No.45830-6-II

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

WANDA RILEY-HORDYK,

Appellant,

v.

BETHEL SCHOOL DISTRICT,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Because of declining enrollment and decreased funding, the Bethel School District closed the Bethel Online Academy (BOA) prior to the 2012-13 school year. Wanda Riley-Hordyk was principal of the BOA and her contract was not renewed when the online school was closed. Consistent with state law and the District's contractual obligations, the District offered Ms. Riley-Hordyk the opportunity to *apply* for other administrative positions in the District. She declined to apply, and instead claimed that she had the right to automatically *transfer* to an open position of her choosing. When the District did not renew her contract and did not transfer her to a new position, Ms. Riley-Hordyk appealed the nonrenewal of her contract.

The hearing officer upheld the District's decision. The hearing officer found that the District exercised good faith judgment in electing to close the BOA and that neither state law nor the collective bargaining agreement with the Bethel Principal's Association required the District to transfer Ms. Riley-Hordyk to another Principal position. In addition, the hearing officer rejected Ms. Riley-Hordyk's claim that *Peters v. South Kitsap School District,* 8 Wn. App. 809, 509 P.2d 67 (1973), required the District to transfer her to an open Principal position.

For these reasons, the hearing officer concluded that the District had sufficient cause to not renew Ms. Riley-Hordyk's contract. Because the hearing officer's finding of fact were not clearly erroneous, because

the hearing officer did not err in concluding that the District had sufficient cause, and because the *Peters* case has no bearing on this case, the superior court affirmed the hearing officer's decision. For the same reasons, this Court should affirm the decision of the superior court.

II. RESTATEMENT OF THE ISSUES

1. Are the hearing officer's findings of fact—that the District closed the BOA and eliminated Ms. Riley-Hordyk's position after the District projected an operating loss of $330,00 for the BOA combined with declining revenue and enrollment for the District—not clearly erroneous when these findings were supported by the record?

2. Did the hearing officer correctly conclude that the District had sufficient cause to issue the notice of nonrenewal of Ms. Riley-Hordyk's employment contract?

3. Did the hearing officer correctly conclude that the District was not required to automatically transfer Ms. Riley-Hordyk to another principal position of her choosing, when such a transfer is not required by statute or the collective bargaining agreement?

III. COUNTERSTATEMENT OF THE CASE

A. Ms. Riley-Hordyk becomes principal of the Bethel Online Academy.

Prior to becoming principal of BOA, Ms. Riley-Hordyk had been principal of Bethel High School. Clerk's Papers (CP) 138. During the 2009-10 school year, issues arose concerning her performance, including allegations that she had kicked a student, and she was removed from the

position and placed on administrative leave. Clerk's Papers (CP) 79-80, 150. Ms. Riley-Hordyk filed a lawsuit against the District, which was ultimately resolved in a settlement agreement where she agreed to become principal of BOA:

> Wanda Riley-Hordyk agrees to accept the position as principal of the Bethel Online Academy and the District has agreed to employ her on a continuing contract basis for the remainder of the 2010-11 school year and for the 2011-12 school year. This Agreement does not alter Ms. Riley-Hordyk's status as being on a continuing contract, and nothing in this provision is intended to imply that the District may terminate Ms. Riley-Hordyk's employment after the 2011-12 school year. Rather, this provision is simply meant to state what assignments will be held by Ms. Riley-Hordyk for the periods established above.

Agreement between Bethel School District and Ms. Riley-Hordyk, dated May 4, 2011 ("Settlement Agreement"). CP 384-88.

The Settlement Agreement stated that Ms. Riley-Hordyk would have the various benefits and rights as set forth in the collective bargaining agreement between the Bethel Principal's Association and the Bethel School District. CP 385. The collective bargaining agreement with the Bethel Principal's Association provided that administrators who lost their job due to a reduction in force only had the right to be considered for an open teaching position. CP 402 (Art. 9, Sect. 8 of the Agreement Between Bethel's Principal's Association and Bethel School District) ("collective bargaining agreement" or "CBA"). The CBA did not require the District to transfer the principal to another principal position within the District.

In addition, the Settlement Agreement provided that Ms. Riley-Hordyk would be paid at the salary level of an elementary school principal, which was lower than the salary paid to a high school principal. CP 385, 415. Ms. Riley-Hordyk testified that being paid at the level of an elementary school principal was reasonable because the duties of an online academy principal were less than the duties of a typical high school principal. CP 152:13-22.

B. Declining enrollment and decreased revenue lead to the decision to close the BOA.

As an online academy, the BOA conducted learning over the Internet. When the school was established and Ms. Riley-Hordyk was appointed its Principal, the District anticipated that the school would grow in enrollment and generate revenue for the District. CP 30:7-15. The legislature, however, subsequently changed the funding formula for online students, reducing the state allotment and decreasing the revenue generated by the BOA. CP 31:22-32:11.

There were also significant issues with compliance with various state regulations governing online schools and these issues reduced the funding available to the District. CP 31:4-15, 254. Going into the 2011-12 school year, the District had based its budget upon receiving funding for 330 students attending BOA full-time. CP 31:16-18, 251. In reality, complying with the rules governing online schools resulted in only 145 full-time students being claimed by the District. CP 31:18-19.

The decline in full-time students that could be claimed by the District and the reduced funding allocated by the state, resulted in the District projecting that the BOA would lose $330,000 during the 2012-13 school year. CP 36:16-18, 260. In addition, the District anticipated an overall decrease in enrollment for the 2012-13 school year and a decrease in funding from the state for that year. CP 33:18-34:9, 245.

Confronted with declining enrollment and revenue, the administration and School Board considered closing several District schools and programs. CP 34:10-36:1. One of the programs considered was the BOA, which the District projected as losing $330,000 if it remained open for the 2012-13 school year. CP 35:17-36:10, CP 260.

Prior to closing a school, RCW 28A.335.020 requires the District to hold public hearings. The District held these hearings to address the possibility of closing various schools, including the BOA. CP 36:2-11, 257-58, 261. While the District was considering closing the BOA, but before it had taken final action to close the school, Ms. Riley-Hordyk requested a transfer to the principal position at Graham-Kapowsin High School. CP 108:18-109:2, 410.

The District responded to this request by letter dated February 22, 2012. CP 411. The District noted that the posting for this position had closed without Ms. Riley-Hordyk applying for the position, that she did not have the right to automatically transfer under the CBA, and that such a transfer would actually constitute a promotion because it would result in an increase in pay. CP 411. The letter added that no final action to close

the BOA had occurred at that time and informed Ms. Riley-Hordyk that there would likely soon be three open assistant principal position for which Ms. Riley-Hordyk could apply. CP 412.

On February 28, 2012, the Board of Directors voted to close the BOA, beginning with the 2012-13 school year. CP 70:20-22, 265. The District closed the BOA because of reduced funding from the state for online programs, because the increased reporting required by the state for online schools increased the administrative burden upon the District and because the BOA was projected to lose $330,000 in the next school year. CP 70:23-71:18, 265.

C. With the closing of the BOA, the District elected to not renew the employment contract of Ms. Riley-Hordyk.

By letter dated May 9, 2011, Ms. Riley-Hordyk was given notice that probable cause existed to terminate her employment at the end of the 2011-12 school year. CP 381. The notice set forth the reason for the non-renewal as the elimination of the BOA program and stated, in part, that:

> You have the right to apply for open positions in Bethel School District. Open positions will be announced on the District's website.

Letter from T. Seigel to Mrs. Riley-Hordyk, dated May 9, 2012. CP 381. The notice also advised Ms. Riley-Hordyk of her right to appeal.

The decision to close the BOA and eliminate the principal position constituted a reduction in force even though the District had the same number of principals in the 2012-13 school year, 27, as it had in the prior year. CP 50:5-13. The District had the same number of principals because

it re-opened a school for the 2012-13 school year. *Id.* Had it not re-opened a school, the total number of principals would have been reduced.

Despite the clear directives from the District and the notice provided to Ms. Riley-Hordyk, she continued to request a transfer to various positions. CP 417-19. She was informed again that she did not have the right to transfer, but that she should apply for any open position in which she was interested. CP 420.

Ms. Riley-Hordyk did apply for one elementary school principal position, but she did not appear for the interview. CP 113:20-114:6, 448. She was not selected for the position. Ms. Riley-Hordyk did not apply for any other position. CP 113:11-19. The District considered transferring Ms. Riley-Hordyk to a teaching position in the one area that she was qualified to teach, Spanish, but no positions were available. CP 107:7-108:3.

Ms. Riley-Hordyk was not the only administrator whose contract was not renewed at the end of the 2011-12 school year; six other administrators also received notices of probable cause that their contracts would not be renewed. CP 111:23-112:11. Those six administrators applied for other positions, and five were re-hired. CP 112:12-23.

Rather than pursue open positions within the District, Ms. Riley-Hordyk appealed the nonrenewal of her contract. A hearing was held in January 2013 before Hearing Officer Margo Keller. CP 14. After receiving testimony from five witnesses, reviewing 46 exhibits, and considering pre- and post-hearing briefs submitted by the parties, the hearing officer upheld the nonrenewal of Ms. Riley-Hordyk's contract. CP 14-18.

The hearing officer held that the District acted in good faith when it closed the BOA and that eliminating Ms. Riley-Hordyk's position was a reduction in force under the CBA. CP 17. The hearing officer also ruled that under the CBA and state law, the District was not required to transfer Ms. Riley-Hordyk to an open Principal position. CP 17-18. As a result, the hearing officer concluded that the District had sufficient cause to not renew her employment contract. CP 18. Ms. Riley-Hordyk appealed the hearing officer's ruling to Pierce County Superior Court, pursuant to RCW 28A.405.320.

Oral argument before the Honorable Elizabeth Martin occurred on November 1, 2013. On December 4, 2013, Judge Martin issued a detailed letter affirming the hearing officer's decision. CP 599-604. The court also directed counsel for the District to prepare Findings of Fact, Conclusions of Law and an order in accordance with the court's decision. CP 603.

On January 17, 2014, the superior court entered Findings of Fact, Conclusions of Law and Order affirming the hearing officer's decision. CP 617-26. Ms. Riley-Hordyk timely appealed the court's order.

IV. ARGUMENT

A. Standard of review

The standard of review 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 (2012). 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." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

While a hearing officer's factual determinations are reviewed under the clearly erroneous standard, a reviewing court makes a de novo determination of the applicable law. *Griffith* at 670-71. Whether sufficient cause exists to nonrenew a certificated employee's contract is a legal conclusion and "should not be disturbed unless it constitutes an error of law." *Griffith* at 671. The Supreme Court has summarized this standard:

> [T]he Superior Court was bound to affirm the factual findings of the hearing officer, unless they were clearly erroneous, but was free to determine the correct law independent of the hearing officer's decision and apply it to the facts as found by the hearing officer.

Clarke v. Shoreline Sch. Dist. No. 412, 106 Wn. 2d 102, 110, 720 P.2d 793 (1986). An appellate court applies the same standard of review as the superior court. *Clarke*, 106 Wn.2d at 110.

B. The hearing officer correctly held that sufficient cause existed to nonrenew Ms. Riley-Hordyk's contract.

The hearing officer found that the District acted in good faith when it decided to close the BOA, noting that the decision was made after a public hearing and School Board consideration and that the decision was based upon the recommendation of district employees and their financial committees. CP 17 at ¶ 4.4. The hearing officer noted that the decision to

close the BOA was based upon a projected operating loss of $330,000 for the BOA for the 2012-13 school year and declining revenues overall for the District. CP 15.

The hearing officer also found that the elimination of Ms. Riley-Hordyk's position was a reduction in force even though the District ended up with the same number of principals. CP 17 at ¶ 4.4. As the hearing officer stated, the District "ended up with the with the same number of Principals after the BOA closure simply because 2012-13 included a previously planned reopening of another school." CP 17 at ¶ 4.4. For these reasons, the hearing officer concluded that under the CBA and state law, the District was not required to transfer her to another principal position. CP 17-18.

The Superior Court, after a thorough review of the record and the case law, concluded that the hearing officer's decision was not clearly erroneous or arbitrary and capricious, and that sufficient cause existed to non-renew Ms. Riley-Hordyk. CP 638. In her written decision, Judge Martin examined each assignment of error asserted by Ms. Riley-Hordyk—errors almost identical to the assignments of error in this appeal—before affirming the decision of the hearing officer "in its entirety." CP 603.

This Court should also give deference to the factual determinations of the hearing officer, 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 the hearing officer correctly held that sufficient cause existed to nonrenew Ms. Riley-Hordyk's contract requires a discussion of Washington law governing the nonrenewal of certificated employees.

C. Washington's "continuing contract" law and the "nonrenewal" of certificated employees.

In Washington, the employment of teachers, principals, and other certificated employees is governed by statute, Chapter 28A RCW. Under RCW 28A.405.210, known as the "continuing contract" statute, certificated employees are employed for one-year terms which are usually renewed each year. RCW 28A.405.210.

The statute, however, permits school districts to prevent the renewal of employee contracts for cause. RCW 28A.405.210. Such nonrenewal of a contract typically occurs when performance deficiencies, declining enrollment or economic difficulties lead a school district to conclude that the retention of the employee's services would be inappropriate. *See, e.g., Barnes v. Seattle School District*, 88 Wn.2d 483, 487, 563 P.2d 199 (1977); *Robel v. Highline School District*, 65 Wn.2d 477, 485, 398 P.2d 1 (1965); RCW 28A.405.210.

Under RCW 28A.405.210, a notice of nonrenewal must be served upon the employee by May 15th (or in some cases by June 15th) and specify the nonenewal causes. Employees whose contracts are not renewed have the right to a hearing if they request one within 10 days.

Here, the District timely notified Ms. Riley-Hordyk of her nonrenewal and she timely requested a hearing.

D. The decision to not renew an employee's contract may only be reversed if the district acted illegally, with bad faith, or in an arbitrary and capricious manner.

As a leading treatise on labor arbitration notes, employers have the right to determine the size of its workforce:

> In the absence of contractual restriction, it is the right of management to determine the number of employees to be used at any given time and to lay off employees in excess of that number, giving the required recognition to seniority.

Elkouri & Elkouri, *How Arbitration Works* § 13.19.A at 781 (6th ed. 2003) (footnote omitted).

Indeed, a school district's right to nonrenew a certificated employee may be set aside only if the district acted illegally, with bad faith, or in an arbitrary and capricious manner. *See Diedrick v. School Dist. 81*, 87 Wn.2d 598, 607, 555 P.2d 825 (1976); *Refai v. Central Washington University,* 49 Wn. App. 1, 8, 742 P.2d 137 (1987). As the Washington Supreme Court has held:

> [A] district properly may reduce salaries and require the same job to be performed, or it may abolish and consolidate employment positions and impose the duties on other employees where done in good faith and in a manner consistent with the district's economic exigencies or other requirements.

Diedrick, 87 Wn. 2d at 605. Because the school district did not act arbitrarily or capriciously, the *Diedrick* court upheld the district's

personnel decisions, which included the nonrenewal of teachers and administrators. *Id.* at 609.

As *Diedrick* illustrates, a reviewing court should hesitate before interfering with the decision to lay off workers:

> We note further that courts should exercise caution when reviewing [a reduction in force] decision.
>
> > [W]here lack of funds necessitate[s] releasing a sizeable number of the faculty, certainly it [is] peculiarly within the province of the school administration to determine which teachers should be released, and which retained.
> >
> > > Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts which it believes are for the best interest of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body.

Refai, 49 Wn. App. at 7-8 (quoting *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113, 1118 (S.D.N.Y. 1977)).

Similarly, an employee disagreeing with the judgment exercised by an employer does not mean that the employer acted arbitrarily and capriciously. *See, e.g., City of Federal Way v. Pub. Employment Relations Comm'n*, 93 Wn. App. 509, 514, 970 P.2d 752 (1998) ("When room for two opinions exists, an action is not arbitrary and capricious even though one believes the conclusion is erroneous.")

Rather, an employer's action is "arbitrary and capricious" if it is willful and unreasoning and taken without regard to the surrounding facts

and circumstances. *Cox v. Lynnwood*, 72 Wn. App. 1, 6, 863 P.2d 578 (1993) (citing *Washington Waste Sys, Inc. v. Clark Cy.*, 115 Wn.2d 74, 81, 794 P.2d 508 (1990)). Evaluating whether an agency's decision was arbitrary and capricious involves evaluating the evidence considered by the agency in making its decision. *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). In addition, "'[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration.'" *Landmark Development, Incorporated v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (quoting *DuPont-Fort Lewis Sch. Dist. No. 7 v. Bruno*, 79 Wn.2d 736, 739, 489 P.2d 171 (1971)). Furthermore, the burden of demonstrating the invalidity of agency action is on the party asserting invalidity. *Apostolis v. Seattle*, 101 Wn. App. 300, 304, 3 P.3d 198 (2000).

Here, the financial need to reduce expenditures for the 2012-13 school year was well established. The District estimated that the Bethel Online Academy would have an operating loss in excess of $330,000 during the 2012-13 school year. Given such a dire economic forecast, the School Board closed the Bethel Online Academy beginning with the 2012-13 school year. This closure naturally precipitated the elimination of Ms. Riley-Hordyk's position.

E. In the absence of a statute or a contract granting the right to transfer, an employee has no right to transfer to another position.

Except as otherwise may be provided by statute or in a collective bargaining agreement, the employment relationship with a school district is governed by principles of general contract law. *See Corcoran v. Lyle Sch. Dist. No. 406*, 20 Wn. App. 621, 623, 581 P.2d 185, 187 (1978) ("Beyond the statutory rights contained in the continuing contract law, the relationship between the school district and its employees is a contractual one governed by general principles of law.") Because the teacher in *Corcoran* failed to comply with the statutory requirements for signing his employment contract, the court held that the teacher had no due process rights to continued employment. *Id.* at 623-25.

Indeed, any due process right that a certificated employee has to continuing employment must derive from a property interest created by state law. As the Ninth Circuit has held: "To state a claim under the Due Process Clause, a plaintiff must first establish that he possessed a "property interest" that is deserving of constitutional protection." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998) (citing *Gilbert v. Homar,* 520 U.S. 924, 117 S. Ct. 1807, 1811, 138 L.Ed.2d 120 (1997)). To possess a property interest in a benefit such as the automatic right to transfer, "an individual must have more than 'an abstract need or desire for it' or 'a unilateral expectation of it.'" *Brewster*, 149 F.3d at 982 (quoting *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972)).

Rather, as the Supreme Court has explained, these due process property interests must derive from state law:

> Property interests ... are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S. at 577. Thus, it is Washington law that governs a public employee's due process claim and determines whether that employee has a due process right to transfer.

Here, there is no statute, collective bargaining agreement, or contract entitling Ms. Riley-Hordyk to transfer to another principal position.

The collective bargaining agreement, for example, only provides for a transfer in the absence of a reduction in force. The District's notice to Ms. Riley-Hordyk stated specifically that she had no right to transfer to another position. At the hearing, the District established that there is no policy or practice of allowing administrators who have lost their position through a reduction in force to transfer. Indeed, there were six other administrators, besides Ms. Riley-Hordyk, whose contracts were not renewed at the end of the 2011-12 school year. These six administrators were treated the same as Ms. Riley-Hordyk: they were invited to apply for new positions but were not automatically transferred. CP 112:4-25.

In the absence of any statutory or contractual right to transfer, Ms. Riley-Hordyk has no right to transfer.

F. Appellant's brief fails to refer to the record and ignores the appropriate legal standard while primarily relying upon a case that is not relevant.

1. Appellant's brief fails to cite to the record.

The Rules of Appellate Procedure require that the Appellant's statement of the case contain references to the record for each factual statement. RAP 10.3(a)(5). While there are *references* in Appellant's statement of the case, these references are *not* to the record.

For example, page 4 of Ms. Riley-Hordyk's brief contains references to CP 10523, 10483 and 10373. These citations cannot refer to the Clerk's Papers. do not exist because the Clerk's Papers end at page 648. Other references to the record are equally nonsensical: page 3 of Appellant's brief cites to CP 130:22-124:2; page 4 cites to CP 57:20-51:7; page 5 cites to CP 103:23-97:3.

Even when the Appellant cites to a Clerk's Paper that does exist, the reference does not support the factual statement. For example, the first sentence in Appellant's statement of the case states: "Petitioner Wanda Riley-Hordyk was first employed by the Bethel School District in 1990 as a Spanish teacher. CP 129:12-13." App. Br. at 3. Clerk's Paper 129 has nothing to do with the District's hiring of Ms. Riley-Hordyk, or her history as a Spanish teacher.

Indeed, in the first three pages of Appellant's statement of the case, Counsel for the Respondent did not find a single reference to the record that was accurate. (Respondent's Counsel ceased checking the citations after the first three pages proved fruitless.)

2. This Court should affirm the factual findings of the hearing officer because these findings are not "clearly erroneous."

Appellant fails to apply the appropriate standard for reviewing the decision of a hearing officer. Instead, Appellant argues that the hearing officer erred when she found: that the District was justified in closing the BOA, that the elimination of the BOA's principal position constituted a reduction in force, and that the CBA did not require the District to transfer Ms. Riley-Hordyk to another position. App. Br. at 1-2, 8-9.

But the standard for reviewing a hearing officer's factual determinations is not whether the hearing officer erred; rather the standard is whether the findings are "clearly erroneous." *Griffith*, 165 Wn. App. at 670-71. Under this standing, a reviewing court must be left with a "firm and definite conviction that a mistake has been committed" before setting aside the factual findings of the hearing officer. *Department of Ecology v. PUD 1*, 121 Wn.2d at 201.

Here, the evidence established that the District faced decreased revenue and declining enrollment, that the BOA was expected to lose $330,000 in the 2012-13 school year and that the District held public hearings to discuss which schools and programs should be eliminated. For these reasons, the hearing officer did not err when she found that the decision to close the BOA was made in good faith. Moreover, the District established that the elimination of the BOA's principal position constituted a reduction in force and that the CBA did not require the

District to transfer Ms. Riley-Hordyk. Because these findings were not clearly erroneous, this Court should affirm the findings.

In addition, as discussed above, no statute, collective bargaining agreement, or contract entitled Ms. Riley-Hordyk to transfer to another principal position. Because the District did not act illegally, arbitrarily or capriciously when it refused to transfer her, the hearing officer correctly held that the District had sufficient cause to not renew her contract.

Ms. Riley-Hordyk, however, primarily relies upon a relatively obscure case from 1973, *Peters v. South Kitsap School District,* to argue that the District was required to transfer Ms. Riley-Hordyk. App. Br. at 12-20. According to Ms. Riley-Hordyk, "*Peters* imposes an affirmative duty on the District to 'offer' open positions to Ms. Riley-Hordyk, and then transfer her to one of the open positions." Ap. Br. at 13. As discussed in the following section, Ms. Riley-Hordyk's reliance upon *Peters* is misplaced.

3. *Peters* is not relevant to this case.

Like the hearing officer and the superior court, this Court should conclude that *Peters* has little bearing upon this case. There are three reasons why *Peters* is not relevant.

First, the actual holding of *Peters* is quite narrow. In *Peters*, the court held that a school district was not required to offer a nonrenewed teacher a different teaching position at the expense of another teacher solely because the nonrenewed teacher had greater seniority. Because seniority is not an issue here, *Peters* is inapplicable.

Second, to the extent that *Peters* may be read more broadly, the case states only that a nonrenewed teacher has the right to apply for vacant positions and that a school district should use objective criteria when reviewing candidates, but that the school district is under no obligation to create a position for the nonrenewed employee. Here, Ms. Riley-Hordyk applied for only one vacant position, but then never went to the interview. Because Ms. Riley- Hordyk never really applied for a position, *Peters*, even when read broadly, is not applicable.

Finally, *Peters* was decided in 1973, *before* the Legislature enacted statutes governing collective bargaining by principals and allowing school districts to transfer principals to subordinate positions. The *Peters* case itself notes that Washington is not a "true tenure" state and that any expectation of continued employment or reemployment rights derives from statute. *Peters* at 813. The subsequent enactment of statutes allowing for collective bargaining (RCW 41.59) and for the transfer of principals (RCW 28A.405.230) abrogates the holding of *Peters* advocated by Ms. Riley-Hordyk. Moreover, the collective bargaining agreement between the District and the Bethel Principal's Association only provides for the transfer to a teaching position. Given the terms of the CBA and the enactments of RCW 41.59 and 28A.405.230, Ms. Riley-Hordyk's reliance upon *Peters* is misplaced.

The following sections discuss each of the above reasons in greater detail.

a) The actual holding of Peters—that a nonrenewed teacher with seniority does not have the right to displace a teacher with less seniority—is not relevant to this case.

In *Peters,* the key issue was whether a teacher's seniority dictated staffing decisions following a reduction in force. In that case, Daniel Peters had been a certificated teacher in the school district since 1960. Mr. Peters was qualified to teach in four areas—Spanish, English, Social Studies and Study Hall. *Peters*, 8 Wn. App. at 811. From 1960 through the 1968-69 school year, Mr. Peters taught either Spanish or a combination of Spanish and English. Beginning with the 1969-70 school year, Mr. Peters was assigned to study hall on a full-time basis.[1] During the 1970-71 school year, the state cut funding for students. To reduce its costs accordingly, the district decided to eliminate the certificated study hall position, replacing it with a non-certificated study hall supervisor. *Id.* at 812. Thus, Mr. Peters' contract was not renewed for the next school year.

Mr. Peters appealed his nonrenewal. The trial court upheld the nonrenewal, holding that (1) the district's duty under the continuing contact law, then codified at RCW 28A.67.070, was satisfied when it allowed Mr. Peters to apply for vacancies; (2) the district was not required to offer Mr. Peters a teaching position if it would require replacement of a teacher with less seniority; and (3) the district was not required to adjust teaching positions to make room for Mr. Peters. *Id.* at 812-13.

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[1] Mr. Peters challenged his full-time assignment to study hall, lost his grievance, and then declined to appeal the matter. 8 Wn. App. at 811-12.

Mr. Peters appealed the trial court's decision, primarily arguing that the trial court failed to properly consider his seniority:

> Appellant's principal complaint with these rulings was that they fail to consider his seniority rights and that to give effective recognition to those rights the school district should have either offered him an existing position at the expense of a teacher with less seniority, or adjusted its curriculum combinations so as to offer him employment where vacancies arose.

Peters, 8 Wn. App. at 813.

The *Peters* court rejected this seniority argument. Noting that Washington was not a "true tenure" state, the court stated that seniority was not a factor in the reemployment rights created by Washington's continuing contract statute, RCW 28A.67.070:

> It needs to be stated initially that the Washington law dealing with teacher rights and responsibilities is not a true tenure law. Under RCW 28A.67.070 Every teacher under contract with the school district has certain reemployment rights which apply with equal force to all teachers without reference to length of service. The statute does not create tenured and nontenured classes of teachers with reemployment preferences given to the former group and denied to the latter. For this reason, many of the authorities cited by appellant from other jurisdictions are inapposite.

Peters at 813.

The *Peters* court noted that school districts have wide discretion in making employment decisions: "The legislature has seen fit to leave the question of employment solely to the discretion of a majority of the school board and once a teacher is employed, the tenure of his contract is one

year." *Peters at* 814. The court then stated that a terminated or nonrenewed teacher has no seniority-based right to reemployment: "It is equally clear that a properly terminated teacher applying for a position with his former employer or to a new district, has no statutory preference for employment based upon his length of prior service, . . ." *Id.* at 814.

Then, the *Peters* court considered and rejected the argument that the district acted in bad faith when it assigned Mr. Peters full-time to study hall. *Id.* at 814. Because the former teacher had no seniority rights to reemployment and because the district did not act improperly when it nonrenewed his contract, the *Peters* court affirmed the nonrenewal:

> We conclude that the financial problems facing South Kitsap School District furnished probable cause not to renew appellant's contract and that the district did not violate due process or appellant's 'seniority' rights in electing to nonrenew his contract.

Peters, 8 Wn. App. at 815.

Thus, the holding of *Peters* is that seniority does not control reemployment decisions and that the district did not violate RCW 28A.67.070 because it had probable cause to nonrenew the teacher's contract. All other statements by *Peters* are dicta, remarks by a court that are not essential to the decision. *See State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464, 468 (1954). As dicta, these statements are not binding upon subsequent courts. *See e.g., Hudson v. United Parcel Serv., Inc.*, 163 Wn. App. 254, 267 n.6, 258 P.3d 87 (2011).

Here, seniority is not at issue. Thus, *Peters* is not relevant.

b) Even when read broadly, *Peters* only requires that a district allow a nonrenewed teacher to apply for vacant positions and that the district must use objective criteria in reviewing candidates.

Although not essential to its decision, the *Peters* court did discuss the duty owed by districts to nonrenewed teachers, as that duty existed in 1973. The court stated that districts must consider the continuing contract rights of teachers, as established by RCW 28A.67.070 when it fills vacancies that occur after some teachers have been nonrenewed. *Peters* at 815-16.

In *Peters*, the trial court held that the continuing contract statute only required that the district give Mr. Peters the opportunity to apply for open positions. To that requirement, *Peters* added that the district must establish objective criteria to evaluate job applicants. *Id.* at 816-17. If there are no vacancies, or if the nonrenewed teacher is not qualified for a vacant position, then there is no obligation to renew the teacher's contract. *See Peters* at 817; *Stieler v. Spokane Sch. Dist. No. 81*, 88 Wn.2d 68, 71-72, 558 P.2d 198 (1977) (discussing *Peters* and holding that nonrenewal was appropriate because teacher was not qualified for vacant positions).

Thus, *Peters*, even when read broadly, only holds that a district is required to allow nonrenewed teachers to apply for vacancies, for which the district has established objective criteria to assess the application. Because Ms. Riley-Hordyk never applied, *Peters* is not relevant.

In addition, Ms. Riley-Hordyk's statement that "continuing contract law" and *Peters* requires districts to offer a position to "internal

candidates before opening the positions" to others, App. Br. at 12, is not an accurate state of the law nor an accurate reading of *Peters*. Furthermore, *Peters*, a case decided over 40 years ago, predates more recent statutes that affect the reemployment rights of nonrenewed principals. As discussed in the following section, these statutory developments undercut Ms. Riley-Hordyk's attempts to make *Peters* relevant to the case at hand.

c) The subsequent enactments of RCW 41.59 and 28A.405.230 have abrogated *Peters* and made it inapplicable to this case.

Any due process right that a teacher has to continuing employment or to transfer must derive from a property interest created by state law. *See Roth, supra.* Thus, it is Washington law that governs whether a public employee's due process claim. The *Peters* court recognized this requirement when it noted that the reemployment rights of nonrenewed teachers are controlled by RCW 28A.67.070, the continuing contract law in effect in 1973. *Peters* at 810 n.1, 813-14. Since *Peters,* however, the legislature has enacted two statutes that affect the property interests and reemployment rights of principals.

In 1975, the collective bargaining statute for certificated employees, RCW 41.59, was passed. The purpose of the statute is:

> to prescribe certain rights and obligations of the educational employees of the school districts of the state of Washington, and to establish procedures governing the relationship between such employees and their employers which are designed to meet the special requirements and needs of public employment in education.

RCW 41.59.010. Under the statute, employees have the right to bargain collectively and to enter into collective bargaining agreements. *See* RCW 41.59.060. The statute allows for a bargaining unit of principals and assistant principals. RCW 41.59.080(3).

After passage of the collective bargaining statute, collective bargaining agreements may provide specifically for the transfer of certificated employees and establish the rules for effectuating these transfers. *See Lake Washington Sch. Dist. No. 414 v. Lake Washington Educ. Ass'n/Washington Educ. Ass'n*, 109 Wn.2d 427, 428-29, 745 P.2d 504 (1987), *amended sub nom. Lake Washington Sch. Dist. No. 414 v. Lake Washington Educ. Ass'n*, 757 P.2d 533 (Wash. 1988). In *Lake Washington,* the court enforced the collective bargaining agreement and allowed the teachers to transfer because the agreement provided for the transfer. *Id.* at 435.

Conversely, a collective bargaining agreement may contain reduction in force and reemployment provisions that limit or destroy any right to transfer. Here, for example, the CBA between the District and the Bethel Principal's Association only provides for the transfer to a teaching position following a reduction in force:

> In the absence of a reduction in force among Bethel Education Association staff, non-interim administrators in good standing, who lose their positions due to a reduction in force, will be considered for a contract for an open teaching position for which he/she is qualified. ...

CP 402 (Art. 9, Sect. 8). The District considered transferring Ms. Riley-Hordyk to a position teaching Spanish—the only subject she was qualified to teach—but no positions were available. CP 107:7-108:3.

And in the 1975-76 session, the Legislature enacted RCW 28A.405.230, which allows districts to transfer principals with less than three years experience, to a subordinate certificated position:

> Any certificated employee of a school district employed as . . . principal, assistant principal, coordinator, or in any other supervisory or administrative position, hereinafter in this section referred to as "administrator", shall be subject to transfer, at the expiration of the term of his or her employment contract, to any subordinate certificated position within the school district. "Subordinate certificated position" as used in this section, shall mean any administrative **or nonadministrative certificated position** for which the annual compensation is less than the position currently held by the administrator.

RCW 28A.405.230 (emphasis added). A nonadminstrative certificated position is typically a teaching position. Thus the statute allows, but does not compel, a district to transfer a principal with less than three years experience to a lower-paying teaching position.

For principals with three or more years experience, RCW 28A.405.230 allows districts to unilaterally transfer them to another administrative position, provided that there is no reduction in salary. *Sneed v. Barna*, 80 Wn. App. 843, 848, 912 P.2d 1035, *rev. denied,* 129 Wn.2d 1023 (1996). As the *Sneed* court stated:

> Under [RCW 28A.405.230], the District has the right to transfer tenured principals as long as their salaries

> are not reduced. This allows the employer to match the skills of the individual administrator with the District's needs, either or both of which may change from year to year.

Id. Thus, the *Sneed* court affirmed the transfer, even though the employee argued that the transfer "was in reality a demotion." *Id.* at 848-49.

By granting districts the discretion to unilaterally transfer a principal, the legislature has significantly gutted any "right to transfer" perceived by Ms. Riley-Hordyk in the *Peters* case. After RCW 28A.405.230.. Thus, Ms. Riley-Hordyk's argument that she has the right to transfer to an administrative position has no merit.

Under the CBA, RCW 41.59, RCW 281.405.230, or RCW 28A.405.210 (the modern day version of RCW 28A.67.070), there is no right to transfer. Under the law and the facts of this case, Ms. Riley-Hordyk has no right to transfer. Even if one believes that *Peters* might have given Ms. Riley-Hordyk the right to transfer in 1973, there is no right in 2013.

Indeed, the lack of relevancy of *Peters* to modern jurisprudence is underscored by the paucity of cases citing the decision. Since 1982, only two cases—reported or unreported—have cited *Peters,* and neither case supports Ms. Riley-Hordyk's position. In *Moldt v. Tacoma Sch. Dist. No. 10*, 103 Wn. App. 472, 12 P.3d 1042 (2000), for example, the court citied *Peters* for the proposition that Washington's "continuing contract law is similar to tenure laws . . . . It affords reemployment rights to all covered

employees." *Moldt* at 482.[2] And in *Greene v. Pateros Sch. Dist.*, 59 Wn. App. 522, 799 P.2d 276 (1990), the court cited *Peters* for the rule that that the district was not required to consider the nonrenewed teacher's seniority when filling vacant positions and that the district need not consider the teacher's qualifications when establishing the district's goals or requirements. *Greene* at 533-34. Neither *Moldt* nor *Greene,* nor any case cited in the past 30 years, stands for the proposition advocated by Ms. Riley-Hordyk.

Thus, the *Peters* decision is not relevant to the case at hand.

4. Appellant's reliance upon legislative history is misplaced

In an attempt to bolster her argument that she has the right to automatically transfer to the position of her choosing, Appellant cites to the legislative history behind RCW 28A.405.230. App. Br. at 17-19. This argument fails for two reasons.

First, legislative history should only be consulted to resolve ambiguity in the statute; it should not be examined in the absence of ambiguity. *E.g., Eastlake Cmty. Council v. City of Seattle*, 64 Wn. App. 273, 279, 823 P.2d 1132 (1992) ("It is inappropriate to look to the legislative history where the intent can clearly be divined from the plain

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[2] In an attempt to bolster *Peters,* Appellant misquotes *Arnim v. Shoreline Sch. Dist. No. 412*, 23 Wn. App. 150, 594 P.2d 1380 (1979). According to the Appellant, the *Armin* court stated: "[*Peters*] affords reemployment rights to all covered employees." App. Br. at 20 (Citing *Armin* at 154). But that is the not what the *Armin* court stated; rather, *Armin* was referring to RCW 28A.67.070—and not *Peters*—as the source of law affording "reemployment rights to all covered employees." *Armin*, 23 Wn. App. at 23.

language of the ordinance." Here, there is no ambiguity in RCW 28A.405.230 and the Appellant does not claim that the statute is ambiguous. Thus, it is inappropriate to resort to legislative history.

Second, the legislative history cited by the Appellant states only that principals have continuing contract rights and that principals with three or more years of experience cannot be transferred to a teaching position—two contentions that the District has never contested. There is nothing, however, in the legislative history or in the statute itself that grants principals the right to automatically transfer to another position.

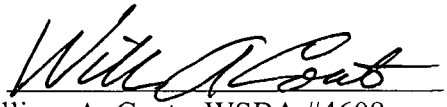
Ms. Riley-Hordyk cannot create a right where none exists.

V. CONCLUSION

Because sufficient cause existed to not renew Ms. Riley-Hordyk's contract, and because the District did not act illegally, arbitrarily or capriciously, the District requests that this Court affirm the decision of the hearing officer and the superior court.

RESPECTFULLY SUBMITTED this 12th day of May, 2014.

VANDEBERG JOHNSON &
GANDARA, LLP

By 
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CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandeberg Johnson & Gandara, LLP. On the 12th day of May, 2014, in the manner indicated below, I caused a copy of:

BRIEF OF RESPONDENT

to be served, via Legal Messenger, on Counsel for the Appellant:

Tyler K. Firkins
Van Siclen, Stocks, & Firkins
721 45th St NE
Auburn, WA 98002-1381

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

Dated this 12th day of May, 2014.

Mary D. Petrich