: 68373-0

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NO. 68373-0

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

JAMES McLAIN,

Respondent,

v.

KENT SCHOOL DISTRICT NO. 415,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD McDERMOTT

REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

Cases

Statutes

Former Kent School District teacher and Respondent James McLain has filed his response brief in this matter. In part, the respondent's brief is evidence that there is no authority directly on point on which either party can rely. To the appellant's knowledge, no discharged certificated employee in Washington has ever before requested to be heard regarding his employer's decision, abandoned the RCW 28A.405.310 hearing process for more than a year, and then emerged expecting that the statutory employment hearing process be restarted at his demand. Likewise, neither party has been able to identify another situation in this state where a court has misapplied the hearing officer selection process of RCW 28A.405.310(4), using it instead to compel a school district to engage in a hearing with a teacher who arguably has waived, or should be estopped from untimely asserting, his opportunity to be heard regarding the teacher's discharge or nonrenewal.

Nevertheless, the fact that this case is a matter of first impression does not mean that the principles of waiver and estoppel, long recognized in Washington, should not be applied to the facts before the court where the respondent has failed to timely

pursue an opportunity to be heard. Similarly, the language and purpose of the petition and appointment provision in RCW 28A.405.310(4) are clear and unambiguous, and the process should not have been misused to substitute for a writ of mandamus procedure compelling the district to hold a hearing when it lawfully refused to do so. See RCW 7.16.160. The appellant asks that the court find that the respondent, as a matter of law, is untimely in his demand for a hearing and that the matter be dismissed. In addition, the appellant asks that the court to rule that the RCW 28A.405.310(4) process is limited to its clearly-stated statutory purpose, and that superior courts be prevented from substituting the subsection for a mandamus procedure when a school district refuses to grant an employee a hearing.

1. McLain's interpretation and application of chapter 28A.405 RCW is unreasonable.

In essence, McLain argues in his brief that a teacher discharged or nonrenewed[1] by a school district pursuant to chapter 28A.405 RCW who asks to be heard regarding that decision triggers a

[1] As previously noted, the statutory employment hearing requirements at issue in this case are the same for any public school certificated employee (for simplicity, referred to as a "teacher"), whether the teacher is discharged pursuant to RCW 28A.405.300 or whether the teacher's annual employment contracts is "nonrenewed" for an ensuing school year pursuant to RCW 28A.405.210.

statutory process *which must continue without him* even if he abandons the process for more than a year. McLain claims that the discharge/nonrenewal determination of a school district superintendent never becomes a "final decision" until an independent officer decides whether sufficient cause exists. Brief of Respondent, p. 15-16. This means, McLain maintains, that a discharged/nonrenewed teacher can request an opportunity to be heard about the employment decision; then stop communicating with the school district and drop out of sight; only to resurface years later and re-assert his right to a hearing again. McLain theorizes that the only way a school district can finalize a teacher's discharge/nonrenewal in the teacher's absence is to petition the superior court *ex parte* for the appointment of an independent hearing officer and conduct an *ex parte* hearing with the hearing officer to review that discharge/nonrenewal decision. And by statute, of course, the school district would bear the costs of this meaningless *ex parte* hearing, including the fees of the hearing officer.

This interpretation of chapter 28A.405 RCW is illogical and leads to strained conclusions. As set forth in its opening brief and further below, the appellant's position is much more reasonable and

consistent with the language of chapter 28A.405 RCW: that is, (a) a teacher has a right to an opportunity to be heard regarding a discharge/nonrenewal decision; (b) the teacher has an obligation to make a timely written request for a hearing; (c) the teacher requesting a hearing has an obligation to timely participate in the various aspects of that process in order to pursue this right to be heard; (d) a petition to the superior court pursuant to RCW 28A.405.310(4) by either party and subsequent appointment of a hearing officer by the superior court occurs solely when the parties are unable to agree on the identity of a hearing officer; (e) if a teacher voluntarily abandons the hearing process prior to the hearing itself absent extraordinary, extenuating circumstances, the need for an "opportunity to be heard" is moot; (f) if the teacher abandons the process for an unreasonable amount of time (e.g., more than one year), then the teacher has waived, or should be estopped from re-asserting, the opportunity to be heard at a later time; and (g) if a teacher reappears and reasserts a demand for a hearing that the school district, in turn, refuses to grant because of the untimeliness of the demand, the remedy is for the teacher to file for a writ of mandamus pursuant to RCW 7.16.160.

2. The respondent has the right to an opportunity to be heard regarding his discharge or nonrenewal, but the school district has no obligation to conduct an *ex parte* hearing to review a discharge/nonrenewal determination in the respondent's absence.

In his brief, the respondent argues that the district has an obligation to conduct a hearing with an independent officer even if the discharged/nonrenewed teacher who has requested an opportunity to be heard abandons the process and stops communicating with his former employer. The respondent maintains that the teacher has no obligation to participate once he makes a request for the right to be heard, and the entire hearing officer selection, prehearing, and hearing process is a mandatory ritual that must occur in his absence. Under the respondent's theory, a school district would never be able to finalize the discharge/nonrenewal of a certificated employee who asks to be heard regarding that discharge/nonrenewal unless the district itself petitions the superior court *ex parte* for the appointment of a hearing officer (because obviously no mutual selection of an officer per statute would be possible); meets with the hearing officer *ex parte* for prehearing conference matters required by statute; conducts an *ex parte* hearing to present the reasons that the teacher was properly discharged/nonrenewed; and ultimately

receives a written decision from the hearing officer upholding the superintendent's determination.

The respondent's interpretative theories are based in part, however, on a mischaracterization of the hearing process itself. McLain analogizes this process to a lawsuit in which the school district is a plaintiff; he argues that the *district* initiates the RCW 28A.405.310 process and that the teacher merely "answers" the complaint by filing a request to be heard. The duty to pursue the hearing process is entirely the obligation of the plaintiff-school district, not the teacher.

This is a false analogy. A 28A.405.310 hearing is, in essence, the due process-related opportunity to be heard afforded a teacher facing a discharge/nonrenewal from a public employment contract. Giedra v. Mount Adams School District No. 209, 126 Wn. App. 840, 847-48 110 P.3d 332 (2005) (due process provisions for challenging public school discharge are an "opportunity for the employee to present his side of the case" and avoid erroneous termination; plaintiffs in this case were erroneously "denied the opportunity to explain particular circumstances bearing on alternative remedies to termination ranging from an unpaid leave of absence to continuation with interim alternative credentials.").

When a school district superintendent notifies a teacher in writing that probable cause exists for discharge/nonrenewal, the decision becomes final if the teacher chooses not to exercise the opportunity to be heard and/or to present alternative facts or remedies by requesting a hearing within ten days of such notice. RCW 28A.405.210 and 28A.405.300. No review of the superintendent's determination by a hearing officer is automatically a mandatory part of this process.[2] Only the teacher's written request for a hearing initiate's the process of RCW 28A.405.310 ("In the event that an employee requests a hearing pursuant to RCW 28A.405.300 or 28A.405.210, a hearing officer shall be appointed in the following manner. . . ." RCW 28A.405.310(4)). The hearing is solely a benefit and due process protection afforded the teacher and is dependent on the teacher's interest in pursuing the right to be heard. An "opportunity to be heard" is pointless if the teacher has abandoned the process and no one is present to be heard. Holding a hearing in such a case is simply a waste of public time and resources.

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[2] As noted in the appellant's opening brief, the teacher can also take subsequent action that compromises or waives the teacher's right to an opportunity to be heard. See Lande v. South Kitsap School District No. 402, 2 Wn. App. 468, 469 P.2d 982 (1970) (right to challenge a variation in her new teaching contract waived by teacher's decision to negotiate with the school district and sign a new contract for the ensuing school year)

3. The petition and appointment process authorized by RCW 28A.405.310(4) is limited to resolving the dispute when parties cannot agree on the identity of the hearing officer.

When the respondent requested an opportunity to be heard, the provisions of RCW 28A.405.310(4) required the parties to work mutually to select a hearing officer. Only if the parties could not agree on the identity of the hearing officer would this subsection then authorize either party to petition the superior court to decide who the hearing officer should be. The superior court's authorized role in this process is solely to appoint a qualified, fair, and impartial hearing officer when the parties cannot agree on one.[3]

That is not what happened in this case. The school district notified respondent's counsel that it believed McLain had waived his right to a hearing by failing to timely pursue his opportunity to be heard for more than a year after the withdrawal of his previous attorney. The parties did not disagree on the identity of the hearing officer—the school district refused to grant McLain a hearing at all.

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[3] ". . . . *Should said nominees fail to agree as to who should be appointed as the hearing officer*, either the board of directors or the employee, upon appropriate notice to the other party, may apply to the presiding judge of the superior court for the county in which the district is located for the appointment of such hearing officer, whereupon *such presiding judge shall have the duty to appoint a hearing officer who shall, in the judgment of such presiding judge, be qualified to fairly and impartially discharge his or her duties. . . .* The district shall pay all fees and expenses of any hearing officer selected pursuant to this subsection." (emphasis added).

McLain's remedy at that point was to seek a *writ of mandamus* to compel the district to engage in a RCW 28A.405.310 hearing. RCW 7.16.160; Walker v. Munro, 124 Wn.2d 402, 407-08, 879 P.2d 920 (1994); see also Land Title of Walla Walla, Inc. v. Martin, 117 Wn. App. 286, 289, 70 P.3d 978 (2003).[4] A mandamus action filed in the superior court would have afforded the district an opportunity to be heard regarding why it believed McLain was no longer entitled to a statutory hearing and subjected that determination to judicial review. Subsection (4) of 28A.405.310 was never intended for that purpose and provides no opportunity for a school district to be heard regarding why the defendant had waived, or should be estopped from asserting, his right to such a hearing.[5]

McLain also argues that the issue of whether his abandoning the process for more than a year constitutes a waiver and/or estoppel regarding his right to a hearing should be decided by the hearing officer himself. In other words, the respondent argues, the

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[4] "A writ of mandamus is 'issued by a superior court to compel . . . a government officer to perform mandatory or purely ministerial duties correctly.' BLACK'S LAW DICTIONARY 973 (7th ed. 1999). Mandamus is an appropriate action to compel a state official to comply with a law when the claim is clear and a duty to act exists. Walker v. Munro, 124 Wn.2d 402, 408, 879 P.2d 920 (1994)." Id. at 289.

[5] The parties both filed briefs with the superior court in this case, but did so without statutory authorization and despite there being no invitation by the presiding judge to submit briefing. No oral arguments were scheduled by the court to discuss these issues.

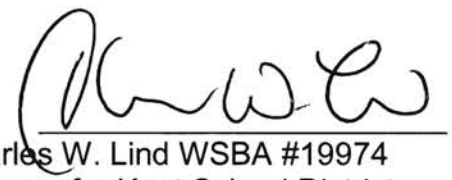
district's objection to holding a 28A.405.310(4) hearing should be heard and decided during a 28A.405.310(4) hearing. Not only is this reasoning illogical and a waste of public funds, but this process would deny a school district judicial review regarding the interpretation and application of state statutes. See Federal Way School District v. Vinson, 172 Wn.2d 756, 765-67, 261 P.3d 145 (2011) (a school district may not seek judicial review of an adverse decision by a hearing officer). While the Washington Supreme Court has decided that a hearing officer's determination of sufficient cause adverse to a district is not subject to judicial review, it is not clear that the legislature intended more complex legal issues of statutory construction, waiver, and/or estoppel to be left to an employment hearing officer as well.

Instead, a school district should be able to defend its reasonable determination that a teacher has waived the right to a 28A.405.310 hearing in a judicial forum pursuant to an action for a writ of mandamus brought by the teacher, complete with the right to be fully heard and the right of judicial appellate review for either party. This is especially important when interpretations of RCW 28A.405.310 and its application are at issue.

Conclusion

For the reasons state above, the appellant Kent School District respectfully requests this court to vacate the superior court order appointing an administrative hearing officer and compelling the district to grant respondent McLain a RCW 28A.405.310 hearing. The appellant asks that the court find that the respondent, as a matter of law, is untimely in his demand for a hearing and that the matter be dismissed. Finally, the appellant asks that the court to rule that the RCW 28A.405.310(4) process is limited to its clearly-stated statutory purpose, and that superior courts may not substitute this process for a writ of mandamus procedure where a school district refuses to grant an employee a hearing.

Respectfully submitted the 4th day of February, 2013.

By: 
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CERTIFICATE OF MAILING

I hereby certify under penalty of perjury under the laws of the State of Washington that on February 4, 2013, I delivered via email, as well as placing in the U.S. Mail, a copy of the Reply Brief of Appellant in this matter, to plaintiff's counsel, Douglas M. Wartelle, at dmw@cnrlaw.com and at the following postal address: 32 Square, 3232 Rockefeller Avenue, Everett, WA 98201.

Signed and dated this 4th day of February, 2013 in Kent, Washington.

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