ORIGINAL

Cause No. 44750-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LYNDA SCHLOSSER)
)
Appellant)
)
vs.)
)
BETHEL SCHOOL DISTRICT,)
)
Respondent)

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DIVISION II
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STATE OF WASHINGTON
BY
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REPLY BRIEF OF APPELLANT

RICHARD H. WOOSTER, WSBA 13752
Kram & Wooster
Attorney for Appellants
1901 South I Street
Tacoma, WA 98405
(253) 572-4161

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I. SUMMARY OF ARGUMENT

Respondent, Bethel School District (the "District") ignores Appellant, Mrs. Schlosser's (the Teacher's) twenty seven year teaching career by glossing over the property rights established under the Washington Certificated Teacher statutes. The District asserts that the Teacher has no property interest in retaining her employment and thus enjoys no right to any pre-termination hearing with the actual decision maker, Superintendent Siegel (Superintendent or Decision Maker), and that the post-deprivation procedures available to the Teacher fully satisfy due process, even where no opportunity is ever afforded to the Teacher to invoke the discretion of the Decision Maker. The procedures adopted by the District violate the Teacher's fundamental rights of due process and require a reversal of the adverse employment action and reinstatement until such time as Mr. Schlosser is afforded an opportunity to invoke the discretion of the Superintendent.

This Court should reject the District's semantic arguments mischaracterizing other state statutes as "tenure" statutes or asserting that under Washington statutes a twenty seven year teacher has no

property interest in their continuing employment affording the Teacher any right to a pre-termination hearing. This Court should reject the District's argument that the post deprivation review provided before an independent hearing examiner satisfies the pre-termination procedural requirement set forth in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Post deprivation procedures, regardless of how elaborate, do not satisfy the pre-termination opportunity to invoke the discretion of the decision maker at a meaningful time, before the decision is made.

The determination the teacher was an unsatisfactory teacher is contrary to the evidence and not supported by substantial evidence. The Teacher should be awarded her attorneys' fees in this matter.

II. ARGUMENT

A. Factual Recap.

Mrs. Schlosser joined the Bethel School District in September 1998 (CP 566) having been recruited by the District. (CP 566-67) Her evaluations demonstrated that she continued to be a good teacher in the Bethel School District. (CP 1056-1074). Not withstanding years of excellent performance reviews, the District evaluators asserted she lacked knowledge of her subject matter and was

unsatisfactory in virtually every other rubric, except her interest in teaching students. (CP 1039)

Numerous irregularities occurred in the procedures and reports relied upon by the District's administrators determining the Teacher was not satisfactory. The Teacher had no chance to make the Superintendent aware of these irregularities. See generally, Appellant's opening brief, pages 8-14; 16-17. These irregularities included, but are not limited to, accusing the Teacher of permitting off task behavior for students that were not part of the class (CP 84-85; 666-67). She was accused of not taking effort toward improvement of her skills, when such efforts were blocked by her evaluators. (CP 443-45) Her lack of subject matter knowledge was based in part on her use of "principal" for the balance on a loan, when the evaluator was wrong when she insisted it should have been "principle." (CP 575) The teacher had taught a yearbook class for which the school's yearbook won a statewide award the year she was found to be an unsatisfactory teacher, but the Superintendent was unaware the Teacher was an award winning teacher. (CP75, 2033-34)

The Decision Maker acknowledged that his decision was made without any input from the Teacher to present her side of the story. (CP 86). It is this failure to afford the Teacher an opportunity to

present her side of the story to the Decision Maker before the decision was made to not renew her contract that violated the Teacher's rights of due process.

B. The District's Focus on Post-Deprivation Review Procedures Ignores The Fundamental Necessity of Affording Some Opportunity to Invoke the Discretion of the Superintendent Before the Decision Not to Renew a Contract Is Made.

Mrs. Schlosser does not assert that the District failed to follow the procedures outlined for teacher evaluation and contract non-renewal under RCW 28A.405.010 et. seq. Her assertion is that the failure to afford the Teacher an opportunity to invoke the discretion of the Superintendent before the decision is made to not renew the contract violates the Teacher's rights of due process outlined in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and its progeny, including *Giedra v. Mount Adams School Dist. No. 209*, 126 Wash. App. 840, 845-846, 110 P.3d 232, 234 - 235 (2005).

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. See *Arnett v.*

> *Kennedy,* 416 U.S., at 170–171, 94 S.Ct., at 1652–1653(opinion of POWELL, J.); *id.,* at 195–196, 94 S.Ct., at 1664–1665 (opinion of WHITE, J.); see also *Goss v. Lopez,* 419 U.S., at 581, 95 S.Ct., at 740.To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495 (1985).

The pre-termination "hearing," though necessary, need not be elaborate, the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. The Employees in *Loudermill,* just like the Teacher here, were later entitled to a full administrative hearing and judicial review. "The only question is what steps were required before the termination took effect." *Cleveland Bd. of Educ. v. Loudermill* 470 U.S. 532, 545, 105 S.Ct. 1487, 1495 (1985).

Rather than address the issue of the necessity for a pre-termination hearing directly, the District argues that following the procedures outlined in RCW 28A.405.210 and RCW 28A.405.310 provided the Teacher all the process to which she is due. This assertion overlooks the fact that the Decision Maker was never provided the other side of the story, never reviewed Mrs. Schlosser's personnel files, observed her teach, or had knowledge of the excellent educational outcomes for Mrs. Schlosser's students.

The decision is the determination by the Superintendent that probable cause exists to refuse to renew the Teacher's contract. The Teacher has the right to appeal that decision to a hearing officer's decision, but is never afforded a chance to present her evidence to the Superintendent who decides to take the action that triggers the post-deprivation review.

Washington's teacher contract non-renewal statutes were adopted more than a decade before the decision in *Loudermill* was announced.

Because the provisions of RCW 28A.405.310 do not provide for any pre-termination hearing with the Superintendent does not mean that the statute is unconstitutional. Where a statute can be interpreted in a Constitutional manner, Courts will not read into the statute a provision that renders it unconstitutional. *See In re Chorney,* 64 Wash.App. 469, 477, 825 P.2d 330 (1992) (where a statute is susceptible to interpretation which may render it unconstitutional, courts adopt construction which will sustain the statute's constitutionality)

The unconstitutional acts are solely those of the District and its Superintendent in denying Mrs. Schlosser a pre-deprivation hearing so that she had the opportunity to invoke the discretion of the Decision Maker at a meaningful time and in a meaningful manner before he made the decision that her contract would not be renewed and the Superintendent's decision

was turned over to the hearing officer for the Teacher to appeal the Superintendent's decision.

This omission of a pre-termination hearing is particularly important when the School District urged the Hearing Officer, the Superior Court and Court of Appeals, to accord special deference to the decisions of the professional school district administrators whom recommended Mrs. Schlosser's termination. See: "2. This Court Should Give Weight to the Judgment of Experienced School Administrators Who [sic] All Found Ms. Schlosser's Performance To Be Unsatisfactory. Respondent's Brief, pg 15 and Respondent's [Bethel S.D.] Superior Court Hearing Brief pages 21-23. (CP 2597)" 2. A Hearing Officer Should Give Weight to the Judgments of Experienced School Administrators" Districts pre-hearing brief pages 7-9.

The essence of the *Loudermill* decision is that the scope of the pre-termination hearing is determined by the availability of post-deprivation review. The District urges this court to find that because a hearing is held after the decision is made not to renew a teacher's contract that affording a post non-renewal decision hearing is all due process requires. The District's argument eliminates all pre-termination opportunity to invoke the Decision Maker's discretion.

How elaborate the pre-termination hearing is required to be is inversely related to the extent of post termination hearings available. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 545, 105 S.Ct. 1487, 1495 (1985). In Ms. Schlosser's case there was no pre-termination hearing of any kind and the District argues that satisfies due process because an elaborate post decision review is available. Even under the elaborate post review procedures the Teacher is never afforded to invoke the Decision Maker's discretion and the District urges those reviewing the decision not to renew the contract to defer to the Decision Maker's "special expertise."

The recommendation from Ms. West and Mr. Westering (CP 1052) was sent to Superintendent Seigel and he acted upon it the very next day. (1053) The Teacher was never provided a forum to invoke the discretion of the Decision Maker and point out errors upon which his decision was based or provide her side of the story.

RCW 28A.405.300 establishes notice provisions for a determination of probable cause and the teacher's right to request a hearing following the Superintendent's decision not to renew a teacher's contract. "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." *Id.* "Any employee receiving a notice of probable cause for discharge or adverse effect in contract status pursuant to RCW 28A.405.300, or any employee, with the exception of provisional employees as defined in RCW 28A.405.220, receiving a notice of probable cause for nonrenewal of contract pursuant to RCW 28A.405.210, shall be granted the opportunity for a hearing pursuant to this section." RCW 28A.405.310.

Those protections establish that the Teacher has a property interest in the renewal of her contract entitling her to due process protections, including *Loudermill* rights, before the decision is made that the contract is subject to non-renewal. An employee cannot be notified of the discharge as a *fait accompli,* but must first be afforded an opportunity to be heard. *Martin v. Dayton Sch. Dist. 2,* 85 Wash.2d 411, 412, 536 P.2d 169 (1975), *cert. denied,* 424 U.S. 912, 96 S.Ct. 1110, 47 L.Ed.2d 316 (1976). The District asks this Court to ignore the similar cases from other jurisdictions because they assert, without any analysis of the statutes at issue, that the statutes invoke the word "tenure." The assertion that Washington is not a "tenure" state is belied by the language of RCW 28A.405.220 which specifies teachers are "provisional" until they have

completed three years of service in a district with satisfactory performance. In 2010, when the Education—Reform—Accountability Framework Bill, 2010 Wash. Legis. Serv. Ch. 235 (S.S.S.B. 6696) extended the provisional status of teachers from two years, to three years, the HOUSE BILL REPORT, on the companion bill HB 3035 observed that: "Two years is not enough time for a solid evaluation of a teacher's performance before tenure is granted." http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/House/3035%20HBR%20ED%2010.pdf.

The district describes *McMillen v. U.S.D. 380*, 253 Kan. 259, 855 P.2d 896 (1993) as a "tenure" case. However, *McMillen* involves the decision not to renew a teacher's contract. The Kansas law in effect at that time was virtually identical to the Washington Statute in that it provided for automatic renewal "unless written notice of intention to terminate a contract of employment is served by a board of education upon any teacher on or before May 1" Kansas Teacher Due Process Law, K.S.A. 72–5436 *et seq* *McMillen* was also instructive in that it described the appropriate remedy for the due process violation as the payment of wages until such time as the contract terminated or when the pre-termination hearing occurred, which ever occurs later. *Id. at* 273, 855

P.2d. at 905. That is precisely the remedy this Court should order for Mrs. Schlosser.

The District also describes *Short v. Kiamichi Area Voc. Tech School Dist. No. 7 of Choctaw County,* 761 P.2d 472, 49 Ed. Law Rep. 772 (1988) as a "teacher tenure" case. But again, the statute in effect is virtually identical to Washington's Statute. Copies of the Oklahoma statute in effect at that time are attached as an appendix to that reported decision.

The District further attacks *Short* on the basis that it did not require a hearing prior to the determination that probable cause existed because there the superintendent makes a recommendation to the school board who then passes on the decision to the teacher subject to the right of the teacher to a hearing. The distinction is one without a difference. In Oklahoma the decision-maker is the school board rather than the superintendent who is the decision-maker under Washington law, but the review procedure is the same under both statutes after the decision maker has determined that a teacher's contract would not be renewed. Omitted from the Respondent's Brief at page 29 quoting of the Oklahoma statute at issue is the following language, "In the case of a tenured teacher, the notice shall state the one or more statutory grounds for dismissal or non-reemployment and the right of the teacher to have a hearing conducted by a hearing panel." *Short* 761

P.2d at 481, setting out 70 O.S. 1981, § 6-103.4. The decision reviewed under the Oklahoma statute is no more or less a *fiat accompli* than notice given under Washington's statute to Mrs. Schlosser.

The District attempts to lead this Court into the erroneous belief that the controlling authority on Washington Teacher Non-renewal cases who have completed their provisional status is not *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), but *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 s.Ct. 2701 (1972).

The District's analysis ignores the fundamental distinction between a certificated teacher that had completed the three years service necessary to trigger a property interest in employment and a provisional teacher that has no property interest in their employment. See generally, RCW 28A.405.220 providing for the discharge during the first three years with a district or during the first year if the teacher had served at least two years as in a certificated position in Washington state for a different district. The Teacher could only be terminated for cause and that limitation gave her a property interest that triggered her right to a pre-termination hearing with the decision maker that was not cured by any subsequent hearing before a hearing officer.

The court in *Roth* observed:

> "[T]erms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment. (footnotes omitted).

Board of Regents of State Colleges v. Roth 408 U.S. 564, 578, 92 S.Ct. 2701, 2710 (1972)

By contrast, the Teacher's contract in Washington, having completed her provisional status, could only be terminated for cause. RCW 28A.405.300.

Bethel cites to many pre-*Loudermill* cases, including *Pierce v. Lake Stevens School District,* 84 Wn.2d 772, 559 P.2d 810 (1974) and *Barnes v. Seattle School Dist. No.* 1, 88 Wn.2d 483, 563 P.2d. 199 (1977) for the proposition that different due process protections apply for nonrenewal and discharge cases.[1] Respondent's Brief, pg. 23. The ongoing validity of *Pierce v. Lake Stevens* and *Barnes v. Seattle School* is dubious. The 9th Circuit has held that employees with a property interest are entitled to their *Loudermill* rights even in the context of a layoff.

[1] The District also attempts to distinguish *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893 (1976) as a "disability benefits case" without recognizing that the decision provides a fundamental analysis of due process often relied upon by courts when analyzing due process issues, including the *Loudermill* court and refer to the "The Mathews' Test."

Clements v. Airport Authority of Washoe County 69 F.3d 321 (9th Cir.1995). The quoted portion of *Pierce v. Lake Stevens* discusses the concept of a liberty interest rather than the property interest at issue in this case.

The concepts of public employee due process have evolved considerably since 1974 and *Loudermill* had yet to enter the legal landscape of public employee due process rights when the cases relied upon by the District were decided and the teacher contract statutes were first drafted.

The District relies upon another pre-*Loudermill* case, *Carlson v. Centrailia School District*, 27 Wn. Wpp. 599, 619 P.2d 998 (1980). *Carlson* is not persuasive for the same reasons as the *Pierce v. Lake Stevens* case upon which *Carlson* relies, it provides no analysis of the due process issues discussed in *Loudermill* and involved layoffs for budgetary reasons.

The District and the hearing officer argue that the *Petroni v. Board of Directors of Deer Park School Dist., No. 414,* 127 Wn.App. 722, 113 P.3d 10, 11, (2011) stands for the proposition that Ms. Schlosser had no right to a pre-termination hearing. However, the teacher in that case was provisional teacher and unlike Mrs. Schlosser, that teacher had no property interest in employment which is required to trigger the *Loudermill* right to

a pre-decisional opportunity to address errors in the information upon which the decision not to renew the contract is based and for the teacher to invoke the discretion of the decision maker by telling her side of the story before the decision is made to issue the non-renewal notice. *Deer Park*, 127 Wn. App. at 724-25, 113 P.3d at 11.

Because Mrs. Schlosser's contract could only be subject to non-renewal after the Superintended determined there was probable cause not to renew her contract she had a property interest in employment, which in turn afforded her the right to a pre-termination hearing with the Superintendent before he made the decision that her contract would not be renewed as the Teacher is entitled to oral or written notice of the charges against her, an explanation of the employer's evidence, and an opportunity to present her side of the story.

C. The Evidence That Mrs. Schlosser is an Unsatisfactory Teacher Flies in the Face of a 27 year Career In Which Her Professional Competence Was Recognized and Honored.

In order to obtain her certification to teach Continuing Technical Education Mrs. Schlosser was required to have 2000 hours of experience in a related field. (CP 564, 566) Her evaluators were not certified to teach CTE courses. Mr. Westering had been a physical education instructor.

(CP 178) as had Mrs. West. (CP 179). Mr. Westering had never taught business courses (CP 179) and neither had Mrs. West. (CP 419).

Even where the evaluators determined Ms. Schlosser demonstrated good teaching skills (CP 951. 386), she was rated unsatisfactory. (CP 938) That determination coupled with over twenty five years of strong performance evaluations (CP 1092-1098) demonstrates a biased evaluation and undermines the determination Ms. Schlosser was an unsatisfactory teacher.

The only objective evaluation of Mr. Schlosser's performance during the period at issue was the Award issued for the yearbook presented by the publisher for the yearbook and the use of that yearbook as a model for other schools to follow. (CP 42, 1118)

Despite years of evaluations demonstrating strong instructional skill, subject matter knowledge and an ability to inspire students with a variety of teaching methods, the Superintendent accepted the recommendation that she was unsatisfactory and put in process the end of her teaching career, without so much as a twenty minute interview to check on the accuracy and appropriateness of the recommendation he was acting upon. A review of the record will undermine the support for that proposition.

Whether her alleged ineffectiveness resulted in sufficient cause for nonrenewal is a mixed question of law and fact. Pursuant to RCW 28A.405.340, the superior court reviews a hearing officer's findings of fact to determine whether they are clearly erroneous. Appellate Courts are bound to the same standard of review. *Clarke v. Shoreline Sch. Dist. No. 412,* 106 Wn.2d 102, 109-10, 720 P.2d 793 (1986). A factual determination is clearly erroneous if it is not supported by substantial evidence in the record. *State v. Jeannotte,* 133 Wn.2d 847, 856, 947 P.2d 1192 (1997). Great deference is afforded to the hearing officer's findings of fact. However, the determination regarding whether the hearing officer properly applied the correct law to the facts is reviewed de novo. *Clark,* 106 Wn.2d at 109-10; *Wright v. Mead Sch. Dist. No. 354,* 87 Wn.App. 624, 628, 944 P.2d 1 (1997).

As noted above, the termination action was unlawful because Mrs. Schlosser was not afforded pre-termination due process. The termination action was arbitrary and capricious because it is not supported by substantial evidence. The hearing officer accepted the hearsay comment of the Union representative (CP 360) that a union consultant (Carol Coar) who worked with Mrs. Schlosser as a coach (CP 603) would not be supportive of Mrs. Schlosser and elevated that conclusion to a cornerstone of his decision. (CP 1561). That inference and conclusion is not

supported by the evidence and taints the entire decision requiring reversal of the hearing officer's decision.

The District further ignored the evidence of the Teacher's successful accomplishments which were never communicated to the Superintendent and the lack of qualifications of the evaluatiors to consider Mrs. Schlosser's ability in teaching business courses.

The hearing examiner stated that there was no evidence Ms. Schlosser could have attended a pre-termination meeting and that it is highly improbable that a different result would have occurred had she been afforded such an opportunity. (CP 001562). However, there is no evidence to establish she could not have attended. Further, Mr. Seigel indicated that several salient facts may have impacted his decision. The record indicates that the recommendation was submitted to Mr. Siegel and he made the decision to non-renew and communicated that decision without any attempt to gather Mrs. Schlosser's side of the story.

D. Mrs. Schlosser is Entitled to Be Reimbursed for Her Reasonable Attorneys Fees.

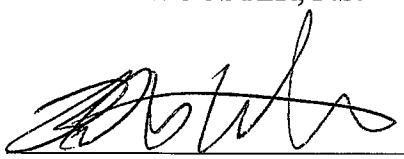
If the Teacher prevails, RCW 28A.405.310(7)(c) provides for "reasonable attorneys' fees." Mrs. Schlosser the decisions below should be reversed and the Teacher is entitled to reimbursement for her attorneys fees.

III. CONCLUSION

The Decision of the Superior Court should be reversed. Mrs. Schlosser should be reinstated into her teaching position with full back pay, until such time as a proper determination is made that she is an unsatisfactory teacher and that she is afforded a proper pre-termination hearing with the Superintendent to address that recommendation before it proceeds to the post deprivation review procedures afforded to teachers who have passed their provisional status period. The findings of unsatisfactory performance should be overturned as lacking substantial evidence. The Teacher should be awarded her full attorney's fees as provided by RCW 28A.405.310.

Respectfully submitted this 20 day of August 2013.

KRAM & WOOSTER, P.S.



Richard H. Wooster, WSBA #13752

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LYNDA SCHLOSSER	)	
	)	Cause No. 44750-9-II
Appellant	)	
	)	DECLARATION OF
vs.	)	SERVICE
	)	
BETHEL SCHOOL DISTRICT,	)	
	)	
Respondent	)	

KNOW ALL PERSONS BY THESE PRESENTS: That I, Connie DeChaux, the undersigned, of Bonney Lake, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, am over the age required and competent to be a witness;

That on the 20th day of August, 2013, I delivered via ABC Legal Messenger a copy of the following documents:

1. Declaration of Service;
2. Reply Brief of Appellant;

properly addressed to the following person:

William A. Coats
Attorney at Law
1201 Pacific Ave Ste 1900
Tacoma WA 98402

I declare under penalty of perjury under the laws of the State of Washington and of the United States that the foregoing is true and correct.

Signed at Tacoma, Pierce County, Washington this 20th day of August, 2013.

Connie DeChaux

Connie DeChaux

Kram & Wooster, Attorneys at Law
1901 South I Street
Tacoma WA 98405
(253) 572-4161
(253) 572-4167 fax