68373-0

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NO. 68373-0

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JAMES McLAIN,

Respondent,

vs.

KENT SCHOOL DISTRICT, NO. 415,

Appellant.

RESPONSE BRIEF OF RESPONDENT

COGDILL NICHOLS REIN
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I. INTRODUCTION

This is the Respondent's Opening Brief in opposition to the Appellant's appeal in this matter.

II. STATEMENT OF THE CASE

Notwithstanding anything otherwise suggested by the Appellant, there was only one matter to be decided by the lower court Judge upon application for the appointment of a hearing office under RCW 28A.405.310. Wash.Rev.Code, 28A.405.310. Specifically, the Presiding Judge was to appoint a hearing officer to serve in that capacity in accordance with RCW 28A.405. et. seq. CP 1. Any other substantive or procedural issues regarding the Appellant's effort to nonrenew Respondent's continuing contract were, (and are), to be presented to, and decided by, the hearing officer.

This Court needs to know only a few simple facts in ruling upon this appeal. Those facts, not disputed, are as follows: (a) that the Appellant issued, what is known within this practice field, as a *Notice of Probable Cause For Nonrenewal* seeking to nonrenew Respondent's continuing

contract with the District; (b) that Respondent filed with the District a *Notice of Appeal* pursuant to his rights under RCW 28A.405.300; (c) that the parties did not agree upon a hearing officer to serve in said capacity for this matter; and (d) upon application to the presiding judge in King County Superior Court, the court appointed a hearing officer who is qualified to serve. CP 2 – 13, CP 51.

III. LEGAL ARGUMENT

1. The Lower Court Did Not Err

The lower court's authority began and ended with the appointment of a hearing officer, and that is exactly what the lower court did. The lower court did exactly what was required – appoint a person qualified to serve as a hearing officer for the litigation under RCW 28A.405.310 – that being retired Judge Terry Lukens. CP 51. There is no dispute he is qualified to serve in that capacity, even though the Appellant raises some vague notion, (unsupported by any authority), that a hearing officer under RCW 28A.405.310 is possibly less qualified to make a ruling upon the position taken by the Appellant here.

The lower court did not abuse its discretion in its appointment of a hearing officer. The lower court did not act contrary to the law. The lower court did precisely that which is required, and which is authorized, under laws applicable to this type of proceeding.

It is the hearing officer under RCW 28A.405.310 who has the authority to decide all procedural and substantive issues that arise in the litigation, and here, the Appellant should have raised its "waiver" issue with the hearing officer. That hearing officer then has the ability to hear testimony, consider the evidence, consider the legal arguments and the law, and make a ruling. Wash. Rev. Code, 28A.405.310.

Since it is the hearing officer who is charged making procedural and substantive rulings in the litigation, the lower court obviously did not err when it did exactly what the law requires – appoint a hearing officer. The issue raised by the Appellant is to be addressed in the context of the statutory hearing process under RCW 28A.405.310. That statute clearly delineates the power of the hearing officer to make evidentiary

rulings, to make rulings regarding discovery, to issue subpoenas, and to make other appropriate rulings of law and procedure. Wash.Rev.Code, 28A.405.310(5), (6), (7).

2. **No Waiver, But If So, By The Appellant**

The Appellant's notion that Respondent "waived" his statutory right to a hearing is flawed, unsupported by the provisions of RCW 28A.405 et. seq., and contrary to Washington law. But if there has been any waiver, it has been by the Appellant, and the Appellant's *Notice of Probable Cause For Nonrewal* should be stricken, and thereafter Respondent to carry forward as a continuing contract teacher with the District.

Under Washington law in order for the Appellant to nonrenew Respondent's contract the Appellant was required to provide notice to Respondent of the grounds for said adverse action. That notice, in education litigation parlance known as a *Notice of Probable Cause*, is akin in the civil arena to a *complaint* filed by a plaintiff to commence litigation. Upon receipt of the *Notice of Probable Cause*, Respondent availed himself of his statutory right to a full evidentiary hearing to

determine whether sufficient cause exists for the adverse action the District wants to pursue. CP 2 – 13. Again, in the context of education litigation, the *Notice of Appeal* filed by Respondent is akin in the civil arena to an *answer* a defendant would file with the court. Neither a school district's disciplinary action, nor a school district's effort to nonrenew a teacher's contract, becomes final until the educator has been afforded a full evidentiary hearing before the statutory hearing officer, and the hearing officer finds that the school district has proven by a preponderance of the evidence that sufficient cause exists for the adverse action. Since, by Washington law *either the Appellant or Respondent* could have sought the appointment of a hearing officer, if there is a "waiver" to be had here or a "failure to prosecute", such waiver or failure to prosecute falls upon the Kent School District.

The Respondent must be afforded a hearing. Had the Appellant wanted to move forward with the selection of a hearing officer it easily could have done so. CP 39 – 47. It did not need the Respondent's participation or cooperation no more

so than does a plaintiff need the participation or cooperation of a defendant to note a matter for trial. The Appellant simply needed to provide Respondent with notice that it was seeking the appointment of a hearing officer, and upon such a motion and notice, a hearing officer would have been appointed.

The Appellant's notion that such responsibility fell solely on Respondent, is unsupported by the statutory scheme, RCW 28A.405 et. seq. If the Appellant had done so, then a hearing officer would have been appointed, a hearing date set, and the Appellant – who carries the burden of proof in establishing sufficient cause to nonrenew Respondent's contract – would have presented whatever evidence it had.

The Appellant's idea that Respondent had some "duty" to actively participate in the process is likewise not supported by the statutory scheme. Once Respondent filed his notice of appeal, effectively an *answer* to the Appellant's notice of probable cause, the Appellant was free to move forward with the selection of hearing officer – either by agreement of the parties, or in the absence of the same, by motion to the

superior court. This is much like the process for civil claims litigated under Washington law. The plaintiff files and serves the *Complaint*. If the defendant fails to appear or otherwise defend the litigation, then the plaintiff is free to seek a default and default judgment. Here, the Appellant issued the *notice of probable cause*, and Respondent filed his *notice of appeal*. CP 2 – 13. The Appellant then did not prosecute its case even though, like a plaintiff in the civil arena, it had every ability and opportunity to do so. Now, the Appellant wants the Court of Appeals to impose some artificial deadline upon the appointment of hearing officer, which deadline cannot be found anywhere in the statutory scheme, and place the burden of seeking the appointment of a hearing officer upon the Respondent when RCW 28A.405.310 permits either Appellant or Respondent to do so. In essence, the Appellant asks this Court of Appeals to enact law.

The Appellant's notion that Respondent "waived" his statutory right to a hearing is unsupported by the provisions of RCW 28A.405 et. seq., and contrary to Washington caselaw.

But if there has been any waiver, it has been by the Appellant, and the Appellant's *Notice of Probable Cause For Nonrewal* should be stricken, and thereafter Respondent to carry forward as a continuing contract teacher with the Appellant.

The general equitable principles of waiver and estoppel, referenced by the Appellant are inapplicable in the context of the issue now before the Court of Appeals. The hearing process in this type of litigation is a creature of statute, and governed by statute – as noted, the provisions of RCW 28A.405. Examining the Appellant's "waiver" and "estoppel" arguments it is just as easy to say that the Appellant should be estopped from discharging the Respondent. It is just as easy to say that the Appellant waived its right to nonrenew Respondent's contract. The Appellant commenced this action. The burden of proof is on the Appellant to establish sufficient cause for such action. The Appellant had every opportunity to seek the appointment of a hearing officer, and did not do so.[1] Once a

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[1] The Appellant identifies a litany of "concerns" incident to delay – those issues run both ways, and still leaves appellant without an explanation as to why, in the absence of an agreement as to a hearing officer, appellant didn't do what is clearly available

hearing officer had been appointed, a hearing date would have been set, and the litigation would have proceeded as set forth under RCW 28A.405.310. Simply issuing a notice of probable cause to nonrenew the Respondent's continuing contract is not, (and was not), sufficient to terminate his employment once Respondent filed his notice of appeal. The Appellant needed, and needs, to do something further – it must present to a hearing officer evidence from which the hearing officer may conclude that sufficient cause exists to end Respondent's employment relationship with Appellant given the reasons stated in the notice.

3. Purpose Of Continuing Contract Law

Some background as to the continuing contract law in Washington is necessary in proceeding further here. The general purposes of both RCW 28A.405.300 and RCW 28A. 405.210 can be expressed as follows:

> "(1) To implement "the sound public policy of retaining in the public school system competent and capable teachers and supervisory personnel who have become increasingly valued by reason of

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under the statute – apply for the appointment of one. Appellant can hardly be heard to complain now.

their experience. This works not only to the advantage of the employees but of the public and those concerned with the administration of the school system. AGO 55-57, No. 51, at p.2.

(2) To protect employees of school districts from arbitrary dismissal. Hill v. Dayton School District, 10 Wn.App. 251, 517 P.2d 223 (1973), reversed on other grounds, 85 Wn.2d 204 (1975), citing Foster v. Carson School District, 63 Wn.2d 29, 385, P.2d 367 (1963).

(3) To eliminate uncertainty in the employment plans of both the teacher and the school district for the ensuing term . . . Robel v. Highline School District, 65 Wn.2d 477, at 483, 398 P.2d 1 (1965).

(4) To create a form of civil service or merit system employment . . . (a) teacher has achieved a legal equivalent of appointment by examination, for he or she cannot even be appointed to a teaching position without possessing the professional qualifications prescribed by law, and evidenced by "an effective teacher's certificate or other certificate required by law of the State Board of Education." RCW 28A.67.070. Rightful possession or entitlement to such a certificate makes one a "certificated employee." These provisions alone should constitute at least the legal equivalent of a civil or merit system certificate of standing in the examinations. Secondly the school board, in employing teachers, must take only those who possess the requisite professional qualifications evidenced by a state certificate. RCW 28A.67.070. The board is not a freely negotiating employer; its contract with the teachers must conform to the laws of the state."

> Justice Hale dissenting in Pierce v. Lake Washington School District, 84 Wn.2d 772 at 790 (1974).

The provisions of RCW 28A.405 define the minimum rights applicable to certificated employees in the State of Washington. These statutes include RCW 28A.405.310, RCW 28A.405.300, RCW 28A.405.100, and RCW 28A.405.210. RCW 28A.405.210 is known as the nonrenewal statute; RCW 28A.405.300 is known as the discharge statute; RCW 28A.405.100 is known as the evaluation and probation statute; and RCW 28A.405.310 gives the statutorily appointed hearing officer certain rights and authority. Combined, RCW 28A.405.210 and RCW 28A.405.300 constitute the "continuing law contract." Under these discharge and nonrenewal statutes, RCW 28A.405.300 and RCW 28A.405.210, and under common law prior to their enactment, the burden is/was on the school district to "establish by a preponderance of the evidence" that there is "sufficient cause or causes" for discharge.

In order to hold a Washington State certificated employee certificated, each applicant for a certificate must

meet certain requirements which have been established either by statute or by the Superintendent of Public Instruction for the State of Washington. And a school board must employ certificated personnel under a written contract. RCW 28A.405.210 (1) and (2). The employment contract can be for a term of not more than one year (it may be for less), and during that year the employee may be "discharged" or nonrenewed only for "sufficient cause or causes", RCW 28A.400.300(1), RCW 28A.405.300 and RCW 28A.405.210. Under these discharged and nonrenewal statutes, RCW 28A.405.300 and RCW 28A.405.210, and under common law prior to their enactment, the burden is/was on the school district to "establish by a preponderance of the evidence" that there is "sufficient cause or causes" for discharge.

Prior to 1943, a school district had no obligation to a certificate employee at the end of the one-year period; the contract was simply terminated according to its terms. Seattle High School Chapter 200 v. Sharples, 159 Wn. 424, 293 P. 994 (1930). In 1943, the Washington State Legislature passed the

predecessor to RCW 28A.405.210. The law then provided as follows:

> "Every teacher, principal, supervisor or superintendent holding a position s such with a school district, whose employment contract is not to be renewed by the district for the next ensuing term, shall be notified in writing on or before April 15 preceding the commencement of such term of the decision of the board of directors not to renew his or her employment and the reason or reasons therefore, and if such notification is not timely given by the district, the teacher, principal, supervisor or superintendent entitled thereto shall be conclusively presumed to have been reemployed by the district for the next ensuing term upon contractual terms identical to those which would have prevailed if his or her employment had actually been renewed by the board of directors for such ensuing term . . . ." Chapter 52, Sec. 1, pp. 95-96, Laws of 1943.

In short, the employee's one year contract was "renewed" or "continued" for the next year, unless the district: (1) Gave written notice by April 15, and (2) Stated the reason or reasons in the notice. In 1955, the Legislature amended the continuing contract law by adding to these requirements that a school district could "nonrenew" an employee's contract only if the district: (1) Had "sufficient cause or causes" for nonrenewal; (2) Gave the employee an opportunity for a hearing before the school board; and (3) "Proved and established at the hearing"

the cause or causes to be sufficient. If the district failed to meet these requirements, the employee's contract was continued. Chapter 68, Sec. 415, Laws of 1955.

In 1969, the Legislature again amended the law providing for an optional direct appeal to superior court for all nonrenewals, i.e. for cause or economic reasons. That was subsequently changed by Laws of the 2nd Ex. Sess., 1975-76, Chapter 114, Sec.2, whereby the hearing officer procedure was first instituted, but preserving the sufficient cause requirement, hearing opportunity and preponderance of evidence tests and standard. This change was codified in RCW 28A.405.310, and was subsequently amended again in Laws of 1st Ex. Sess., 1977, Chapter 7, Sec. 2, whereby the decision of the hearing officer was final subject to subsequent appeal to the superior court.

In summary, RCW 28A.405.210 has a history spanning close to 50 years, the notice provisions for 50 years and the hearing provisions for fewer years. The discharge statute RCW 28A.405.300, has a shorter history, having first been enacted in

1961, Chapter 241, Sec. 2. The appeal procedure as codified in RCW 28A.405.310 is the same for both nonrenewal, pursuant to RCW 28A.405.210 (for cause), and discharge, pursuant to RCW 28A.405.300.

4. Written Notice Specifying the Cause or Causes

A school district's "cause or causes for nonrenewal or discharge" are those factors which "cause" the district to seek to terminate the employment of a person. Both RCW 28A.405.210 and RCW 28A.405.300 require a district to specify in writing its causes or reasons for nonrenewal or other adverse action (ie, discharge).

5. The Hearing Procedure

RCW 28A.405.210 and RCW 28A.405.300 provide through RCW 28A.405.310 for a full fact-finding hearing culminating in a written decision. The hearing officer sits as the tribunal of first resort and substitutes his judgment for that of the officer making the determination of probable cause, the District. The hearing, since it is the first hearing, must be de novo because the District has made only a "probable"

decision and not a final decision as to the sufficiency of the cause or causes.

The hearing officer must follow the rules of evidence, make appropriate rulings of law, make rulings as to the admissibility of evidence, make his or her decision within 10 days following the conclusion of the hearing, and award attorney's fees if the hearing officer restores the employee to his or her position. *See* RCW 28A.405.310(7) and (8).

6. Standard and Scope of Hearing

The hearing officer is required to conduct a full de novo hearing. Obviously, the hearing of first impression then must be a complete and full hearing and any decision made as a result of the hearing must be made independent of any findings or recommendations or decision of the district, superintendent, or any employee thereof.[2]

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[2] The Appellant cites to Lande to support the notion that the question of whether or not there has been a "waiver" is usually for a trier of fact. *See,* Appellant's Opening Brief, Pg. 17. Accepting that notion, the trier of fact in this matter is not a superior court judge who appoints a hearing officer, rather, the trier of fact is the hearing officer. And this is another reason why the superior court did not err in appointing a hearing officer – because the issue such as is being raised by the appellant is one to be addressed to the hearing officer.

Pursuant to both RCW 28A.405.100 and RCW 28A.405.300, and RCW 28A.405.310, where the employee appeals from a probable cause determination to a hearing officer, there is no full due process hearing until a hearing is conducted by the hearing officer and hence there could be no final decision until the hearing officer decides whether probable cause and sufficient cause exist. Hence, under the statutory scheme we do not have the usual situation of judicial review of administrative action where the administrative agency has made a final determination after a full hearing where both sides have had an opportunity to present evidence. Under RCW Title 28A it has been held that where a district, instead of making a probable cause determine, makes a final determination to terminate a teacher's employment prior to affording him notice and an opportunity for hearing, such action renders the district's decision void, and entitled the employee to reinstatement of his employment. Foster v. Carson School District, 63 Wn.2d 29 (1963). The reason for this is that the employee has a statutory and due process right

under the continuing contract law to a hearing prior to a decision terminating his employment.

7. **If No Sufficient Cause for Discharge Exists, Respondent Is Entitled To Reinstatement, Back Wages and Attorney's Fees**

If a school district does not carry its burden of proof, or has otherwise violated statutory procedures, the certificated employee is entitled to reinstatement pursuant to RCW 28A.405.300 and RCW 28A.405.310. Both the nonrenewal and discharge statutes have consistently been interpreted to mean that if it is found that the statutory procedures have not been followed, or if the District cannot prove by a preponderance of evidence that sufficient causes for the nonrenewal or discharge of the certificated employee exists, the court must then order reinstatement.

8. **Respondent Must Be Provided With An Opportunity For A Hearing Prior To His Contract Being Adversely Affected**

By the terms of RCW 28A.405 et. seq. and caselaw interpreting the same, an employee must be provided with an

opportunity for a hearing before his/her contract is adversely affected. RCW 28A.405.300 provides:

> In the event it is determined that there is probable cause or causes for a teacher, principal, supervisor, superintendent, or other certificated employee, holding a position with the school district, hereinafter referred to as "employee", to be discharged or otherwise adversely affected in his or her contract status, such employee shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action. Such determinations of probable cause for certificated employees, other than the superintendent, shall be made by the superintendent. Such notices shall be served upon that employee personally, or by notice at the house of his or her usual abode with some persons of suitable age and discretion then resident therein. **Every such employee so notified, at his or her request made in writing and filed with the president, chair of the board or secretary of the board of directors of the district within ten days after receiving such notice, shall be granted opportunity for a hearing pursuant to RCW 28A.405.310 to determine whether or not there is sufficient cause or causes for his or her discharge or other adverse action against his or her contract status.**
>
> **In the event any such notice or opportunity for hearing is not timely given, or in the event cause for discharge or other adverse action is not established by a preponderance of the evidence at the hearing, such employee shall not be discharged or otherwise adversely affected in his or her contract status for the causes stated in the original notice for the duration of his or her contract.**
>
> If such employee does not request a hearing as provided herein, such employee may be discharged or otherwise

> adversely affected as provided in the notice served upon the employee.
>
> Transfer to a subordinate certificated position as that procedure is set forth in RCW 28A.405.230 shall not be construed as a discharge or other adverse action against contract status for the purposes of this section.
>
> Wash.Rev.Code, 28A.405.300 [emphasis added].

The plain language of RCW 28A.405.300 makes clear that an employee may not be adversely affected in his/her contract status before there is a hearing and decision to determine whether such action is justified. Washington cases addressing this issue, and interpreting RCW 28A.405.300, yield the same conclusion. *See*, Benson v. Bellevue School District, No. 405, 41 Wn.App. 730 (1985), (The Court of Appeals held that RCW 28A.405.450 requires a pre-termination hearing before a certificated employee is adversely affected in his contract status and that Benson should have been notified and given the opportunity for a hearing before the final decision was made); Foster v. Carson School District, No. 301, 63 Wn.2d 29 (1963), Noe v. Edmonds School District, No. 15, 85 Wn.2d 97 (1973).

9. An Absence Of Authority To Support The Appellant's Position

The Appellant relies upon few decisions in an effort to support its position in this matter, but those decisions are distinguishable. The District looks toward the decision in Snohomish County v. Thorp Meats, 110 Wn.2d 163, 750 P.2d 1251 (1988). That case stands for the limited proposition that dismissal of a civil lawsuit for lack of prosecution is precluded where the case was noted for trial before the motion to dismiss was heard. Thorp Meats does not support the District's position, and could be fairly interpreted to stand for the proposition that if there was going to be some dismissal of the Respondent's appeal that he was entitled to have notice and an opportunity to proceed to hearing (not unlike the clerk's notices issued under Civil Rule 41 when there hasn't been action of record on a case for over a year, and whereby the parties have an opportunity to prevent dismissal of the pending action).

There is the decision of Link v. Wabash Railroad Company, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1285 (1962). That case stands for the proposition that a *federal court* under

FRCP 41(b) may dismiss an action because of the plaintiff's failure to prosecute. That case arose from a collision between plaintiff's automobile and one of the respondent's trains in August, 1954. Some six years later, and more than three years after the petitioner prevailed on respondent's motion for summary judgment (during which time two fixed trial dates had been postponed), the District Court notified counsel of a pretrial conference. When petitioner's counsel did not appear at the pretrial conference the District Court, finding counsel had not provided a reasonable reason for his nonappearance, dismissed the action.

In addition to the fact that Link was a case decided under the federal rules of civil procedure which do not apply to this action, *see* RCW 28A.405.310, the facts of that case also make it distinguishable. Here, McLain is absolutely entitled to an opportunity for a hearing under RCW 28A.405. et. seq. and the decisions applying the continuing contract law.

The decision in Potter v. Kalama Public School District, 31 Wn.App. 838, 644 P.2d 1229 (1982), stands for the

proposition that the discharge statutes for deficiencies in teaching in classroom-related performance did not apply to a discharge for a teacher's inappropriate physical contact with students.

There is also reference to the decision in Federal Way School District v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011). That decision stands for the proposition that while RCW 28A.405.320 grants a certificated school district employee a right to petition in superior court for judicial review of a hearing officer's decision in a dispute affecting the employee's contract, the legislature has not granted such a right to the school district. The Vinson decision calls into question whether the Appellant has the ability to appeal as it has done in this case. The Respondent's position here really isn't with the appointment of a hearing officer, it is that Respondent doesn't want a hearing to occur in this matter and it knows that under Vinson there is limited ability to appeal decisions of a hearing officer. That Respondent may not like the decision in Vinson, is not a determinative issue on this appeal.

IV. CONCLUSION

The lower court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of January, 2013.

Cogdill Nichols Rein Wartelle Andrews

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Attorney For Respondent

CERTIFICATE OF MAILING

I hereby certify under penalty of perjury under the laws of the State of Washington that on January 3, 2013, I delivered via email, as well as delivering via legal messenger, a copy of the Response Brief of Respondent in this matter No. 68373-0, to the Court of Appeals Division One, and to appellant's counsel, Charles Lind, at the following address:

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Dated this 3rd day of January, 2013 in Everett, Washington.

Heidi Allen