No. 90252-9

SUPREME COURT OF
THE STATE OF WASHINGTON

No. 313603-1-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

MICHAEL F. CRONIN,

Plaintiff/Appellant,

vs.

CENTRAL VALLEY SCHOOL DISTRICT,

Defendant/Respondent/Petitioner.

CENTRAL VALLEY SCHOOL DISTRICT PETITION FOR REVIEW

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I. INTRODUCTION

Each day at the 295 public school districts in the State of Washington, school boards and school officials (whether superintendents, directors, coordinators, principals, counselors, or others) are asked to make countless decisions and to respond to virtually innumerable requests for action. They are confronted with these requests from various stakeholders, including unions, teachers, students, parents, custodians, food service workers, bus drivers, etc. They are confronted with these demands for action and for decisions when addressing parent concerns, solving student problems, selecting curriculum, before and after contracting with vendors, dealing with unions, helping citizens or organizations with information and explanations, etc. Needless to say, school officials and school boards cannot respond to every single request. Indeed, they often deliberately refuse or fail to respond for a variety of reasons, such as a determination that the request is baseless, untimely, or simply unimportant. Such is their life as educators if they wish to be effective in discharging our State's paramount duty of educating our school children.

The Court of Appeals' decision in this case imposes on school district administrators and boards drastic consequences whenever they fail or refuse to take action or make decisions – so much so that school district officials will be required to do the impossible, by acting on each and every request

made of them, or instead exposing the district and its taxpayers to lawsuits without any effective limitations period, brought years or even decades after the failure to act. Imagine a teacher who retires after 30 years of service and inquires of a school district payroll officer why he failed to act 27 years prior on the teacher's request to include a stipend payment in a retirement report. As soon as the payroll officer responds to the inquiry explaining the reasons for the prior failure, the Court of Appeals would allow the teacher 30 days from the date of the explanation to challenge the failure to act that occurred 27 years prior. Likewise, imagine a former student who challenges a certain grade given in a class several years before and elicits a short email explanation from the teacher about the grade. Further, imagine a citizen who challenges a school board's expensive curriculum selection years after the selection, by eliciting an explanation for why the board previously failed to act on the citizen's curriculum recommendation. The Court of Appeals would allow the student, citizen, or anyone else (who wants to challenge a school board's or school official's failure to act) to simply obtain a response from a school district years after the initial failure to act and thereby trigger a new limitation period.

The Court of Appeals' decision contradicts the clear and direct thirty-day time line in RCW 28A.645.010 – a statute that, according to this Court, **must** be strictly applied because it "means what it says" and is necessary to

protect our K-12 public school system. That statute requires a person to bring suit "within thirty days after the rendition of [a school official or school board] ... decision or order, or **of the failure to act upon the same when properly presented**." The Court of Appeals' decision entirely ignores the "failure to act" language and thus subjects school officials and boards to unwieldy and costly consequences for their failures to act. RCW 28A.645.010, however, expressly contemplates that school officials can and will fail to act (often and deliberately). When they do so, the legislature has imposed a sound public policy that they not be subjected to judicial second-guessing years or even months after events had transpired.

Beyond the fact that the Court of Appeals' decision conflicts with legislative policy and this Court's mandate, the decision conflicts with itself. While the Court of Appeals adopted the argument advanced by the School District – that RCW 28A.645.010 does indeed apply to plaintiff's Complaint – the Court then erroneously applied the statute **only** to plaintiff's First Cause of Action, failing to even address plaintiff's three other independent Causes of Action. All three of those causes of action are obviously untimely based on the Court of Appeals' own reasoning.

II. IDENTITY OF PETITIONER

Petitioner is Central Valley School District ("School District" or "District"), the defendant and respondent below.

III. COURT OF APPEALS' DECISION

Petitioner seeks review of a Division III decision of the Washington Court of Appeals, No. 31360-3-III, filed on March 13, 2014. An Order Denying Motion for Reconsideration was filed April 10, 2014. Copies of the decision and Order Denying Motion for Reconsideration are attached in the Appendix.

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals erroneously allow plaintiff to challenge the Superintendent's failure to act on plaintiff's hearing request, when plaintiff sued more than 30 days after the Superintendent's failure to act and thus beyond the 30-day time limit in RCW 28A.645.010?

2. Did the Court of Appeals erroneously allow plaintiff to challenge the Superintendent's decision to terminate plaintiff's pay, when plaintiff failed to sue within 30 days of the decision to terminate his pay?

3. Did the Court of Appeals erroneously allow plaintiff to challenge the Superintendent's decision to nonrenew plaintiff, when plaintiff did not sue within 30 days of the decision to nonrenew plaintiff?

V. STATEMENT OF THE CASE

This case concerns proper application of a 30-day time line that has been codified, in one form or another, for over a century. The 30-day time line in RCW 28A.645.010 effectuates a powerful and sweeping public policy

from our legislature that challenges to school district action or failure to act must be taken without delay, so that our public schools can discharge our state's paramount constitutional obligation of educating children, without delayed judicial second-guessing.

A. Plaintiff's Complaint asserts four causes of action that challenge either a rendered decision or a failure to act upon a rendered decision.

Plaintiff's Complaint asserts four causes of action, each of which falls well outside the 30-day time line that effectuates the legislative policy mandating prompt challenges of school officials' decisions. Plaintiff's First Cause challenges the Superintendent's failure to act when he failed to give plaintiff a due process hearing. CP 7. The Superintendent issued to plaintiff a Notice of Probable Cause for Discharge and for Nonrenewal due to, among other reasons, his misconduct with students. The probable cause decisions were rendered in strict compliance with RCW 28A.405.210 and .300, offering plaintiff a hearing if he properly and timely requested one within 10 days.[1] Plaintiff says he properly and timely requested a hearing. The School District says he did neither. Based on the Superintendent's decision, the Superintendent deliberately chose not to act (or per the terms of RCW 28A.645. 010, "failed to act"), on the Superintendent's own prior decision to

[1] This 10-day time line, like the 30-day time line in RCW 28A.645.010, is grounded on a legislative policy requiring prompt challenges to school district decisions.

offer plaintiff a hearing (again, because the Superintendent determined that plaintiff had not properly or timely requested such a hearing).

Plaintiff knew of the School District's failure to act as of January 26, 2012 – that is the date by which the School District needed to act under the statute. More specifically, RCW 28A.405.310 requires a district to act by appointing a nominee for selection of a hearing officer within 15 days of a proper and timely request for hearing. Plaintiff asserts that his union representative properly requested a hearing on January 11, 2012. Had a proper hearing request been made, RCW 28A.405.310 required the Superintendent to promptly appoint a nominee by January 26, 2012 (i.e., within 15 days). The Superintendent thus deliberately failed to appoint any such nominee because plaintiff's hearing request was deemed not valid and untimely. Plaintiff knew January 26, 2012 was the date by which the School District needed to act because the Superintendent gave plaintiff a copy of the statute specifying the date.

Plaintiff has never inquired as to why the Superintendent failed to appoint a nominee. Plaintiff's only inquiry was one made by his counsel on February 21, 2012, asking the School District to reinstate plaintiff's pay. CP 24. The School District subsequently provided plaintiff's union representative with an explanation as to why the School District had previously failed to act on the purported hearing request. CP 50.

Plaintiff's Second and Third Causes of Action appeal the District's act in terminating his pay on January 31, 21012. CP 7-8. Plaintiff admits he knew of the act terminating his pay on January 31, 2012. CP 15.

Plaintiff's Fourth Cause of Action directly challenges the Superintendent's January 5, 2012 written decision to nonrenew him. CP 8-9.

B. Plaintiff ignored the public policy timeline in RCW 28A.645.010.

Plaintiff waited until **March 23, 2012** to bring the underlying action. The underlying action challenges the **January 26, 2012** failure to appoint a nominee, the **January 31, 2012** termination of pay decision, and the **January 5, 2012** Notice of Probable Cause of Nonrenewal. Each cause of action is untimely under RCW 28A.645.010. That statute says a person aggrieved by a school board or school official decision or failure to act must challenge that decision or that failure to act within 30 days of the decision or of the failure to act. None of plaintiff's challenges were brought within the 30-day time line.

C. The Court of Appeals failed to address Plaintiff's untimely Second, Third and Fourth Causes of Action.

The Court of Appeals' decision did not address plaintiff's Second, Third or Fourth Causes of Action, instead focusing solely on the plaintiff's First Cause of Action. As to that First Cause of Action, the Court of Appeals relied exclusively on the February 21, 2012 letter from the Superintendent

explaining why the Superintendent **previously failed to act** on plaintiff's hearing request. The Court of Appeals' decision characterized that February 21, 2012 letter as the "rendition of a decision" triggering the 30-day appeal period of RCW 28A.645.010.

The School District's February 21, 2012 letter, however, was not the "rendition of a decision" and certainly was not the rendition of any decision relevant to plaintiff's Second, Third, and Fourth Causes of Action. Those Causes of Action in plaintiff's Complaint are not based on the District's February 21, 2012 letter, were not referenced in that letter, and have nothing to do with that letter.

Specifically, the Second and Third Causes of Action are based on a January 31, 2012 decision to terminate plaintiff's pay, and the Fourth Cause of Action is based on the January 5, 2012 decision by the School District to nonrenew plaintiff. The Court of Appeals' application of the same trigger date (i.e., February 21, 2012) to all **four** of plaintiff's Causes of Action results in the Court of Appeals' decision conflicting with itself.

D. As to Plaintiff's First Cause of Action, the Court of Appeals' decision conflicts with RCW 28A.645.010 because it completely overlooked the rendition of a decision by the Superintendent on January 5, 2012 and then the subsequent failure to act on that decision as of January 26, 2012.

As to plaintiff's First Cause of Action, the Court of Appeals completely overlooked that the Superintendent rendered a decision – a

Notice of Probable Cause – on January 5, 2012, and that the Superintendent subsequently failed to act on that decision after plaintiff requested he do so. CP 46-47. After the rendition of the Superintendent's Notice of Probable Cause (a decision with the **sole purpose** of notifying plaintiff that he was entitled to due process to contest his discharge and nonrenewal), plaintiff presented the Notice of Probable Cause to the Superintendent, requesting that the School District provide the due process it had offered in that Notice. It was the **rendition of the Superintendent's Notice of Probable Cause** that triggered plaintiff's request for the School District to act.

The School District, however, "**failed to act" upon plaintiff's request**. That failure by the District occurred when the Superintendent failed to appoint a nominee within the 15-day deadline specified by statute for doing so. Indeed, fifteen days after the plaintiff's request for due process, the District unequivocally failed to appoint a nominee as required by RCW 28A.405.310. **That** failure to appoint (i.e., failure to act) triggered the 30-day time line to appeal.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

If the Court of Appeals' analysis were allowed to stand, it will immediately subject school districts to challenges years (or even decades) after the pertinent basis for the challenge had occurred. Here, the Court of Appeals allowed the plaintiff to wait several months to challenge the School

District despite clear statutory language requiring a lawsuit within 30 days of the failure to act. Why would the same result not occur as to hundreds of prior decisions or failures to act? Here, plaintiff could have just as easily waited years before seeking an explanation from the School District. After all, plaintiff was incarcerated for part of the time during the pertinent facts here. What if he had been incarcerated for years and only after his release inquired why the Superintendent failed to pay him or why it failed to previously act on his hearing request? Indeed, according to the Court of Appeals' decision, any response by the School District explaining the reasons for the Superintendent's prior failure to act would trigger a new 30-day time line under RCW 28A.645.010. Such a decision by the Court of Appeals, even unpublished, imposes on school districts tremendous uncertainty and a manifestly unwieldy and unjust rule that contradicts the critical public policy at the core of RCW 28A.645.010.[2]

[2] The School District is not unmindful of this Court's apparent hesitancy to grant review of unpublished opinions. While joining plaintiff's motion to publish the decision might have enhanced the chance of review, it would also publicize to anyone who previously wanted to sue a school district, but who had waited too long, that he or she need only inquire anew as to the reason for the prior action or inaction, thus triggering a new 30-day time line. Even as an unpublished opinion (especially where one of the parties is represented by the Washington Education Association, who, in turn, represents over 80,000 employees – virtually every certificated public school employee) the potential for such delayed suits is immediate and significant. The potential is heightened by the proliferation of email as a method of communication. Under the Court of Appeals' decision, a mere email response to an inquiry by an employee about a school official's prior failure to act will land a district in court years after pertinent events transpired.

An understanding of the how the Court of Appeals' decision conflicts with this Court's opinion is most easily explained in reverse order as to plaintiff's four Causes of Action. That is, application of the Court's analysis is most easily explained first by reference to plaintiff's Fourth Cause of Action in his Complaint and then to plaintiff's Second and Third Causes of Action, followed by plaintiff's First Cause of Action.

A. The Court of Appeals' decision as to Plaintiff's Fourth Cause of Action conflicts with this Court's mandate in *Haynes* that RCW 28A.645.010 means what it says.

As to plaintiff's Fourth Cause of Action, the Court of Appeals' decision directly conflicts with this Court's opinion in *Haynes v. Seattle School District*, 111 Wn.2d 250, 758 P.2d 7 (1988). In *Haynes*, this Court unanimously ruled that the 30-day time line in RCW 28A.645.010 applies to an employee's appeal from a school board's or school official's decision. According to this Court, this statute "means what it says" and bars any claim filed more than 30 days after the rendition of a decision. *Id.* at 255.

Plaintiff's "Fourth Cause of Action" asserts that the **January 5, 2012** Notice of Probable Cause for Nonrenewal (which plaintiff admits receiving on January 6, 2012) **itself** is not a valid basis for termination here. CP 8-9. Plaintiff's argument, as explained in briefing below, is that a school district supposedly can only issue a Notice of Probable Cause for

discharge (as opposed to a separate **nonrenewal** notice) for the type of misconduct here. CP 69. Plaintiff's Fourth Cause of Action thus cannot be characterized as anything ***other than*** a challenge to the rendition of a nonrenewal **decision** made on January 6, 2012 and conveyed to him by the Notice of Probable Cause for Nonrenewal itself.

How then did the Court of Appeals allow plaintiff to bring the underlying cause of action over two months after the rendition of the January 6, 2012 decision? The Court of Appeals failed to explain such a result and, indeed, failed to even address the Fourth Cause of Action. Based on the clear public policy mandate of RCW 28A.645.010 and based on this Court's mandate that RCW 28A.645.010 "means what it says," the Court of Appeals' decision is a brazen abrogation of the legislature's insistence on a 30-day time line for challenging school district decisions.

B. The Court of Appeals' decision as to Plaintiff's Second and Third Causes of Action conflicts with this Court's decisions in *Haynes* and *Blunt* and numerous other authorities.

As to plaintiff's "Second Cause of Action" and "Third Cause of Action," the Court of Appeals' decision is equally contrary to this Court's opinion in *Haynes*. What plaintiff appeals in the Second and Third Causes of Action is, quite simply, the School District's action **terminating his** "**wages and benefits**" as of **January 31, 2012**. Plaintiff's Complaint 4.3 and 5.4 (CP 8). The decision to terminate his wages and benefits was

unequivocally rendered and communicated to plaintiff on January 31, 2012. CP 15 ("My January pay, which is directly deposited at the end of the month, was not received."). Plaintiff's Second and Third Causes of Action ask the Court to order the School District to pay plaintiff starting January 31, 2012. How then could the Court of Appeals allow plaintiff to appeal the termination of his pay almost two months after it occurred? Again, there has been and can be no explanation of this result by the Court of Appeals. Just as with plaintiff's Fourth Cause of Action, plaintiff's Second and Third Causes of Action are well beyond the 30-day time line set forth in RCW 28A.645.010 and to allow them is directly contrary to *Haynes*.

Plaintiff would likely argue that the School District must provide some type of "formal" rendition of a decision in order to trigger the 30-day time line.[3] However, any such argument would, again, directly conflict with this Court's decision in *Haynes*. In *Haynes*, this Court reinforced that RCW 28A.88.010 (predecessor to RCW 28A.645.010) applies not just to decisions, but also "actions." According to the Court, "the 30-day time limit on appeals which the Legislature mandated by RCW 28A.88.010 applies to both judicial and non-judicial **actions or decisions** ...." *Id.* at 254; *see also*

[3] Nothing in RCW 28A.645.010 requires the rendering of a formal or written decision. Had the legislature intended such a result, it could have easily written such a requirement into the statute. It did not.

Benson v. Roberts, 35 Wn.App. 362, 367, 666 P.2d 947 (1983) (a mere "failure to allow" performance of a contract was sufficient to trigger the 30-day time limit); *Porter v. Seattle School Dist.,* 160 Wn.App. 872, 881, 248 P.3d 1111 (2011) (a committee selection "process" served as the trigger for the running of the 30-day time line under RCW 28A.645.010). This Court in *Haynes* obviously contemplated that a person might be aggrieved by school district action even where there is no formal written decision.

Moreover, plaintiff's request for back pay is remarkably similar to the high school teacher's request for back pay in *Blunt v. School Dist. No. 35,* 12 Wn.2d 336, 340, 121 P.2d 367 (1942). In *Blunt*, this Court held that a teacher who failed to appeal within 30 days of termination of his pay could not revive that right of appeal by making a later written demand to be paid. The Court rejected the teacher's request for back pay because the teacher did not file an action within 30 days of the school board's **actual failure to pay him**. *Id.* at 337. The board took no action on Blunt's demand to be paid and thus "ignored his written salary demand." *Id.* at 339. The Supreme Court refused to hear Blunt's appeal on the ground that it was not timely filed.

In *Blunt*, like here, the school board never informed the employee of its decision not to pay him and the district did not respond to Blunt's request for pay. *Blunt* did not inquire immediately as to why his pay had been terminated despite having every opportunity to do so. Likewise,

plaintiff here waited three weeks before inquiring and then waited another four weeks before appealing the District's action to terminate his pay.

Imagine if this Court in *Blunt* had required a formal written decision instead of applying the identical trigger date advocated by the School District here. The school district in *Blunt* would have been subjected to years of costly litigation and exposure to significant back pay based on the failure to properly apply the timeline at issue.

This Court's failure to correct the Court of Appeals decision will immediately render the terms of RCW 28A.645.010 meaningless and will result in extreme and unnecessary cost to school district taxpayers—at a time when school districts can ill afford such costs. The Court of Appeals' decision opens the door for any number of former school district employees (who believe they were previously underpaid) to send a letter several years after their employment was terminated or their pay was issued and ask in this letter, "Why was my pay terminated or why was I paid this amount instead of that amount?" If the district responds with any explanation (say, a short email), the Court of Appeals would allow plaintiff to sue within 30 days of that explanation. Such a result completely eviscerates the broad and sweeping public policy of RCW 28A.645.010. Absent this Court's intervention, school district taxpayers are immediately subjected to the

likelihood of significant and unanticipated claims made years after pertinent events have transpired.

C. The Court of Appeals' decision as to Plaintiff's First Cause of Action likewise conflicts with this Court's decisions in *Haynes* and *Bohanon*.

As to plaintiff's First Cause of Action, the Court of Appeals' decision conflicts with the statute itself as well as with another of this Court's decisions, *Bohanon v. Wanamaker*, 47 Wn.2d 794, 803, 289 P.2d 697 (1955). As explained in more detail below, *Bohanon* explicitly prohibits the bootstrapping analysis that the Court of Appeals' decision now endorses and that now exposes districts to unanticipated claims, which long ago should have expired.

Plaintiff's First Cause of Action here is based on the School District's refusal to grant him due process provided by RCW 28A.405.310. Election of a nominee is the first due process step provided by RCW 28A.405.310. According to the Court of Appeals, the rendition of the District's decision to not elect a nominee occurred on February 28, 2012, when plaintiff's nominee received the Superintendent's letter explaining the rationale for the **prior failure to act on plaintiff's hearing request.**

In actuality, the District did not render a decision in February 2012. Instead, the District failed to act on a **previously-rendered** "**decision**." That previously-rendered decision (completely overlooked by the Court of

Appeals) occurred on January 6, 2012 when plaintiff received the Superintendent's Notice of Probable Cause. The Notice of Probable Cause rendered a decision that plaintiff was entitled to "due process rights and a hearing." CP 46-47. Indeed, the notice could not have been more clear: "Pursuant to RCW 28A.405.210, 28A.405.300 and RCW 28A.405.310 (enclosed), you are entitled to due process rights and a hearing to review my determination of probable cause." *Id.*

After the Superintendent's rendition of the Notice of Probable Cause, plaintiff argues that he sought the due process offered by that Notice. So, for jurisdictional purposes only, we assume that, on January 11, 2012, plaintiff properly presented to the Superintendent a request for due process. The request was for the Superintendent to act on the Superintendent's previously rendered January 5, 2012 Notice of Probable Cause (the Notice that offered plaintiff due process proceedings). The Superintendent was required to act on plaintiff's request, within 15 days, under RCW 28A.405.310(4). However, the Superintendent failed to do so and plaintiff eventually (over two months later) brought this action challenging the failure to do so.

RCW 28A.645.010 requires that plaintiff's appeal be brought within 30 days after the Superintendent's "failure to act" on the rendered decision. The failure of the District to act upon the rendered decision (i.e., the rendered decision being the January 5, 2012 decision granting plaintiff his due process

rights) occurred on **January 26, 2012.** Given the admonition in *Haynes* that the statute means what it says, **January 26, 2012** is thus the trigger date for purposes of determining the timeliness of plaintiff's First Cause of Action.

The Court of Appeals' decision, however, somehow attempts to distinguish between the School District's failure to "respond" and failure to "act" saying that the statute does not apply to a failure to respond but that it does apply to a failure to act—a classic distinction without a difference. After all, the District **failed to act** on its own probable cause decision, by **refusing** to provide plaintiff with due process rights because plaintiff did not properly or timely request a hearing. It is impossible for the District to understand how it could have otherwise "**failed to act**" on plaintiff's hearing request, besides by deliberately **refusing** to elect a nominee.

Indeed, to fully appreciate the School District's position, assume the District had never submitted to plaintiff its February 21, 2012 letter (on which the Court of Appeals based its decision). Would that lack of a letter have prevented plaintiff from bringing an action against the District because the District had never rendered a decision? The Court of Appeals' decision seems to say so. However, the answer must be no. Otherwise plaintiff would **never** have any recourse against the District—exactly the opposite result contemplated by RCW 28A.645.010. A school district cannot insulate

itself from a challenge simply by failing to act. That is precisely why the statute uses the phrase "failure to act."

It **must** follow then that the February letter was not the trigger for plaintiff's First Cause of Action. Instead, the trigger was necessarily the District's prior failure to act. It is that failure to act which caused plaintiff to be aggrieved, which occurred regardless of the issuance of any letter, and about which plaintiff fully knew (again, regardless of any letter).

The Court of Appeals' decision opens the door for dilatory plaintiffs to simply make a request for an explanation of any prior school district action or inaction and thus bootstrap themselves into a new 30-day time limit. This type of bootstrap approach was soundly rejected by this Court in *Bohanon.* 47 Wn.2d at 803. There, this Court rejected the notion that the 30-day time line can be re-triggered by writing to a school district after the triggering time line had already occurred:

> He [the employee] could not start the period running again by later writing to the board and eliciting a new refusal to issue the contract. *See Blunt v. School District No. 35*, 12 Wash. 2d 336, 121 P.2d 367.

Id. Applying *Bohanon*, plaintiff could not elicit a ***re***-trigger point for what had already occurred – the District had already failed to appoint a nominee as of January 26, 2012, and had already refused to afford plaintiff his due process rights. Likewise, here, the February 21, 2012 letter cannot ***re***-trigger

what was already triggered by the Superintendent's failure to act. Allowing such a result without this Court's immediate intervention exposes all 295 school districts in this State to the peril of employees, parents, students and others seeking to re-trigger the 30- day time line of RCW 28A.645.010.

VII. CONCLUSION

RCW 28A.645.010 means what it says and mandates the filing of this action within 30 days of a specified trigger event. That trigger event, as defined by plaintiff's First Cause of Action was the District's **January 26, 2012** failure to provide due process rights, unequivocally established by the District's failure to elect a nominee. Plaintiff's Second and Third Causes of Action were triggered by the District's **January 30, 2012** action terminating pay. And, plaintiff's Fourth Cause of Action was triggered by the rendition on **January 6, 2012** of the nonrenewal decision. The School District thus respectfully requests that this Court grant its Petition for Review to rectify the Court of Appeals error and to prevent the very real likelihood of other school districts being subjected to the same error.

DATED this 7th day of May, 2014.

STEVENS CLAY, P.S.

By: B. Kst WSBA #36811, FOR:
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Attorneys for Central Valley School District

CERTIFICATE OF SERVICE

I do hereby certify that on this 7th day of May, 2014, I served a true and correct copy of the above and foregoing PETITION FOR REVIEW on the following, in the method indicated:

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Kimberly Reber

KIMBERLY REBER

APPENDIX

FILED
APRIL 10, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

MICHAEL F. CRONIN, Appellant, v. CENTRAL VALLEY SCHOOL DISTRICT, Respondent.	)	No. 31360-3-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent's motion for reconsideration of this court's decision of March 13, 2014, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, respondent's motion for reconsideration is hereby denied.

DATED: April 10, 2014

PANEL: Jj. Brown, Siddoway, Fearing

FOR THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

FILED
MARCH 13, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MICHAEL F. CRONIN, Appellant, v. CENTRAL VALLEY SCHOOL DISTRICT, Respondent.	)	No. 31360-3-III UNPUBLISHED OPINION

BROWN, J. — Teacher Michael Cronin appeals the trial court's decision to summarily dismiss his declaratory suit seeking to require the Central Valley School District (District) to comply with his request for a statutory discharge hearing. The trial court reasoned the complaint was untimely and it lacked subject matter jurisdiction. Mr. Cronin contends the court erred in finding the time limit set forth in RCW 28A.645.010 precluded his action. We agree with Mr. Cronin, and reverse.

FACTS

On January 5, 2012, while Mr. Cronin was incarcerated for a driving under the influence conviction, the District notified him it had probable cause for his discharge and probable cause for nonrenewal of his contract. The notice informed Mr. Cronin he had the right to timely file a notice of appeal. Mr. Cronin belongs to the Washington

Education Association (WEA) and the Central Valley Education Association (CVEA). The collective bargaining agreement between the District and Mr. Cronin requires an employee who is discharged and/or nonrenewed to either pursue a grievance procedure that leads to arbitration or a statutory hearing under chapter 28A.405 RCW.

On January 11, 2012, Sally McNair, a UniServ[1] representative with the WEA, wrote the District, on Mr. Cronin's behalf, stating, "I have received the Notice of Probable Cause for Termination of Mike Cronin's employment . . . . I am requesting a closed hearing on Mr. Cronin's behalf to determine whether there is sufficient cause for such adverse action." Clerk's Papers (CP) at 48. Ms. McNair further stated, "Due to the lack of access to Mr. Cronin, I will also be filing a grievance in order to preserve timelines to both procedures." *Id.* The District failed to respond.

On February 8, 2012, Ms. McNair notified the District that Mr. Cronin "has decided to pursue the statutory hearing as described in RCW 28A.405.300 as his election of remedy for the notice of probable cause for discharge. He will not be utilizing the grievance procedure." CP at 49. The District again failed to respond. Mr. Cronin obtained counsel.

On February 21, 2012, Mr. Cronin's attorney contacted the District about its lack of response. On that same day, the District drafted a letter stating it would not be responding to Mr. Cronin's request for a hearing because such requests must be made

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[1] WEA UniServ representatives assist regional teachers in such areas as bargaining, contract enforcement, and grievances. http://www.washingtonea.org

by "the employee who receives the notice." CP at 50. This letter was received by Ms. McNair and forwarded to Mr. Cronin's attorney on February 28, 2012.

On March 23, 2012, Mr. Cronin sued for declaratory relief, contending the District was required to respond to his request for a hearing on the finding of probable cause to discharge and nonrenewal. He requested wages from January 1, 2012 through the proceedings.

Both parties requested summary judgment. The court granted the District's request and denied Mr. Cronin's request, finding it lacked subject matter jurisdiction to hear the matter because it was not filed within 30 days of the aggrieved action as required by RCW 28A.645.010(1). After he unsuccessfully attempted reconsideration, Mr. Cronin appealed.

ANALYSIS

The issue is whether the trial court erred in summarily dismissing Mr. Cronin's declaratory suit on lack of subject matter jurisdiction because it was untimely.

We review de novo a trial court's summary judgment decision in a declaratory judgment action. *Internet Comty. & Entm't Corp. v. Wash. State Gambling Com'n*, 169 Wn.2d 687, 691, 238 P.3d 1163 (2010). Likewise, appellate courts review de novo questions of a court's subject matter jurisdiction. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 205, 258 P.3d 70 (2011).

RCW 28A.645.010 grants the superior court jurisdiction to review a decision by a school board. All that is required is that an aggrieved person file and serve a notice of

appeal setting forth the errors complained of within 30 days. *Id.* at RCW 28A.645.010(1). Upon proper filing of the notice of appeal, the superior court obtains subject matter jurisdiction. *Clark v. Selah Sch. Dist. No. 119*, 53 Wn. App. 832, 837, 770 P.2d 1062 (1989).

RCW 28A.645.010(1) partly provides, "Any person . . . aggrieved by *any decision* or order of any school official or board, within thirty days after the rendition of such decision or order, or of the failure to act upon the same . . . may appeal the same to the superior court." (Emphasis added.) RCW 28A.645.010(2) states that appeals "by teachers . . . from the actions of school boards with respect to discharge . . . or failure to renew their contracts . . . shall be governed by the appeal provisions of chapters 28A.400 and 28A.405 RCW[2] . . . *and in all other cases shall be governed by chapter 28A.645 RCW.*" (Emphasis added.)

Here, Mr. Cronin requested declaratory relief after the District refused to appoint a nominee for a hearing on the District's finding of probable cause. This was his remedy election under RCW 28A.405.300, which states that an employee "within ten days after receiving such notice [of a change in contract status], shall be granted opportunity for a hearing pursuant to RCW 28A.405.310." RCW 28A.405.310 specifies the hearing procedure. "In the event that an employee requests a hearing . . . a hearing officer shall be appointed in the following manner: Within fifteen days following the

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[2] Chapter 28A.400 RCW requires employees to be notified of their right to appeal (RCW 28A.400.340) and chapter 28A.405 RCW requires employees to appeal a notice a probable cause to terminate and/or nonrenewal within 10 days (RCW 28A.405.210 and .300).

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." RCW 28A.405.310.

The District refused to comply with the hearing procedure set forth in RCW 28A.405.310. Mr. Cronin's suit to compel the District's compliance is not an action on the probable cause finding. Thus, the time limit set forth in chapter 28A.405 RCW does not apply. This action would fall under the "all other cases" category expressly mentioned in RCW 28A.645.010(2)(a), which carry a 30-day time limit to file an appeal.

By comparison, in *Porter v. Seattle School Dist. No. 1*, 160 Wn. App. 872, 881, 248 P.3d 1111 (2011), citizens filed suit against a school district, challenging the district's approval of a math textbook series for use in the district's high schools. One of the issues was the selection of committee members to review the series. *Id.* The citizens argued teachers and community members willing to publicly question reform methodology were pointedly excluded from the committee. *Id.* Division One of this court held, "The record does not support this allegation, and even if it did, there was not a timely challenge to the committee selection process." *Id.*; *see* RCW 28A.645.010. While the court's statement is dicta, it nevertheless shows the interpretation that an objection to the failure to nominate (in *Porter* a committee member and in this case a nominee to pick a hearing officer) must be made within RCW 28A.645.010's 30-day time limit.

Based on the above, RCW 28A.645.010(1)'s 30-day time limit applies here. The next question, then, is whether Mr. Cronin's action was within 30 days of "any decision" by the District. RCW 28A.645.010(1).

On January 5, 2012, the District notified Mr. Cronin it had probable cause for discharge and probable cause for nonrenewal. On January 11, 2012, Ms. McNair sent a letter to the District stating, "I have received the Notice of Probable Cause for Termination of Mike Cronin's employment . . . . I am requesting a closed hearing on Mr. Cronin's behalf to determine whether there is sufficient cause for such adverse action." CP at 48. The District did not respond. On February 8, 2012, Ms. McNair again notified the District that Mr. Cronin "has decided to pursue the statutory hearing as described in RCW 28A.405.300 as his election of remedy for the notice of probable cause for discharge. He will not be utilizing the grievance procedure." CP at 49. The District again chose not to respond.

Mr. Cronin then obtained counsel. On February 21, 2012, Mr. Cronin's attorney contacted the District about its lack of response. On that same day the District drafted a letter stating it would not be responding to Mr. Cronin's request for a hearing because such requests must be made by "the employee who receives the notice." CP at 50. This letter was received by Ms. McNair and forwarded to Mr. Cronin's attorney on February 28, 2012. On March 23, 2012, Mr. Cronin sued for declaratory relief to compel the District to elect a nominee.

RCW 28A.645.010(1) states, "Any person . . . aggrieved by *any decision* . . . of any school official or board, within thirty days after the rendition of such decision . . . may appeal." (Emphasis added.) Our Supreme Court has observed that this provision "means what it says." *Haynes v. Seattle Sch. Dist. No. 1*, 111 Wn.2d 250, 251, 758 P.2d 7 (1988) (construing identical predecessor statute, former RCW 28A .88.010). Nothing in RCW 28A.645.010 authorizes an appeal from a mere failure to respond; rather, there must be a decision, order, or failure to act. The District argues its failure to act in January made the March appeal untimely. But, the District's February 21, 2012 letter informing Mr. Cronin that it would not comply with RCW 28A.405.310(4) was the rendition of a decision, triggering the 30-day period to appeal.

In *Derrey v. Toppenish School District No. 202*, 69 Wn. App. 610, 613, 849 P.2d 699 (1993), a retired school maintenance supervisor brought an action against the school district for breach of contract and negligent misrepresentation, stemming from reduction of his pension benefits. The superior court dismissed the action as untimely. *Id.* at 613. This court, however, held the district's letter to the retired worker asserting no basis existed upon which to hold the district responsible for a reduction in his pension was a "'decision'" within the meaning of RCW 28A.88.010 (RCW 28A.645.010's identical predecessor). *Id.* at 613. Thus, the letter triggered the 30-day time period.

Similarly, here, the decision appealed was the District's decision asserting Mr. Cronin did not properly elect his remedy received on February 28, 2012. This letter is an unequivocal rejection of Mr. Cronin's request for a hearing and constituted a

"decision or order" within the meaning of RCW 28A.645.010. Mr. Cronin's remedy at that point was an action in the superior court, timely filed on March 23, 2012. Thus, we reason the trial court had subject matter jurisdiction to hear the matter and erred in concluding otherwise. Therefore, the court erred in granting the District's request for summary judgment and not reaching the merits of Mr. Cronin's declaratory suit.

The parties briefed whether Ms. McNair was a proper representative of Mr. Cronin and whether the District improperly withheld wages from Mr. Cronin. Because we hold the summary dismissal of Mr. Cronin's request for declaratory relief was improper and remand for a determination on the merits, we leave these matters for trial court resolution. *See Fisher v. Aldi Tire, Inc.*, 78 Wn. App. 902, 910, 902 P.2d 166 (1995) (holding an award of attorney fees was premature because "it has merely been established that further proceedings are needed.")

Reversed and remanded for further proceedings.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Fearing, J.