NO. 93260-3

(Court of Appeals No. 46067-0-II)

IN THE SUPREME COURT
OF STATE OF WASHINGTON

TERI CAMPBELL,

Petitioner,

v.

TACOMA PUBLIC SCHOOLS, a/k/a
TACOMA SCHOOL DISTRICT NO. 10,

Respondent.

RESPONDENT TACOMA PUBLIC SCHOOLS' ANSWER TO WASHINGTON EDUCATION ASSOCIATION'S *AMICUS CURAE* MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Tacoma School District No. 10 ("the District") submits this Answer to the *Amicus Curae* Memorandum in support of Review filed by the Washington Education Association ("WEA").

II. ARGUMENT

A. The Court Should Decline to Grant Review of Issues That Were Not Raised By Campbell and that Have Been Raised Only by WEA as an *Amicus*

In her petition for review, Petitioner Terri Campbell argued that the Court of Appeals confused "probable cause" and "sufficient cause" in discussing the District's burden at a statutory hearing under RCW 28A.405.310 in this matter. Campbell's Petition for Review, pp. 12-14. The District has responded to that claim in its Answer to Campbell's Petition. District's Answer to Campbell's Petition for Review, pp. 8-10. However, neither Campbell nor the District has raised the primary issue that WEA seeks to present on review, namely whether "arbitrary and capricious" was the appropriate standard of review utilized by the Court of Appeals when it reviewed the hearing officer's decision to uphold the District's choice of sanction against Campbell. The Washington Supreme Court generally does not consider issues that are raised only by an amicus. *Harris v. Dept. of Labor & Indus.*, 120 Wn.2d 461, 467, 843 P.2d 1056

(1993). Because neither of the parties to this case have raised this issue on appeal, it would be inappropriate for this court to review it.

B. The Court of Appeals Correctly Determined the Appropriate Standards to Be Applied by a Court When Reviewing a Hearing Officer's Decision Regarding the Severity of a School District's Sanction

Even if the court considers which standard should be applied when reviewing the severity of the District's sanction despite the fact that neither party has raised the issue, WEA's complaints regarding this issue lack merit. WEA claims that the Court of Appeals committed error by reviewing the hearing officer's decision to uphold the District's choice of sanction – a fifteen day suspension of Campbell – under the "arbitrary and capricious" standard rather than the "error of law" standard.[1] Contrary to WEA's characterization, the Court of Appeals' holding explicitly allows for review under both of these standards, depending upon what type of challenge a teacher is making: "[o]nce sufficient cause is established, the choice of sanction is a policy decision made by the district that we review to determine if it is arbitrary, capricious, or contrary to law." *Campbell v. Tacoma Pub. Sch. Dist. No. 10*, 192 Wn. App 874, 889, 370 P.3d 33 (2016). (quoting *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 675, 266 P.3d 932 (2011) (emphasis added). The same standards of

[1] The various standards of review for a hearing officer's decision, including both "arbitrary and capricious" and "error of law," are set forth in RCW 28A.405.340.

review were previously articulated in at least two prior cases. *Griffith*, 165 Wn. App. at 675; *Butler v. Lamont School Dist.*, 49 Wn. App. 709, 712, 745 P.2d 1308 (1987). Thus, the standards articulated by the Court of Appeals below are not new law. Just as in *Griffith* and *Butler*, the Court of Appeals incorporated both the "arbitrary and capricious" and "error of law" standards of review set forth in RCW 28A.405.340 (4) and (5).

As Washington courts have previously recognized, selecting the appropriate standard of review first requires that the court identify the particular challenge a teacher is making to a hearing officer's decision: "In determining the appropriate standard of review, an appellate court must begin by ascertaining the nature of the ruling it is being asked to review, *i.e.*, is it a question of fact, a question of law, or a mixed question of fact and law?" *Sargent v. Selah School Dist.*, 23 Wn. App. 916, 919, 599 P.2d 25 (1979). In *Sargent*, the Court applied the "error of law" standard, "because the question of sufficient cause for discharge raises a question of mixed law and fact, *i.e.*, there is a dispute both as to the propriety of the inferences drawn by the hearing officer from the raw facts and as to the meaning of the statutory term, sufficient cause." *Id.* at 919-20. The same rule was followed by this court in *Clarke v. Shoreline School Dist. No. 412*, 106 Wn.2d 102, 111, 720 P.2d 793 (1986).

In her petition to Superior Court, Campbell made several different arguments and raised all of the possible standards of review that are set forth in RCW 28A.405.340, including both "arbitrary and capricious" and "error of law." CP 985-89. Campbell claimed that the District's actions were "contrary to law" insofar as they violated the Americans with Disabilities Act ("ADA") and case law that she asserted held that drug testing was a mandatory subject of collective bargaining. CP 993-95. She also specifically argued that the fifteen-day suspension was "arbitrary and capricious" based on the District's alleged lack of any prior history of disciplining employees under Policy 5201. CP 996. The Court of Appeals rejected Campbell's claim that the District's sanction had been "arbitrary and capricious," because "Campbell fail[ed] to provide evidence that . . . the District has treated her differently from any other teacher in a similar situation." *Campbell*, 192 Wn. App. at 890. Thus, the Court of Appeals appropriately addressed the particular challenges that Campbell made in this case. In rejecting Campbell's various arguments, the Court of Appeals correctly applied both the "arbitrary and capricious" and "error of law" standards of review when it determined that the District's actions, as upheld by the hearing officer, were "not arbitrary, capricious, or contrary to law." *Id.* at 891 (emphasis added).

Additionally, WEA deliberately conflates the burden of proof at the statutory hearing with the standard of review that a court applies in judicial review proceedings following the hearing. These are separate and distinct concepts that apply at different stages of the adjudicative process. At the statutory hearing, the District bears the burden of establishing sufficient cause by a preponderance of the evidence. RCW 28A.405.310 (8). Following the statutory hearing, a hearing officer's decision may be challenged under any of the applicable standards of review in RCW 28A.405.340. Thus, when the Court of Appeals indicated that "the challenger of the sanction carries a heavy burden" when arguing that it was arbitrary and capricious, it was referring to a teacher as a petitioner on appeal challenging a hearing officer's decision upholding discipline. *Campbell*, 192 Wn. App. at 889. At this stage of the adjudicative process, a school district has already prevailed at the statutory hearing and thus satisfied its burden of showing sufficient cause by a preponderance of the evidence.

C. WEA's Challenge to District Policy 5201 Under the Americans with Disabilities Act Lacks Merit

WEA's complaints regarding District Policy 5201 based on the Americans with Disabilities Act ("ADA") also lack merit. Medical inquiries to employees are generally prohibited by the ADA "unless such

. . . inquiry is shown to be job-related and consistent with business necessity." 42 USC § 12112 (d)(4)(A). "A covered entity may make inquiries into the ability of an employee to perform job related functions." 42 USC 12112 § (d)(4)(B).

WEA relies on a single case where a court overturned an employer's drug reporting policy under the ADA, which bears no resemblance to this case. In *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221 (9th Cir. 1997), the plaintiff was an accounts manager who worked for a conference center resort. *Id.* at 1226. The employer's policy provided that "[e]mployees must report without qualification, all drugs present within their body system [sic] . . . . Additionally, prescribed drugs may be used only to the extent that they have been reported and approved by an employee supervisor . . . ." *Id.*

In contrast to the extremely overbroad policy in *Roe* that required all drugs not only had to be reported to the employer but also approved by a supervisor, here the District's policy requires employees to report taking only drugs "known or advertised as possibly affecting judgment, coordination or any of the senses . . . ." CP 1316-17. This information can be verified by reading the prescription for the medication, reading the container that the medication came in, or consulting widely published

consumer information.[2] There is no dispute that the many drugs Campbell had been taking were required to be reported under the policy. More importantly, the employee in *Roe* was not responsible for the safety of a class full of children, and thus there was no connection between the drug reporting requirement and any job function or business necessity. In contrast, this court has already held that an essential function of a teacher's job is maintenance of the safety and welfare of students. *Clarke*, 106 Wn.2d at 119. The District's policy is aimed at maintaining student safety and is therefore undeniably job-related.

Besides *Roe*, WEA cites to a consent decree in a case that involved a drug reporting policy, but which also involved many issues which are not present here, including the termination of an employee and an alleged ongoing pattern of discrimination by the employer. *EEOC v. Prod. Facilitators, Inc.*, 666 F.3d 1170 (8th Cir. 2012). Even if the consent decree related to a case that was factually analogous to this matter, a consent decree is a settlement agreement negotiated between parties and is not binding in a separate proceeding involving different parties. *See, e.g., United States v. Armour & Co.*, 402 U.S. 673, 681, 91 S.Ct. 1752, 29

[2] The Food and Drug Administration (FDA) has adopted regulations that require drug manufacturers to label prescription drug products to include information about "any relevant hazards, contraindications, side effects, and precautions." 21 CFR § 801.109 (c). FDA regulations also require that prescription drug advertisements include similar information about side-effects. 21 § CFR 202.1 (e).

L.Ed.2d 256 (1971) ("Consent decrees are entered into by parties after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation."). Thus, WEA has shown no authority establishing that District Policy 5201 was contrary to law. The terrible accident that occurred in this case while Campbell was on her way to school plainly illustrates the type of danger that District Policy 5201 lawfully endeavors to prevent.

III. CONCLUSION

WEA's arguments for review of the Court of Appeals' decision below are no more compelling that Campbell's. For all the forgoing reasons, this court should deny Campbell's petition for review.

RESPECTUFLLY SUBMITTED this 9th day of September, 2016.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on September 9, 2016, I served the foregoing Respondent's Tacoma Public Schools' Answer to Washington Education Association's Amicus Curae Memorandum in Support of Petition for Review to the Court and to the parties to this action as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of September, 2016, at Seattle, Washington.

Kathee Fudge

KATHIE FUDGE

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Attached please find Respondent Tacoma Public Schools' Answer to Washington Education Association's *Amicus Curae* Memorandum in Support of Petition for Review.

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