 (*Rakestraw*)).

A general demurrer challenges the legal sufficiency of the complaint on the ground it fails to state facts sufficient to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).)

On appeal from a judgment dismissing a complaint (or petition) after a demurrer is sustained without leave to amend, we review de novo the trial court's decision to sustain

the demurrer, and we review under the abuse of discretion standard the decision to deny the plaintiff leave to amend. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.)

In reviewing the sufficiency of a complaint against a general demurrer, this court treats the demurrer as admitting the truth of all properly pleaded material facts, as well as facts inferred from the pleadings, but not the truth of contentions, deductions, or conclusions of fact or law. This court also considers matters that may be judicially noticed. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*); *Rakestraw, supra*, 81 Cal.App.4th at p. 43.) When a general demurrer is sustained, this court determines whether the complaint states facts sufficient to constitute a cause of action under any legal theory. (*Schifando*, at p. 1081; *Rakestraw*, at p. 43.) "On appeal, a plaintiff bears the burden of demonstrating tht the trial court erroneously sustained the demurrer as a matter of law." (*Rakestraw*, at p. 43.)

In determining whether the court properly sustained the demurrer without leave to amend, the reviewing court decides whether there is a reasonable possibility an amendment could cure the pleading defect. (*Schifando, supra*, 31 Cal.4th at p. 1081; *Rakestraw, supra*, 81 Cal.App.4th at p. 43.) If there is a reasonable possibility the plaintiff could cure the defect with an amendment, we conclude the trial court abused its discretion and we reverse the judgment; if not, no abuse of discretion has occurred and we affirm the judgment. (*Schifando*, at p. 1081; *Rakestraw*, at p. 43.) The plaintiff bears the burden of proving there is a reasonable possibility an amendment would cure the pleading defect. (*Schifando*, at p. 1081.)

DISCUSSION

I

THE GUILD HAS NOT SHOWN, AND CANNOT ESTABLISH, THE EXISTENCE OF A MINISTERIAL DUTY

In support of its claim that the judgment of dismissal should be reversed, the Guild contends that the District has a ministerial duty "to include all of its non-academic employees, for whom no exemption exists, in its classified service" and that the petition alleges facts that, if proven, are sufficient to support issuance of a writ because they show the District "wrongly excluded" from its classified service (1) the District's KSDS Jazz88.3 radio station employees under the professional experts exemption set forth in section 88003, and (2) lifeguards, tutors, art models, accompanists, and interpreters for the deaf under the personal services contracting exemption set forth in section 88003.1(b)(7)). Quoting *Rodriguez v. Solis, supra*, 1 Cal.App.4th at page 504 for the proposition that "[w]here a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial," the Guild further contends that sections 88003 and 88003.1(b)(7) "'clearly define' the course of conduct the District must take with respect to the classifying employees, and provide *no discretion* to any District official to ignore or circumvent" the requirements set forth therein. These contentions are unavailing.

Section 88003, which codifies the professional expert exemption, provides that "professional experts employed on a *temporary basis for a specific project, regardless of length of employment*, shall not be a part of the classified service." (Italics added.)

Section 88003.1(b)(7), which codifies the personal services contracting exemption, provides:

"(b) Notwithstanding any other provision of this chapter, personal services contracting shall also be permissible when any of the following conditions can be met: [¶] . . . [¶] (7) The services are of *such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under the community college district's regular or ordinary hiring process would frustrate their very purpose.*" (Italics added.)

Here, the Guild claims the professional experts exemption (§ 88003) does not apply to KSDS Jazz88.3 radio station employees because they "serv[e] in regular, ongoing positions as hosts and broadcast operation specialists, have done so for numerous years, and are not serving as 'professional experts' on a 'temporary basis' for a specific project." In support of this claim, the Guild asserts "[t]he Petition alleges that [these] employees . . . are not experts and not employed on temporary bases for specific projects, and thus do not meet the objective criteria for exempt professional experts."

The Guild also claims the personal services contracting exemption (§ 88003.1(b)(7)) does not apply to lifeguards, tutors, art models, accompanists, and interpreters for the deaf because these positions are "longstanding, regular employee positions" and "[i]n no way are they of such an 'urgent, temporary, or occasional nature' that the utilization of the District's ordinary hiring process would 'frustrate their very purpose.'" In support of this claim, the Guild specifically asserts "[t]he Petition alleges that these individuals are *employees, not contractors*, and the services they render are on-going and routine; not urgent, temporary or of an occasional nature; and . . . the District's

use of its 'ordinary hiring process' for these positions would not 'frustrate their very purpose.'" (Italics added.)

The principal question we must decide is whether the factual allegations in the petition show the District has a *ministerial* duty to include these excluded employees in the District's classified service. In sustaining the District's general demurrer without leave to amend, the court found the Guild's petition shows the District has no such duty as a matter of law. We agree.

"A *ministerial* act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment."

(*Rodriguez v. Solis, supra*, 1 Cal.App.4th at pp. 501-502, italics added.) The issue of whether a public agency or functionary has an enforceable ministerial duty or is required to exercise discretion is dependent upon the interpretation of applicable statutory provisions (here, §§ 88003 & 88003.1(b)(7)), and therefore presents a question of law that we determine de novo. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916; *Rodriguez*, at p. 502.)

We conclude the District's determination that the personal services contracting and professional experts exemptions (§§ 88003.1(b)(7) & 88003, respectively) apply to the employee positions at issue in this case, required the exercise of discretion as a matter of law; and, thus, the court properly concluded the Guild had failed to state a claim for

issuance of a writ of mandate because it did not show the existence of an enforceable ministerial duty to include the subject employees in the District's classified service. Our analysis is guided by *Rodriguez v. Solis, supra*, 1 Cal.App.4th 495, which the court cited in dismissing the Guild's petition.

In *Rodriguez*, the petitioners, who owned an automobile dealership, petitioned the trial court for a writ of mandate to compel a city director of development to issue permits to erect freestanding advertisement signs on the dealership premises. (*Rodriguez v. Solis, supra*, 1 Cal.App.4th at pp. 500-501.) The director had denied the petitioners' sign permit applications under city zoning regulations which provided that permits for such signs should not be approved unless the signs were "[c]ompatible with their surroundings." (*Id.* at pp. 505, 502-503.) On appeal, the petitioners claimed the director had a ministerial duty to issue the sign permits, and, even if there were no such ministerial duty, the director abused his discretion by applying arbitrary standards. (*Id.* at pp. 504, 506.) Rejecting these claims, the *Rodriguez* court affirmed the trial court's denial of the petition for writ of mandate, concluding that (1) the director "was vested with the discretion to determine whether the signs requested would have been compatible with their surroundings," and (2) the court was "legally constrained from ruling otherwise" because "mandamus cannot be used to control the discretion of an administrative officer or agency." (*Id.* at p. 506, citing *Lindell Co. v. Board of Permit Appeals, supra*, 23 Cal.2d at p. 315 [A court "may not substitute its discretion for the discretion properly vested in the administrative agency."].)

Similarly here, under sections 88003.1(b)(7) and 88003 the District is statutorily vested with the discretion to determine whether the employee positions in question should be excluded from the District's classified service under the personal services contracting and professional experts exemptions provided therein. Specifically, under the personal services contracting exemption statute (§ 88003.1(b)(7)), the District must determine in its discretion whether the services to be provided are "of such an urgent, temporary, or occasional nature" that the delay involved in using the District's regular hiring process would "frustrate" the purpose of those services. As section 88003.1 does not define the phrase "urgent, temporary, or occasional nature" or the term "frustrate," the determination of whether these exemption criteria are satisfied necessarily is left to the discretion of the District.

Under the professional experts exemption statute, the District must determine in its discretion whether the position requires the services of a "professional expert," and, if it does, whether such expert is to be "employed on a temporary basis for a specific project, regardless of length of employment." (§ 88003.) The term "professional expert" is not statutorily defined, and the determination of whether the foregoing exemption criteria are met of necessity must be left to the discretion of the District as a matter of law.

We reject the Guild's claim that the District has no discretion to exclude employees from its classified service under the personal services contracting exemption because (the Guild contends) section 88003.1(b)(7) applies to contractors, not employees. Specifically, the Guild asserts "[s]ection 88003.1, . . . including [subdivision](b), applies only to contractors, and not district employees," and "is replete with references to

contracting and contractors." However, as the District correctly points out, subdivision (b)(5) of section 88003.1 specifically references emergency appointment of "an employee" as well as "length of employment." Furthermore, section 88003.1(b)(7) expressly provides that, "[n]otwithstanding any other provision of his chapter," personal services contracting is permissible when the criteria set forth therein are met.

We also reject the Guild's "alternative" claim that the petition "properly alleges a count of abuse of discretion." In support of this claim, the Guild asserts that, to the extent the District had any discretion, the petition alleges the District's "actions were 'arbitrary, capricious, unreasonable, and/or a prejudicial abuse of discretion.'"⁶ Mandamus is available to correct an agency's abuse of discretion "whether the action being . . . corrected can itself be characterized as 'ministerial' or 'legislative.'" (*Santa Clara County Counsel Attys. Association v. Woodside*, *supra*, 7 Cal.4th at p. 540, superseded on another ground as stated in *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077; see also *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 562.) However, as already discussed, traditional mandamus does not lie to force the exercise of a public agency's discretion in a particular manner, and this court may not substitute its discretion for the discretion properly vested in the District. (*Lindell Co. v. Board of Permit Appeals*, *supra*, 23 Cal.2d

⁶ In count 2 of the petition, the Guild alleges that "[t]o the extent the District retained any discretion in electing to include the employees and former employees the [Guild] represented in this action in its classified service, the District abused that discretion by the actions complained of herein. These District actions were arbitrary, capricious, unreasonable, and/or a prejudicial abuse of discretion."

at p. 315; *Rodriguez v. Solis*, *supra*, 1 Cal.App.4th at p. 506; *Helena F. v. West Contra Costa Unified School Dist.*, *supra*, 49 Cal.App.4th at p. 1799.) "[I]f reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." (*Helena F. v. West Contra Costa Unified School Dist.*, *supra*, 49 Cal.App.4th at p. 1799; accord, *Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995.) Here, the Guild's petition allegations show that reasonable minds may disagree as to the wisdom of the District's challenged actions. Accordingly, we conclude the petition fails to state facts sufficient to state a claim for abuse of discretion.

For all of the foregoing reasons, we conclude the court properly sustained the District's general demurrer to the petition without leave to amend.

II

STANDING AND EXHAUSTION OF PERB ADMINISTRATIVE REMEDIES

In light of our conclusions that the Guild cannot show the existence of a ministerial duty that would support the issuance of a writ of mandate in this matter, and that the Guild cannot state an abuse of discretion claim, we need not address the Guild's remaining contentions that (1) it has standing to represent the subject NANCEs, and (2) it "has properly exhausted its administrative remedies, since PERB does not have jurisdiction over Education Code violations."

A. Standing

Were it necessary to reach the merits of these contentions, we would first conclude the court did not err in finding that the Guild lacks standing to bring this action because the relief requested requires the participation of individual members in the lawsuit.

In support of its claim that it has standing, the Guild principally relies on Government Code section 3543.8, which provides: "Any employee organization shall have standing to sue in any action or proceeding heretofore or hereafter instituted by it as representative and on behalf of one or more of its members." The Guild asserts that the question of whether it has standing is solely determined by that section, and the court's reliance on the federal standing test in *Hunt, supra*, 432 U.S. 333 was misplaced. Citing *Anaheim Elementary Education Association. v. Board of Education* (1986) 179 Cal.App.3d 1153 (*Anaheim*) and *California School Employees Assn., Tustin Chapter No. 450 v. Tustin Unified School Dist.* (2007) 148 Cal.App.4th 510 (*CSEA*), the Guild also asserts that it has standing "to represent both current and former employees of the District working in positions in any of the bargaining units the Guild represents, regardless of whether . . . the employees or former employees are or were members of the Guild itself"; and that "individual participation of each bargaining unit member as a plaintiff is not required" because it does not request relief that requires such participation.

The California Supreme Court has explained that "[t]o have standing to seek a writ of mandate, a party must be 'beneficially interested' (Code Civ. Proc., § 1086), i.e., have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' [Citation.] This standard . . . is equivalent to the federal 'injury in fact' test." (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361-362 (*Associated Builders*)).

In *Hunt, supra*, 432 U.S. at pages 342-343, the United States Supreme Court explained the federal injury-in-fact test for determining whether an association has standing to bring suit on behalf of its members:

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) *neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.*" (*Id.* at p. 343, italics added.)

Quoting from its prior opinion in *Warth v. Seldin* (1975) 422 U.S. 490, the *Hunt* court further explained that "[w]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a *declaration, injunction, or some other form of prospective relief*, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." (*Hunt, supra*, 432 U.S. at p. 343.)

Here, the Guild does not seek only prospective relief in its representative capacity under Government Code section 3543.8. In its petition, the Guild alleges it has standing to represent current and former District employees, "includ[ing], but . . . not limited to, lifeguards, tutors, art models, accompanists, interpreters for the Deaf, and employees of the District's radio station," that the Guild claims were "improperly categorized and excluded from the classified service." As the District correctly points out, the petition

contains allegations that the radio station employees excluded from classified service under the professional experts exemption were improperly classified as "professional experts," and their positions were not on a temporary basis for a specific project as required by section 88003. The petition also alleges the five positions excluded under the personal services contracting exemption were improperly excluded because the services were not "urgent," "temporary," or "occasional" such that the District's normal hiring process would "frustrate their very purpose" as required by section 88003.1(b)(7). Of particular importance here, the Guild's prayer for relief sought, in addition to prospective relief, a peremptory writ of mandate directing the District to "[r]etroactively compensate and make whole all employees and former employees of the District who were improperly excluded from its classified service for all lost wages, benefits, leaves, holidays, seniority credits and other emoluments of employment, plus interest thereon"

Based on the nature of the foregoing allegations in the petition, we conclude the court did not err in finding that the relief requested "requires the participation of individual members in the lawsuit." Resolution of the numerous claims alleged in the petition would require a factual inquiry into each employee's individual circumstance such that the participation of the individual claimants would be required. Under these circumstances, as the court properly found, the Guild lacks standing to bring this action without their participation. (See *Associated Builders*, *supra*, 21 Cal.4th at pp. 361-362; *Hunt*, *supra*, 432 U.S. at pp. 342-343.)

B. *Exhaustion of PERB Administrative Remedies*

Were it necessary to reach the merits of the Guild's contention that it has properly exhausted its administrative remedies, we would conclude the court erred in finding that the Guild "failed to exhaust its PERB administrative remedies."

The Education Employment Relations Act (EERA) (Gov. Code, § 3540 et seq.) governs employer-employee relations within public school systems, and sets forth conduct that constitutes an unfair employment practice by employers or employee organizations. (*Personnel Com. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, 885 (*Barstow*).

Government Code section 3541.5 provides that "[t]he initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of [PERB]."

"PERB's exclusive jurisdiction extends to all alleged violations of the EERA, not just those which constitute unfair practices." (*Barstow, supra*, 43 Cal.App.4th at p. 885.)

"PERB's exclusive jurisdiction is not limited to cases in which it is clear that an EERA violation is involved[; r]ather, '. . . courts have permitted [PERB] to retain exclusive jurisdiction in order to resolve disputes which *arguably* could give rise to an unfair practice claim.'" (*Id.* at pp. 885-886.) However, "PERB does not have exclusive initial jurisdiction where a pure Education Code violation (as opposed to an arguably unfair practice) is alleged.'" (*Id.* at p. 886.)

Here, the Guild's petition alleges pure Education Code violations. Accordingly, we conclude that as PERB has no initial jurisdiction over the claims asserted in the petition, the Guild has not failed to exhaust PERB administrative remedies.

DISPOSITION

The judgment is affirmed. The District shall recover its costs on appeal.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.