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STATE OF WASHINGTON

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

LINDA SCHLOSSER,

Appellant,

v.

BETHEL SCHOOL DISTRICT,

Respondent.

BRIEF OF RESPONDENT

VANDEBERG JOHNSON &
GANDARA, LLP

William A. Coats, WSBA #4608
Daniel C. Montopoli, WSBA #26217
Attorneys for Respondent
Bethel School District

1201 Pacific Avenue, Suite 1900
P. O. Box 1315
Tacoma, WA 98401-1315
Telephone: (253) 383-3791

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I. INTRODUCTION

After a four-day hearing, involving nine witnesses, 38 exhibits and approximately 800 pages of testimony, the hearing officer found that sufficient cause existed for the Bethel School District (“District”) to not renew the employment contract of the Appellant, Lynda Schlosser. Following appeal to Pierce County Superior Court, the court affirmed the hearing officer’s findings of fact and conclusion of law that sufficient cause existed to nonrenew the contract of Ms. Schlosser.

Not only did the District comply with Washington law when it elected to not renew the contract of a poorly performing teacher, the procedures used by the District and required by state law actually exceed the procedural protections required by the U.S. Constitution. Because the hearing officer's findings of fact were not clearly erroneous and because the hearing officer did not commit an error of law when he held that the District had sufficient cause to not renew Ms. Schlosser’s contract, the superior court affirmed the decision of the hearing officer. For these reasons, this Court should affirm the decision of the hearing officer and superior court.

II. RESTATEMENT OF THE ISSUES

1. Are the hearing officer’s findings of fact—that substantial evidence supported the District’s determination that Ms. Schlosser’s performance was unsatisfactory—not clearly erroneous when these findings were supported by three experienced educators who found

Ms. Schlosser's performance to be unsatisfactory and when her teaching remained unsatisfactory despite intensive efforts at improving her performance?

2. Did the Hearing Officer correctly conclude that the District had sufficient cause to issue the notice of nonrenewal of Ms. Schlosser's employment contract?

3. Does complying with the procedural protections in RCW 28A.405.100 and 28A.405.210—which provide for written notice of probable cause to not renew a teacher's employment contract and an opportunity for the employee to challenge that nonrenewal—satisfy the requirements of the due process clause?

III. COUNTERSTATEMENT OF THE CASE

A. Washington law requires frequent evaluations of teachers.

Washington law requires each teacher to be evaluated annually and to be observed at work at least twice a year for a minimum of 60 minutes. RCW 28A.405.100 (2010).¹ Each district must negotiate with the teachers' union and adopt criteria for evaluating teachers. Under the law in effect in 2012, this criteria must include the following areas: instructional skill, classroom management, professional preparation and scholarship,

¹ In 2012, the legislature revised RCW 28A.405.100 and established new criteria for evaluating teachers. *See* RCW 28A.405.100 (2012). This revised criteria, however, is to be implemented beginning with the 2013-14 school year. *See* RCW 28A.405.100(7)(c) (2012). Unless otherwise noted, all citations to RCW 28A.405.100 are to statute in effect in 2012. A copy of RCW 28A.405.100 (2010) containing the evaluative criteria in effect in 2012, is attached as Appendix A.

effort towards improvement when needed, handling student discipline and attendant problems, interest in teaching students, and knowledge of subject matter.

Prior to nonrenewing a teacher for poor performance, there must be a 60 school day probationary period where the teacher is observed and evaluated on his/her improvement at least on a monthly basis. To place a teacher on probation, the district must conclude that the teacher's overall performance is unsatisfactory and must develop a reasonable plan for improvement to address the areas of deficiency. RCW 28A.405.100.

Bethel School District's Collective Bargaining Agreement ("CBA") with the Bethel Education Association ("BEA") provides that if an employee receives an unsatisfactory evaluation, the employee will be placed on the professional assistance track and an outside evaluator will be appointed to work with the employee to assist him/her to improve and to evaluate his/her performance in addition to probation. (CP 367-70, 1188-94) If the teacher's performance remains unsatisfactory, the superintendent of the school district shall issue a notice of probable cause to not renew the teacher's contract. *See* RCW 28A.405.100(4)(a).

B. Lynda Schlosser's performance rated unsatisfactory.

From 1998 through August 2012, Lynda Schlosser was a career technical education ("CTE") teacher at Bethel High School. Beginning with the 2008-09 school year, Ms. Schlosser began to receive unsatisfactory evaluations. (CP 891) During that year, Susan Mayne was the Assistant Principal who evaluated the CTE department. In her

evaluation, Ms. Mayne marked Ms. Schlosser unsatisfactory in the areas of classroom management and handling student discipline. (CP 891) Ms. Mayne noted in the evaluation that a number of students were failing the class because they failed to turn in their work. She questioned the pacing of the class and recommended that Ms. Schlosser adopt the practice of utilizing lesson plans. The evaluation also noted the number of students who were off task and engaging in disruptive behavior, such as arm wrestling. (CP 891) She noted that the areas of classroom management and handling student discipline should be a focus in the following school year. (CP 891)

Ms. Mayne was again Ms. Schlosser's evaluator for the 2009-10 school year. (CP 893) During that school year, Ms. Mayne rated Ms. Schlosser unsatisfactory in instructional skill. She noted that a large number of students continued to fail Ms. Schlosser's classes because they did not complete their assignments. In addition, Ms. Schlosser had not followed through with the development of lesson plans. (CP 893)

For the 2010-11 school year, Assistant Principal Brad Westering, was assigned to evaluate the CTE department. Mr. Westering conducted three formal observations of Ms. Schlosser's classroom and did multiple "drop-ins" during the school year. (CP 896) He rated her unsatisfactory in instructional skill, classroom management, professional preparation and scholarship, effort towards improvement when needed, and knowledge of subject matter. (CP 896) Mr. Westering noted that Ms. Schlosser taught "without lesson plans, learning targets, a concise opening activity for

immediate subject engagement, [and] little attention to the need for differentiating instruction.” (CP 897) Regarding her classroom management, Mr. Westering noted that Ms. Schlosser:

appeared unaware or more importantly, unconcerned that students continued to carry on in unrelated conversations, working on other things or napping (multiple students). Students display little respect for classroom protocol, speaking out without raising a hand, coming to class ill prepared (creating further distractions), not responding to teacher’s instruction or ongoing off task behavior. ...

(CP 896) Mr. Westering’s evaluation is consistent with the concerns previously expressed by Ms. Mayne, namely that Ms. Schlosser did not prepare lesson plans or adequately prepare for her classes, that students were not engaged in learning, and that there were an excessive number of behavioral issues in the classroom.

Following Mr. Westering’s evaluation that Ms. Schlosser’s overall performance was unsatisfactory, she was placed on the assistance track. In accordance with the CBA, the District retained Connie West, an outside evaluator, to develop a plan for improvement and to work with Ms. Schlosser during the 2011-12 school year. (CP 262-63) Ms. West is a retired administrator from the Peninsula School District who has extensive experience and training in the evaluating certificated staff. (CP 263-67)

The plan for improvement developed for Ms. Schlosser listed the problems identified in her evaluation, the corrective action expected, the support available to her, and the data collection examples. (CP 901-08) Ms. Schlosser’s union representative, Tom Cruver, testified that he

reviewed the plan at the start of the 2011-12 school year and that he offered Ms. Schlosser additional services from the Union, if she needed them. (CP 371-73) In addition, he attended most of the meetings that occurred between Ms. Schlosser and her evaluator. (CP 375)

Between October 4, 2011, and January 3, 2012, Ms. West observed Ms. Schlosser's classroom on 13 occasions. (CP 922-70) Her observations carefully documented what transpired in the classroom, made suggestions, and referred back to the plan for improvement. On January 17, 2012, Ms. West completed a summary evaluation based upon her observations and meetings with Ms. Schlosser. (CP 910-20) Based upon her observations, Ms. West concluded that Ms. Schlosser was unsatisfactory in the areas of instructional skill, classroom management, professional preparation and scholarship, effort towards improvement when needed, handling student discipline and attendant problems, and knowledge of subject matter. She concluded that Ms. Schlosser's overall performance was unsatisfactory. (CP 910)

Based upon Ms. West's evaluation, Ms. Schlosser was placed on probation beginning February 3, 2012. (CP 974) Ms. West and Mr. Westering were her evaluators during the probationary period. A revised plan of assistance that paralleled the earlier plan was given to Ms. Schloser. (CP 975-83) In addition, the union provided its own evaluator, Carol Coar, to assist Ms. Schlosser and to ensure that the district's evaluators, Ms. West and Mr. Westerling, were fair in their evaluation of Ms. Schlosser. (CP 392-94)

During her probationary period, Ms. Schlosser was observed on at least 20 occasions. (CP 985-1142) In an evaluation dated May 10, 2012, Ms. West and Mr. Westerling noted that there continued to be a lack of instruction from bell to bell, a lack of rigor in most of the classes, a lack of clear directions, and poor pacing. (CP 1130-32) While Ms. Schlosser improved in the preparation of lesson plans and posting her targets, she failed to implement these activities in the classroom. There continued to be problems with student behavior and the evaluation noted:

Ms. Schlosser does not consistently deal with inappropriate student behavior. She does not seem to be aware of inappropriate conversations, use of profanity blurted out in the classroom, and students napping during class. While teaching in the computer lab, she doesn't realize that students are on various websites not related to the learning activity. The lack of monitoring does not provide a climate conducive to learning ...

(CP 1133)

Based upon Ms. Schlosser's failure to make adequate improvement, Ms. West and Mr. Westerling recommended to Superintendent Seigel that Ms. Schlosser's employment be nonrenewed for the following school year. (CP 1144) Even the union's evaluator, Carol Coar, did not challenge the recommendation to not renew Ms. Schlosser's contract. (CP 11, 394)

Relying upon the recommendations of two experienced administrators, Superintendent Seigel issued a letter of probable cause for the nonrenewal of Ms. Schlosser's contract on May 11, 2012. (CP 1146)

The Superintendent's letter noted that the nonrenewal of her contract became effective at the end of the 2011-2012 school year (which was August 31, 2012). (CP 1146). In her letter dated May 17, 2012, Ms. Schlosser appealed the decision to not renew her contract. (CP 1148).

A hearing was held before the Honorable Robert Peterson (Ret.). After four days of testimony, involving nine witnesses, 38 exhibits and approximately 800 pages of testimony, Judge Peterson found that "Bethel School District has proven by a preponderance of the evidence that Ms. Schlosser's performance was unsatisfactory in each of the six areas, and in the general category, over a two year period leading up to the May 11 notice of non-renewal." (CP 13) As a result, Judge Peterson concluded that the District had probable cause to issue the notice of nonrenewal: "I am convinced and I do find that by a preponderance of the evidence, probable cause for the notice of nonrenewal of the teaching contract of Lynda Schlosser has been proven." (CP 13)

Ms. Schlosser then appealed Judge Peterson's decision to Pierce County Superior Court. On April 8, 2013, the Honorable K.A. van Doorninck affirmed the decision of the hearing officer. (CP 3262) The court held that the findings of the hearing officer were supported by substantial evidence and were not clearly erroneous and that sufficient cause existed to support the nonrenewal of Ms. Schlosser's contract. (CP 3262; Tr. of 3/22/2013 Hearing at 22-23)

In addition, the court held that "the procedures in RCW 28A.405.210 for nonrenewing an employee satisfy the requirements

of the Due Process clause.” (CP 3263) Moreover, Judge van Doorninck added that Ms. Schlosser suffered no damages even if a reviewing court held that she was entitled to a hearing prior to receiving the notice of probable cause not to renew her contract:

If . . . a reviewing court subsequently holds that Ms. Schlosser was entitled to [a] hearing prior to receiving the notice of probable cause not to renew her contract, then the Court finds that the failure to hold the hearing had de minimis effect and did not damage Ms. Schlosser monetarily because she had an opportunity to be heard prior to receiving the notice and because a hearing was held in September 2012.

(CP 3263). For these reasons, the court affirmed the hearing officer’s decision. (CP 3263).

IV. ARGUMENT

A. Standard of review

The standard of review by the superior court of the hearing officer’s decision is governed by RCW 28A.405.340. Under this standard, the factual determinations of a hearing officer will be upheld unless they are clearly erroneous. *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 670-71, 266 P.3d 932 (2011) *rev. denied*, 174 Wn.2d 1004, 278 P.3d 1111 (2012). As the Washington Supreme Court has stated:

Whether a teacher actually engaged in certain conduct or was deficient in his practices or methods clearly is a factual question. Accordingly, a hearing officer’s findings of fact on such matters should not be disturbed unless clearly erroneous.

Clarke v. Shoreline School Dist., 106 Wn.2d 102, 110, 720 P.2d 793 (1986) (citation omitted).). A finding is “clearly erroneous” when “the reviewing court on the entire record is left with the firm and definite conviction that a mistake has been committed.” *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Whether a teacher actually “was deficient in her practices or methods is a factual question.” *Griffith*, 165 Wn. App. at 671. Whether sufficient cause exists to nonrenew a teacher is a legal conclusion and “should not be disturbed unless it constitutes an error of law.” *Id.* This Court applies the same standard of review as the superior court. *Clarke*, 106 Wn.2d at 110.

Here, the hearing officer, Judge Peterson, concluded that “Bethel School District has proven by a preponderance of the evidence that Ms. Schlosser’s performance was unsatisfactory in each of the six areas, and in the general category, over a two year period leading up to the May 11 notice of non-renewal.” (CP 13) As a result, Judge Peterson held that the District had probable cause to issue the notice of nonrenewal for Ms. Schlosser:

Bethel School District and Lynda Schlosser have been represented by most competent counsel and they have left no stone unturned. After four days of testimony and carefully reviewing the exhibits admitted, I am convinced and I do find that by a preponderance of the evidence, probable cause for the notice of nonrenewal of the teaching contract of Lynda Schlosser has been proven.

(CP 13)

This Court should give deference to Judge Peterson's factual determinations, reviewing them under the clearly erroneous standard. These facts must then be applied to the law governing sufficient cause; only if the Hearing Officer's conclusions of law constitute an error of law should they be set aside. To understand why Judge Peterson held that probable cause existed to nonrenew Ms. Schlosser's contract requires a discussion of Washington law governing the nonrenewal of teachers

B. Washington law provides the framework for identifying and evaluating teacher performance deficiencies and for not renewing contracts because of these deficiencies.

In Washington, the employment of public school teachers is governed by statute. Under RCW 28A.405.210, known as the "continuing contract" statute, teachers are employed for one-year terms which are usually renewed each year. RCW 28A.405.210.² The statute, however, permits school districts to *prevent* the renewal of teacher contracts for cause:

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, . . . which notification shall specify the cause or causes for nonrenewal of contract.

RCW 28A.405.210. Probable or sufficient cause for the "nonrenewal" of a teacher contract typically occurs when a teacher's performance deficiencies or economic difficulties lead a school district to conclude that

² A copy of RCW 28A.405.210 is attached as Appendix B.

the retention of the teacher's services would be inappropriate. *See, e.g., Barnes v. Seattle School District No. 1*, 88 Wn.2d 483, 487, 563 P.2d 199 (1977); *Robel v. Highline School District No. 401*, 605 Wn.2d 477, 485, 398 P.2d 1 (1965).

Teacher performance deficiencies are identified and, if possible, corrected through procedures set forth in RCW 28A.405.100. As directed in RCW 28A.405.100, school principals periodically observe and evaluate teacher performance according to evaluative criteria contained in the collective bargaining agreement between a school district and the union representing the teachers. Such agreements must contain the statutory criteria set forth in RCW 28A.405.100. These criteria are: "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).

If performance deficiencies in any of these areas are found to be sufficiently serious to judge a teacher's performance unsatisfactory, the principal, or principal's designee, may recommend to the superintendent that the teacher be placed on probation for a period of 60 school days. RCW 28A.405.100(4)(a). Observations are conducted during the probationary period to monitor teacher performance carefully.

In addition to the above statutory procedure, the CBA specifies additional steps the District must follow prior to a teacher being placed on probation and ultimately nonrenewed. (CP 1188-94) Most important of the

contractual requirements is the provision for a professional assistance track. Under the CBA, an employee whose work is judged unsatisfactory must be placed in a professional assistance track and an outside evaluator obtained. (CP 367-70, 1189)

1. Uncorrected performance deficiencies constitute “sufficient cause” for nonrenewal.

If teacher performance deficiencies remain uncorrected at the end of the probationary period, RCW 28A.405.100 expressly provides that probable cause for nonrenewal exists:

The probationer may be removed from probation if he or she has demonstrated improvement to the satisfaction of the principal in those areas specifically detailed in his or her initial notice of deficiency and subsequently detailed in his or her improvement program. **Lack of necessary improvement shall be specifically documented in writing with notification to the probationer and shall constitute grounds for a finding of probable cause under RCW ... 28A.405.210 [the nonrenewal statute].**

RCW 28A.405.100(4)(a) (emphasis added).

In addition to this express statutory language, Washington courts have held that performance deficiencies constitute cause for the nonrenewal of a teacher’s contract:

It can hardly be gainsaid that classroom organization, control and discipline are vital to the success of any teaching program. At the very least, teacher failure in this area would constitute sufficient cause for nonrenewal of such teacher’s contract.

Robel, 65 Wn.2d at 485. See also *Potter v. Richland School District No. 400*, 13 Wn. App 316, 534 P.2d 577 (1975) (failure to adequately

supervise students was cause for discharge); *State ex rel. Board of Directors, Dist. 306 v. Preston*, 120 Wash. 569, 208 P. 47 (1922) (disciplinary shortcomings and lack of success in teaching certain subjects held sufficient for discharge).

When a school district's superintendent determines that probable cause exists to nonrenew a teacher's contract, this decision is communicated, in writing, to the teacher, who may request a hearing to determine whether sufficient cause exists for the nonrenewal. RCW 28A.405.210. The hearing procedure is prescribed in RCW 28A.405.310, which closely resembles superior court procedures for cases tried to the court. Under the statute, the hearing must occur within 10 days after the prehearing conference, unless the employee requests a continuance. RCW 28A.405.310(6)(d). The statute requires the use of rules of evidence which are applicable to the superior court of the State of Washington. The statute also provides that:

Any final decision by the hearing officer to nonrenew the employment contract of the employee . . . 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.

RCW 28A.405.310(8).

Here, Ms. Schlosser requested a hearing and that hearing was conducted before Judge Peterson. After a comprehensive four-day hearing, Judge Peterson found that sufficient cause existed for the District to not renew the employment of Ms. Schlosser.

Because Judge Peterson's findings are not clearly erroneous and because he did not commit an error of law in concluding that sufficient cause existed to nonrenew Ms. Schlosser's contract, this Court should affirm the Hearing Officer's decision. In addition, as discussed in the following section, this Court should give weight to the decisions of school administrators. These experienced educators unanimously concluded that Ms. Schlosser's teaching performance warranted the nonrenewal of her teaching contract.

2. This Court should give weight to the judgments of experienced school administrators who all found Ms. Schlosser's performance to be unsatisfactory.

Washington courts have long recognized the expertise of school principals and administrators in evaluating teacher qualifications and performance. For example, in *Arnim v. Shoreline School District No. 412*, 23 Wn. App. 150, 594 P.2d 1380, *rev. denied*, 92 Wn.2d 1022 (1979), the court concluded that the relative merits of candidates for teaching positions were best determined by trained administrators:

Without doubt, the question of the relative qualifications of teachers is one professional educators have more expertise in analyzing than do members of the judiciary. Such decisions are not ones courts historically have made

Arnim, 23 Wn. App. at 156. And in *Clarke*, the Washington Supreme Court, after quoting *Arnim*, refused to set aside a district's determination that the plaintiff was unqualified to teach: "We decline to substitute our judgment for that of the District's Assistant Superintendent." *Clarke*, 106 Wn.2d at 119 n.4.

Furthermore, the extensive procedures set forth both in the statute and in the CBA constitute a barrier to arbitrary and capricious action by a school district to nonrenew a teaching contract. These same procedures also establish a “road map” that a district can follow to nonrenew the employment contract of a teacher who is not adequately performing in the classroom. The system established both by statute and contract relies heavily upon the negotiated criteria for evaluation and the application of those criteria by experienced school administrators. Like Judge Peterson, this Court should be reluctant to substitute its judgment for the judgment of those individuals specified by statute and contract.

Here, Assistant Principal Susan Mayne first determined that Ms. Schlosser’s performance in the key area of instructional skill was unsatisfactory. A second administrator, Assistant Principal Brad Westering, after observing Ms. Schlosser on numerous occasions, determined that Ms. Schlosser’s performance was unsatisfactory in the areas of instructional skill, classroom management, professional preparation and scholarship, effort towards improvement when needed, and knowledge of subject matter.

A third administrator, Ms. Connie West, was hired from outside the District to evaluate Ms. Schlosser and to develop and implement a plan for improvement. Ms. West and Mr. Westering observed Ms. Schlosser on numerous occasions and made several recommendations to improve her teaching. In addition, representatives from Ms. Schlosser’s union also made recommendations designed to improve her teaching. Despite these

recommendations and the efforts of Ms. West and Mr. Westering, Ms. Schlosser's performance remained unsatisfactory. In accordance with Washington law and the CBA, Superintendent Tom Seigel decided not to renew her contract effective at the end of the 2011-2012 school year.

Because sufficient cause existed to not renew Ms. Schlosser's contract, the Hearing Officer upheld the decision to let her contract expire at the end of the school year. Because sufficient cause existed, the District requests that the decision of Judge Peterson be affirmed by this Court.

3. The district followed the appropriate procedures in determining to not renew Ms. Schlosser's contract.

The procedures governing the nonrenewal of teachers are found in RCW 28A.405.210. Under that statute, superintendents determine when there is probable cause for the nonrenewal of a teacher's contract. Employees whose contract is not being renewed are entitled to written notice on or before May 15 stating that the superintendent has determined that there is probable cause for the nonrenewal of their contract at the end of the current school year. The notice should and specifying the cause(s) for such action, state that the employee may appeal the superintendent's determination, and indicate how the appeal may be obtained. RCW 28A.405.210; 28A.405.310. An employee receiving such notice may file a written request for a hearing.

The procedural protections outlined in RCW 28A.405.210, are exactly what has occurred here. In a letter dated May 10, 2012 to Superintendent Seigel, Ms. West and Mr. Westering concluded that

Ms. Schlosser's overall performance remained unsatisfactory and recommended that Ms. Schlosser's employment expire at the end of the 2011-12 school year. Superintendent Seigel then notified Ms. Schlosser by letter dated May 11, 2012 that her contract would not be renewed for the 2012-13 school year. Ms. Schlosser appealed that decision and a hearing was held to determine if District had probable cause to nonrenew her contract.

Here, numerous evaluations conducted by experienced administrators identified several deficiencies in Ms. Schlosser's teaching. Students were napping in her class, using profanity, not paying attention, talking with each other, ignoring classroom protocol, and not responding to her instruction. Even the union's evaluator did not support Ms. Schlosser. Despite extensive attempts at improving her performance, Ms. Schlosser did not improve.

For these reasons, substantial evidence supports the hearing officer's finding that the District established that Ms. Schlosser's performance was unsatisfactory. Because the hearing officer correctly held that sufficient cause existed to not renew Ms. Schlosser's contract, this Court should affirm the decision of the hearing officer.

In her brief, Ms. Schlosser argues that she was entitled to a hearing *before* Superintendent Seigel issued his letter on May 11, 2012 informing her that probable cause existed to not renew her contract for the next school year. App. Br. at 1, 14, 21. Ms. Schlosser made this argument before Judge Peterson who rejected that argument. Judge Peterson

concluded that the District had followed appropriate procedures and that the District was not required to conduct a pre-termination hearing prior to determining that her contract would not be renewed. (CP 12)

Ms. Schlosser then repeated this argument in Superior Court. After requesting additional briefing, the court rejected her argument. (CP 3263) The court found that the procedures in RCW 28A.405.210 satisfied the requirements of the Due Process clause and that Ms. Schlosser had an opportunity to be heard prior to the Superintendent's notice and at the September 2012 hearing. (CP 3263; Tr. of 3/22/2013 Hearing at 23-24).

In her brief, Ms. Schlosser repeats this argument and claims that she was entitled to a "pre-termination hearing" prior to Superintendent Seigel issuing his May 11, 2012 letter. App. Br. at 14. As discussed in the following section, there are numerous reasons why Ms. Schlosser's argument should be rejected.

C. Ms. Schlosser's argument that she was entitled to pre-termination hearing is without merit because: she confuses nonrenewal with discharge, she was not terminated when she received a notice of nonrenewal, she had an opportunity for a hearing, and she has had a hearing to contest her nonrenewal.

Ms. Schlosser's misguided claim that she is entitled to a hearing before getting a letter informing her that her contract will not be renewed for the next school year stems from her misunderstanding of the different procedures governing teacher *nonrenewal* from teacher *discharge*. Although Ms. Schlosser acknowledges that "Discharge and nonrenewal are separate and distinct methods of school district employee termination,

which have different elements” App. Br. at 44, Ms. Schlosser ignores this difference when discussing the procedures governing nonrenewal.

As discussed in the following sections, Ms. Schlosser’s attempt at grafting the procedures for discharge onto the procedures for nonrenewal is not required by Washington law, by U.S. Supreme Court precedent, or by the facts of this case. Moreover, requiring school districts to hold hearings prior to issuing notices of nonrenewal would have significant, and potentially disastrous, consequences as school districts in Washington may issue thousands of nonrenewal notices in any given year. For these reasons, Ms. Schlosser’s claim that she is entitled to a pre-termination hearing should be rejected.

1. There is a fundamental difference between nonrenewal and discharge and this difference dictates the due process protections received by Ms. Schlosser.

Under RCW 28A.405.210, the District may elect to not renew the employment contract of a teacher for the next school year. Nonrenewal may be for financial reasons or for performance deficiencies, and it severs the employment relationship prospectively at the end of the current school year. Conversely, *discharge*, which is typically for employee misconduct, can occur at any time. Discharge is governed by the procedures found in RCW 28A.405.300.

If Ms. Schlosser had been discharged for misconduct on May 11, 2012, then she would have been entitled to a pre-termination hearing. This pre-termination hearing is called a *Loudermill* hearing after the Supreme Court’s holding in *Cleveland Board of Education v.*

Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). In *Loudermill*, a security guard for a school district was fired for failing to disclose a felony conviction on his job application. The employee claimed that he was fired before he was afforded an opportunity to respond to the charge of dishonesty or to challenge his dismissal. *Loudermill*, 470 U.S. at 535. The Court held that the employee was entitled to a hearing before being terminated:

The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. [citations omitted]. *To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.*

Loudermill, 470 U.S. at 546 (emphasis added). Thus, *Loudermill* is an employee discharge case, requiring that the employee be terminated, and is inapplicable to the notice of nonrenewal of a teacher for performance deficiencies.

A more relevant case involving the nonrenewal of a professor's contract is *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), a case that is largely ignored by Ms. Schlosser. As discussed below, it is *Roth* and the Washington cases that apply its principles that govern this case.

2. Neither *Roth* nor Washington case law require a hearing prior to issuing a notice of nonrenewal.

In *Roth*, the U.S. Supreme Court interpreted the Fourteenth Amendment's protection of a person's liberty or property interest to determine whether procedural due process requirements, namely a statement of reasons and a hearing, applied to a school's decision not to renew a non-tenured teacher's one-year contract. *Roth*, 408 U.S. at 569. The Court held that nonrenewal did not implicate the non-tenured teacher's right to liberty because it did not "seriously damage his standing and associations in his community," such as would a charge of dishonesty or immorality. *Roth*, 408 U.S. at 573. Neither did the non-tenured teacher have a property right in having his one-year contract renewed because the contract expressly terminated on a specific date. *Roth*, 408 U.S. at 578. Nothing in state law rules or otherwise entitled the non-tenured teacher to the right to have his one-year contract renewed. *Roth*, 408 U.S. at 578. Finding no liberty or property interest in having the contract renewed, the Court held that the Fourteenth Amendment's procedural due process requirements do not require a hearing in which the non-tenured teacher could challenge the school's decision not to renew his one-year contract. *Roth* at 579. As the *Roth* court held: "the respondent . . . did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." *Roth*, 408 U.S. at 577-78.³

³ The teacher in *Roth* even claimed that he had a right to re-employment because most teachers were routinely re-hired each year. The Court

Thus, under *Roth*, nonrenewal decisions require no hearing, much less the pre-termination hearing which Ms. Schlosser mistakenly believes she is entitled to under existing law.

Washington has long followed the nonrenewal/discharge distinction under *Roth* and *Loudermill*. See, e.g., *Barnes*, 88 Wn.2d at 487-88 (the discharge statute was unavailable to terminate employees whose positions had been eliminated because of the adverse financial condition of the district); *Pierce v. Lake Stevens School District*, 84 Wn.2d 772, 529 P.2d 810 (1974) (citing *Roth* for the proposition that different procedures govern nonrenewal and discharge); *Petroni v. Bd. of Directors of Deer Park Sch. Dist. No. 414*, 127 Wn. App. 722, 113 P.3d 10 (2005) (the procedural protections governing discharge do not apply to the nonrenewal of a teacher); and *Carlson v. Centralia School District*, 27 Wn. App. 599, 619 P.2d 998 (1980) (Washington's statutory process for teacher nonrenewal satisfies due process requirements, citing *Pierce*).

In *Pierce*, for example, the court noted that different procedures govern nonrenewal and discharge. *Pierce*, 84 Wn.2d at 775-76. The court then held that the statutory notice requirement for the nonrenewal of a teacher satisfied due process. 84 Wn.2d at 777 (“The procedural requirements of due process as laid down by the Supreme Court in the cited cases are met by these statutes.”) Thus, the *Pierce* court held that the

dismissed that argument in a footnote, noting that there is no common law right to re-employment. *Roth*, 408 U.S. at 578 n.16

district's notice of nonrenewal did not violate the teachers' due process rights nor their rights under RCW 28A.67.070 (now RCW 28A.405.210).

Similarly, in *Petroni*, the court considered a teacher's argument that the procedures governing discharge should govern her nonrenewal. *Petroni*, 127 Wn. App. 727-28. The *Petroni* court began by noting the differences between nonrenewal and discharge:

Here, the Board did not discharge Ms. Petroni and the Board's decision did not adversely affect her contract status. By making a nonrenewal decision, the Board afforded Ms. Petroni the opportunity to find another job while receiving pay for the remainder of the contract period.

Id. at 728. Applying this principle, the *Petroni* court held that the procedural protections governing discharge did not apply to the nonrenewal of a teacher. *Id.* at 729 (“the procedural protections of RCW 28A.405.310 [governing teacher discharge] do not apply to a provisional teacher receiving a notice of nonrenewal.”)

See also *Barnes*, 88 Wn.2d at 487-88, where the court held that the discharge statute could not be used to terminate employees whose positions had been eliminated because of the district's poor financial condition. The court stated that the nonrenewal statute was the exclusive means to terminate certificated employees for financial reasons. *Id.* at 488-89.

Similarly, Division II of the Court of Appeals held in *Carlson v. Centralia School District*, 27 Wn. App. 599, 619 P.2d 998 (1980), that the procedures in RCW 28A.67.070 (now RCW 28A.405.210) applied to the nonrenewal of teachers and that these statutory protections satisfied due

process. *Id.* at 605 (“The statutory requirements of RCW 28A.67.070 derive from due process requirements.”) Because the notice given to the teachers complied with RCW 28A.67.070, the court found no due process violations had occurred. *Id.*

As *Pierce*, *Petroni*, *Barnes*, and *Carlson* establish, the nonrenewal and discharge statutes are not interchangeable. Under *Roth* and the Washington cases discussed above, the procedural protections applicable in a teacher discharge case should not be imposed upon nonrenewal.

Moreover, Washington is a non-tenure state. *Kirk v. Miller*, 83 Wn.2d 777, 780, 522 P.2d 843, 845-46 (1974). By statute, Washington teachers have one-year contracts that automatically renew in the absence of a nonrenewal notice. *Kirk*, 83 Wn.2d at 780. This system of one-year contracts does not establish the system of tenure that some other states provide. *Id.* (“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”)

These distinctions between teacher nonrenewal versus discharge and between teachers on continuing contract versus tenure are important here because they dictate the applicable legal precedent. This is a case of nonrenewal of a teacher on a one-year contract. It is not a teacher discharge case, or a case of nonrenewal of a tenured teacher. Ms. Schlosser did not have tenure; she had a one-year contract with no guarantee of renewal. Therefore, *Roth* and its Washington progeny (e.g., *Barnes*, *Pierce*, *Petroni* and *Carlson*) control this case.

Remarkably, however, Ms. Schlosser's brief mentions *Roth* only in a parenthetical, Appellant's brief at 18, while completely ignoring the *Pierce, Barnes, Carlson, and Kirk* cases. Rather than discussing nonrenewal cases, Ms. Schlosser relies solely on teacher discharge, teacher tenure, or other cases from other jurisdictions with circumstances that are irrelevant to this case. Indeed, Ms. Schlosser cites *no* case from *any* jurisdiction, holding that due process requires a hearing before a school district may decide not to renew, or issue a notice of probable cause not to renew, a non-tenured teacher's one-year contract at the end of its term.

3. The cases cited by Ms. Schlosser are irrelevant because they involve discharge or arise in tenure states not applicable to Washington.

The cases cited by Ms. Schlosser in support of her pre-termination argument are primarily discharge cases that do not apply to this case. For example, in *Giedra v. Mount Adams Sch. Dist. No. 209*, 126 Wn. App. 840, 844, 110 P.3d 232 (2005), cited on page 22 of Appellant's brief as "controlling," the employee was *discharged* immediately on November 12, after the district learned that the teacher had let his certificate lapse.

Similarly, page 19 of Ms. Schlosser's brief cites another discharge case, *Bellevue Pub. Sch. Dist. No. 405 v. Benson*, 41 Wn. App. 730, 707 P.2d 137 (1985), where a principal was demoted and suspended without pay before he was given the opportunity for a hearing. *Id.* at 733. The *Benson* court noted that under RCW 28A.58.450 (the precursor to RCW 28A.405.300) "an employee cannot be notified of the *discharge* as a

fait accompli but must first be afforded an opportunity to be heard.” *Id.* at 735 (emphasis added).

Giedra, Benson, and Loudermill are all discharge cases with little relevance here. In addition to these cases, Ms. Schlosser’s brief cites the following cases that do not apply to the nonrenewal of a teacher in non-tenure state like Washington: *McDaniel v. Princeton City Sch. Dist. Bd. of Educ.*, 72 F. Supp. 2d 874 (S.D. Ohio 1999) (discharge); *McMillen v. U.S.D. No. 380, Marshall County, Kan.*, 855 P.2d 896 (Kan. 1993) (tenure); *Lee v. Giangreco*, 490 N.W.2d 814 (Iowa 1992) (tenure); and *Coggin v. Longview Indep. Sch. Dist.*, 337 F.3d 459 (5th Cir. 2003) (discharge); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 905, 47 L. Ed.2d 18 (1976) (whether a hearing is required prior to termination of disability benefits);⁴ *Stana v. Sch. Dist. of City of Pittsburgh*, 775 F.2d 122 (3d Cir. 1985) (whether bypassing a teacher’s name from a list of eligible teachers for hire violated due process); *Grounds v. Tolar Indep. Sch. Dist.*, 856 S.W.2d 417 (Tex. 1993) (whether the nonrenewal notice complied with statutory requirements); *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 776 (9th Cir. 1982) (teacher discharged after female students complained of offensive conduct by teacher).

⁴ The *Mathews* case, cited throughout Appellant’s brief, is not an employment case. Instead, *Mathews* is disability benefits case where the Court held that a hearing was *not* required prior to termination of disability benefits. *Mathews*, 424 U.S. at 340.

In addition, the case Ms. Schlosser calls “most instructive,”⁵ *Short v. Kiamichi Area Voc. Tech. School Dist. No. 7 of Choctaw County*, 761 P.2d 472 (Okla. 1988), is a case that can be distinguished on two grounds. First, it is a teacher *tenure* case. The *Short* case began its analysis by citing U.S. Supreme Court precedent holding that: “due process requires that *tenured* public employees must be afforded some form of pretermination opportunity to respond to charges leading to dismissal.” *Id.* at 474 (emphasis added). The *Short* case then held that a *tenured* teacher had the right to pretermination hearing. *Id.* at 477 (“a pretermination hearing must be offered to a tenured teacher.”) Washington, however, is not a tenure state. *See Kirk, supra*. Thus, the due process requirements for a tenured teacher do not apply here. *See e.g., Roth*.

Second, *Short* did *not* require a hearing prior to the superintendent’s determination that probable cause existed to not renew the teacher’s contract. Under Oklahoma law in effect at that time (unlike Washington law), the superintendent notified the school board, and not the teacher, that probable cause exists to not renew a teacher: “Whenever a superintendent of a school district determines that cause exists for the dismissal or nonreemployment of a teacher employed within the school district, he or she shall submit a recommendation in writing to the board of education for such school district.” *Id.* at 481 (quoting 70 O.S.1981, §§ 6–103.4).⁶ If it decided to not renew the teacher, the board informs the

⁵ Page 30 of Appellant’s brief.

⁶ 70 O.S.1981, §§ 6–103.4 was repealed in 1989.

teacher of the nonrenewal as a fait accompli: “If the local board of education approves the recommendation of the superintendent, . . . the board shall cause written notice of the dismissal or nonreemployment to be mailed . . . to the teacher.” *Id.* (quoting Oklahoma statute § 6–103.4). Indeed, the teacher in *Short* was notified by the school board that his employment was not being renewed. *Id.* at 474 (“On April 2, 1985, the School board advised the teacher by certified mail that his teaching contract was being nonrenewed.”) Because the *Short* case did not require a hearing prior to the superintendent’s initial determination that probable cause existed to not renew the teacher’s contract and because it is a tenure case, it has little relevance here.

Ms. Schlosser, however, is requesting that this Court hold that the district was required to hold a hearing prior to Superintendent’s Seigel’s determination in May 2012 that probable cause existed to not renew her contract. Such an outcome is not supported by *Short*, *Roth*, or any Washington case.

Indeed, Ms. Schlosser cites to no authority from any state or other jurisdiction that contradicts *Roth* regarding the process due a non-tenured teacher facing nonrenewal of a one-year contract. Nor does she cite to any case that requires a hearing before a district issues a notice of probable cause of non-renewal with no tenure.

Roth and its Washington progeny articulate the Constitutional due process to which Ms. Schlosser, as a non-tenured teacher facing nonrenewal of her one-year contract, is entitled. In fact, because the

district here followed Washington statute and the CBA, it provided Ms. Schlosser with *greater* due process protection than required under *Roth* because it provided her with a right to a hearing under RCW 28A.405.210 and .310.

D. The procedural due process protections received by Ms. Schlosser far transcended those required by *Roth*.

Even before Judge Peterson held that the district had probable cause to issue its notice of nonrenewal, the district's procedures gave Ms. Schlosser many opportunities to be heard. To summarize, Ms. Schlosser's classroom performance had been evaluated since 2008 by four different, experienced educators, one of whom was independent and retained by Ms. Schlosser's union representative as an evaluator not affiliated with the school district. In many meetings with these evaluators between 2008-2012, Ms. Schlosser was given ample opportunity to voice her concerns and participate in the process of improving her performance. When Ms. Schlosser's classroom performance did not sufficiently improve over those four years, she was put on probation in February of the 2011-2012 school year. The district superintendent then timely notified Ms. Schlosser in writing on May 11, 2012, that he had found probable cause to not renew Ms. Schlosser's contract for the ensuing school year due to poor performance. That notice did not terminate Ms. Schlosser's employment. Neither did the hearing officer's decision, which affirmed the district superintendent's finding of probable cause after a four-day hearing. Rather, when the school board did not act to renew her contract,

Ms. Schlosser's employment with the district terminated on August 31, 2012, by the terms of her one-year contract and in accordance with Washington law, the CBA and the Fourteenth Amendment of the U.S. Constitution.

There were no surprises here. Ms. Schlosser knew well before she received the nonrenewal notice on May 11, 2012 that the district considered her performance lacking, and she was given numerous opportunities to address those deficiencies.

Throughout, the district afforded Ms. Schlosser more procedural due process than required by the Fourteenth Amendment under the precedent set forth in *Roth*. She even received more procedural due process than required under *Loudermill*, whose due process pre-termination hearing—which amounted to nothing more than discussing his transgression during an informal meeting with his supervisor just before he was fired—was much less formal than the hearing Ms. Schlosser received. *See Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304 (6th Cir. 1988), *cert. denied*, 488 U.S. 941 (1988).

That Ms. Schlosser has had ample opportunity to be heard was acknowledged in Judge van Doorninck's order affirming the hearing officer's decision, where the court stated that Ms. Schlosser "had an opportunity to be heard prior to receiving the notice and because a hearing was held in September 2012."

E. Requiring a pre-termination or pre-notice of nonrenewal hearing for every nonrenewal would overburden school districts throughout Washington.

Often, a district superintendent will determine that there is probable cause not to renew a teacher's contract for financial reasons requiring a reduction in force, or "RIF." RCW 28A.405.210. At times, these RIF notifications have been sent to a large number of teachers throughout the state. In the spring of 2009, for example, 137 of Washington's 295 school districts issued RIF notices to more than 1800 classroom teachers—representing 3% of *all* teachers in Washington.⁷ The Bethel School District itself issued 67 RIF notices in 2011 and 220 RIF notices in 2009. (CP 3234-38).

Requiring a district to provide a *Loudermill* hearing for each teacher prior to each RIF notice would be overly burdensome on a school district's limited resources. In 2009, for example, more than 1800 hearings would have been required throughout the state. Thus, granting the relief that Ms. Schlosser requests would result in significantly overburdening school districts throughout Washington.

V. CONCLUSION

Ms. Schlosser's primary argument that the procedures governing teacher discharge should apply to the nonrenewal of an employment contract is not supported by the law or by the facts of this case. Under

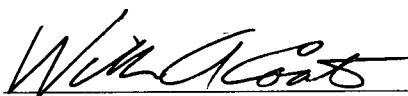
⁷ M.L. Plecki, et al., *Examining the Impact of Reduction in Force (RIF) Notices in Washington School Districts: 2009-2010*, University of Washington College of Education (2010). (reprinted at CP 3204-32)

RCW 28A.405.210 and the case law governing nonrenewal, a school district must issue written notice of nonrenewal of employee's contract on or before May 15th and grant that employee an opportunity for a hearing. Here, it is uncontroverted that the District complied with these requirements: the Superintendent issued his notice on May 11, 2012 and Ms. Schlosser had a four-day hearing before Judge Peterson. Ms. Schlosser has no right, under the U.S. Constitution or Washington law, to a hearing before Superintendent Seigel issued his notice of probable cause to not renew her contract.

Because sufficient cause existed to not renew Ms. Schlosser's teaching contract, the District requests that this Court affirm the decision of the hearing officer.

RESPECTFULLY SUBMITTED this 25 th day of July, 2013.

VANDEBERG JOHNSON &
GANDARA, LLP

By 
William A. Coats, WSBA #4608
Daniel C. Montopoli, WSBA #26217
Attorneys for Respondent
Bethel School District

Appendix A

- 28A.405.360 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appellate review.
- 28A.405.370 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Other statutes not applicable.
- 28A.405.380 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Direct judicial appeal, when.

SALARY AND COMPENSATION

- 28A.405.400 Payroll deductions authorized for employees.
- 28A.405.410 Payroll deductions authorized for certificated employees—Savings.
- 28A.405.415 Bonuses—National board for professional standards certification.

MISCELLANEOUS PROVISIONS

- 28A.405.460 Lunch period for certificated employees.
- 28A.405.465 Use of classified personnel to supervise in noninstructional activities.
- 28A.405.466 Presence of certificated personnel at schools before and after school—Policy.

TERMINATION OF CERTIFICATED STAFF

- 28A.405.470 Crimes against children—Mandatory termination of certificated employees—Appeal—Recovery of salary or compensation by district.
- 28A.405.475 Termination of certificated employee based on guilty plea or conviction of certain felonies—Notice to superintendent of public instruction—Record of notices.
- 28A.405.900 Certain certificated employees exempt from chapter provisions.

Assistance of certificated or classified employee—Reimbursement for substitute RCW 28A 300.035

Conditional scholarship and loan repayment program for future teachers. Chapter 28B.102 RCW.

Educational employment relations act. Chapter 41.59 RCW.

QUALIFICATIONS

28A.405.030 Must teach morality and patriotism. It shall be the duty of all teachers to endeavor to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism; to teach them to avoid idleness, profanity and falsehood; to instruct them in the principles of free government, and to train them up to the true comprehension of the rights, duty and dignity of American citizenship. [1969 ex.s. c 223 § 28A.67.110. Prior: 1909 c 97 p 308 § 8; RRS § 4855; prior: 1897 c 118 § 58; 1890 p 371 § 42; 1886 p 19 § 50; Code 1881 § 3203. Formerly RCW 28A.67.110, 28.67.110.]

28A.405.040 Disqualification for failure to emphasize patriotism—Penalty. (1) No person, whose certificate or permit authorizing him or her to teach in the common schools of this state has been revoked due to his or her failure to endeavor to impress on the minds of his or her pupils the principles of patriotism, or to train them up to the true comprehension of the rights, duty and dignity of American citizenship, shall be permitted to teach in any common school in this state.

(2) Any person teaching in any school in violation of this section, and any school director knowingly permitting any person to teach in any school in violation of this section is guilty of a misdemeanor. [2003 c 53 § 167; 1990 c 33 § 384; 1969 ex.s. c 223 § 28A.67.030. Prior: 1919 c 38 § 2; RRS § 4846. Formerly RCW 28A.67.030, 28.67.030.]

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

28A.405.060 Course of study and regulations—Enforcement—Withholding salary warrant for failure.

Certificated employees shall faithfully enforce in the common schools the course of study and regulations prescribed, whether regulations of the district, the superintendent of public instruction, or the state board of education, and shall furnish promptly all information relating to the common schools which may be requested by the educational service district superintendent.

Any certificated employee who wilfully refuses or neglects to enforce the course of study or the rules and regulations as above in this section required, shall not be allowed by the directors any warrant for salary due until said person shall have complied with said requirements. [1975 1st ex.s. c 275 § 132; 1971 c 48 § 49; 1969 ex.s. c 223 § 28A.67.060. Prior: (i) 1909 c 97 p 307 § 4; RRS § 4850; prior: 1899 c 142 § 11; 1897 c 118 § 54; 1886 p 18 § 47. Formerly RCW 28.67.060. (ii) 1909 c 97 p 360 § 8; RRS § 5051; prior: 1903 c 156 § 8; 1897 c 118 § 166. Formerly RCW 28A.67.060, 28.87.150.]

28A.405.070 Job sharing. Effective December 31, 1995, school and educational service districts shall have a policy on the sharing of jobs by district employees. [1995 c 335 § 701; 1989 c 206 § 1. Formerly RCW 28A.58.580.]

Additional notes found at www.leg.wa.gov

CRITERIA FOR EVALUATION AND MODEL PROGRAMS



28A.405.100 Minimum criteria for the evaluation of certificated employees, including administrators—Procedure—Scope—Models—Penalty. (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)(b) of this section, every board of directors shall, in accordance with procedures provided in

RCW 41.59.92 level rat (b) instructi demonstr individu address focus or and ma using n and im laborat (viii) ex on imp (c) tificate a conti have b availat referen tiple n based, subsec achiev (3 tion, it desigr schoo certifi poses assign for ea empl RCW the pe time : Follo princ resul empl repor once first secti catec who uatic of d men be ti Imp new tor l sigt sch sha per em (201

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.

(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. When student growth data, if available and relevant to the teacher and subject matter, is referenced in the evaluation process it 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.

(3)(a) Except as provided in subsection (10) 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.

(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. 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. 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; 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. The probationer may be removed from probation if he or she has demonstrated improvement to the satisfaction of the principal in those areas specifically detailed in his or her initial notice of deficiency and subsequently detailed in his or her improvement program. Lack of necessary improvement during the established probationary period, as specifically documented in writing with notification to the probationer and shall constitute grounds for a finding of probable cause under RCW 28A.405.300 or 28A.405.210.

(b) Immediately following the completion of a probationary period that does not produce performance changes detailed in the initial notice of deficiencies and improvement program, the employee may be removed from his or her assignment and placed into an alternative assignment for the remainder of the school year. 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.

(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. When available, student growth data that is referenced in the evaluation process 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.

(7)(a) The superintendent of public instruction, in collaboration with state associations representing teachers, principals, administrators, and parents, 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 (c) of this subsection and implemented in all school districts beginning with the 2013-14 school year.

(c) 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 super-

intendent 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.

(8) 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.

(9) 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.

(10) After a certificated classroom teacher or certificated support personnel has four years of satisfactory evaluations under subsection (1) of this section or has received one of the two top ratings for four years under subsection (2) 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 autho-

rized 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. [2010 c 235 § 202; 1997 c 278 § 1; 1994 c 115 § 1; 1990 c 33 § 386; 1985 c 420 § 6; 1975-'76 2nd ex.s. c 114 § 3; 1975 1st ex.s. c 288 § 22; 1969 ex.s. c 34 § 22. Formerly RCW 28A.67.065.]

Finding—2010 c 235: See note following RCW 28A.405.245.

Construction of chapter—Employee's rights preserved: See RCW 41.59.920.

Construction of chapter—Employer's responsibilities and rights preserved: See RCW 41.59.930.

Criteria used for evaluation of staff members to be included in guide: RCW 28A.150.230.

Additional notes found at www.leg.wa.gov

28A.405.102 Analysis of evaluation systems. (1) Representatives of the office of the superintendent of public instruction and statewide associations representing administrators, principals, human resources specialists, and certificated classroom teachers shall analyze how the evaluation systems in RCW 28A.405.100 (2) and (6) affect issues related to a change in contract status.

(2) The analysis shall be conducted during each of the phase-in years of the certificated classroom teacher and principal evaluation systems. The analysis shall include: Procedures, timelines, probationary periods, appeal procedures, and other items related to the timely exercise of employment decisions and due process provisions for certificated classroom teachers and principals. [2010 c 235 § 204.]

Finding—2010 c 235: See note following RCW 28A.405.245.

28A.405.104 Professional development funding for new teachers—Districts participating in evaluation system in RCW 28A.405.100 (2) and (6). If funds are provided for professional development activities designed specifically for first through third-year teachers, the funds shall be allocated first to districts participating in the evaluation systems in RCW 28A.405.100 (2) and (6) before the required implementation date under that section. [2010 c 235 § 205.]

Finding—2010 c 235: See note following RCW 28A.405.245.

28A.405.110 Evaluations—Legislative findings. The legislature recognizes the importance of teachers in the educational system. Teachers are the fundamental element in assuring a quality education for the state's and the nation's children. Teachers, through their direct contact with children, have a great impact on the development of the child. The legislature finds that this important role of the teacher requires an assurance that teachers are as successful as possible in attaining the goal of a well-educated society. The legislature finds, therefore, that the evaluation of those persons seeking to enter the teaching profession is no less important than the evaluation of those persons currently teaching. The evaluation of persons seeking teaching credentials should be strenuous while making accommodations uniquely appropriate to the applicants. Strenuous teacher training and preparation should be complemented by examinations of prospective

(2010 Ed.)

teachers prior to candidates being granted official certification by the professional educator standards board. Teacher preparation program entrance evaluations, teacher training, teacher preparation program exit examinations, official certification, in-service training, and ongoing evaluations of individual progress and professional growth are all part of developing and maintaining a strong precertification and postcertification professional education system.

The legislature further finds that an evaluation system for teachers has the following elements, goals, and objectives: (1) An evaluation system must be meaningful, helpful, and objective; (2) an evaluation system must encourage improvements in teaching skills, techniques, and abilities by identifying areas needing improvement; (3) an evaluation system must provide a mechanism to make meaningful distinctions among teachers and to acknowledge, recognize, and encourage superior teaching performance; and (4) an evaluation system must encourage respect in the evaluation process by the persons conducting the evaluations and the persons subject to the evaluations through recognizing the importance of objective standards and minimizing subjectivity. [2006 c 263 § 806; 1985 c 420 § 1. Formerly RCW 28A.67.205.]

Findings—Purpose—Part headings not law—2006 c 263: See notes following RCW 28A.150.230.

Reviser's note: (1) 1985 ex.s. c 6 § 501 provides specific funding for the purposes of this act.

(2) 1985 ex.s. c 6 took effect June 27, 1985.

Additional notes found at www.leg.wa.gov

28A.405.120 Training for evaluators. School districts shall require each administrator, each principal, or other supervisory personnel who has responsibility for evaluating classroom teachers to have training in evaluation procedures. [1995 c 335 § 401; 1985 c 420 § 3. Formerly RCW 28A.67.210.]

Additional notes found at www.leg.wa.gov

28A.405.130 Training in evaluation procedures required. No administrator, principal, or other supervisory personnel may evaluate a teacher without having received training in evaluation procedures. [1985 c 420 § 4. Formerly RCW 28A.67.215.]

Additional notes found at www.leg.wa.gov

28A.405.140 Assistance for teacher may be required after evaluation. After an evaluation conducted pursuant to RCW 28A.405.100, the principal or the evaluator may require the teacher to take in-service training provided by the district in the area of teaching skills needing improvement, and may require the teacher to have a mentor for purposes of achieving such improvement. [1993 c 336 § 403; 1990 c 33 § 387; 1985 c 420 § 5. Formerly RCW 28A.67.220.]

Findings—Intent—Part headings not law—1993 c 336: See notes following RCW 28A.150.210.

Findings—1993 c 336: See note following RCW 28A.150.210.

Additional notes found at www.leg.wa.gov

CONDITIONS AND CONTRACTS OF EMPLOYMENT

28A.405.200 Annual salary schedules as basis for salaries of certificated employees. Every school district by

Appendix B

action of its board of directors shall adopt annual salary schedules and reproduce the same by printing, mimeographing or other reasonable method, which shall be the basis for salaries for all certificated employees in the district. [1969 ex.s. c 283 § 1. Formerly RCW 28A.67.066, 28.67.066.]

Additional notes found at www.leg.wa.gov

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. 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 follow-

ing 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. [2010 c 235 § 303; 2009 c 57 § 1; 2005 c 497 § 216; 1996 c 201 § 1; 1990 c 33 § 390. Prior: 1983 c 83 § 1; 1983 c 56 § 11; 1975-'76 2nd ex.s. c 114 § 4; 1975 1st ex.s. c 275 § 133; 1973 c 49 § 2; 1970 ex.s. c 15 § 16; prior: 1969 ex.s. c 176 § 143; 1969 ex.s. c 34 § 12; 1969 ex.s. c 15 § 2; 1969 ex.s. c 223 § 28A.67.070; prior: 1961 c 241 § 1; 1955 c 68 § 3; prior: (i) 1909 c 97 p 307 § 5; 1897 c 118 § 55; 1891 c 127 § 14; 1890 p 369 § 37; 1886 p 18 § 47; Code 1881 § 3200; RRS § 4851. (ii) 1943 c 52 § 1, part; 1941 c 179 § 1, part; 1939 c 131 § 1, part; 1925 ex.s. c 57 § 1, part; 1919 c 89 § 3, part; 1915 c 44 § 1, part; 1909 c 97 p 285 § 2, part; 1907 c 240 § 5, part; 1903 c 104 § 17, part; 1901 c 41 § 3, part; 1897 c 118 § 40, part; 1890 p 364 § 26, part; Rem. Supp. 1943 § 4776, part. Formerly RCW 28A.67.070, 28.67.070.]

Finding—2010 c 235: See note following RCW 28A.405.245.

Effective date—2009 c 57: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 10, 2009]." [2009 c 57 § 5.]

Intent—Part headings not law—Effective date—2005 c 497: See notes following RCW 28A.305.011.

Minimum criteria for the evaluation of certificated employees, including administrators—Procedure—Scope—Models—Penalty: RCW 28A.405.100.

School superintendent—RCW 28A.405.210 not applicable to contract renewal: RCW 28A.400.010.

Additional notes found at www.leg.wa.gov

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 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

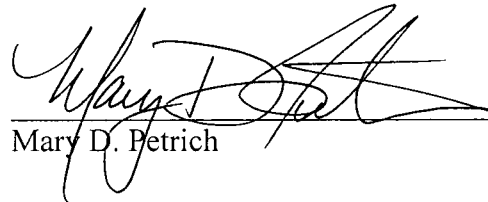
1. Brief of Respondent;
2. Declaration of Service;

Properly addressed to the following person:

Richard H. Wooster
Kram & Wooster
Attorneys at Law
1901 South I Street
Tacoma, WA 98405

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

Signed at Tacoma, Pierce County, Washington this 25th day of July 2013.



Mary D. Petrich

Vandenberg Johnson & Gandara, LLP
1201 Pacific Avenue, Suite 1900
Tacoma, WA 98401-1315
(253) 383-3791
(253) 383-6377 fax

DECLARATION OF SERVICE- 2

FILED
COURT OF APPEALS
DIVISION II

2013 JUL 25 PM 3:05

STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

In the Matter of)	Pierce County Superior Court
)	Cause No. 12-2-14163-6
LYNDA SCHLOSSER,)	
)	Court of Appeals Cause
Appellant,)	No. 44750-9-II
)	
v.)	DECLARATION OF
)	SERVICE
BETHEL SCHOOL DISTRICT,)	
)	
Respondent.)	
_____)	

KNOW ALL PERSONS BY THESE PRESENTS: That I, Mary D. Petrich, the undersigned, of Fox Island, in the County of Pierce and State of Washington, have declared and do hereby declare:

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

That on the 25th day of July, 2013, I delivered via ABC Legal Messenger a copy of the following documents:

DECLARATION OF SERVICE- 1