91840-6

WASHINGTON STATE SUPREME COURT
NO._____

COURT OF APPEALS (DIV. II) NO. 45830-6-II

WANDA RILEY-HORDYK,

Petitioner/Appellant,

-vs-

BETHEL SCHOOL DISTRICT,

Respondent.

PETITIONER/APPELLANT'S PETITION FOR REVIEW TO THE WASHINGTON STATE SUPREME COURT

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I. IDENTITY OF PETITIONERS

Petitioner is Wanda Riley-Hordyk.

II. CITATION TO THE COURT OF APPEALS DECISION

Petitioner seeks review of the decision from the Court of Appeals, Division II, in *Riley-Hordyk v. Bethel Sch. Dist.*, No. 45830-6-II (May 19, 2015).

III. ISSUES PRESENTED FOR REVIEW

3.1 Whether a teacher or principal's rights under the continuing contract statute can be waived by a collective bargaining agreement when another statute forbids principals from bargaining on such subjects, i.e., can the Court of Appeals ignore the law.

3.2 Whether the Court of Appeals' opinion is contrary to its prior holding in *Peters v. S. Kitsap Sch. Dist.*, 8 Wn. App. 809, 509 P.2d 67 (1973).

3.3 Whether the Court of Appeals' opinion is contrary to the continuing contract statute, RCW 28A.405.310.

3.4 Whether the Court of Appeals erred by declining to address whether there had been a reduction in force.

IV. STATEMENT OF THE CASE

Factual History: Petitioner Wanda Riley-Hordyk was first employed by the Bethel School District in 1990 as a Spanish teacher. CP

129:12-13. She served as Spanish teacher until 2002, when she elevated to the position of interim assistant principal. CP 130:2-6. In 2004, she applied for the position of principal at Bethel High School. CP 130:6-8. She was hired and served with distinction five and a half years. *Id.*

In 2009, a dispute arose between Ms. Riley-Hordyk and the District concerning an issue of harassment Ms. Riley-Hordyk filed against a supervisory administrator. CP 139:14-24. Ms. Riley-Hordyk subsequently accessed the court system and initiated a lawsuit against the District. CP 71:4-7. That lawsuit was eventually resolved to the satisfaction of both parties. CP 57:20-51:7; 482-86.

As part of the settlement of the lawsuit, Ms. Riley-Hordyk was placed into the position of principal of the Bethel Online Academy (BOA). CP 105:23. Her tenure in that position was short yet successful. Further, when she went into the position as principal of BOA, she was specifically informed that her position was to be classified as being a high school principal. CP 105:23. The superintendent has a duty to recommend principals that are candidates for transfer of position according to state law to the school board for decision, and has done so with other employees. CP 88:12-13; 110:15-111:3; 10483.

However, on May 9, 2012, the Superintendent of the Bethel School District issued a letter of non-renewal to Ms. Riley-Hordyk, explaining the

reasons for the decision as insufficient revenue to maintain the current level of programs and services in the District. CP 103:73. All other staff members of the BOA were accommodated with a job elsewhere in the District. CP 154:17-20. None of the retained individuals appear to have instituted a prior lawsuit against the District.

At the time the letter was issued, Ms. Riley-Hordyk was employed in the position of "principal." In 2011-2012, there were 27 principals in the District. CP 32:14-15. The following year, after her position was supposedly eliminated, there were still 27 principals. CP 32:21-26:1. Because no reduction in force actually occurred, the District Superintendent had a duty to recommend Ms. Riley-Hordyk for transfer. CP 10483.

The District contends that it reduced the number of assistant principal positions, while leaving the number of principals totals the same. CP 103:23-97:3. This is true; however, no assistant principal was displaced. CP 104:17-21. Three were hired as assistant principals in different schools, and three were offered other administrative positions. *Id.* At the same time the District hired a candidate from out of state to fill a purportedly vacant principal position. CP 87:17-23. Therefore, there were no necessary reductions by the time Riley's contract ended on July 1, 2012. Specifically, when Ms. Riley-Hordyk's contract ended on July 1, the

District never reduced its staff of principals; it continued to maintain 27 principals in the district for the following school year just as it did in the previous year despite its claimed "reduction in force." CP 98:12-15.

On February 14, 2012, a public hearing on BOA concluded that it should be closed. CP 75:21-69:2. On February 28, 2012 the School Board met and voted to accept the Administration's recommendation to close BOA, which allowed the matter to go on to the required public hearings in order to formally close BOA. CP 105:31. As of the 28th of February, at the latest, District administrators needed to give consideration to Riley's statutory continuing contract rights for continued employment in the Bethel School District in the 2012-2013 school year. They did not do so. Todd Mitchell, the District's Human Resources Director, testified that Ms. Riley-Hordyk was not considered for transfer to another position because the District had decided to label her termination as a reduction in force. CP 110:15-104:3.

Because this was inaccurate, on February 16, 2012, Ms. Riley-Hordyk began to request transfers to open principal positions. CP 104:88. Mr. Mitchell discouraged Ms. Riley-Hordyk from actually applying for positions under the premise that her termination was not finalized. CP 158:18-21. On March 1, 2012, Ms. Riley-Hordyk asked to be transferred into the open Spanaway Lake Principal position. CP 104:92. On March

26, 2012, Ms. Riley-Hordyk requested a transfer to an open middle school principal position at Frontier. CP 104:97. On April 27, 2012, well after the vote on the closure of the BOA, the District announced that it had hired Mark Barnes from Colorado to fill an open principal position in the District, the same position Ms. Riley-Hordyk had requested in March. CP 87:17-23; 105:04.

In every instance that Ms. Riley-Hordyk requested consideration for transfer to a principal position for which she was imminently qualified, however, the District denied the request because it incorrectly believed that she had to apply to the positions "like anybody else," current employee or not. CP 59:8-15; 77:23-78:1. Mr. Mitchell admitted that, in the absence of a reduction in force designation, Ms. Riley-Hordyk would have been entitled to transfer to an open teaching position for which she was qualified. CP 98:19-99:19.

Procedural History: The hearing officer found sufficient cause to uphold Bethel School District's termination of Ms. Riley-Hordyk as part of a reduction in force, despite the fact that there were no administrators displaced from the Bethel School District after the 2012 school year. CP 9. The hearing officer concluded that *Peters v. S. Kitsap Sch. Dist.*, 8 Wn. App. 809, 509 P.2d 67 (1973), had been abrogated by subsequent legislative enactments. Petitioner appealed to superior court, which

upheld the hearing officer's decision on all grounds. Petitioner then appealed to Division II of the Court of Appeals. The Court upheld the decision of the hearing officer, but on different grounds. While concluding that *Peters* had not been abrogated, the Court held that the case was not applicable here and that any rights Ms. Riley-Hordyk had to continuing employment had been waived by the collective bargaining agreement. A copy of the opinion is attached hereto as Exhibit A. Petitioner now seeks review in this Court.

V. ARGUMENT

This case is important because school districts have begun to deliberately skirt the continuing contract rights of principals, by using a variety of tactics that are clearly contrary to RCW 28A.405.230. By permitting the Court of Appeals decision to stand, this Court allows the school districts to continue to ignore plain statutes, clear legislative intent, and numerous cases of Washington courts. This is true because the tautological gymnastics employed by the Court of Appeals demonstrates to the school districts a willingness to adopt any argument, no matter how contrary to law, to achieve the results desired by the school districts.

The need to review this case is found in RAP 13.4(b), considerations 1, 2, and 4. First, the decision of Division Two is in conflict with decisions of the Supreme Court. Second, the decision is in conflict

with other decisions in the Court of Appeals. Third, this petition involves an issue of substantial public interest that should be determined by the Supreme Court. The Court of Appeals erred by misconstruing RCW 28A.405.210, disregarding the holdings of *Peters v. South Kitsap School District No. 402*, 8 Wn. App. 809, 509 P.2d 67 (1973), and *Kelso Education Association v. Kelso School District 453,* 48 Wn. App. 743, 749, 740 P.2d 889, *review denied,* 109 Wn.2d 1011 (1987), and holding that the collective bargaining agreement waived Ms. Riley-Hordyk's right to continued employment with the District, even though principals are statutorily prohibited from bargaining on that subject matter.

A. The Court of Appeals decision violates clear mandates of public policies and encourages school districts to flaunt such policy.

In its opinion, the Court of Appeals ignored numerous cases dealing with continuing contract rights and declines in enrollment. Instead, the Court of Appeals built its decision on the concept that those cases are irrelevant because the Collective Bargaining Agreement in this case waived the Appellant's statutory rights. It said:

> Riley-Hordyk argues that *Peters* gives her the right to transfer to open positions. We disagree because Riley-Hordyk's CBA waived the statutory right to transfer discussed in *Peters*.

Opinion at 12. However, such a waiver is actually prohibited by a

statute ignored by the Court of Appeals.

The Court ruled that Section 8 of the Collective Bargaining Agreement operated as a waiver of any rights Ms. Riley-Hordyk had under the nonrenewal statute. This holding is plainly contrary to RCW 41.59.080 which expressly limits what principals and assistant principals may bargain for. RCW 41.59.080 states:

> (7) Notwithstanding the definition of collective bargaining, a unit that contains only supervisors and/or principals and assistant principals ***shall be limited in scope of bargaining*** to compensation, hours of work, and the number of days of work in the annual employment contracts.

RCW 41.59.080. Far from allowing principals to collectively agree to waive their statutory rights, this statute limits what principals may bargain for. The statute does not allow for discussion of waiver, or even transfer. It certainly does not permit any bargaining with regard to a reduction in force.

It is therefore statutorily impossible for Ms. Riley-Hordyk to have waived her statutory rights because her bargaining unit was not legally permitted to address that issue. The Court of Appeals' attempt to re-write the clear intention of the legislature must be addressed by this Court.

This sort of flawed opinion demonstrates to the school districts that even unsound legal theories will be given credence, and statutes will

be ignored. That this case is unpublished makes no difference to the districts that read unpublished opinions and learn new ways to avoid legislative intent, and clear statutory authority. Because Appellant could not have waived her statutory rights, the Court of Appeals was not permitted to ignore the precedent of this Court, and its own precedent.

B. The ruling that Ms. Riley-Hordyk had no right to a transfer is in conflict with decisions of the Supreme Court and Court of Appeals.

1. The Court of Appeals' decision is contrary to *Peters v. S. Kitsap Sch. Dist.*

The Court of Appeals' holding that Ms. Riley-Hordyk was not entitled to be offered any of the many open principal positions within the District is contrary to its earlier opinion in *Peters v. South Kitsap School District No. 402*, 8 Wn. App. 809, 509 P.2d 67 (1973), and all cases reaffirming it. Pursuant to the Continuing Contract Law (RCW 28A.405.210) and *Peters*, the District was required to offer jobs to internal candidates before opening the positions to the general public. As stated by the *Peters* court:

> "We turn now to the central question with which we are concerned. Once a contract is properly nonrenewed because of a financial reduction in personnel, what duty does the district owe to the nonrenewed employee with respect to vacancies which might occur prior to the expiration of his existing contract . . . .?
>
> ... Even though the financial requirements of the district

> may require reduction in staff, individual teachers who have been properly nonrenewed solely for that reason do not lose their statutory right to reemployment until their contract is actually terminated. Thus, the district may not approach the task of selecting personnel to fill vacancies that occur after some teachers have been nonrenewed without first giving effect to the continuing contract rights of those nonrenewed teachers. . . ."
>
> . . .When the school board turns to this task [determining the educational needs, curricula and resources for the ensuing school year], it must continue the contracts of those teachers who have qualifications that satisfy its needs. Thus, even though a teacher is properly notified and nonrenewed on the grounds of financial necessity, a change in the needs of the district before actual termination of the teacher's contract compels a reconsideration of the nonrenewal."

Peters, 8 Wn. App. at 815-6. [Emphasis added.]

This principle was later confirmed by the Washington State Supreme Court, which stated:

> In *Peters*, the Court of Appeals, Division Two, said that where a teacher is nonrenewed for financial reasons, he must be offered any job for which he is qualified, which becomes available before 'termination of his contract.'

Johnson v. Central Valley Sch. Dist. No. 356, 97 Wn.2d 419, 434, 645 P.2d 1088 (1982) (citing *Peters*, 8 Wn. App. 809).[1] Taken together, *Johnson* and *Peters* impose an affirmative duty on the District to "offer" open positions to Ms. Riley-Hordyk, and then transfer her to one of the open positions. To read the opinion otherwise gives the provision no

[1] This principle was held not to apply in that case, as the plaintiff did not hold a valid certificate. *Johnson*, 97 Wn.2d at 434.

force: the District could simply state that it considered nonrenewed employees for a job, and then chose in each instance to offer the job to someone else.

Here, under *Peters*, the District was not permitted to eliminate Ms. Riley-Hordyk's continuing contract rights without first offering her any open positions that might have been available. The District, rather than offering her the various open positions, falsely claimed she had to apply for open positions. Indeed, the District went so far as to hire a principal from out of the state rather than to offer Ms. Riley-Hordyk a position that she clearly was qualified to hold. As a consequence the only principal or assistant principal that lost her job and was not offered a new position was Ms. Riley-Hordyk. As the *Peters* court explained:

> Filling the needs so established is another question. When the school board turns to this task, it must continue the contracts of those teachers who have qualifications that satisfy its needs. Thus, even though a teacher is properly notified and nonrenewed on the grounds of financial necessity, a change in the needs of the district before actual termination of the teacher's contract compels a reconsideration of the nonrenewal...
>
> Moreover, when it becomes apparent that vacancies will occur following a personnel reduction, we think due process principles require that the district promulgate specific criteria to apply in satisfying its needs. Such criteria should clearly reflect the district's program requirements, set forth the requisite qualifications, and announce guidelines by which length of service will be considered.

Peters, 8 Wn. App. at 813-817.

That did not occur here. Despite Ms. Riley-Hordyk's repeated efforts to claim open principal positions for which she was imminently qualified to hold, her requests were refused, over and over again. Instead, less senior, less qualified, less experienced administrators were moved into the District's open positions. Finally, despite an open position, the District again ignored Ms. Riley-Hordyk's continuing contract rights and hired a new principal from out of the state of Washington, and terminated the rights of Ms. Riley-Hordyk to her continuing contract.

The Court of Appeals' reason for distinguishing *Peters* is that the case was decided before promulgation of the collective bargaining statute, chapter 41.59 RCW. This holding ignores the fact that *Peters* has been reaffirmed on numerous occasions, both by the Court of Appeals and the Supreme Court, since the passage of the Educational Employment Relations Act in 1975. In *Moldt v. Tacoma School Dist. No. 10*, 103 Wn. App. 472, 12 P.3d 1042 (2000), the Court of Appeals held that "[a]lthough not a true tenure law, the continuing contract law is similar to tenure laws." (citing *Peters*, 8 Wn. App. at 813-14). *Arnim v. Shoreline Sch. Dist. No. 412*, 23 Wn. App. 150, 154, 594 P.2d 1380 (1979), similarly relies on *Peters*, stating "[*Peters*] affords reemployment rights to all

covered employees." Similarly, *Johnson v. Central Valley School District* deals with events that occurred in 1978-1979. *Johnson*, 97 Wn.2d at 420-21. In *Johnson*, the Washington Supreme Court expressly demonstrated that *Peters* remained good law subsequent to the legislature's 1976 changes to the statutes. *Id.* at 434. Notably, these cases were decided well after the enactment of the EERA in 1975, and dealt with factual situations that arose after that enactment was in effect. There is thus no support for the Court of Appeals' conclusion that *Peters* only applies in the absence of collective bargaining agreements.

This Court should accept review of this case, so that it may correctly apply the precedent set out by *Peters* and *Johnson.*

2. The right of transfer upon nonrenewal cannot be waived by collective bargaining agreement.

The Court of Appeals erred in its holding that the right of transfer upon nonrenewal, as articulated in *Peters*, is a private statutory right that can be waived via collective bargaining agreement. This holding ignores the Court of Appeals' own precedent on this issue.

While a collective bargaining agreement can waive certain statutory rights, it cannot do so when waiver of the right would violate public policy. *Shoreline Cmty. Coll. Dist. No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 409-10, 842 P.2d 938 (1992). Thus, "[w]here a statutorily

created private right serves a public policy purpose, the persons protected by the statute cannot waive the right either individually or through the collective bargaining process." *Id.* at 410 (citing *Kelso Educ. Ass'n v. Kelso Sch. Dist. 453,* 48 Wn. App. 743, 749, 740 P.2d 889, *review denied,* 109 Wn.2d 1011 (1987)).

Division II of the Court of Appeals has already determined that the rights promulgated by RCW 28A.405.210 cannot be waived via collective bargaining agreement. In *Kelso Education Association v. Kelso School District 453,* 48 Wn. App. 743, 749, 740 P.2d 889, *review denied,* 109 Wn.2d 1011 (1987), the Court of Appeals examined whether a collective bargaining agreement could waive a teacher's right to continuing contract protection. The Court held that it could not:

> Even if the teachers had waived their right, this waiver would be ineffective as against public policy. In A.G.L.O., 1974, No. 59, the attorney general opined that a school district may not offer a contract to an individual containing a condition that the employee waive his continuing contract rights under RCW 28A.67.070. In addition, the attorney general held that if an employee did sign such a waiver, the waiver would not be valid or enforceable. A.G.L.O., 1974, No. 59.

Kelso, 48 Wn. App. at 748-49. This holding was reaffirmed by the Supreme Court in *Shoreline*. 120 Wn.2d at 409-10.

The Court's opinion in this case does not purport to overturn *Kelso*. In fact, the opinion contains no discussion whatsoever of *Kelso*.

Its failure to consider prior binding precedent constitutes manifest error that the Supreme Court should correct. Furthermore, as *Kelso* remains binding precedent, the Court of Appeals has created a conflict that requires resolution by the Supreme Court.

Moreover, although *Shoreline* indicates that a collective bargaining agreement can waive an employee's statutory rights, there is no indication in that case or any other in Washington that a collective bargaining agreement may waive an employee's ***constitutional*** rights. The right to transfer to a vacant position if nonrenewed for financial reasons was characterized by the Court in *Peters* as a due process right. 8 Wn. App. at 816-17. This characterization is consistent with more recent decisions, which hold that all certificated teachers and principals have a property right in continued employment, for which they are entitled to constitutional protections. *Giedra v. Mount Adams Sch. Dist. No. 209*, 126 Wn. App. 840, 846, 110 P.3d 232 (2005); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). The Court of Appeals' characterization of Ms. Riley-Hordyk's right of transfer as a statutory right without consideration of the constitutional implications of RCW 28A.405.310 was in error.

Courts will not find waiver of constitutional rights unless it has been clearly articulated. *Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S. Ct.

1983, 32 L. Ed. 2d 556 (1972) ("For a waiver of constitutional rights in any context must, at the very least, be clear."); *Rogoski v. Hammond*, 9 Wn. App. 500, 506, 513 P.2d 285 (1973). The Collective Bargaining Agreement here does not clearly waive Ms. Riley-Hordyk's property interest in continued employment with the District. The right to transfer to another position in the District before being nonrenewed for financial reasons is a vital part of this right. Were it otherwise, any school could nonrenew a principal whenever another person was willing to do the job for less money. Principals' and teachers' rights do not evaporate solely because of budgetary shortfalls.

As the decision of the Court of Appeals is contrary to the law protecting the continued employment rights of school personnel, this Court should accept review and correct the errors committed.

3. The Court of Appeals' Decision is Contrary to Public Policy.

The Court of Appeals' decision in this case is also contrary to the public policies behind the continuing contract statute. The Washington State legislature purposely included principals in the continuing contract statute along with certificated teachers to protect from improvident dismissals. *See generally* RCW 28A.405.210, 28A.405.230. One of the primary purposes of Washington's continuing contract law is to "eliminate

uncertainty in the employment plans of both the teacher and the school district." *Robel v. Highline Public Sch. Dist. No. 401*, 65 Wn.2d 477, 483, 398 P.2d 1 (1965). But now school districts are employing a variety of tactics to get rid of the continuing contract rights of principals, such as the tactics used in this case. Such tactics are clearly contrary to legislative intent.

Examining the debate on the 1976 version of RCW 28A.405.230, it was evident that the legislature intended to provide principals with the protection of the continuing contract law against the whims of a superintendent. During a Point of Inquiry, Senator Gould stated the following:

> We are talking only about principals and assistant principals and we are extending this particular provision of the continuing contract to principals for a specific reason and not to other administrators. First of all, may I back up to say this, it was originally suggested in the House on the floor, and it got lost on a technicality, but the reason for this is that principals themselves often have to go out on point. They are the ones that are responsive to the students. They have to work with the parents in the area and they have to work with their own teachers in their buildings and sometimes they go out and point for those teachers. Sometimes they have to say to the rest of the administration, "No. I think you are wrong." In order to have the protection to be able to do that, we felt it was necessary to give them the protection of the continuing contract law when, as principals they have those protections now.

Wash. Senate Journal, 52nd Day, February 26, 1976 at 624-25.

The three year provisional period in RCW 28A.405.230 allows a district to determine if a principal is adequately performing his or her job during that period of time, and if not, the district may move them to a subordinate position, with a lower salary, if the superintendent chooses. Once that three year period has elapsed, however, this flexibility is no longer given to a superintendent. This protects against a new superintendent coming into a district and removing well-performing principals for no cause. During debate in the house, the bill sponsor clarified the intent of the three year provision in the bill as follows:

> Mr. Bauer yielded to a question by Mr. Hendricks.
>
> Mr. Hendricks: "I don't know whether I have the accurate interpretation or the accurate bill that just passed the Senate yesterday, but one proviso was put in and this is in reference to a transfer of administrators, and I'm thinking now of principals, to subordinate certificate positions and the proviso reads as follows: "PROVIDED, That in the case of principals such transfer shall be made at the expiration of the contract year and only during the first three consecutive school years of employment..." A reasonable interpretation would be that after three years then that state protection in the interest of the certificated employee is under the continuing contract law, but for the record could I ask you does that mean that principals do have tenure after three years probationary period?"
>
> Mr. Bauer: "That's correct they do have full tenure after that three years, but for the purpose of transfer for the first three years, they have no tenure."
>
> Mr. Hendricks: "The word transfer refers to a change in status to a subordinate certificate position and not to

> transfer between schools or between districts? Is that correct?"
>
> Mr. Bauer: "Any change of status that adversely affects the condition of the contract would be excluded for a three-year period. In other words, they get transferred anywhere within that district or transferred up or down in terms of salary and they would not have to show sufficient cause as they do now under the current law."

Journal of the House, 54th Day, February 27, 1976 at 637.

Thus the legislature carefully considered whether principals should have continuing contract rights. School districts should not be permitted to sidestep these important statutory rights that have been referred to by this court as constitutional rights. *Fed. Way Sch. Dist. No. 210 v. Vinson,* 172 Wn. 2d 756, 773, 261 P.3d 145, 154 (2011) ("The nexus requirement finds root in the constitution," referring to continuing contract rights and discharge).

VI. CONCLUSION

Review should be accepted in this case because under RAP 13.4(b), considerations 1, 2, and 4 apply.

DATED this the 18th day of June, 2015.

VAN SICLEN, STOCKS & FIRKINS

Tyler K. Firkins, WSBA 20964
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on June 18, 2015, she caused the foregoing *Petition for Review* to be served on the following parties of record and/or interested parties by hand delivery and email transmission the same day:

William Coats
Daniel Montopoli
Vandeberg Johnson Gandara
1201 Pacific Ave., Ste. 1900
Tacoma, WA 98402-4315

Dated this 18th day of June, 2015 Auburn, Washington.

Diana Butler

APPENDIX A

COURT OF APPEALS DECISION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WANDA RILEY-HORDYK, Appellant, v. BETHEL SCHOOL DISTRICT, Respondent.	No. 45830-6-II PUBLISHED OPINION

MELNICK, J. — Bethel School District (District) nonrenewed Wanda Riley-Hordyk's employment contract, effective at the end of the 2011-2012 school year, because the District closed the online school where she held the position of principal. A hearing officer upheld the District's decision to nonrenew Riley-Hordyk's contract, and the superior court affirmed the hearing officer's decision. Riley-Hordyk appeals from the superior court's order affirming the nonrenewal, arguing that the District's nonrenewal of her contract and its subsequent refusal to transfer her to an open principal position violated the collective bargaining agreement (CBA), the continuing contract statute,[1] and our decision in *Peters v. South Kitsap School District No. 402*, 8 Wn. App. 809, 509 P.2d 67 (1973). We disagree and affirm the superior court.

FACTS

Riley-Hordyk served as a teacher and principal at Bethel High School until issues arose concerning her performance during the 2009-2010 school year. Near the end of the 2009-2010 school year, the District demoted Riley-Hordyk from her principal position at Bethel High School to a subordinate position at the Bethel Online Academy (BOA). Then at the end of the 2009-2010 school year, the District nonrenewed her employment contract because of unprofessional conduct.

[1] RCW 28A.405.210.

Riley-Hordyk filed a lawsuit against the District and the parties settled the suit. As part of this settlement, Riley-Hordyk became the principal of the Bethel Online Academy (BOA). The District classified Riley-Hordyk as a secondary principal and paid her at the level of an elementary school principal. She was also subject to the terms and conditions of the CBA negotiated between the District and the principals' union.

On February 28, 2012, due to financial issues, the District's board of directors unanimously voted to close BOA effective the following school year. The District projected that BOA would lose $330,000 in the 2012-2013 school year because of reduced state funding, administrative burdens, and decreased enrollment. Riley-Hordyk repeatedly requested that the District transfer her into another principal position within the District. Each time, the District refused her request. The District told Riley-Hordyk that she needed to submit an application to be considered for open principal positions and that the CBA did not provide her a right to transfer into one of the positions.[2] The District invited Riley-Hordyk to apply for open positions through the normal process.

On May 9, the District notified Riley-Hordyk that probable cause existed to nonrenew her employment contract at the end of the 2011-2012 school year. The District informed Riley-Hordyk that her position was being eliminated due to "insufficient revenue to maintain the current level of programs and services in the District." Clerk's Papers (CP) at 381. This elimination occurred because of "the overall financial situation of the District, changes in the school funding formula,

[2] The CBA specifically addressed rights of administrators to transfer to other positions, providing that "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." Clerk's Papers (CP) at 402. It is undisputed that there were no open teaching positions for which Riley-Hordyk was qualified.

student enrollment, and the overall needs of the District." CP at 381. The District stated that Riley-Hordyk's performance did not factor into the decision to nonrenew her contract. The District referred to Riley-Hordyk's contract's nonrenewal as a "[r]eduction in [f]orce" under the CBA.[3] CP at 382.

Despite eliminating Riley-Hordyk's principal position, the total number of principals in the District for the 2012-2013 school year remained unchanged from the previous year because concurrent with its closure of BOA, the District re-opened an elementary school that had been previously closed for renovation. In addition to Riley-Hordyk's position, the District also eliminated six assistant principals' positions. All six displaced assistant principals applied for open positions within the District, and five of them were hired into other positions. Riley-Hordyk applied for a single elementary school principal position, but she did not appear for the interview because she believed that it conflicted with her son's graduation.[4] She also applied for various associate administrator positions, but she did not receive invitations for interviews.

Riley-Hordyk appealed her contract's nonrenewal.[5] After hearing testimony, the hearing officer made the following findings of fact:

- Riley-Hordyk was employed at BOA on a continuing contract basis;
- BOA was projected to lose $330,000 in the 2012-2013 school year as a result of reduced allotments and increased recordkeeping and compliance requirements;

[3] The CBA did not define the term "reduction in force."

[4] Riley-Hordyk's son's graduation began at 2:00 P.M. The District accommodated her by moving her interview from 11:00 A.M. to 9:15 A.M. This change would have allowed her to finish her interview at 12:00 P.M. Riley-Hordyk believed "this will still be cutting it close" and asked for another reschedule, which the District did not provide. CP at 522. Ultimately, Riley-Hordyk did not attend her interview.

[5] An appeal before a hearing officer is authorized under RCW 28A.405.210 and RCW 28A.405.310.

- BOA was closed for financial reasons, and Riley-Hordyk's employment nonrenewed;

- Riley-Hordyk asked to be transferred to other principal positions, but was denied;

- Riley-Hordyk failed to apply for any principal positions except for the elementary school position, for which she did not appear for her interview; and

- The District still had 27 principals following its reduction in force because it had re-opened an elementary school in accordance with a preexisting plan.

The hearing officer's conclusions of law included the following:

- BOA was closed in good faith, as there was no evidence of pretext or ill-will towards Riley-Hordyk;

- Riley-Hordyk was subject to a reduction in force, meaning that the District had no obligation under the CBA to transfer her to another principal position;

- *Peters* does not articulate a "blanket transfer policy" and does not contemplate a situation in which there is a collective bargaining agreement in place; CP at 18;

- The District was not obligated to transfer Riley-Hordyk to a principal position.

Implicitly the hearing officer concluded that sufficient cause[6] existed to nonrenew Riley-Hordyk's contract.

Riley-Hordyk appealed the hearing officer's decision to the Pierce County Superior Court, which affirmed the hearing officer's decision. Riley-Hordyk appeals.

[6] The continuing contract statute uses the term "probable cause" to describe the cause required for a school district to nonrenew an employee's contract, and uses the term "sufficient cause" to refer to the cause required to justify the district's determination in the event it is challenged. *See* RCW 28A.405.210 ("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, . . . [e]very such employee so notified . . . shall be granted opportunity for hearing . . . to determine whether there is *sufficient cause* or causes for nonrenewal of contract."). (Emphasis added.). We follow the statute in using "probable cause" to refer to the district's determination of cause and using "sufficient cause" to refer to a hearing officer's or a court's evaluation of that cause.

ANALYSIS

Riley-Hordyk argues that the District's nonrenewal of her contract and its subsequent refusal to transfer her to an open principal position violated the CBA, the continuing contract statute, and our decision in *Peters*, 8 Wn. App. 809. Because none of these authorities entitles Riley-Hordyk to the relief she seeks, we hold that the hearing officer did not err by upholding the District's nonrenewal of her contract and the rejection of her requests to transfer to open principal positions.. Accordingly, we affirm the superior court.

I. STANDARD OF REVIEW

Under RCW 28A.405.340(5), we review a hearing officer's factual determinations under the "clearly erroneous standard." *See Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 109-10, 720 P.2d 793 (1986) (relying on former statute); *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 670, 266 P.3d 932 (2011). A factual determination is clearly erroneous if it is not supported by substantial evidence in the record, which is evidence sufficient to persuade a fair-minded person of the finding's truth or correctness. *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014); *Clarke*, 106 Wn.2d at 121. Errors of law are reviewed de novo. RCW 28A.405.340(4); *Clarke*, 106 Wn.2d at 109. When reviewing the application of the law to the facts, we determine the applicable law de novo and give deference to the hearing officer's factual determinations, reviewing them under the clearly erroneous standard. *Clarke*, 106 Wn.2d at 109-10.

Like the superior court sitting in its appellate capacity, we confine our review of the hearing officer's decision to the verbatim transcript and the evidence admitted at the hearing. *See* RCW 28A.405.340. We review the hearing officer's findings of fact and conclusions of law; we give no deference to the superior court's decision. *Griffith*, 165 Wn. App. at 671.

II. NONRENEWAL FOR CAUSE—CONTINUING CONTRACT STATUTE

Riley-Hordyk asserts that the District violated her statutory continuing contract rights by nonrenewing her contract without probable cause. Specifically, she argues that the hearing officer erred by finding financial necessity led to the nonrenewal rather than finding that the District nonrenewed her contract as a means to retaliate against her in bad faith. She further argues that the hearing officer erred by concluding that the renewal was a reduction in force because the number of District principals remained the same in the year after the nonrenewal. We disagree with Riley-Hordyk.

A. Statutory Overview

Riley-Hordyk's employment is governed, in part,[7] by the continuing contract statute, RCW 28A.405.210, which addresses the employment, discharge, and reduction in rank of teachers and administrators.[8] *See Issaquah Educ. Ass'n v. Issaquah Sch. Dist. 411*, 104 Wn.2d 443, 446-47, 706 P.2d 618 (1985) (discussing former continuing contract statute). The continuing contract statute empowers school boards to employ teachers and administrators for not more than one year. RCW 28A.405.210. It further provides that the one-year contracts are automatically renewed for the next year unless certain events occur. RCW 28A.405.210. This statute "is similar to tenure

[7] Riley-Hordyk's employment is also governed by the CBA. "The general relationship between school authorities and teachers in the public schools of our state is created by contract and governed by general principles of contract law." *Tondevold v. Blaine Sch. Dist. No. 503*, 91 Wn.2d 632, 635, 590 P.2d 1268 (1979). Yet, the language of the employment contract, here the CBA, is not the sole consideration, because "the general law in force at the time of the formation of the contract is a part thereof." *Arnim v. Shoreline Sch. Dist. No. 412*, 23 Wn. App. 150, 153, 594 P.2d 1380 (1979). The continuing contract statute is one such general law.

[8] Riley-Hordyk also cites to RCW 28A.405.230, which establishes the process for transfer of an administrator to a subordinate certificated position. That statute is inapplicable because Riley-Hordyk was not transferred to a subordinate position. Moreover, the statute does not vest any *right* to transfer in an administrator. It merely states that an administrator "shall be subject to transfer" at the expiration of his or her contract. RCW 28A.405.230.

laws" because it "affords reemployment rights to all covered employees." *Moldt v. Tacoma Sch. Dist. No. 10*, 103 Wn. App. 472, 482, 12 P.3d 1042 (2000).

B. Statutory Procedure to Terminate Reemployment Rights

An employee's reemployment rights "may be involuntarily cut off only if the statutory procedure is followed." *Arnim v. Shoreline Sch. Dist. No. 412*, 23 Wn. App. 150, 154, 594 P.2d 1380 (1979). That procedure requires the employer to provide timely notice of nonrenewal, including the probable cause or causes for the nonrenewal, and an opportunity for a sufficient cause hearing.[9] RCW 28A.405.210. If the employer fails to do so, then the employee is "conclusively presumed to have been reemployed by the district for the next ensuing [one-year] term." RCW 28A.405.210.

Here, the District provided Riley-Hordyk with timely notice of nonrenewal, which included the District's reasons for its determination that probable cause existed to terminate her employment. She also received a sufficient cause hearing where she presented extensive evidence and argument. Riley-Hordyk does not challenge the procedural aspects of the nonrenewal. Therefore, the District discharged its duties under the continuing contract statute so long as probable cause supported its decision to nonrenew Riley-Hordyk's contract.

1. Sufficient Cause—Financial Exigency

Riley-Hordyk assigns error to the hearing officer's conclusion of law that the nonrenewal of her contract was supported by sufficient cause. She argues that the hearing officer erred by finding her contract was nonrenewed as a result of financial necessity and that the hearing officer should have found the District retaliated against her in bad faith. We disagree.

[9] The hearing is provided for in RCW 28A.405.310.

The District informed Riley-Hordyk that it was nonrenewing her contract for financial reasons. The District provided the following statement of probable cause to Riley-Hordyk:

> There is insufficient revenue to maintain the current level of programs and services in the District. The Board of Directors met and determined that certain programs needed to be modified or eliminated. One of the eliminated programs is the Bethel Online Academy. In reaching its decision, the Board of Directors considered the overall financial situation of the District, changes in the school funding formula, student enrollment, and the overall needs of the District. As a result of the Board's action, your position was eliminated.

CP at 381.

A district's "adverse financial condition" may constitute sufficient cause to nonrenew an employee's contract. *Barnes v. Seattle Sch. Dist. No. 1*, 88 Wn.2d 483, 487, 563 P.3d 199 (1977). The question of whether specific conditions constitute sufficient cause is a mixed question of law and fact that is subject to de novo review. *See Clarke*, 106 Wn.2d at 111.

The hearing officer's conclusion that sufficient cause existed to support the District's nonrenewal of Riley-Hordyk's contract is supported by the foregoing case law and the hearing officer's findings of facts. The hearing officer found that the District in general and BOA in particular were in financial distress. Riley-Hordyk does not assign error to these findings,[10] and therefore they are verities on appeal. *Yuchasz v. Dep't of Labor & Indus.*, 183 Wn. App. 879, 886, 335 P.3d 998 (2014); *Fisher v. Tacoma Sch. Dist. No. 10*, 53 Wn. App. 591, 595, 769 P.2d 318 (1989).

[10] But even if she did, they are supported by substantial evidence in the record. Uncontroverted testimony at the hearing showed that the District had lost a total of 26 million dollars in funding in recent years, requiring the District to "cut just about everything [it] could possibly cut to maintain core services." CP at 67. Uncontroverted testimony showed that the legislature reduced the state allotment for online schools, reporting requirements became more burdensome, and enrollment was less than half what the District projected. As a result, BOA was projected to lose $330,000 in the 2012-2013 school year.

The hearing officer also found that the District exercised good faith judgment when it decided to close the BOA.[11] Riley-Hordyk assigned error to this factual conclusion, but it is supported by substantial evidence in the form of other unchallenged findings of fact that: (1) the District relied on a variety of sources, including the work product of several District employees and their financial committees; (2) the decision was made after a public hearing, Board consideration, and vote; and (3) there was no evidence of pretext or ill-will directed towards Riley-Hordyk.[12] Therefore, we hold that the hearing officer's factual conclusion that the District exercised good faith judgment when it decided to close the BOA is not clearly erroneous. Moreover, whether the District exercised its judgment in good faith is akin to a credibility determination, which we do not disturb on appeal. *See Griffith*, 165 Wn. App. at 672.

Given the dire financial straits of the District, the District's decision to close down the BOA, and the resulting elimination of Riley-Hordyk's position, the hearing officer did not err in concluding that sufficient cause existed to nonrenew Riley-Hordyk's contract.

2. Reduction in Force

Riley-Hordyk next assigns error to the hearing officer's conclusion of law that the nonrenewal of her contract based on the closure of the BOA constitutes a "reduction in force." Br. of Appellant at 2. She argues that her contract's nonrenewal resulted not from a reduction in force, but out of retaliation for her prior litigation against the District. Further, she argues that the hearing

[11] Although the hearing officer labeled this finding of good faith as a conclusion of law, good faith is typically understood as a question of fact. *See, e.g., Marthaller v. King County Hosp. Dist. No. 2*, 94 Wn. App. 911, 916, 973 P.2d 1098 (1999). A finding of fact that is mislabeled as a conclusion of law will be reviewed as a finding of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

[12] This factual findings was also mislabeled as a conclusion of law.

officer's conclusion that the nonrenewal was a reduction in force was error because the number of principals in the District remained unchanged in the year after the nonrenewal.

The term "reduction in force" does not play a pivotal role in this case. Riley-Hordyk's focus on whether a reduction in force occurred is misguided because it does not affect whether the District had probable cause to nonrenew Riley-Hordyk's contract, which is the real issue here. The term reduction in force does not appear in the continuing contract statute, and its only mention in the CBA relates to a right to transfer, which we discuss below. *See* RCW 28A.405.210. Likewise, the hearing officer's only reference to reduction in force pertains to a potential right to transfer in the CBA. Riley-Hordyk's argument conflates "reduction in force" with probable cause to terminate her contract, but we do not. Reduction in force is not a term that has any bearing on the District's probable cause determination.

III. RIGHT TO TRANSFER

A. No Right to Transfer Under *Peters*

Riley-Hordyk argues that pursuant to *Peters*, 8 Wn. App. 809, the District was required to offer her any principal positions that opened prior to the expiration of her existing contract. We disagree.

In *Peters*, we considered what duties, if any, a school district owes to an employee whose contract was nonrenewed for financial reasons, with respect to vacancies that might occur before the expiration of the employee's existing contract. 8 Wn. App. at 815. We held that a school district "may not approach the task of selecting personnel to fill vacancies that occur after some [employees' contracts] have been nonrenewed without first giving effect to the continuing contract rights of those nonrenewed [employees]." *Peters*, 8 Wn. App. at 816. In short, a school district

must continue the contracts of those employees who have qualifications that satisfy its needs even if that means reconsidering a nonrenewal. *Peters*, 8 Wn. App. at 816.

Riley-Hordyk claims that *Peters* supports her assertion that the District was required to transfer her into a vacant principal position for which she was qualified. *Peters* did not, however, involve a collective bargaining agreement that provided the employees' exclusive rights to transfer into open positions. 8 Wn. App. at 810-17. Indeed, *Peters* predates the collective bargaining agreement statute (i.e., the Educational Employment Relations Act), chapter 41.59 RCW. These facts are significant because it is well settled that provisions in a collective bargaining agreement do control over certain conflicting statutory provisions.

A union may lawfully bargain away, i.e., "waive," certain statutory rights of represented employees in a collective bargaining agreement, but statutorily created private rights that serve public policy purposes cannot be waived. *Shoreline Cmty. Coll. Dist. No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 409-10, 842 P.2d 938 (1992) (holding that a purported waiver of unemployment benefits is void against public policy); *Hitter v. Bellevue Sch. Dist. No. 405*, 66 Wn. App. 391, 397-99, 832 P.2d 130 (1992) (holding that right to attorney fees was not a minimum substantive guaranty to individual workers and, therefore, collective bargaining provision took precedence over statute that provided attorney fees). For example, in *Hitter*, we distinguished between "minimum substantive guarant[ies] to individual workers," such as rights to receive minimum wage and overtime pay and to be free from unlawful discrimination, which cannot be waived, and a wrongfully discharged employee's right to receive reasonable attorney fees in connection with a judgment for wages or salary, which may be bargained away in a collective bargaining agreement. 66 Wn. App. at 399.

Riley-Hordyk argues that *Peters* gives her the right to transfer into an open position. We disagree because Riley-Hordyk's CBA waived the statutory right to transfer discussed in *Peters*. A statutory right can be waived in a collective bargaining agreement if it is not in the category of minimum substantive guaranties to individual workers. *Shoreline Cmty. Coll. Dist. No. 7*, 120 Wn.2d at 409-10; *Hitter*, 66 Wn. App. at 399. A right to transfer into an open position after nonrenewal is fundamentally different from rights that courts have interpreted as minimum substantive guaranties to individual workers, such as rights to minimum wage and overtime pay, unemployment benefits, and to be free of discrimination. *See Shoreline Cmty. Coll. Dist. No. 7*, 120 Wn.2d at 409-10; *Hitter*, 66 Wn. App. at 398-99. Rather, a right to transfer into an open position after nonrenewal is more aligned with rights that may be waived by a collective bargaining agreement, such as the statutory right to reasonable attorney fees in connection with a judgment for wages or salary. *See Hitter*, 66 Wn. App. at 397-99; *see also Shoreline Cmty. Coll. Dist. No. 7*, 120 Wn.2d at 409-10. We hold that the statutory right to transfer discussed in *Peters* is not in the category of minimum substantive guaranties to individual workers. Therefore, an employee's statutory right to transfer under the continuing contract statute can be waived or altered by a collective bargaining agreement.

Here, the CBA controls principals' rights to transfer to open positions upon nonrenewal of their contracts: "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 at 402. The parties to the CBA specifically contemplated a situation like the present case and bargained for a specific outcome that is inconsistent with the result in *Peters*. Because the right to transfer conferred by *Peters* is not in "the category of a minimum substantive guaranty to individual workers, which cannot be waived by the exercise of collective rights," we

hold that Riley-Hordyk waived any remedy under *Peters* by entering into the CBA. *Hitter*, 66 Wn. App. at 399. We hold that the *Peters* ruling and rationale did not entitle Riley-Hordyk to transfer to an open position. Riley-Hordyk's right to transfer after a nonrenewal of her contract is controlled solely by the CBA.

B. No Right to Transfer Under the CBA

Riley-Hordyk next argues that the CBA required the District to transfer her into an open principal position. We disagree.

The only mention in the CBA of a right to transfer is as follows:

> 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 at 402. The language of the CBA does not support Riley-Hordyk's argument. The CBA provides that where an administrator loses her position due to a reduction in force, she would only be "considered for a contract for an open *teaching* position." CP at 402 (emphasis added). The first clause of the applicable CBA provision limits Riley-Hordyk's right to transfer to an open teaching position. Under that clause, an administrator like Riley-Hordyk would be considered for an open teaching position only if the Bethel Education Association staff are not also experiencing a reduction in force. The CBA does not provide administrators a right to transfer into open *principal positions*.

Assuming the most favorable conditions to Riley-Hordyk—that a reduction in force led to Riley-Hordyk's contract being nonrenewed, but the Bethel Education Association staff was not also experiencing a reduction in force—she was entitled to be "considered for a contract for an open teaching position for which [she was] qualified." CP at 402. Uncontroverted testimony at

the hearing established that Riley-Hordyk was endorsed to teach only one subject—Spanish—and that no teaching positions existed for which she qualified.

Because no Spanish teaching positions were open to offer Riley-Hordyk, the District did not violate the duties it owed under the CBA. Because the CBA does not provide Riley-Hordyk a right to transfer to an open principal position within the district, the hearing officer did not err by concluding that the District had no obligation to transfer her to another principal position. Accordingly, we affirm the superior court in affirming the hearing officer.

Melnick, J.

We concur:

Worswick, P.J.

Sutton, J.