90818-4

Supreme Court No.
COA No: 44750-9-II

SUPREME COURT
OF THE STATE OF WASHINGTON

LYNDA SCHLOSSER

Petitioners,

vs.

BETHEL SCHOOL DISTRICT

Respondents.

PETITION FOR REVIEW

RICHARD H. WOOSTER, WSBA 13752
Attorney for Petitioner
Kram & Wooster
1901 South I Street
Tacoma, WA 98405
(253) 272-7929

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I. INDENTITY OF PETITIONERS.

Lynda Schlosser (hereinafter "Schlosser" or the "Teacher.") a Bethel School District (hereinafter "Bethel" or the "District") certificated teacher.

II. CITATION TO COURT OF APPEALS DECISION.

Teacher seek review of the August 26, 2014, Published Opinion in Lynda Schlosser v. Bethel School District 44750-9-II ____ Wn. App. ____, ____ P.3d _____, 2014 WL 4212736. ("Schlosser Opinion").

III. ISSUES PRESENTED FOR REVIEW.

1. **Does a Certificated Teacher Have a Property Interest in the Renewal of Their Contract?**
2. **Does a Certificated Teacher Have a Right to a Pretermination Opportunity to Invoke the Decision Maker's Discretion Before the Decision to Not Renew Her Contract is Made?**
3. **What are the Appropriate Remedies for a Violation of the Teacher's Due Process Rights?**
4. **Did the Superior Court Inappropriately Conclude That Any Failure to Provide Due Process Caused No Injury?**
5. **Is the Teacher Entitled to Attorney Fees?**

IV. STATEMENT OF THE CASE

A. This is a Review of a Teacher's Contract Non-Renewal Pursuant to RCW 28A.405, *et seq.*

This appeal addresses the non-renewal of the Teacher's contract under RCW 28A.405.100(4)(a). Before being recruited in 1998 to teach in the

Bethel School District, the Teacher successfully taught for 13 years in the Clover Park School District. (CP 599-600).

On May 10, 2012 Connie West and Brad Westering (the Evaluators) issued a report to Bethel School Superintendent, T. G. Siegel that Mrs. Schlosser had been evaluated as an "unsatisfactory" teacher. (CP 1144). The next day, without any input from the Teacher, Superintendent Siegel issued his notice that Mrs. Schlosser's teaching contract would not be renewed. (CP 1146).

Mrs. Schlosser unsuccessfully appealed to a hearing examiner. The failure to provide a predeprivation meeting with the Superintendent denied her due process, a violation that could not be cured.

B. The District Did Not Afford the Teacher a Pre-termination Hearing Denying Her Due Process.

The Superintendent afforded the Teacher no opportunity to address the recommendation or correct erroneous information before his decision was made. (CP 710-12). The Superintendent admitted his decision was based solely on the Evaluators' input (CP 69) without the Teacher's input. (CP 66-67).

The Superintendent made his decision without knowledge of the following key facts: The Teacher had taught a yearbook class that won a statewide award that year (CP 75, 2033-34); the educational outcomes or

grades of the Teacher's students (CP 76, 90) demonstrating they had, for the most part, learned the materials from the Teacher's instruction (CP 2059-2284); Schlosser's request to attend a training seminar had been denied to her by the Evaluators and that she had gone and observed other teachers (CP 446, 655-58); Teacher's requests to have her classroom videotaped were not acted on by the administration. (CP 78-79).

Superintendent admitted that knowledge of those facts may have impacted his assessment of the Teacher. (CP 78-79). Mr. Seigel admitted that he would be surprised that the Teacher's request for training was not granted. (CP 80). He indicated that knowledge of the efforts undertaken by Mrs. Schlosser to learn and observe other teaching methods may have impacted his decision, but that he relied solely upon the evaluator's "check mark" of the assessment of those efforts (CP 80-81) although he did consider the evaluator's comments as well. (CP 92-93). He acknowledged that Mrs. Schlosser's participation in professional organizations for CTE instructors may have influenced his assessment of her professional preparation and scholarship. (CP 82).

Mr. Siegel acknowledged that in many classrooms there is a lot of activity going on that could cause one to question, "How is this a good classroom?" However, the teacher has a coherency to the lesson and resulting outcomes are good. (CP 83-84). Certification to teach

Continuing Technical Education (CTE) requires 2000 hours experience in a related field. (CP 599, 601) In this instance, the evaluators had no CTE instructional experience. (CP 212, 453). They often did not know what they were was observing, to them the activity looked like chaos.

Mr. Seigel acknowledged that he was unaware of Mrs. Schlosser's simultaneously teaching four different class subjects in a single period. (CP 84, 614-17) He acknowledged that such a skill set might indicate a good instructor. (CP 84). Mr. Seigel acknowledged that he was unaware that instances of students being off task involved students that were not even members of the class being taught and that such knowledge may have influenced his decision not to renew Ms. Schlosser's contract, but that he relied upon the Evaluators. (CP 84-85). He assumed that such information would have been taken into account by the Evaluator but that a single incident should not have skewed the overall evaluation. (CP 85). He acknowledged that was an assumption on his part without having spoken to the Teacher for her side of the story. (CP 86).

Mrs. Schlosser was not an "unsatisfactory teacher" and the decision upholding her non-renewal is not supported by the evidence and is the product of a due process violation.

V. ARGUMENT

A. The Court of Appeals Decision That Certificated Teachers Have No Property Interest In Contract Renewal Ignores the Procedural Protections of RCW 28A.405. *et seq.* Creating a Property Interest in the Continuing Renewal of the Teachers' Contract and Concomitant Right of Predeprivation Due Process.

The Schlosser Opinion (1) conflicts with prior precedent of this court and the court of appeals; (2) this case involves a significant question of law under the Constitution; and (3) the right of certificated teachers to minimal predeprivation due process is a matter of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

Bethel School District did not provide the Teacher any hearing prior to its decision not to renew her contract, violating her procedural due process rights. Schlosser's property interest in her renewing contract created a right to an informal predeprivation hearing. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 545–46, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Whether the decision, or the statute supporting the order, violates constitutional provisions is a question of law which is reviewed *de novo. Amunrud v. Bd. of Appeals,* 158 Wn.2d 208, 215, 143 P.3d 571 (2006). Whether the hearing officer properly applied the correct law to the facts is reviewed *de novo. Clarke v. Shoreline Sch. Dist. No. 412,* 106 Wn.2d 102, 109-10, 720 P.2d 793 (1986).

A public school superintendent's authority not to renew a certificated employee's contract must be based on probable cause. RCW 28A.405.210. If a teacher's performance is not satisfactory, the school must establish a probationary period of 60 school days. RCW 28A.405.100(4)(b). If a teacher's deficiencies are remediable, the district must also provide the teacher with "a reasonable program for improvement." RCW 28A.405.100(4)(a). A finding of probable cause exists under RCW 28A.405.300 or RCW 28A.405.210 if the teacher fails to make "necessary improvement[s] during the established probationary period, as specifically documented in writing with notification to the [teacher]." RCW 28A.405.100(4)(b).

RCW 28A.405.310(8) places substantive procedural restrictions on the decision maker's discretion not to renew a teacher's contract, thus giving the Teacher a property interest in her contract's renewal. "Protected property interests include all benefits to which there is a legitimate claim of entitlement." *Crescent Convalescent Ctr. v. Dep't of Soc. & Health Servs.,* 87 Wn.App. 353, 358, 942 P.2d 981 (1997). A statute creates a legitimate claim of entitlement where it places *substantive* procedural restrictions on a decision maker's discretion. *Crescent Convalescent Ctr.,* 87 Wn.App. at 358, 942 P.2d 981. A statute stating that an employee can be deprived of employment only "for cause" constitutes

a substantive procedural restriction. *Danielson v. City of Seattle*, 108 Wn.2d 788, 797, 742 P.2d 717, 722 (1987). RCW 28A.405.310(8) is such a statute.

The very purpose of the *Loudermill* hearing is to permit the employee to invoke the discretion of the decision maker before the adverse decision is announced. *Loudermill* balances the extent of post termination review available to the employee to help determine the scope of the required pre-termination process that must be afforded to the employee.

In this case, the adverse action was when Superintendent Siegel issued the Notice of Intent not to renew the Teacher's contract. Thereafter, the Teacher had no opportunity to invoke the discretion of the Superintendent and she was afforded no opportunity before the decision was made.

> Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Cf. *Califano v. Yamasaki,* 442 U.S. 682, 686, 99 S.Ct. 2545, 2550, 61 L.Ed.2d 176 (1979). Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, **the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect**. See *Goss v. Lopez,* 419 U.S., at 583-584, 95 S.Ct., at 740-741; *Gagnon v. Scarpelli,* 411 U.S. 778, 784-786, 93 S.Ct. 1756, 1760-1761, 36 L.Ed.2d 656 (1973).

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543, 105 S.Ct. 1487, 1494 (1985) (emphasis supplied)

Giedra v. Mount Adams School Dist. No. 209, 126 Wn.App. 840, 845-846, 110 P.3d 232, 234 - 235 (2005) held that teachers are employees whom enjoy protected property interests in their jobs that require a *Loudermill* hearing before they may be terminated. *Giedra* dealt with terminations for expired teaching certificates. It is illogical to conclude that teachers have property interests during the contract year but no such interest in their recurring contract renewal.

The Hearing Officer and the Court of Appeals erroneously relied upon *Petroni v. Board of Directors of Deer Park School Dist., No. 414,* 127 Wn.App. 722, 113 P.3d 10, 11, (2005), rev. denied for the proposition that the certificated Teacher had no right to a pre-termination hearing regarding nonrenewal. (CP 11). The Court of Appeals characterized the holding of *Deer Park* as follows: "(holding that procedural protections governing discharge do not apply to nonrenewal of teacher contracts)." However, *Deer Park* does not so hold and does not even discuss *Loudermill.* First, Ms. Petroni was a first year, provisional teacher and therefore did not have a protected property interest which is the requirement triggering due process rights. *Deer Park*, 127 Wn. App. at 724-25, 113 P.3d at 11. The *Loudermill* case and the Constitutional issues

implicated *were* not cited in *Deer Park* much less analyzed. *Deer Park* holds only that procedural protections of RCW 28A.405.310 do not apply to a provisional teacher receiving a notice of nonrenewal. Mrs. Schlosser had twenty-seven years of teaching experience and was not a provisional teacher.

"An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportunity for a hearing appropriate to the nature of the case.' " *Loudermill,* 470 U.S. at 542, 105 S.Ct. 1487 (citing *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The need for "some form of pre-termination hearing" is evidenced by a balancing of the competing interests involved: the private interests in retaining employment against the governmental interests in expeditious removal of unsatisfactory employees, and the risk of an erroneous termination. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

In public employee cases, the pre-termination hearing need not definitively resolve the propriety of the discharge, but should serve as an initial check against mistaken decisions—to determine whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action. *Loudermill,* 470 U.S. at 545–46, 105 S.Ct. 1487). The 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 their side of the story. *Loudermill, 470 U.S. at 546, 105 S.Ct. 1487.*

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 Wn.2d 411, 412, 536 P.2d 169 (1975), *cert. denied,* 424 U.S. 912, 96 S.Ct. 1110, 47 L.Ed.2d 316 (1976).

In Wright v. Mead School Dist. No. 354, 87 Wn.App. 624, 628-629, 944 P.2d 1, 3 (1997); *abrogated on other grounds by Federal Way School Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769-775, 261 P.3d 145, 152 - 155 (2011) the court ruled, without any analysis of the purpose behind *Loudermill's* due process requirements, that the post termination hearing provided by RCW 28A.405.210 was sufficient to protect due process rights. The teacher in *Wright* was discharged for alleged sexual misconduct with students. An important interest in reviewing this case is that *Wright* should be disregarded as *dicta* because no analysis was done of the *Loudermill* issue of a pretermination hearing.

How elaborate the pre-termination hearing is 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. The recommendation from the Evaluators (CP 1978) was sent to Superintendent Seigel and he acted upon it the very next day. The court of appeals cites to *Pierce v. Lake Stevens School District,* 84 Wn.2d 772, 559 P.2d 810 (1974) for the proposition that post deprivation hearing satisfies due process in layoff cases. The ongoing validity of *Pierce v. Lake Stevens* is dubious. 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 Court of Appeals were decided and the teacher contract statutes were first drafted. The 9th Circuit has held that employees with a property interest are entitled to their *Loudermill* rights even in the context of a layoff. *Clements v. Airport Authority of Washoe County* 69 F.3d 321 (9th Cir.1995). This is another reason this case is of substantial public importance.

The tribunals below were in error ruling a 27-year teacher has no property interest in her contract renewal triggering the right to some pretermination due process. The opportunity to invoke the discretion of the decisionmaker is never afforded by the hearing examiner's post decision review that bypasses the superintendent all together.

B. Most States Have Embraced the Due Process Protections of *Loudermill* Within the Text of Their Statutes.

1. Overview of Teacher Contract Renewal Statutes.

The Superior Court requested the parties brief the issue of how other States and their courts have addressed this due process issue since *Loudermill* with particular emphasis upon States with teacher non-renewal practices similar to those expressed in RCW 28A.405.210 and RCW 28A.405.310. Counsel provided a detailed analysis of the laws affecting teacher contract renewal. (CP 2835-3174) States have adopted statutes specifying due process procedures of notice of intent not to renew their contract, and affording both pre-deprivation due process and post-termination review of the decision not to renew their contract.

These statutes have names such as the "Teacher Tenure Act", M.S.A. § 122A.41, V.A.M.S. 168.102; "Teacher Due Process Act of 1990", 70 Okl.St.Ann. § 6-101.20; "Students First Act", Ala.Code 1975 § 16-24C-2; "The Teacher Fair Dismissal Act of 1983", A.C.A. § 6-17-1501; "Teachers Due Process Act", K.S.A. 72–5436 *et seq.;* "School Employment Procedures Law", Miss. Code Ann. § 37-9-109; "Tenure Employees Hearing Law", N.J.S.A. 18A:6-10; "Employment and Dismissal Act", R.I. Code 1976 § 59-25-430; "School Personnel Act", N. M. S. A. 1978, § 22-10A-27; "Term Contract Non-renewal Act", Tex

Educ. Code §§ 21-201-211; "Utah Orderly School Termination Procedures Act.", U.C.A. 1953 § 53A-8-101; and the ambitiously titled, "Accountability for Schools for the 21st Century Law" O.R.S. § 342.805.

The procedures adopted by the states use a variety of approaches to address due process concerns including the right to a pretermination hearing. A summary of the Notice, Pre-deprivation Process and Post-deprivation process available by State is attached as Exhibit 1 to the Wooster Declaration. (CP 2635-2785).

Washington State's procedure of notice of probable cause for non-renewal of contract per RCW 28A.405.210, and the opportunity for a hearing before a hearing officer RCW 28A.405.310(1) is one of the few states that does not call for an opportunity to invoke the discretion of the decision maker at any time before or after the decision is made. While many states use a hearing officer or hearing panel in one form or another, most provide for the decision of the hearing officer to be a recommendation to be acted upon by the school board (the decision maker) with the teacher having an opportunity to address the hearing officer's recommendation before the school board's decision is made.

Washington's statute specifies that the teacher receives the notice of intent not to renew their contract and then the teacher may trigger a hearing before a hearing officer whose decision is final and subject only to

court review. Teachers in Washington are never afforded the opportunity to enjoy "the only meaningful opportunity to invoke the discretion of the decisionmaker [which] is likely to be before the termination takes effect." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Once the Superintendent's decision has been made, the proceeding before the hearing officer is akin to an appellate review because the discretion of the decision maker is never invoked in the review process set out under Washington law. This is a fundamental denial of the minimal due process rights outlined in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

The fact that no opportunity is afforded to invoke the decisionmaker's discretion under Washington means that just following the statutory review provisions denies due process. That flaw may be cured by affording the Teacher a pretermination hearing with the Superintendent.

2. Washington's Failure to Enumerate Constitutional Protections in RCW 28A.405 *et seq.* Does Not Render the Statute Unconstitutional.

Just because the way the Bethel School District carried out Mrs. Schlosser's contract non-renewal does not mean that the Washington Statutes RCW 28A.405.210, RCW 28A.405.310 are unconstitutional.

Those statutes do not direct the Bethel School District or any other district to deny the Teacher rights to a pretermination hearing before advancing to the procedures set forth in the statute. 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 Wn.App. 469, 477, 825 P.2d 330 (1992). The unconstitutional acts are solely those of the Bethel School District and its Superintendent in denying the Teacher a predeprivation hearing to invoke the decision maker's discretion before the decision not to renew the Teacher's contract is made.

Omitting a pretermination hearing is particularly significant when the District urges the courts and the Hearing Officer to accord special deference to the decisions of the professional school district administrators. (CP 2597)

This assertion overlooks the fact that the Superintendent was never provided the other side of the story by the Teacher, and as noted above among other things, never reviewed Mrs. Schlosser's personnel files, observed her teach, or had knowledge of the excellent educational outcomes for Mrs. Schlosser's students. That violates due process.

C. Courts Addressing Teacher Tenure Statutes Post *Loudermill* Have Uniformly Observed the Importance of Preterminaton Process as Vital to Affording Due Process.

Because of the diversity of approaches among the states in their statutory schemes protecting teachers' due process rights, there are few

cases squarely on point regarding an employee's *Loudermill* rights when a referral is made to a hearing examiner after the employer has made an initial determination of non-retention, but failed to provide the employee notice and an opportunity to respond before sending the matter to an outside hearing officer to pass upon the employer's decision.

The most instructive case is *Short v. Kiamichi Area Voc. Tech School Dist. No. 7 of Choctaw County,* 761 P.2d 472, 49 Ed. Law Rep. 772 (1988) noting the district action was taken only two weeks after *Loudermill* had been decided. After noting that "the right of due process is conferred not by legislative grace but by constitutional guaranties," the court held that a preterminaton hearing is required even though the statutes provided a hearing before an administrative hearing panel. *Id. 746 P.2d at474, 477.* That decision paid particular attention to Loudermill's impact upon statutorily established procedures for teacher non-retention mirroring Washington's RCW 28A.405.210 and RCW 28A.405.310. *Id. at 478.*

> Here, the teacher's interest is clearly sufficient to warrant pretermination procedural safeguards. It is apparent that this claim, like the one of tenured public employees in *Loudermill,* arises to the status of a property interest. Once this interest is established, *Loudermill* requires that some form of pretermination hearing be provided. In the absence of a constitutionally adequate pretermination procedure, the nonrenewal failed to pass constitutional muster. *The statute, 70 O.S. 1981 § 6–103.4(B), insofar as it fails to provide a Loudermill pretermination hearing, is unconstitutional.* Post-termination remedies however

> elaborate, are insufficient; some form of pre-termination hearing is required. Contrary to the implication in the dissent, we do not strike down § 6–103.4(B) post-termination proceedings. We simply hold that its procedures must be supplemented by a pretermination opportunity to be heard before the board of education reaches a final decision. A pretermination hearing provides additional protection—not less. (It should be noted that the pretermination hearing should be held before the local school board, and that one of the crucial reasons for the hearing is to avoid mistaken employment decisions by affording the teacher a pretermination opportunity to be heard. After the board resolves the issue, the post-termination hearing is before a different tribunal, the hearing panel.

Short v. Kiamichi Area Voc. Tech School Dist. No. 7 of Choctaw County, 761 P.2d 472, 477, 49 Ed. Law Rep. 772 (1988)(emphasis in original)..

The decision in *Short* squarely observes that a statute that provided post deprivation review by a hearing panel, but no predeprivation hearing failed to satisfy due process.

A Washington school district meets the requirements of due process by affording the affected teacher notice of proposal to not renew the teacher's contract with a statement of all of the reasons the decisionmaker is relying upon for the decision and afford the affected teacher a conference with the decisionmaker to address the issues upon which the adverse employment action is based. The conference need not be an elaborate evidentiary hearing because post-deprivation review is

available. Schlosser was denied the predeprivation element of due process.

D. The Appropriate Remedy for this Due Process Violation is to Reinstate The Teacher's Contract Until Such Time as a Loudermill Hearing with The District Superintendent Can Be Held.

At issue is whether a post-termination hearing can remedy the due process deficiency in the pre-termination proceedings. *Lujan v. G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001). The appropriate remedy is reinstatement. However, A court may order that a hearing be held as a remedy for a public employee terminated in violation of due process, and, ancillary to that relief, court may order the equitable relief of back pay from the date of termination and reinstatement until such time as a hearing is held, and a court ordering such relief need make no determination as to propriety of the employee's termination. *Brewer v. Parkman,* 918 F.2d 1336, 1341 - 1343 (8th Cir.1990).

In *Nickerson v. City of Anacortes,* 45 Wash.App. 432, 440-441, 725 P.2d 1027, 1032 (1986) the court found the appropriate remedy was, if the superior court finds and concludes that a pretermination hearing as required by *Loudermill* would, within reasonable probabilities, have prevented his discharge, then the employee is entitled to reinstatement

with back pay and benefits from the date of his termination. If the superior court finds and concludes that a pre-termination hearing would not have prevented his ultimate discharge, then the employee's remedy is limited to the recovery of such monetary damages, if any, as the court finds were proximately caused by the denial of a pre-termination hearing.

One reason for the pre-termination hearing is to invoke the discretion of the decision maker at a meaningful time, before the decision is made and publicly announced. It is human nature when a decisionmaker has publicly stated their decision, there is a reluctance to change their position. That is the core reason why the predeprivation hearing requirement exists. After that opportunity evaporates, it is highly unlikely the employer would acknowledge that a different decision would have been reached.

In this instance, Superintendent Seigel acknowledged that he was relying upon the facts stated by the Evaluators and he could not say how he would have reacted if he had been informed of factual discrepancies in the record. (CP 73-75; 78; 81, 84-86; 150, 431,443). He acknowledged an awareness of those factors may have impacted his decision. (CP 78-79).

The fact that the Superintendent acknowledged numerous issues that may have impacted his decision to non-renew the Teacher's contract

undermines the Superior Court's determination that failing to provide the Teacher a *Loudermill* hearing caused her no injury. The appropriate remedy is to reinstate the Teacher with back pay.

F. The Teacher is Entitled to Be Reimbursed for Her Reasonable Attorney's Fees.

If a district employee prevail, RCW 28A.405.310(7)(c) provides for "reasonable attorneys' fees." The Teacher should be awarded her attorney's fees. RAP 18.1.

V. CONCLUSION

A mischarge of justice has occurred that ended the twenty-seven (27) year teaching career of a dedicated teacher. The Teacher was non-renewed without the opportunity to invoke the discretion of the decision maker in any fashion. The record reflects numerous issues in dispute regarding what transpired during this evaluation period. A mistake was made and this court should correct the mistake by finding the failure to afford her a pre-termination Loudermill hearing requires that she be reinstated with back pay until such time as the Loudermill hearing can be held and award attorneys' fees.

RESPECTFULLY SUBMITTED this 17th day of September, 2014.

Richard H. Wooster, WSBA 13752
Attorney for Petitioner

APPENDIX

1. Published Opinion-Schlosser v. Bethel School District COA No: 44750-9-II.

2. Due Process Clause of the U.S. Constitution

3. The Washington Teacher Contract Statutes cited in the brief.

Appendix 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LYNDA SCHLOSSER, Appellant, v. BETHEL SCHOOL DISTRICT, Respondent.	No. 44750-9-II PUBLISHED OPINION

HUNT, P.J. — Lynda Schlosser, a certified teacher with the Bethel School District, appeals the superior court's order affirming a hearing officer's decision that the District had probable cause to "terminate" her employment. She argues that the superior court erred in ruling that (1) her post-"deprivation"[1] hearing satisfied her due process rights and, therefore, she was not entitled to a predeprivation hearing; and (2) substantial evidence supported the hearing officer's Findings of Fact and Conclusions of Law that Schlosser was an "unsatisfactory" teacher. The District counters that (1) Schlosser was not entitled to a predeprivation hearing; and (2) the hearing officer's record showed "sufficient cause" for the District's declining to renew her contract. We hold that Schlosser was not entitled to a predeprivation hearing, that she received due process, and that substantial evidence supported the hearing officer's decision. We affirm the superior court's affirmance of the hearing officer's ruling that the District had probable cause not to renew Schlosser's teaching contract.

[1] The parties use the term "deprivation" as synonymous with "termination from employment," in contrast with nonrenewal of a teacher's annual contract.

FACTS

From the mid-1980s until 1998, Lynda Schlosser taught business in the Clover Park School District. In 1998, she began teaching at Bethel High School, where she continued to teach business related subjects. Like all Washington teachers, Schlosser had annual evaluations that addressed seven teaching criteria specified in RCW 28A.405.100[2]: (1) instructional skill; (2) classroom management; (3) professional preparation and scholarship; (4) efforts toward improvement when needed; (5) handling student discipline and attendant problems; (6) interest in teaching students; and (7) knowledge of subject matter. A teacher receives a rating of "Satisfactory" or "Unsatisfactory" in each category and overall. Clerk's Papers (CP) at 4.

From 1998 through 2008, all of Schlosser's evaluation reports for her teaching at Bethel High School were "Satisfactory." CP at 5. On Schlosser's May 29, 2009 report, however, Assistant Principal Susan Mayne rated Schlosser "Unsatisfactory" for classroom management and handling student discipline, "satisfactory" in the other five areas, and "Satisfactory" overall. CP at 5. In a May 27, 2010 report, Mayne rated Schlosser "Unsatisfactory" in instructional skill, "satisfactory" in all other areas, and "Satisfactory" overall. CP at 5. But in Schlosser's May 27, 2011 report a year later, Assistant Principal Brad Westering[3] rated Schlosser as "Satisfactory" for her handling of student discipline and her interest in teaching students, but "unsatisfactory" in all other areas and overall. CP at 5.

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[2] The legislature amended RCW 28A.405.100 in 2010. LAWS OF 2010, ch. 235, § 202. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

[3] Although the hearing officer's decision refers to the Assistant Principal as "Scott Westering," CP at 136, the record reveals that his name is "Brad Westering." CP at 36.

In a February 1, 2012 letter, Superintendant of Schools Thomas G. Seigel notified Schlosser that based on her performance evaluations, her overall performance was unsatisfactory; and he placed her on a 60-school-day probation period effective February 3. This letter also included a plan for Schlosser's improvement. To implement this plan, the District hired Connie West, a retired Peninsula School District administrator, to work with Schlosser with the goal of helping her return to a "satisfactory" status.[4] CP at 5. Over the course of four months, West conducted eight evaluations of Schlosser, all of which were "Satisfactory" in only one category—interest in teaching students—and "Unsatisfactory" in all other categories and overall. CP at 6. Because of her husband's medical issues, Schlosser did not attend the last evaluation session; however, she did attend the others with her union representative, Tom Cruver.

On May 11, after receiving West's and Cruver's reports, Seigel sent a May 11, 2012 letter to Schlosser notifying her he had "determined that probable cause exist[ed] to nonrenew [her] employment with Bethel School District No. 403 effective at the end of the 2011-12 school year." CP at 1146. Seigel based his determination on Schlosser's "final evaluation and the supporting materials submitted by [her] evaluators," which showed that her performance was unsatisfactory for the following statutory criteria[5]:

Criterion 1: Instructional skill
Criterion 2: Classroom management
Criterion 3: Professional preparation and scholarship
Criterion 4: Effort toward improvement when needed
Criterion 5: Handling student discipline and attendant problems

[4] Schlosser does not dispute that this improvement plan met statutory requirements.

[5] RCW 28A.405.100(1)(a).

Criterion 7: Knowledge of subject matter

CP at 1146.

Schlosser appealed the Superindendent's decision to a hearing officer under RCW 28A.405.210[6], .310(4).[7] Both Schlosser and the District were represented by counsel at the hearing. The hearing officer took testimony from Seigel, Mayne, and Westering. After 4 days of testimony involving 38 exhibits, the hearing officer found that the District had established probable cause to issue Schlosser a notice of nonrenewal of her teaching contract.

Schlosser appealed the hearing officer's decision to superior court, which affirmed. The superior court ruled that (1) substantial evidence supported the hearing officer's decision, including his Findings of Fact and Conclusions of Law; (2) the hearing officer's decision was not clearly erroneous or arbitrary and capricious; (3) Schlosser had received due process in that she had an ample opportunity to be heard post-deprivation; and (4) she was not entitled to a predeprivation hearing under RCW 28A.405.210. Schlosser now appeals to this court.

ANALYSIS

I. DUE PROCESS

Schlosser first argues that the District's failure to provide a predeprivation hearing before deciding not to renew her teaching contract violated her constitutionally protected property interest in continued employment. The District counters that (1) Schlosser did not have a property interest in renewing her contract and, thus, she was not entitled to a hearing before the

[6] The legislature amended RCW 28A.405.210 in 2010. LAWS OF 2010, ch. 235, § 303, effective June 10, 2010. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

[7] Both statutes give an aggrieved teacher an opportunity to appeal a superintendent's decision to a hearing officer.

Superindendent issued his nonrenewal decision; nevertheless, (2) the District provided her with due process when it followed the post-deprivation review procedures in chapter 28A.405 RCW. We agree with the District.

A. Standard of Review; Underlying Principles

Whether the hearing officer's decision, or the statute supporting the order, violates constitutional provisions is a question of law, which we review de novo. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). When reviewing an administrative action, we sit in the same position as the superior court, applying the standards of the Washington Administrative Procedure Act[8] directly to the record before the agency. *Tapper v. State Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). It is undisputed that the State may not deprive its citizens of a property interest without procedural due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d. 494 (1985).

But to determine whether the District deprived Schlosser of due process, we must first determine whether a property interest existed entitling her to such protections. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 29, 65 P.3d 319 (2003); *see also Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Such property interest is "'defined by existing rules or understandings that stem from an independent source such as state law.'" *Loudermill*, 470 U.S. at 538 (quoting *Roth*, 408 U.S. at 577). Schlosser cites no Washington authority holding that a certificated teacher has a property interest in renewing his or her contract.

[8] Chapter 34.05 RCW.

If Schlosser had a property interest entitling her to due process protections, then we must determine what process is due. *Wash. Indep. Tel. Ass'n*, 110 Wn. App. 498, 508, 41 P.3d 1212 (2002) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)), *aff'd*, 149 Wn.2d 17 (2003). Our legislature created a statutory scheme with heightened procedural due process protections for discharging school certificated employees in general. RCW 28A.405.300-.380. But it also promulgated a separate set of statutes governing school district decisions not to renew contracts of certificated employees, such as teachers; these statutes provide for post-decision review of decisions not to renew a teacher's contract. *See* RCW 28A.405.210-.240. Schlosser does not dispute that the District "follow[ed] the procedures outlined for teacher evaluation and contract nonrenewal" under chapter 28A.405 RCW. Reply Br. of Appellant at 4.

Instead, she argues that Washington's statutory scheme does not provide due process because it provides for a hearing only after a school district has decided not to renew a teacher's contract, not before. When applying chapter 28A.405 RCW and when determining due process protections, Washington courts distinguish between nonrenewal of teachers' contracts and teachers' discharge from employment. *See, e.g., Petroni v. Bd. of Dirs. of Deer Park Sch. Dist. No. 414*, 127 Wn. App. 722, 729, 113 P.3d 10 (2005) (holding that procedural protections

governing discharge do not apply to nonrenewal of teacher contracts).[9] This distinction is fatal to Schlosser's claims.

B. Due Process Not Applicable to Nonrenewal under RCW 28A.405.210 and .220

Schlosser contends that the continuing contract statute, former RCW 28A.405.220 (2009),[10] vests in certificated teachers a right essentially identical to "tenure." Reply Br. of Appellant at 9. She argues that (1) the statute specifies teachers are "provisional until they have completed three years of service"[11] with satisfactory performance; (2) thus, once she completed three "satisfactory" years with the District, her status as a teacher was no longer "provisional"; (3) as a result, she has the same property interest in continuing employment as that enjoyed by tenured teachers; and (4) we should extend to her the due process predeprivation protections that some courts have required for tenured employees. Br. of Appellant at 40-41 (citing *McMillen v. U.S.D. 380*, 253 Kan. 259, 266, 855 P. 2d 896 (1993)). Schlosser's attempt to analogize to tenure fails because (1) tenure is a creation of statutory or contract law, not common law; and (2) Washington does not provide tenure for public employees of "'common schools,'" which was

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[9] *See also Barnes v. Seattle Sch. Dist. No. 1*, 88 Wn.2d 483, 487-88, 563 P.2d 199 (1977) (holding that relief under discharge statute unavailable to employees whose contracts not renewed because of school district's adverse financial conditions); *Carlson v. Centralia Sch. Dist. No. 401*, 27 Wn. App. 599, 605, 619 P.2d 998 (1980) (holding that "economic reasons," reduction in force because of budget cuts, were probable cause for nonrenewal of teachers' contracts and the district complied with statutory requirements for nonrenewal, which "derive from due process requirements").

[10] The legislature amended RCW 28A.405.220 in 2010. LAWS OF 2010, ch. 235, § 203, effective June 10, 2010. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

[11] Reply Br. of Appellant at 9-10.

Schlosser's status here.[12] *Kirk v. Miller*, 83 Wn.2d 777, 778, 780, 522 P. 2d 843 (1974) (quoting former RCW 28A.05.010 (1969), *recodified as* RCW 28A.230.020).

Washington's statutory scheme distinguishes between "common school provisions," governed by Title 28A RCW, and "higher education," governed by Title 28B RCW. As a teacher in Bethel School District, Schlosser falls under Title 28A RCW:

> "Common schools" means schools maintained at public expense in each school district and carrying on a program from kindergarten through the twelfth grade or any part thereof including vocational educational courses otherwise permitted by law.

RCW 28A.150.020. Common schools include public schools, such as Bethel High School. RCW 28A.150.010.

As our Supreme Court explained 40 years ago:

> [T]enure statutes change the common-law right of boards of education to contract with teachers, by changing the system from one of tenure by contract ending automatically at the expiration of the contract to one of a permanent tenure period. We emphasize that a continuing contract statute such as ours, providing for automatic renewal of teachers' contracts in the absence of notice, *does not establish tenure for teachers*.

Kirk, 83 Wn.2d at 780 (emphasis added).[13]

Title 28B RCW tenure provisions and cases addressing continued employment of *tenured* teachers do not apply to this case; instead, Washington's applicable statutory scheme includes specific procedures, "derive[d] from due process," governing contract renewal for teachers such as Schlosser. *See Carlson v. Centralia Sch. Dist. No. 401*, 27 Wn. App. 599, 605, 619 P.2d 998

[12] Schlosser taught at Bethel High School, a public school. As a certificated teacher, she was subject to chapter 28A.405 RCW. *See* RCW 28A.405.900.

[13] (Citing *State ex rel. Mary M. Knight Sch. Dist. No. 311 v. Wanamaker*, 46 Wn.2d 341, 345, 281 P.2d 846 (1955); 78 C.J.S. Schools and School Districts § 180 (1952)).

(1980). RCW 28A.405.210 expressly limits a certificated teacher's contract term to not more than one year, which one-year term is automatically renewal for an additional year if the employee is not notified in writing on or before May 15. If a school district decides not to renew a teacher's contract for the following school year, the statute requires the district's May 15 notification to specify the cause for nonrenewal and gives the employee a right to request a hearing.[14] RCW 28A.405.210.

As we have explained:

> [T]he Washington law dealing with teacher rights and responsibilities is not a true tenure law. Under [former] RCW 28A.67.070 [recodified by LAWS OF 1990, ch. 33, § 4, current version at RCW 28A.405.210] *every* teacher under contract with the school district has certain reemployment rights which apply with equal force to all teachers without reference to length of service. *The statute does not create tenured and nontenured classes of teachers with reemployment preferences given to the former group and denied to the latter.*

Peters v. S. Kitsap Sch. Dist. No. 402, 8 Wn. App. 809, 813, 509 P.2d 67, *review denied*, 82 Wn.2d 1009 (1973) (second emphasis added). Thus, Schlosser had neither tenure rights to continue her public school employment nor a property interest in continued employment that is analogous to tenure rights. We hold, therefore, that in following the statutory procedures and deciding not to renew Schlosser's teaching contract, the District did not deprive her of a property interest requiring due process.

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[14] The District also emphasizes that requiring a pretermination or prenotice of nonrenewal hearing for every decision not to renew a teacher's contract would overburden schools. In support, the District (1) notes that "[i]n the spring of 2009, . . . 137 of Washington's 295 school districts issued [reduction in force] notices to more than 1800 classroom teachers—representing 3 [percent] of *all* teachers in Washington"; and (2) concludes that in 2009, Schlosser's interpretation would have required 1800 nonrenewal teacher contract hearings throughout the state. Br. of Resp't at 32 (citing CP at 3234-238).

Nevertheless, we address the alternative issue of whether the District's following the statutory procedures accorded Schlosser due process. Thus, we next assume, without deciding, that renewal of Schlosser's teaching contract was a property interest and address whether the statutory procedures the District followed here (post-deprivation hearing) comported with due process requirements.

C. Statutory Procedures Meet Constitutional Due Process Requirements

Schlosser contends that (1) the cases on which the District relies predated *Loudermill* and, thus, no longer apply; and (2) *Loudermill* required the District to afford her a hearing *before* it decided not to renew her teaching contract.[15] It is irrelevant that these other cases predated *Loudermill* for the following reasons: First, in *Loudermill* the United States Supreme Court held that a pretermination hearing was necessary before deciding to *discharge* a public employee; but it did not address nonrenewal of an annual contract. *Loudermill*, 470 U.S. at 542. Second, *Loudermill* involved Ohio law, not Washington's statutory scheme. Third, the Court neither

[15] Schlosser relies on *Loudermill* for the proposition that an "employee is entitled to be afforded the opportunity to invoke the discretion of the decision maker before the adverse action." Br. of Appellant at 21. But her reliance is misplaced because the *Loudermill* Court noted in passing that in "[*d*]*ismissals for cause*," where "the appropriateness or necessity of the discharge may not be [clear,] the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." *Loudermill*, 470 U.S. at 543 (emphasis added). Although the Court discussed the value of a pretermination hearing in dismissals for cause, it never addressed the question of whether an employer must provide a hearing before declining to renew an employee's contract. *See Loudermill*, 470 U.S. at 543.

Similarly, when we revisited chapter 28A.405 RCW in 2000, after *Loudermill*, we held that former RCW 28A.405.210's automatic renewal procedures, though "*similar* to tenure laws," did not create "a true tenure law." *Moldt v. Tacoma Sch. Dist. No. 10*, 103 Wn. App. 472, 482, 12 P.3d 1042 (2000) (emphasis added). And although we held that "[r]egular teachers" are entitled to "a formal appeal procedure upon nonrenewal," we did not hold that a school district must hold a pretermination hearing before deciding not to renew a teacher's contract. *Moldt*, 103 Wn. App. at 482 (citing former RCW 28A.405.210 (1996)).

addressed nor held that post-deprivation procedures deprive employees of due process; on the contrary, the Court noted that sometimes such procedures may be sufficient to provide due process. *Loudermill*, 470 U.S. at 542 n.7.

Although our Washington State courts have not yet directly addressed the issue before us here, our Supreme Court has reviewed a former codification of RCW 28A.405.210,[16] former RCW 28A.67.070 (1970), in the context of a budget-driven reduction in staff. *Pierce v. Lake Stevens Sch. Dist. No. 4*, 84 Wn.2d 772, 774-75, 529 P.2d 810 (1974). In *Pierce*, the court (1) considered that former RCW 28A.67.070 (a) required a district to provide notice before deciding not to renew a contract and (b) entitled an aggrieved employee to request a hearing; and (2) held that the "procedural requirements of due process as laid down by the Supreme Court . . . are met by these statutes." *Pierce*, 84 Wn.2d at 777. Applying our Supreme Court's *Pierce* rationale here, we similarly hold that the District's post-deprivation review, which followed the statutory requirements, met procedural due process requirements. *Pierce*, 84 Wn.2d at 777.

II. SUFFICIENT EVIDENCE

Schlosser also argues that the hearing officer lacked substantial evidence to support his conclusion that she was an unsatisfactory teacher, thereby justifying nonrenewal of her teaching contract. The District counters that the "numerous evaluations conducted by experienced administrators identified several deficiencies in Ms. Schlosser's teaching" and gave the hearing officer substantial evidence on which to base his findings that the District established that

[16] The legislature recodified former RCW 28A.67.070 as RCW 28A.405.210 according to LAWS OF 1990, ch. 33, § 4. Neither the recodification nor the subsequent amendments to RCW 28A.405.210 in 1996, 2005, 2009, and 2010, altered the May 15 deadline to notify a teacher that a school district would not renew his or her contract.

Schlosser's performance was unsatisfactory. Br. of Resp't at 18. We hold that substantial evidence supported the hearing officer's decision.

A. Standards of Review

We review a hearing officer's administrative decision to determine whether the officer acted arbitrarily, capriciously, or contrary to law. *Haynes v. Seattle Sch. Dist. No. 1*, 111 Wn.2d 250, 255, 758 P.2d 7 (1988). An "arbitrary and capricious" act means "willful and unreasoning action in disregard of facts and circumstances." *Washington Waste Sys., Inc. v. Clark County*, 115 Wn.2d 74, 81, 794 P.2d 508 (1990). Where there is room for two opinions, an administrative action is not arbitrary or capricious if the agency rendered its decision honestly and with due consideration, even if we believe that the agency reached an erroneous conclusion. *Freeman v. State*, 178 Wn.2d 387, 403, 309 P.3d 437 (2013); *Porter v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 872, 880, 248 P.3d 1111 (2011).

We review the hearing officer's factual determinations under the "'[c]learly erroneous'" standard. *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 109-10, 720 P.2d 793 (1986) (quoting former RCW 28A.58.480(5) (1976)[17]). 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). When reviewing the application of the law to the facts, we determine the applicable law de novo and give deference to the hearing officer's factual determinations. *Clarke*, 106 Wn.2d at 109-10. Like the superior court sitting in its appellate capacity, we confine our review of the hearing officer's decision to the verbatim transcript and the evidence admitted at the hearing. *See* RCW 28A.405.340.

[17] *Recodified as* RCW 28A.405.340 (LAWS OF 1990, ch. 33, § 4).

B. Statutory Grounds for Nonrenewal of Teacher's Contract for Cause

Our legislature has given a public school superintendent authority to not renew a certificated employee's contract based on probable cause. RCW 28A.405.210. If a teacher's performance is not satisfactory, the school must establish a probationary period of 60 school days. RCW 28A.405.100(4)(b).[18] If a teacher's deficiencies are remediable, the district must also provide the teacher with "a reasonable program for improvement." RCW 28A.405.100(4)(a). A finding of probable cause exists under RCW 28A.405.300[19] or RCW 28A.405.210 if the teacher fails to make "necessary improvement[s] during the established probationary period, as specifically documented in writing with notification to the [teacher]." RCW 28A.405.100(4)(b). Deficiencies in a teacher's professional skill and competency may be grounds for nonrenewal of the teacher's contract. RCW 28A.405.100(4)(b); *see also Myking v. Bethel Sch. Dist. No. 403*, 21 Wn. App. 68, 72-73, 584 P.2d 413 (1978), *review denied*, 91 Wn.2d 1010 (1979).

The District evaluated Schlosser's professional skill and competency using the statutory minimum criteria: "Instructional skill; classroom management, professional preparation and scholarship; effort toward improvement when needed; the handling of student discipline and attendant problems; and interest in teaching pupils and knowledge of subject matter." RCW 28A.405.100(1)(a). Based on Schlosser's repeated unsatisfactory ratings in six of the seven

[18] The legislature amended RCW 28A.405.100 in 2010. LAWS OF 2010, ch. 235, § 202, effective June 10, 2010. It amended the statute again in 2012. LAWS OF 2012, ch. 35, § 1, effective June 7, 2012. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

[19] The legislature amended RCW 28A.405.300 in 2010. LAWS OF 2010, ch. 235 § 305. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

criteria, the Superintendent decided not to renew her contract. The hearing officer concluded that Schlosser's evaluations gave the Superintendent probable cause, under RCW 28A.405.210, not to renew her contract.

C. Unsatisfactory Performance

Schlosser argues that substantial evidence did not support the hearing officer's decision that the District had probable cause to not renew her contract and, therefore, his decision was "arbitrary and capricious." Br. of Appellant at 45. She asserts[20] that the hearing officer lacked substantial evidence to enter finding of fact 2 (that Schlosser's evaluations showed she was deficient), and additional finding of fact 3[21] (that Schlosser could not have attended a predeprivation meeting and that it was highly improbable that a different result would have occurred had she been afforded such an opportunity). Schlosser also contends that the hearing officer's conclusion of law 6 (that due process does not require the Superindendent to hold a hearing with a teacher before issuing a notice of nonrenewal), and conclusion of law 3 (the overall conclusion that the District proved that Schlosser was not a satisfactory teacher), are contrary to the weight of the evidence and should be set aside.

1. Finding of fact 2: evaluations

Schlosser argues that substantial evidence did not support the hearing officer's finding of fact 2 that her evaluations showed she was deficient. The District counters that school

[20] Schlosser assigns error to various factual findings and legal conclusions in the hearing officer's decision. But the hearing officer did not separately number all of his findings and conclusions.

[21] The hearing officer did not formally designate this statement as a finding of fact; rather, he prefaced three of his findings of fact with the statement: "In addition, I note: . . . ." CP at 12. We treat these statements as findings of fact despite their not having been numbered.

administrator Susan Mayne, Brad Westering, and Connie West's consistent evaluations criticizing Schlosser's teaching constituted substantial evidence to support this finding. Although Mayne's 2009 and 2010 evaluations concluded that Schlosser's performance was satisfactory overall, they also included criticisms about her teaching, which the hearing officer found to be "accurate, fair and true." CP at 8. And in 2012, Mayne considered Schlosser to be "'close to the bottom'" in all evaluation categories. CP at 8.

Westering's 2010 and 2011 evaluations raised similar criticisms and found Schlosser's performance to be unsatisfactory overall. West's 2011 and 2012 evaluations included "most of the same findings as . . . in the prior year" and also evaluated Schlosser as unsatisfactory overall. CP at 8. Westering concurred in West's evaluations (covering January through May 2012), thus providing consistent evaluations of Schlosser's unsatisfactory performance over a three-year period. Thus, substantial evidence supports this finding.

2. Additional finding of fact 3: predeprivation meeting

Schlosser next argues that substantial evidence does not support the hearing officer's additional finding of fact 3 that it was "highly improbable" that a predeprivation meeting with the Superindendent would have produced a different result. Br. of Appellant at 47. The hearing officer based this challenged finding on the following facts[22]: (1) Schlosser, the evaluators, and the union representative were scheduled to meet on May 10, 2012, but Schlosser could not attend because her husband was ill; (2) the District was required to notify Schlosser by May 15, 2012 if it chose not to renew her contract; (3) Schlosser presented no evidence that she could have attended a meeting with the Superindendent between May 10 and May 15; and (4) in light of the

[22] The hearing officer did not assign numbers to these additional findings of fact.

information before the Superindendent, it is unlikely that a predeprivation meeting would have produced a different result.

The hearing officer heard the following evidence: (1) that the short time between the May 10 final evaluation and the May 15 deadline, along with Schlosser's husband undergoing open heart surgery, could reasonably have prevented Schlosser from meeting with the Superindendent before May 15; (2) that Schlosser's teaching was unsatisfactory; and (3) that, according to two evaluators, Schlosser failed to remedy her deficiencies during the probationary period. We hold that substantial evidence supported the hearing officer's factual finding that it was highly improbable that a predeprivation meeting with the Superindendent would have produced a different result for Schlosser.[23]

3. Conclusion of law 3: unsatisfactory performance

Schlosser assigns error to the hearing officer's "overall conclusion that [she] was not a satisfactory teacher is contrary to the weight of the evidence and should be set aside." Br. of Appellant at 2. The District argues that the evidence from several educators consistently showed that Schlosser was not qualified and that the Superindendent properly decided against renewing her teaching contract. We agree with the District. Washington courts defer to the expertise of school principals and administrators in evaluating teacher qualifications:

> Without doubt, . . . professional educators have more expertise in [evaluating teacher qualifications] than do members of the judiciary.

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[23] We note, however, that whether Schlosser could have attended a predeprivation meeting and whether such a meeting would have produced a different outcome matter only if Schlosser had been entitled to such a meeting. Because chapter 28A.405 RCW does not require a meeting before a school district decides not to renew a teacher's contract, Schlosser was not entitled to such a meeting.

Arnim v. Shoreline Sch. Dist. No. 412, 23 Wn. App. 150, 156, 594 P.2d 1380, *review denied*, 92 Wn.2d 1022 (1979). Whether sufficient cause exists to nonrenew a teacher's contract is a legal conclusion and "should not be disturbed unless it constitutes an error of law." *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 671, 266 P.3d 932 (2011) (citing *Clarke*, 106 Wn.2d at 110), *review denied*, 174 Wn.2d 1004 (2012).

Schlosser's evaluations were thorough; they comprehensively summarized classroom topics, the events during the course of the lessons, and student and teacher activities. They included specific suggestions about how Schlosser could improve her classroom instruction. They graded Schlosser on the seven statutory criteria and her progress over the course of the semester, and supported these observations with specific events that occurred during class sessions. Schlosser's final evaluation, which included West's and Westering's evaluations,[24] summarized the results of 16 classes over the course of almost 3 months, plus 7 evaluations or conferences relating to Schlosser's teaching performance. These evaluations provided substantial evidence to support the Superindendent's decision not to renew Schlosser's teaching contract.

The hearing officer also reviewed these evaluations. He based his decision on Westering's and West's evaluations and testimonies, 38 exhibits, and Assistant Principal Mayne's and Superindendent Seigel's testimonies. And Schlosser has not shown that the hearing

[24] West and Westering also based their final evaluation on the seven statutory criteria in RCW 28A.405.100(1)(a).

officer willfully and unreasonably disregarded facts and circumstances.[25] *See Washington Waste Sys., Inc.*, 115 Wn.2d at 81.

We hold that (1) the hearing officer's findings of fact that Schlosser was an unsatisfactory teacher were not clearly erroneous because substantial evidence convincingly showed that Schlosser was "unsatisfactory"[26] over the course of the semester; (2) substantial evidence supports the hearing officer's overall conclusion that the District was justified in not renewing Schlosser's teaching contract; and (3) the hearing officer did not act arbitrarily, capriciously, or contrary to law. *See Haynes*, 111 Wn.2d at 255.

III. ATTORNEY FEES

Schlosser requests reasonable attorney's fees under RAP 18.1. Because we affirm the superior court, we deny Schlosser's request for fees.

We affirm.

Hunt, J.
Hunt, P.J.

I concur:

Melnick, J.
Melnick, J.

[25] Schlosser asserts that the evaluators were biased, emphasizing her satisfactory teaching evaluations for over 25 years and an evaluator's one-time disagreement with her use of the word "'principal.'" Br. of Appellant at 12. Schlosser raised this argument before the hearing officer, who considered and rejected these claims of bias.

[26] *Clarke*, 106 Wn.2d at 109-10.

WORSWICK, J. (dissenting) — I respectfully dissent. RCW 28A.405.310(8) gives Lynda Schlosser a property interest in her contract's renewal. Because she had such an interest, procedural due process entitled Schlosser to an informal pre-deprivation hearing. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46,105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Bethel School District did not provide Schlosser a hearing prior to its decision to nonrenew her contract, thus violating her procedural due process rights.

I. SCHLOSSER HAD A PROPERTY INTEREST IN CONTRACT RENEWAL

The majority correctly holds that chapter 28A.405 RCW does not provide teachers with rights analogous to tenure. *See Peters v. S. Kitsap Sch. Dist. No. 402*, 8 Wn. App. 809, 813, 509 P.2d 67 (1973). But RCW 28A.405.310(8) places substantive procedural restrictions on the decision maker's discretion over whether to nonrenew a teacher's contract, thus giving a teacher a property interest in his or her contract's renewal.

"Protected property interests include all benefits to which there is a legitimate claim of entitlement." *Crescent Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 87 Wn. App. 353, 358, 942 P.2d 981 (1997). A statute creates a legitimate claim of entitlement where it places *substantive* procedural restrictions on a decision maker's discretion. *Conard v. Univ. of Wash.*, 119 Wn.2d 519, 529-30, 834 P.2d 17 (1992); *Crescent Convalescent Ctr.*, 87 Wn. App. at 358. Substantive procedural restrictions are those restrictions containing "'substantive predicates'" to guide the decision maker's discretion and "'specific directives to the decision maker that if the regulations' substantive predicates are present, a particular outcome must follow.'" *Conard*, 119 Wn.2d at 529-30 (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462-63, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)). A statute stating that an employee can be deprived of

employment only "for cause" constitutes a substantive procedural restriction. *See Cain v. Larson*, 879 F.2d 1424, 1426 (7th Cir. 1989). RCW 28A.405.310(8) is such a statute.

RCW 28A.405.310(8) states:

> Any final decision by the hearing officer to *nonrenew* the employment contract of the employee, or to discharge the employee, or to take other action adverse to the employee's contract status, as the case may be, shall be based solely upon the cause or causes specified in the notice of probable cause to the employee and *shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action.*

(Emphasis added.) RCW 28A.405.310(8) comprises a substantive predicate to guide the decision maker's discretion over whether to nonrenew a teacher's contract (i.e., whether the stated probable cause for the teacher's nonrenewal is sufficient to warrant such nonrenewal) and gives a specific directive to the decision maker that if the stated probable cause is not sufficient, a particular outcome must follow (i.e., renewal of the teacher's contract).

Thus, RCW 28A.405.310(8) creates a substantive procedural restriction on the decision maker's discretion over whether to nonrenew a teacher's contract, thereby giving a teacher a property interest in his or her contract's renewal. This restriction entitles a teacher facing his or her contract's nonrenewal to procedural due process protections.

II. Due Process Entitles Schlosser to a Pre-deprivation Hearing

The majority alternatively assumes arguendo that Schlosser had a property interest in her contract's renewal, and then holds that the District's compliance with chapter 28A.450 RCW's post-deprivation hearing procedures satisfied due process. While due process requires a far less elaborate pre-deprivation hearing where a full post-deprivation hearing exists, such a full post-deprivation hearing does not remove due process's pre-deprivation hearing requirement. *Loudermill*, 470 U.S. at 545-46; *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 332

(9th Cir. 1995); *Tellevik v. Real Prop. Known as 31641 W. Rutherford St.*, 120 Wn.2d 68, 82, 838 P.2d 111, 845 P.2d 1325 (1992).

Even where a full post-deprivation hearing is available, due process requires a hearing *prior* to deprivation of a property interest, absent extraordinary circumstances. *Loudermill*, 470 U.S. at 542, 546; *Tellevik*, 120 Wn.2d at 83. The "'root requirement' of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Loudermill*, 470 U.S. at 542 (quoting *Boddie v. Conn.*, 401 U.S. 371, 379, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)).

Due process does not always require that this pre-deprivation hearing be a full evidentiary hearing. *Tellevik*, 120 Wn.2d at 82-83. The required scope of the pre-deprivation hearing is determined by balancing three factors: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Loudermill*, 470 U.S. at 542-43; *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Tellevik*, 120 Wn.2d at 82.

In *Loudermill*, the United States Supreme Court balanced these factors to determine what process was due to two public employees who were terminated without a pre-deprivation hearing, but who had an opportunity for a full post-deprivation hearing under former OHIO REV. CODE ANN. § 124.34 (1979). *Loudermill*, 470 U.S. at 536-37, 546. The Supreme Court held that even though former OHIO REV. CODE ANN. § 124.34 provided the public employee with an opportunity for a full post-deprivation hearing, due process nonetheless required provision of a pre-deprivation hearing. *Loudermill*, 470 U.S. at 545-48.

But the Supreme Court held that because former OHIO REV. CODE ANN. § 124.34 gave the teacher a full post-deprivation hearing, the pre-deprivation hearing need not be elaborate or formal, as long as it provides the employee with "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken." *Loudermill*, 470 U.S. at 546. The pre-deprivation hearing "need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[27] *Loudermill*, 470 U.S. at 545-46.

In determining that the post-deprivation hearing met constitutional due process requirements, the majority distinguishes *Loudermill* in three ways. I address each in turn.

First, the majority asserts that whereas the *Loudermill* Court addressed a decision to terminate an employee's contract, Schlosser's contract was merely nonrenewed. But the *Loudermill* Court's holding applies to any decision that deprives an employee of his or her property interest in "retaining employment." *See Loudermill*, 470 U.S. at 542-43. A teacher with a property interest in renewal of his or her contract, whose contract is nonrenewed, has been deprived of his or her property interest in "retaining employment." Thus, the distinction between discharge and nonrenewal does not remove the need for a pre-deprivation hearing in Schlosser's case.

[27] The majority mentions the District's concern that requiring a pre-deprivation hearing to teachers whose contracts are nonrenewed would overburden schools, given the number of teachers whose contracts are nonrenewed. Because the pre-deprivation hearings need not be formal or elaborate, the government interest in avoiding the minimal administrative burden of these informal hearings does not overcome the public employees' strong private interest in continued employment and the high risk of erroneous deprivation of that interest without a pre-deprivation hearing. *See Loudermill*, 470 U.S. at 544.

Second, the majority asserts that whereas *Loudermill* concerned former OHIO REV. CODE ANN. § 124.34's procedural protections, Schlosser's case concerns chapter 28A.405 RCW's procedural protections. But an opportunity for a full post-deprivation hearing exists in both former OHIO REV. CODE ANN. § 124.34 and chapter 28A.405 RCW. Given that former OHIO REV. CODE ANN. § 124.34's full post-deprivation hearing did not remove due process's pre-deprivation hearing requirement; chapter 28A.405 RCW's full post-deprivation hearing does not remove due process's pre-deprivation hearing requirement.

Finally, the majority asserts that the *Loudermill* Court stated that in certain rare cases, due process does not require a pre-deprivation hearing. But the two cases cited by the *Loudermill* Court as examples of this phenomenon were cases in which an extraordinary circumstance, the need to immediately seize potentially harmful products before they reached consumers, was present. *See Loudermill*, 470 U.S. at 542 n.7 (citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S. Ct. 870, 94 L. Ed. 1088 (1950); *N. Am. Cold Storage Co. v. Chi.*, 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195 (1908)). Because the District has not raised extraordinary circumstances in Schlosser's case, the holdings of *Ewing* and *North American Cold Storage Company* are inapplicable.

Instead of applying the *Loudermill* factors, the majority relies on *Pierce v. Lake Stevens School District Number 4*, 84 Wn.2d 772, 529 P.2d 810 (1974), which predates *Loudermill*. In *Pierce*, our Supreme Court stated that "[t]he procedural requirements of due process . . . are met by [Washington's statutory hearing procedures for nonrenewal of teacher's contracts]," despite those procedures lacking a pre-deprivation hearing opportunity. *Pierce*, 84 Wn.2d at 775, 777; *see* former RCW 28.67.070 (1973). Because *Pierce* was decided before *Loudermill*, and because

in *Pierce*, our Supreme Court discussed the necessity of pre-deprivation hearings only in passing, reliance on *Pierce* is misplaced. *See Pierce*, 84 Wn.2d at 775.

I would hold that Schlosser had a property interest in her contract's renewal, and that the District's failure to provide Schlosser with any pre-deprivation hearing violated due process. Thus, I respectfully dissent.[28]

Worswick, J.

[28] An issue exists as to the remedy available to Schlosser for the District's failure to provide her with a pre-deprivation hearing, given the hearing examiner's finding that if a pre-deprivation hearing had occurred, "it [is] highly improbable that there would have been any different result." Clerk's Papers at 12; *see Carey v. Piphus*, 435 U.S. 247, 260, 267, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); *Bullo v. City of Fife*, 50 Wn. App. 602, 610, 749 P.2d 749 (1988); *Nickerson v. City of Anacortes*, 45 Wn. App. 432, 440-41, 725 P.2d 1027 (1986). But at the very least, Schlosser would be entitled to nominal damages, plus any damages proven to have resulted directly from the denial of a pre-deprivation hearing. *See Carey*, 435 U.S. at 263-64, 267.

Appendix 2

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENTXIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT, USCA CONST Amend. XIV-Full Text

Appendix 3

28A.405.100. Minimum criteria for the evaluation of certificated employees--Revised four-level evaluation systems for classroom teachers and for principals--Procedures--Steering committee--Models--Implementation--Reports

Currentness

(1)(a) Except as provided in subsection (2) of this section, the superintendent of public instruction shall establish and may amend from time to time minimum criteria for the evaluation of the professional performance capabilities and development of certificated classroom teachers and certificated support personnel. For classroom teachers the criteria shall be developed in the following categories: Instructional skill; classroom management, professional preparation and scholarship; effort toward improvement when needed; the handling of student discipline and attendant problems; and interest in teaching pupils and knowledge of subject matter.

(b) Every board of directors shall, in accordance with procedure provided in RCW 41.59.010 through 41.59.170, 41.59.910, and 41.59.920, establish evaluative criteria and procedures for all certificated classroom teachers and certificated support personnel. The evaluative criteria must contain as a minimum the criteria established by the superintendent of public instruction pursuant to this section and must be prepared within six months following adoption of the superintendent of public instruction's minimum criteria. The district must certify to the superintendent of public instruction that evaluative criteria have been so prepared by the district.

(2)(a) Pursuant to the implementation schedule established in subsection (7)(c) of this section, every board of directors shall, in accordance with procedures provided in RCW 41.59.010 through 41.59.170, 41.59.910, and 41.59.920, establish revised evaluative criteria and a four-level rating system for all certificated classroom teachers.

(b) The minimum criteria shall include: (i) Centering instruction on high expectations for student achievement; (ii) demonstrating effective teaching practices; (iii) recognizing individual student learning needs and developing strategies to address those needs; (iv) providing clear and intentional focus on subject matter content and curriculum; (v) fostering and managing a safe, positive learning environment; (vi) using multiple student data elements to modify instruction and improve student learning; (vii) communicating and collaborating with parents and the school community; and (viii) exhibiting collaborative and collegial practices focused on improving instructional practice and student learning. Student growth data must be a substantial factor in evaluating the summative performance of certificated classroom teachers for at least three of the evaluation criteria listed in this subsection.

(c) The four-level rating system used to evaluate the certificated classroom teacher must describe performance along a continuum that indicates the extent to which the criteria have been met or exceeded. The summative performance ratings shall be as follows: Level 1--unsatisfactory; level 2--basic; level 3--proficient; and level 4--distinguished. A classroom teacher shall receive one of the four summative performance ratings for each of the minimum criteria in (b) of this subsection and one of the four summative performance ratings for the evaluation as a whole, which shall be the comprehensive summative evaluation performance rating. By December 1, 2012, the superintendent of

public instruction must adopt rules prescribing a common method for calculating the comprehensive summative evaluation performance rating for each of the preferred instructional frameworks, including for a focused evaluation under subsection (12) of this section, giving appropriate weight to the indicators evaluated under each criteria and maximizing rater agreement among the frameworks.

(d) By December 1, 2012, the superintendent of public instruction shall adopt rules that provide descriptors for each of the summative performance ratings, based on the development work of pilot school districts under subsection (7) of this section. Any subsequent changes to the descriptors by the superintendent may only be made following consultation with a group broadly reflective of the parties represented in subsection (7)(a) of this section.

(e) By September 1, 2012, the superintendent of public instruction shall identify up to three preferred instructional frameworks that support the revised evaluation system. The instructional frameworks shall be research-based and establish definitions or rubrics for each of the four summative performance ratings for each evaluation criteria. Each school district must adopt one of the preferred instructional frameworks and post the selection on the district's web site. The superintendent of public instruction shall establish a process for approving minor modifications or adaptations to a preferred instructional framework that may be proposed by a school district.

(f) Student growth data that is relevant to the teacher and subject matter must be a factor in the evaluation process and must be based on multiple measures that can include classroom-based, school-based, district-based, and state-based tools. Student growth data elements may include the teacher's performance as a member of a grade-level, subject matter, or other instructional team within a school when the use of this data is relevant and appropriate. Student growth data elements may also include the teacher's performance as a member of the overall instructional team of a school when use of this data is relevant and appropriate. As used in this subsection, "student growth" means the change in student achievement between two points in time.

(g) Student input may also be included in the evaluation process.

(3)(a) Except as provided in subsection (11) of this section, it shall be the responsibility of a principal or his or her designee to evaluate all certificated personnel in his or her school. During each school year all classroom teachers and certificated support personnel shall be observed for the purposes of evaluation at least twice in the performance of their assigned duties. Total observation time for each employee for each school year shall be not less than sixty minutes. An employee in the third year of provisional status as defined in RCW 28A.405.220 shall be observed at least three times in the performance of his or her duties and the total observation time for the school year shall not be less than ninety minutes. Following each observation, or series of observations, the principal or other evaluator shall promptly document the results of the observation in writing, and shall provide the employee with a copy thereof within three days after such report is prepared. New employees shall be observed at least once for a total observation time of thirty minutes during the first ninety calendar days of their employment period.

(b) As used in this subsection and subsection (4) of this section, "employees" means classroom teachers and certificated support personnel except where otherwise specified.

(4)(a) At any time after October 15th, an employee whose work is not judged satisfactory based on district evaluation criteria shall be notified in writing of the specific areas of

deficiencies along with a reasonable program for improvement. For classroom teachers who have been transitioned to the revised evaluation system pursuant to the district implementation schedule adopted under subsection (7)(c) of this section, the following comprehensive summative evaluation performance ratings based on the evaluation criteria in subsection (2)(b) of this section mean a classroom teacher's work is not judged satisfactory:
(i) Level 1; or
(ii) Level 2 if the classroom teacher is a continuing contract employee under RCW 28A.405.210 with more than five years of teaching experience and if the level 2 comprehensive summative evaluation performance rating has been received for two consecutive years or for two years within a consecutive three-year time period.
(b) During the period of probation, the employee may not be transferred from the supervision of the original evaluator. Improvement of performance or probable cause for nonrenewal must occur and be documented by the original evaluator before any consideration of a request for transfer or reassignment as contemplated by either the individual or the school district. A probationary period of sixty school days shall be established. Days may be added if deemed necessary to complete a program for improvement and evaluate the probationer's performance, as long as the probationary period is concluded before May 15th of the same school year. The probationary period may be extended into the following school year if the probationer has five or more years of teaching experience and has a comprehensive summative evaluation performance rating as of May 15th of less than level 2. The establishment of a probationary period does not adversely affect the contract status of an employee within the meaning of RCW 28A.405.300. The purpose of the probationary period is to give the employee opportunity to demonstrate improvements in his or her areas of deficiency. The establishment of the probationary period and the giving of the notice to the employee of deficiency shall be by the school district superintendent and need not be submitted to the board of directors for approval. During the probationary period the evaluator shall meet with the employee at least twice monthly to supervise and make a written evaluation of the progress, if any, made by the employee. The evaluator may authorize one additional certificated employee to evaluate the probationer and to aid the employee in improving his or her areas of deficiency. Should the evaluator not authorize such additional evaluator, the probationer may request that an additional certificated employee evaluator become part of the probationary process and this request must be implemented by including an additional experienced evaluator assigned by the educational service district in which the school district is located and selected from a list of evaluation specialists compiled by the educational service district. Such additional certificated employee shall be immune from any civil liability that might otherwise be incurred or imposed with regard to the good faith performance of such evaluation. If a procedural error occurs in the implementation of a program for improvement, the error does not invalidate the probationer's plan for improvement or evaluation activities unless the error materially affects the effectiveness of the plan or the ability to evaluate the probationer's performance. The probationer must be removed from probation if he or she has demonstrated improvement to the satisfaction of the evaluator in those areas specifically detailed in his or her initial notice of deficiency and subsequently detailed in his or her program for improvement. A classroom teacher who has been transitioned to the revised evaluation system pursuant to the district

implementation schedule adopted under subsection (7)(c) of this section must be removed from probation if he or she has demonstrated improvement that results in a new comprehensive summative evaluation performance rating of level 2 or above for a provisional employee or a continuing contract employee with five or fewer years of experience, or of level 3 or above for a continuing contract employee with more than five years of experience. Lack of necessary improvement during the established probationary period, as specifically documented in writing with notification to the probationer constitutes grounds for a finding of probable cause under RCW 28A.405.300 or 28A.405.210.

(c) When a continuing contract employee with five or more years of experience receives a comprehensive summative evaluation performance rating below level 2 for two consecutive years, the school district shall, within ten days of the completion of the second summative comprehensive [comprehensive summative] evaluation or May 15th, whichever occurs first, implement the employee notification of discharge as provided in RCW 28A.405.300.

(d) Immediately following the completion of a probationary period that does not produce performance changes detailed in the initial notice of deficiencies and program for improvement, the employee may be removed from his or her assignment and placed into an alternative assignment for the remainder of the school year. In the case of a classroom teacher who has been transitioned to the revised evaluation system pursuant to the district implementation schedule adopted under subsection (7)(c) of this section, the teacher may be removed from his or her assignment and placed into an alternative assignment for the remainder of the school year immediately following the completion of a probationary period that does not result in the required comprehensive summative evaluation performance ratings specified in (b) of this subsection. This reassignment may not displace another employee nor may it adversely affect the probationary employee's compensation or benefits for the remainder of the employee's contract year. If such reassignment is not possible, the district may, at its option, place the employee on paid leave for the balance of the contract term.

(5) Every board of directors shall establish evaluative criteria and procedures for all superintendents, principals, and other administrators. It shall be the responsibility of the district superintendent or his or her designee to evaluate all administrators. Except as provided in subsection (6) of this section, such evaluation shall be based on the administrative position job description. Such criteria, when applicable, shall include at least the following categories: Knowledge of, experience in, and training in recognizing good professional performance, capabilities and development; school administration and management; school finance; professional preparation and scholarship; effort toward improvement when needed; interest in pupils, employees, patrons and subjects taught in school; leadership; and ability and performance of evaluation of school personnel.

(6)(a) Pursuant to the implementation schedule established by subsection (7)(b) of this section, every board of directors shall establish revised evaluative criteria and a four-level rating system for principals.

(b) The minimum criteria shall include: (i) Creating a school culture that promotes the ongoing improvement of learning and teaching for students and staff; (ii) demonstrating commitment to closing the achievement gap; (iii) providing for school safety; (iv) leading the development, implementation, and evaluation of a data-driven plan for increasing

student achievement, including the use of multiple student data elements; (v) assisting instructional staff with alignment of curriculum, instruction, and assessment with state and local district learning goals; (vi) monitoring, assisting, and evaluating effective instruction and assessment practices; (vii) managing both staff and fiscal resources to support student achievement and legal responsibilities; and (viii) partnering with the school community to promote student learning. Student growth data must be a substantial factor in evaluating the summative performance of the principal for at least three of the evaluation criteria listed in this subsection.

(c) The four-level rating system used to evaluate the principal must describe performance along a continuum that indicates the extent to which the criteria have been met or exceeded. The summative performance ratings shall be as follows: Level 1--unsatisfactory; level 2--basic; level 3--proficient; and level 4--distinguished. A principal shall receive one of the four summative performance ratings for each of the minimum criteria in (b) of this subsection and one of the four summative performance ratings for the evaluation as a whole, which shall be the comprehensive summative evaluation performance rating.

(d) By December 1, 2012, the superintendent of public instruction shall adopt rules that provide descriptors for each of the summative performance ratings, based on the development work of pilot school districts under subsection (7) of this section. Any subsequent changes to the descriptors by the superintendent may only be made following consultation with a group broadly reflective of the parties represented in subsection (7)(a) of this section.

(e) By September 1, 2012, the superintendent of public instruction shall identify up to three preferred leadership frameworks that support the revised evaluation system. The leadership frameworks shall be research-based and establish definitions or rubrics for each of the four performance ratings for each evaluation criteria. Each school district shall adopt one of the preferred leadership frameworks and post the selection on the district's web site. The superintendent of public instruction shall establish a process for approving minor modifications or adaptations to a preferred leadership framework that may be proposed by a school district.

(f) Student growth data that is relevant to the principal must be a factor in the evaluation process and must be based on multiple measures that can include classroom-based, school-based, district-based, and state-based tools. As used in this subsection, "student growth" means the change in student achievement between two points in time.

(g) Input from building staff may also be included in the evaluation process.

(h) For principals who have been transitioned to the revised evaluation system pursuant to the district implementation schedule adopted under subsection (7)(c) of this section, the following comprehensive summative evaluation performance ratings mean a principal's work is not judged satisfactory:

(i) Level 1; or

(ii) Level 2 if the principal has more than five years of experience in the principal role and if the level 2 comprehensive summative evaluation performance rating has been received for two consecutive years or for two years within a consecutive three-year time period.

(7)(a) The superintendent of public instruction, in collaboration with state associations representing teachers, principals, administrators, school board members, and parents, to

be known as the steering committee, shall create models for implementing the evaluation system criteria, student growth tools, professional development programs, and evaluator training for certificated classroom teachers and principals. Human resources specialists, professional development experts, and assessment experts must also be consulted. Due to the diversity of teaching assignments and the many developmental levels of students, classroom teachers and principals must be prominently represented in this work. The models must be available for use in the 2011-12 school year.

(b) A new certificated classroom teacher evaluation system that implements the provisions of subsection (2) of this section and a new principal evaluation system that implements the provisions of subsection (6) of this section shall be phased-in beginning with the 2010-11 school year by districts identified in (d) of this subsection and implemented in all school districts beginning with the 2013-14 school year.

(c) Each school district board of directors shall adopt a schedule for implementation of the revised evaluation systems that transitions a portion of classroom teachers and principals in the district to the revised evaluation systems each year beginning no later than the 2013-14 school year, until all classroom teachers and principals are being evaluated under the revised evaluation systems no later than the 2015-16 school year. A school district is not precluded from completing the transition of all classroom teachers and principals to the revised evaluation systems before the 2015-16 school year. The schedule adopted under this subsection (7)(c) must provide that the following employees are transitioned to the revised evaluation systems beginning in the 2013-14 school year:

(i) Classroom teachers who are provisional employees under RCW 28A.405.220;

(ii) Classroom teachers who are on probation under subsection (4) of this section;

(iii) Principals in the first three consecutive school years of employment as a principal;

(iv) Principals whose work is not judged satisfactory in their most recent evaluation; and

(v) Principals previously employed as a principal by another school district in the state of Washington for three or more consecutive school years and in the first full year as a principal in the school district.

(d) A set of school districts shall be selected by the superintendent of public instruction to participate in a collaborative process resulting in the development and piloting of new certificated classroom teacher and principal evaluation systems during the 2010-11 and 2011-12 school years. These school districts must be selected based on: (i) The agreement of the local associations representing classroom teachers and principals to collaborate with the district in this developmental work and (ii) the agreement to participate in the full range of development and implementation activities, including: Development of rubrics for the evaluation criteria and ratings in subsections (2) and (6) of this section; identification of or development of appropriate multiple measures of student growth in subsections (2) and (6) of this section; development of appropriate evaluation system forms; participation in professional development for principals and classroom teachers regarding the content of the new evaluation system; participation in evaluator training; and participation in activities to evaluate the effectiveness of the new systems and support programs. The school districts must submit to the office of the superintendent of public instruction data that is used in evaluations and all district-collected student achievement, aptitude, and growth data regardless of whether the data is used in evaluations. If the data is not available electronically, the district may submit it in nonelectronic form. The superintendent of public instruction must analyze the districts'

use of student data in evaluations, including examining the extent that student data is not used or is underutilized. The superintendent of public instruction must also consult with participating districts and stakeholders, recommend appropriate changes, and address statewide implementation issues. The superintendent of public instruction shall report evaluation system implementation status, evaluation data, and recommendations to appropriate committees of the legislature and governor by July 1, 2011, and at the conclusion of the development phase by July 1, 2012. In the July 1, 2011, report, the superintendent shall include recommendations for whether a single statewide evaluation model should be adopted, whether modified versions developed by school districts should be subject to state approval, and what the criteria would be for determining if a school district's evaluation model meets or exceeds a statewide model. The report shall also identify challenges posed by requiring a state approval process.

(e)(i) The steering committee in subsection (7)(a) of this section and the pilot school districts in subsection (7)(d) of this section shall continue to examine implementation issues and refine tools for the new certificated classroom teacher evaluation system in subsection (2) of this section and the new principal evaluation system in subsection (6) of this section during the 2013-14 through 2015-16 implementation phase.

(ii) Particular attention shall be given to the following issues:

(A) Developing a report for the legislature and governor, due by December 1, 2013, of best practices and recommendations regarding how teacher and principal evaluations and other appropriate elements shall inform school district human resource and personnel practices. The legislature and governor are provided the opportunity to review the report and recommendations during the 2014 legislative session;

(B) Taking the new teacher and principal evaluation systems to scale and the use of best practices for statewide implementation;

(C) Providing guidance regarding the use of student growth data to assure it is used responsibly and with integrity;

(D) Refining evaluation system management tools, professional development programs, and evaluator training programs with an emphasis on developing rater reliability;

(E) Reviewing emerging research regarding teacher and principal evaluation systems and the development and implementation of evaluation systems in other states;

(F) Reviewing the impact that variable demographic characteristics of students and schools have on the objectivity, reliability, validity, and availability of student growth data; and

(G) Developing recommendations regarding how teacher evaluations could inform state policies regarding the criteria for a teacher to obtain continuing contract status under RCW 28A.405.210. In developing these recommendations the experiences of school districts and teachers during the evaluation transition phase must be considered. Recommendations must be reported by July 1, 2016, to the legislature and the governor.

(iii) To support the tasks in (e)(ii) of this subsection, the superintendent of public instruction may contract with an independent research organization with expertise in educator evaluations and knowledge of the revised evaluation systems being implemented under this section.

(iv) The superintendent of public instruction shall monitor the statewide implementation of revised teacher and principal evaluation systems using data reported under RCW

28A.150.230 as well as periodic input from focus groups of administrators, principals, and teachers.

(v) The superintendent of public instruction shall submit reports detailing findings, emergent issues or trends, recommendations from the steering committee, and pilot school districts, and other recommendations, to enhance implementation and continuous improvement of the revised evaluation systems to appropriate committees of the legislature and the governor beginning July 1, 2013, and each July 1st thereafter for each year of the school district implementation transition period concluding with a report on December 1, 2016.

(8)(a) Beginning with the 2015-16 school year, evaluation results for certificated classroom teachers and principals must be used as one of multiple factors in making human resource and personnel decisions. Human resource decisions include, but are not limited to: Staff assignment, including the consideration of an agreement to an assignment by an appropriate teacher, principal, and superintendent; and reduction in force. Nothing in this section limits the ability to collectively bargain how the multiple factors shall be used in making human resource or personnel decisions, with the exception that evaluation results must be a factor.

(b) The office of the superintendent of public instruction must report to the legislature and the governor regarding the school district implementation of the provisions of (a) of this subsection by December 1, 2017.

(9) Each certificated classroom teacher and certificated support personnel shall have the opportunity for confidential conferences with his or her immediate supervisor on no less than two occasions in each school year. Such confidential conference shall have as its sole purpose the aiding of the administrator in his or her assessment of the employee's professional performance.

(10) The failure of any evaluator to evaluate or supervise or cause the evaluation or supervision of certificated classroom teachers and certificated support personnel or administrators in accordance with this section, as now or hereafter amended, when it is his or her specific assigned or delegated responsibility to do so, shall be sufficient cause for the nonrenewal of any such evaluator's contract under RCW 28A.405.210, or the discharge of such evaluator under RCW 28A.405.300.

(11) After a certificated classroom teacher or certificated support personnel has four years of satisfactory evaluations under subsection (1) of this section, a school district may use a short form of evaluation, a locally bargained evaluation emphasizing professional growth, an evaluation under subsection (1) or (2) of this section, or any combination thereof. The short form of evaluation shall include either a thirty minute observation during the school year with a written summary or a final annual written evaluation based on the criteria in subsection (1) or (2) of this section and based on at least two observation periods during the school year totaling at least sixty minutes without a written summary of such observations being prepared. A locally bargained short-form evaluation emphasizing professional growth must provide that the professional growth activity conducted by the certificated classroom teacher be specifically linked to one or more of the certificated classroom teacher evaluation criteria. However, the evaluation process set forth in subsection (1) or (2) of this section shall be followed at least once every three years unless this time is extended by a local school district under the bargaining process set forth in chapter 41.59 RCW. The employee or evaluator may require that the evaluation

process set forth in subsection (1) or (2) of this section be conducted in any given school year. No evaluation other than the evaluation authorized under subsection (1) or (2) of this section may be used as a basis for determining that an employee's work is not satisfactory under subsection (1) or (2) of this section or as probable cause for the nonrenewal of an employee's contract under RCW 28A.405.210 unless an evaluation process developed under chapter 41.59 RCW determines otherwise. The provisions of this subsection apply to certificated classroom teachers only until the teacher has been transitioned to the revised evaluation system pursuant to the district implementation schedule adopted under subsection (7)(c) of this section.

(12) All certificated classroom teachers and principals who have been transitioned to the revised evaluation systems pursuant to the district implementation schedule adopted under subsection (7)(c) of this section must receive annual performance evaluations as provided in this subsection:

(a) All classroom teachers and principals shall receive a comprehensive summative evaluation at least once every four years. A comprehensive summative evaluation assesses all eight evaluation criteria and all criteria contribute to the comprehensive summative evaluation performance rating.

(b) The following categories of classroom teachers and principals shall receive an annual comprehensive summative evaluation:

(i) Classroom teachers who are provisional employees under RCW 28A.405.220;

(ii) Principals in the first three consecutive school years of employment as a principal;

(iii) Principals previously employed as a principal by another school district in the state of Washington for three or more consecutive school years and in the first full year as a principal in the school district; and

(iv) Any classroom teacher or principal who received a comprehensive summative evaluation performance rating of level 1 or level 2 in the previous school year.

(c)(i) In the years when a comprehensive summative evaluation is not required, classroom teachers and principals who received a comprehensive summative evaluation performance rating of level 3 or above in the previous school year are required to complete a focused evaluation. A focused evaluation includes an assessment of one of the eight criteria selected for a performance rating plus professional growth activities specifically linked to the selected criteria.

(ii) The selected criteria must be approved by the teacher's or principal's evaluator and may have been identified in a previous comprehensive summative evaluation as benefiting from additional attention. A group of teachers may focus on the same evaluation criteria and share professional growth activities. A group of principals may focus on the same evaluation criteria and share professional growth activities.

(iii) The evaluator must assign a comprehensive summative evaluation performance rating for the focused evaluation using the methodology adopted by the superintendent of public instruction for the instructional or leadership framework being used.

(iv) A teacher or principal may be transferred from a focused evaluation to a comprehensive summative evaluation at the request of the teacher or principal, or at the direction of the teacher's or principal's evaluator.

(v) Due to the importance of instructional leadership and assuring rater agreement among evaluators, particularly those evaluating teacher performance, school districts are

encouraged to conduct comprehensive summative evaluations of principal performance on an annual basis.
(vi) A classroom teacher or principal may apply the focused evaluation professional growth activities toward the professional growth plan for professional certificate renewal as required by the professional educator standards board.
(13) Each school district is encouraged to acknowledge and recognize classroom teachers and principals who have attained level 4--distinguished performance ratings.

28A.405.100. Minimum criteria for the evaluation of certificated employees--Revised four-level evaluation systems for classroom teachers and for principals--Procedures--Steering committee--Models--Implementation--Reports, WA ST 28A.405.100

28A.405.210. Conditions and contracts of employment--Determination of probable cause for nonrenewal of contracts--Nonrenewal due to enrollment decline or revenue loss--Notice--Opportunity for hearing

Currentness

No teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with a school district, hereinafter referred to as "employee", shall be employed except by written order of a majority of the directors of the district at a regular or special meeting thereof, nor unless he or she is the holder of an effective teacher's certificate or other certificate required by law or the Washington professional educator standards board for the position for which the employee is employed.
The board shall make with each employee employed by it a written contract, which shall be in conformity with the laws of this state, and except as otherwise provided by law, limited to a term of not more than one year. Every such contract shall be made in duplicate, one copy to be retained by the school district superintendent or secretary and one copy to be delivered to the employee. No contract shall be offered by any board for the employment of any employee who has previously signed an employment contract for that same term in another school district of the state of Washington unless such employee shall have been released from his or her obligations under such previous contract by the board of directors of the school district to which he or she was obligated. Any contract signed in violation of this provision shall be void.
In the event it is determined that there is probable cause or causes that the employment contract of an employee should not be renewed by the district for the next ensuing term such employee shall be notified in writing on or before May 15th preceding the commencement of such term of that determination, or if the omnibus appropriations act has not passed the legislature by May 15th, then notification shall be no later than June 15th, which notification shall specify the cause or causes for nonrenewal of contract. Such determination of probable cause for certificated employees, other than the superintendent, shall be made by the superintendent. Such notice shall be served upon the employee personally, or by certified or registered mail, or by leaving a copy of the notice at the house of his or her usual abode with some person 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 or secretary of the board of directors of the

district within ten days after receiving such notice, shall be granted opportunity for hearing pursuant to RCW 28A.405.310 to determine whether there is sufficient cause or causes for nonrenewal of contract: PROVIDED, That any employee receiving notice of nonrenewal of contract due to an enrollment decline or loss of revenue may, in his or her request for a hearing, stipulate that initiation of the arrangements for a hearing officer as provided for by RCW 28A.405.310(4) shall occur within ten days following July 15 rather than the day that the employee submits the request for a hearing. If any such notification or opportunity for hearing is not timely given, the employee entitled thereto shall be conclusively presumed to have been reemployed by the district for the next ensuing term upon contractual terms identical with those which would have prevailed if his or her employment had actually been renewed by the board of directors for such ensuing term.

This section shall not be applicable to "provisional employees" as so designated in RCW 28A.405.220; transfer to a subordinate certificated position as that procedure is set forth in RCW 28A.405.230 or 28A.405.245 shall not be construed as a nonrenewal of contract for the purposes of this section.

28A.405.210. Conditions and contracts of employment--Determination of probable cause for nonrenewal of contracts--Nonrenewal due to enrollment decline or revenue loss--Notice--Opportunity for hearing, WA ST 28A.405.210

28A.405.220. Conditions and contracts of employment--Nonrenewal of provisional employees--Notice--Procedure

(1) Notwithstanding the provisions of RCW 28A.405.210, every person employed by a school district in a teaching or other nonsupervisory certificated position shall be subject to nonrenewal of employment contract as provided in this section during the first three years of employment by such district, unless: (a) The employee has previously completed at least two years of certificated employment in another school district in the state of Washington, in which case the employee shall be subject to nonrenewal of employment contract pursuant to this section during the first year of employment with the new district; or (b) the employee has received an evaluation rating below level 2 on the four-level rating system established under RCW 28A.405.100 during the third year of employment, in which case the employee shall remain subject to the nonrenewal of the employment contract until the employee receives a level 2 rating; or (c) the school district superintendent may make a determination to remove an employee from provisional status if the employee has received one of the top two evaluation ratings during the second year of employment by the district. Employees as defined in this section shall hereinafter be referred to as "provisional employees."

(2) In the event the superintendent of the school district determines that the employment contract of any provisional employee should not be renewed by the

district for the next ensuing term such provisional employee shall be notified thereof in writing on or before May 15th preceding the commencement of such school term, or if the omnibus appropriations act has not passed the legislature by May 15th, then notification shall be no later than June 15th, which notification shall state the reason or reasons for such determination. Such notice shall be served upon the provisional employee personally, or by certified or registered mail, or by leaving a copy of the notice at the place of his or her usual abode with some person of suitable age and discretion then resident therein. The determination of the superintendent shall be subject to the evaluation requirements of RCW 28A.405.100.

(3) Every such provisional employee so notified, at his or her request made in writing and filed with the superintendent of the district within ten days after receiving such notice, shall be given the opportunity to meet informally with the superintendent for the purpose of requesting the superintendent to reconsider his or her decision. Such meeting shall be held no later than ten days following the receipt of such request, and the provisional employee shall be given written notice of the date, time and place of meeting at least three days prior thereto. At such meeting the provisional employee shall be given the opportunity to refute any facts upon which the superintendent's determination was based and to make any argument in support of his or her request for reconsideration.

(4) Within ten days following the meeting with the provisional employee, the superintendent shall either reinstate the provisional employee or shall submit to the school district board of directors for consideration at its next regular meeting a written report recommending that the employment contract of the provisional employee be nonrenewed and stating the reason or reasons therefor. A copy of such report shall be delivered to the provisional employee at least three days prior to the scheduled meeting of the board of directors. In taking action upon the recommendation of the superintendent, the board of directors shall consider any written communication which the provisional employee may file with the secretary of the board at any time prior to that meeting.

(5) The board of directors shall notify the provisional employee in writing of its final decision within ten days following the meeting at which the superintendent's recommendation was considered. The decision of the board of directors to nonrenew the contract of a provisional employee shall be final and not subject to appeal.

(6) This section applies to any person employed by a school district in a teaching or other nonsupervisory certificated position after June 25, 1976. This section provides the exclusive means for nonrenewing the employment contract of a provisional employee and no other provision of law shall be applicable thereto, including, without limitation, RCW 28A.405.210 and chapter 28A.645 RCW.

West's RCWA 28A.405.220

28A.405.300. Adverse change in contract status of certificated employee--Determination of probable cause--Notice--Opportunity for hearing

Currentness

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 as such 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 certified or registered mail, or by leaving a copy of the notice at the house of his or her usual abode with some person 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 or 28A.405.245 shall not be construed as a discharge or other adverse action against contract status for the purposes of this section.

28A.405.300. Adverse change in contract status of certificated employee--Determination of probable cause--Notice--Opportunity for hearing, WA ST 28A.405.300

28A.405.310. Adverse change in contract status of certificated employee, including nonrenewal of contract--Hearings--Procedure

(1) 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 inRCW 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.

(2) In any request for a hearing pursuant to RCW 28A.405.300 or28A.405.210, the employee may request either an open or closed hearing. The hearing shall be open or closed as requested by the employee, but if the employee fails to make such a request, the hearing officer may determine whether the hearing shall be open or closed.

(3) The employee may engage counsel who shall be entitled to represent the employee at the prehearing conference held pursuant to subsection (5) of this section and at all subsequent proceedings pursuant to this section. At the hearing provided for by this section, the employee may produce such witnesses as he or she may desire.

(4) 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: Within fifteen days following the receipt of any such request the board of directors of the district or its designee and the employee or employee's designee shall each appoint one nominee. The two nominees shall jointly appoint a hearing officer who shall be a member in good standing of the Washington state bar association or a person adhering to the arbitration standards established by the public employment relations commission and listed on its current roster of arbitrators. 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. Nothing herein shall preclude the board of directors and the employee from stipulating as to the identity of the hearing officer in which event the foregoing procedures for the selection of the hearing officer shall be inapplicable. The district shall pay all fees and expenses of any hearing officer selected pursuant to this subsection.

(5) Within five days following the selection of a hearing officer pursuant to subsection (4) of this section, the hearing officer shall schedule a prehearing conference to be held within such five day period, unless the board of directors and employee agree on another date convenient with the hearing officer. The employee shall be given written notice of the date, time, and place of such prehearing conference at least three days prior to the date established for such conference.

(6) The hearing officer shall preside at any prehearing conference scheduled pursuant to subsection (5) of this section and in connection therewith shall:

(a) Issue such subpoenas or subpoenas duces tecum as either party may request at that time or thereafter; and

(b) Authorize the taking of prehearing depositions at the request of either party at that time or thereafter; and

(c) Provide for such additional methods of discovery as may be authorized by the civil rules applicable in the superior courts of the state of Washington; and

(d) Establish the date for the commencement of the hearing, to be within ten days following the date of the prehearing conference, unless the employee requests a continuance, in which event the hearing officer shall give due consideration to such request.

(7) The hearing officer shall preside at any hearing and in connection therewith shall:

(a) Make rulings as to the admissibility of evidence pursuant to the rules of evidence applicable in the superior court of the state of Washington.

(b) Make other appropriate rulings of law and procedure.

(c) Within ten days following the conclusion of the hearing transmit in writing to the board and to the employee, findings of fact and conclusions of law and final decision. If the final decision is in favor of the employee, the employee shall be restored to his or her employment position and shall be awarded reasonable attorneys' fees.

(8) Any final decision by the hearing officer to nonrenew the employment contract of the employee, or to discharge the employee, or to take other action adverse to the employee's contract status, as the case may be, shall be based solely upon the cause or causes specified in the notice of probable cause to the employee and shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action.

(9) All subpoenas and prehearing discovery orders shall be enforceable by and subject to the contempt and other equity powers of the superior court of the county in which the school district is located upon petition of any aggrieved party.

(10) A complete record shall be made of the hearing and all orders and rulings of the hearing officer and school board.

West's RCWA 28A.405.310

28A.405.320. Adverse change in contract status of certificated employee, including nonrenewal of contract--Appeal from--Notice--Service--Filing--Contents

Any teacher, principal, supervisor, superintendent, or other certificated employee, desiring to appeal from any action or failure to act upon the part of a school board relating to the discharge or other action adversely affecting his or her contract

status, or failure to renew that employee's contract for the next ensuing term, within thirty days after his or her receipt of such decision or order, may serve upon the chair of the school board and file with the clerk of the superior court in the county in which the school district is located a notice of appeal which shall set forth also in a clear and concise manner the errors complained of.

West's RCWA 28A.405.320

28A.405.380. Adverse change in contract status of certificated employee, including nonrenewal of contract--Appeal from--Direct judicial appeal, when

In the event that an employee, with the exception of a provisional employee as defined in RCW 28A.405.220, receives a notice of probable cause pursuant to RCW 28A.405.300 or 28A.405.210 stating that by reason of a lack of sufficient funds or loss of levy election the employment contract of such employee should not be renewed for the next ensuing school term or that the same should be adversely affected, the employee may appeal any said probable cause determination directly to the superior court of the county in which the school district is located. Such appeal shall be perfected by serving upon the secretary of the school board and filing with the clerk of the superior court a notice of appeal within ten days after receiving the probable cause notice. The notice of appeal shall set forth in a clear and concise manner the action appealed from. The superior court shall determine whether or not there was sufficient cause for the action as specified in the probable cause notice, which cause must be proven by a preponderance of the evidence, and shall base its determination solely upon the cause or causes stated in the notice of the employee. The appeal provided in this section shall be tried as an ordinary civil action: PROVIDED, That the board of directors' determination of priorities for the expenditure of funds shall be subject to superior court review pursuant to the standards set forth in RCW 28A.405.340: PROVIDED FURTHER, That the provisions of RCW 28A.405.350 and28A.405.360 shall be applicable thereto.

West's RCWA 28A.405.380