No. 330621-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

MICHAEL F. CRONIN,

Plaintiff,

vs.

CENTRAL VALLEY SCHOOL DISTRICT,

Respondent.

SCHOOL DISTRICT'S RESPONSE BRIEF

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I. INTRODUCTION

The Collective Bargaining Agreement ("CBA") at issue expressly requires that plaintiff select one of two procedures for contesting his termination from employment. The CBA states that an "employee shall select the statutory procedures or the grievance procedure." CP 5. In this case, no procedure was selected until after the deadlines for both procedures had passed. The underlying action is the result of plaintiff suing to force the Central Valley School District ("District") to participate in a procedure that was not timely selected.

The Trial Court, per the Honorable Kathleen M. O'Connor, correctly dismissed plaintiff's action because plaintiff did not properly select either procedure as required by the CBA and by law. CP 311; RP 8. In her Oral Ruling, Judge O'Connor noted that the requirement to properly select a procedure is not a requirement that "elevates form over substance" and instead is a requirement that needed to be made out of fairness to the District. RP 7-8. After all, the requirement was born of a negotiated contract in which the District was entitled to the benefit of its bargain. Moreover, the District was entitled to know in a timely manner (and according to the law) which procedure plaintiff selected. *Id.* As Judge O'Connor also noted, plaintiff's union representative (Ms. Sally McNair), knew full well that the selection needed to be made and she knew when it needed to be made. *Id.* In fact, the

District provided plaintiff and his representative with copies of the very statutes that expressly stated the deadline and method for selection. CP 91-92.

In addition to the above, plaintiff's union representative lacked authority to act as a general litigating agent for purposes of selecting the statutory procedure, because that procedure is an individual employee right under the law (and not a union bargained right under the CBA). Judge O'Connor correctly held in her Oral Ruling that plaintiff's union representative did not possess authority to select the statutory hearing procedure on behalf of plaintiff. RP 4-5. Judge O'Connor did rule, however, that Ms. McNair was acting as a special agent for plaintiff, and that Ms. McNair had authority as such to select a procedure for plaintiff. *Id.* The District assigns error to this narrow ruling based on the argument that Ms. McNair lacked apparent or actual authority as a special litigating agent for selecting the statutory procedure. Nevertheless, Judge O'Connor made clear that Ms. McNair made no timely selection in the manner required by the CBA and the law. RP 7-8. Thus, the action needed to be dismissed on that basis. *Id.*

II. ASSIGNMENTS OF ERROR

No assignment of error is made as to the Trial Court's finding and conclusion that neither plaintiff nor his representative made a proper selection as to which procedure plaintiff would use to contest his termination.

Assignment of error is made as to the Trial Court's finding and conclusion that Ms. McNair had actual or apparent authority to select the statutory procedure on behalf of plaintiff.

III. STATEMENT OF THE CASE

Plaintiff is a member of the Central Valley Education Association ("CVEA"), the teachers' union at the District. A CBA is a contract resulting from lengthy, protracted, and often times exhaustive give and take between the parties. The resulting CBA contract here specifies wages, hours, and working conditions for the members of the CVEA. CP 4-19. The CBA contains an expressly negotiated provision that requires an employee who is discharged and/or nonrenewed to select either a grievance procedure (ending in arbitration) or a statutory procedure (ending in a hearing under RCW 28A.405.310), but never both. CP 5. The CBA language is clear and definite:

> [I]n cases of nonrenewal, discharge, or actions which adversely affect the employee's contract status, **the employee shall select the statutory procedures or the grievance procedure**.

Id. (emphasis added). If an employee selects the statutory procedures, he or she must do so within ten days of receiving a notice of probable cause. The Washington State Legislature has mandated the ten-day deadline for every statutory procedure request. *See* RCW 28A.405.210 & .300 ("Every such

employee so notified [of probable cause], at his or her request made in writing ... within ten days after receiving such notice, shall be granted opportunity for a hearing pursuant to RCW 28A.405.310 ....").

On January 5, 2012, the District's Superintendent, Mr. Ben Small, issued a Notice of Probable Cause for Discharge and Notice of Probable Cause for Nonrenewal ("Notice") to plaintiff for various misconduct (including on-the-job exploitive conduct toward students). CP 91-92 (McNair Decl. Ex. 3). The District personally served the Notice on plaintiff, as expressly provided in RCW 28A.405.210 (for the nonrenewal notice) and as expressly provided in RCW 28A.405.300 (for the discharge notice). *Id.* The Notice cited both statutes numerous times.

The Notice also expressly notified plaintiff of his statutory procedure rights. Though not required, the District included copies of each statute that describe exactly how to select the statutory hearing procedure and by when. CP 92. The Notice and statutes specified that plaintiff needed to request a statutory hearing within ten days, otherwise the "decision will become final, binding, and non-appealable." *Id.*

Prior to the issuance of the Notice, the District's Assistant Superintendent, Mr. Jay Rowell, met with plaintiff on December 15, 2011 to give plaintiff final notice of the allegations against him and an opportunity to respond. CP 213 (Rowell Decl. ¶ 3). Mr. Rowell, mindful of

the holiday season, deliberately chose to wait until after Christmas to issue the Notice. *Id.* At this point in time, the District did not know when plaintiff would be released from jail. CP 214 (Rowell Decl. ¶ 4). It did not know if plaintiff had earned early release time, or whether his time would be extended for something about which the District might not be privy. *Id.* His date of release did not factor into the District's decision about when to issue the Notice. *Id.*

After the District issued the Notice, a representative for the CVEA, Ms. Sally McNair, presented a letter to Superintendent Small on January 11, 2012. The first paragraph of the letter indicated that Ms. McNair would be selecting the statutory procedure for plaintiff. The second paragraph of the letter, however, states:

> Due to the **lack of access to Mr. Cronin, I will** ... **be filing a grievance** in order to **preserve timelines to both procedures.** It is **clear the contract requires an election of remedies** and it is not our intent to pursue both options, only to **allow time to consult with Mr. Cronin so he can determine his desired path.** We anticipate notifying the District on or before February 10th, 2012 as to Mr. Cronin's decision to **pursue either the statutory hearing or the grievance.** At that time, either this request or the grievance will be withdrawn.

CP 93 (McNair Decl. Ex. 4, emphasis added).

Not only did Ms. McNair admit in her letter that the CBA clearly requires a selection of procedures, she also admits that plaintiff had not, as

of January 11, 2012, selected a procedure (or in her words "determine[d] his desired path"). *Id.* Ms. McNair makes this admission again in her Declaration filed below. In her Declaration, she expressly concedes that the January 11, 2012 letter was not a selection of remedies as required by the CBA: "I further stated [in the January 11, 2012 letter] that we would **indicate to the District by February 10, 2012, the decision whether to pursue the statutory hearing or grievance, and one or the other would be withdrawn by then**." CP 75 (McNair Decl. ¶ 8, emphasis added). Ms. McNair thus admits that her January 11, 2012 letter did not "indicate ... the decision" to select either a hearing or a grievance, and that instead she would "indicate ... the decision" later. *Id.*

The sole purpose of the January 11, 2012 letter was "to preserve timelines to both procedures." CP 93. The letter likewise made clear that Ms. McNair did not have authority to select one procedure over another because she needed more time "to consult with Mr. Cronin so **he can determine his desired path.**" *Id.* (emphasis added). Ms. McNair then provided a unilateral deadline for when she and plaintiff would notify the District of the selected procedure: "We anticipate notifying the District on or before February 10th, 2012 as to Mr. Cronin's decision to pursue either the statutory hearing or the grievance." *Id.* When the District received Ms. McNair's letter on January 11, 2012, six days remained until expiration of

the ten-day deadline for selecting the statutory hearing procedure (January 17, 2012). Moreover, 18 working days remained until expiration of the deadline for selecting the grievance procedure (February 6, 2012).

In no uncertain terms, Ms. McNair's January 11, 2012 letter notified the District that the District would have to wait for plaintiff's determination of his desired path. As of that date, Ms. McNair told the District that plaintiff had not yet made a decision to "pursue either the statutory hearing or the grievance" and she told the District she had "a lack of access" to plaintiff. CP 93. As of January 11th, the District thus made the decision to wait for a further response from Ms. McNair.

Subsequently, on February 8, 2012 (over a month after issuance of the notices of probable cause, and well after the ten-day deadline for selection of the statutory procedure), Ms. McNair sent an email to the District's Assistant Superintendent, Mr. Rowell, "to provide notice that Mr. Cronin has decided to pursue the statutory hearing as described in RCW 28A.405.300 [the discharge statute] as his election of remedy for the notice of probable cause for discharge." CP 94 (McNair Decl. Ex. 5). While the February 8, 2012 email finally constituted a selection by Ms. McNair of one of the two procedures, the email was well past the deadline for selecting the statutory procedure (and, indeed, even past the deadline for selecting the grievance procedure).

Additionally, as of February 8, 2012, the District was a week away from a District-wide levy election. CP 297 (Rowell Second Decl. ¶ 4). On February 14, 2012, the District ran its levy election, and the undersigned counsel went on vacation four days later (on Saturday, February 18, 2012). *Id.*; CP 233 (Clay Second Decl. ¶ 3). A few days later, on February 21, 2012, and while on vacation, the undersigned received an inquiry from Mr. Kuznetz regarding plaintiff's wages. CP 233 (Clay Second Decl. ¶ 3). The undersigned immediately forwarded Mr. Kuznetz' inquiry to Mr. Rowell.

Given that Mr. Rowell had worked with Ms. McNair and the Washington Education Association (WEA) for several years, and given that the undersigned was on vacation, Mr. Rowell responded directly to Ms. McNair. CP 214 (Rowell Decl. ¶ 5). On February 22, 2012, the day after the undersigned received the inquiry from Mr. Kuznetz, Mr. Rowell personally contacted Ms. McNair. *Id.* In doing so, Mr. Rowell explained that he was responding to Mr. Kuznetz letter and sought assurance that Ms. McNair would connect with Mr. Kuznetz. *Id.* Mr. Rowell then explained the District's position that the plaintiff's pay was terminated in January since he failed to appeal the District's decision. Ms. McNair did not ask Mr. Rowell to respond directly to Mr. Kuznetz, nor did she ask Mr. Rowell to have the undersigned contact Mr. Kuznetz. *Id.* It was clear to Mr. Rowell

that his conversation with Ms. McNair would result in her following up with Mr. Kuznetz. *Id.*

Shortly thereafter, Ms. McNair communicated the District's position with Mr. Kuznetz. Mr. Kuznetz did not again attempt to contact the undersigned to discuss this matter. CP 233-234 (Clay Second Decl. ¶ 3). Indeed, Mr. Kuznetz never responded to the email by the undersigned. *Id.* He never once indicated any need for a further response from the undersigned, nor did he indicate that the response to Ms. McNair did not fully address his question about pay in his February 21, 2012 letter. *Id.*

On February 28, 2012, the District followed up its February 22, 2012 discussion with Ms. McNair in writing. CP 95. The District extended this courtesy to Ms. McNair, given that it had and would have an ongoing working relationship with her. CP 214 (Rowell Decl. ¶ 5). It was under no obligation to send the February 28, 2015 letter.

Not until over a month after the District responded to Ms. McNair did plaintiff file the underlying action (March 23, 2012). The underlying action alleged four causes of action. Each cause of action is premised on whether plaintiff properly selected the statutory hearing procedure.[1] Both

[1] Plaintiff's first cause of action asserts that the District failed to grant him the opportunity for a statutory hearing; his second and third causes of action assert that the District failed to pay him pending that hearing procedure; and his fourth cause of action asserts the right to the statutory hearing procedure specific to his nonrenewal.

parties moved for summary judgment. The District sought summary judgment on numerous grounds, including that plaintiff's cause of action did not comply with RCW 28A.645.010; that plaintiff did not properly select a procedure; and that plaintiff's representative lacked authority to make a selection.[2] The Trial Court granted the District's motion on the basis that plaintiff did not properly comply with RCW 28A.645.010. CP 23. Thus, the Trial Court did not address the other issues.

Plaintiff appealed, initially arguing that RCW 28A.645.010 did not apply to this action. In an unpublished opinion, the Court of Appeals upheld the District's position that RCW 28A.645.010 did apply. CP 20-28. The Court nevertheless held that plaintiff complied with the requirement of that statute, and that the matter could thus move forward. *Id.* On remand, both parties again moved for summary judgment, at which point Judge O'Connor granted the District's motion for summary judgment as to plaintiff failing to properly select a procedure. CP 309-312; RP 5-8.

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[2] The District's initial brief in support of summary judgment is not in the Clerk's Papers as it was filed with the Trial Court in the preceding action in front of Judge Jerome Leveque on May 7, 2012. The District would, of course, be willing to produce this brief if the Court so desires.

IV. ARGUMENT

A. Standard of Review.

The parties agree that this Court applies a de novo standard of review to the Trial Court's decision.

B. Judge O'Conner Correctly Ruled That Plaintiff Failed to Timely Select a Procedure As Required by the Collective Bargaining Agreement.

1. Plaintiff was Required to Select a Procedure.

There is no dispute that the expressly negotiated bargaining agreement required plaintiff to select either a statutory hearing procedure or a grievance procedure. *See Appellant's Brief* at 9-10. Indeed, the language of the CBA is quite clear:

> [I]n cases of nonrenewal, discharge, or actions which adversely affect the employee's contract status, **the employee shall select the statutory procedures or the grievance procedure**.

CP 5. It is also undisputed that, if the employee selects the statutory hearing procedure, the deadline for making that selection is ten days after receipt of the probable cause notice. Again, the statute is quite clear:

> Every such employee so notified [of probable cause for discharge or nonrenewal], at his or her request made in writing and filed with the president, chair of the board or secretary of the board of directors of the district **within ten days after receiving such notice**, shall be granted

> opportunity for a hearing pursuant to RCW 28A.405.310 to determine whether or not there is sufficient cause ...

RCW 28A.405.210 & .300 (emphasis added). In this case, ten days after receipt of the probable cause notice was January 17, 2012.

2. No Timely Selection Was Made.

Rather than selecting one procedure over another as required by the CBA, the January 11, 2012 letter from Ms. McNair "preserved" both procedures so that a selection of plaintiff's "desired path" could occur at a later date. Indeed, the letter itself makes clear that plaintiff had not yet made a selection (or in Ms. McNair's words a "decision") as of January 11, 2012:

> I am requesting a closed hearing on Mr. Cronin's behalf . . . [and] [d]ue to the lack of access to Mr. Cronin, I will **also** be filing a grievance in order to **preserve timelines** to **both procedures** . . . so [Mr. Cronin] can [later] **determine his desired path.** We anticipate notifying the District on or before February 10th, 2012 as to Mr. Cronin's **decision to pursue either the statutory hearing or the grievance.**

CP 93 (McNair Decl. Ex. 4, emphasis added).

Plaintiff admits in his briefing before the Trial Court that the above was not a selection of procedures. In his Response Memorandum (CP 171), plaintiff admits that Ms. McNair's letter was nothing more than notice to the District that plaintiff was attempting to preserve a supposed "right" to later select the statutory procedure or the grievance procedure:

> All Ms. McNair did was notify the District that she was requesting a statutory hearing, but preserving his right to the

> option to file a grievance because she was unable to speak with him . . . She was attempting to preserve his option to file a grievance.

CP 171 (Plaintiff's Response Memorandum at 9). Clearly, plaintiff was preserving his option to file a grievance and, as of January 11, 2012, plaintiff had not yet selected his "desired path" as required by the CBA.

Ms. McNair likewise made this admission in her Declaration. CP 70-95. In her Declaration, she concedes that her January 11th letter was not a selection of remedies as required by the CBA: "I further stated [in the January 11, 2012 letter] that we would **indicate to the District by February 10, 2012, the decision whether to pursue the statutory hearing or grievance, and one or the other would be withdrawn by then**." CP 75 (McNair Decl. ¶ 8, emphasis added).

Based on the letter itself, plaintiff's admission in his briefing, and Ms. McNair's admission in her Declaration, plaintiff did not make a "decision" or "selection" in the January 11, 2012 letter. Judge O'Connor thus properly dismissed plaintiff's entire Complaint because each of his four causes of action are predicated on a proper and timely selection of the statutory procedure.

3. Plaintiff Argues that Ms. McNair's Letter was a Selection.

Plaintiff, of course, disputes Judge O'Connor's finding that the January 11, 2012 letter was not a selection. Plaintiff's initial argument is

based on the first paragraph of Ms. McNair's letter. Indeed, as Judge O'Connor recognized, the content of Ms. McNair's first paragraph does convey a selection. RP 6. However, as also noted by Judge O'Connor, what Ms. McNair did in her first paragraph, she readily undid in her second paragraph. *Id.* Her second paragraph made clear that: (1) she had not yet even contacted plaintiff; (2) she had no actual authority to make either selection on behalf of plaintiff because she had no access to him; and, (3) she did not know which of the two procedures would be plaintiff's "desired path." When **read as a whole,** it is impossible to conclude that plaintiff had selected one procedure over another. The message in Ms. McNair's letter is plaintiff's attempt to have his cake and eat it too. It is not a "selection."

4. Plaintiff Argues that Ms. McNair's February 8th Email Was Not a Selection.

Judge O'Connor also correctly noted that plaintiff's actual selection was made on February 8, 2012 in an email from Ms. McNair. CP 94; RP 7-8. Plaintiff tries to argue that the February 8th email was not really plaintiff's selection and instead was "superfluous." *See Appellant's Brief* at 16. Ms. McNair's February 8, 2012 email, however, was the first indication of plaintiff's actual "desired path." The February 8, 2012 email states: "Mr. Cronin **has decided** to pursue the statutory hearing as described in RCW 28A.405.300 as his election of remedy ... He will not be utilizing the

grievance procedure." CP 94 (McNair Decl. Ex. 5, emphasis added). Ms. McNair's Declaration discusses this email. She says: "I further stated [in the January 11, 2012 Letter] that **we would indicate** to the District by February 10, 2012, **the decision** whether to pursue the statutory hearing or grievance, and one or the other would be withdrawn by then." CP 75 (McNair Decl. ¶ 8, emphasis added). Her February 8, 2012 email was the indication of the "decision" (i.e., the "selection").

Of course, the District did not receive this February 8, 2012 email until 22 days after the ten-day deadline for selecting the statutory hearing procedure. Judge O'Connor aptly noted that Ms. McNair's February 8th email was the decision/selection that Ms. McNair said (on January 11th) would be made. RP 7-8. That February 8th selection of the statutory procedure was well after the January 17th deadline and clearly untimely. *Id.*

5. Plaintiff Argues that He Can Select One Procedure and then Select Another.

Plaintiff makes a new argument on appeal. He argues that he can select the statutory procedure, later select the grievance procedure, and then waive the first selection. He somewhat sheepishly says "[a]rguably, after he requested the statutory hearing procedure, the grievance was still available to Cronin." *Appellant's Brief* at 13. He bases his assertion on the argument say that: "There is no requirement under either the law or the

Collective Bargaining Agreement that a teacher has to give notice of an election of remedy." *Id.* There are numerous problems with plaintiff's argument.

First, plaintiff's argument ignores that the express language of the CBA is disjunctive and not conjunctive. The CBA requires selection of the statutory procedure "**or**" the grievance procedure. CP 5. It does not allow selection of both procedures followed by a subsequent waiver, withdrawal, abandonment, rejection, or whatever other new theory plaintiff might offer to pretend that the first selection was not made. Plaintiff's argument is clearly premised on being able to make more than one selection. The CBA, however, expressly states that "the employee shall select the statutory procedures **or** the grievance procedure." *Id.* (emphasis added). Acceptance of plaintiff's argument, that he should be able to select the statutory procedure **and** the grievance procedure (followed by a waiver of the statutory procedure), would require ignoring the negotiated CBA language.

Second, acceptance of plaintiff's argument would result in re-writing the bargained language between the parties to the CBA. Had the parties intended to allow two selections followed by waiver of the first selection, they could have easily included such language in the CBA. Alternatively, they could have decided not to negotiate a selection of procedures requirement in the first place. The parties reached the bargain

they did through careful negotiation. Allowing the CBA to be re-written without the give and take of bargaining would not only undermine the bargaining process, it would grant the CVEA a benefit without the School District receiving any corresponding consideration. Plaintiff tries to rely on *Oak Harbor Education Ass'n v. Oak Harbor School District,* 162 Wn.App. 254, 259 P.3d 274 (2011) for his argument that he can select both procedures under a CBA. In *Oak Harbor,* however, the Court of Appeals did not render any decision regarding a selection of procedures requirement because no such requirement existed in the CBA. Furthermore, the issue in that case was whether the arbitrator versus the court had authority to decide arbitrability.

Third, even if plaintiff were allowed to make a selection, then make another selection followed by a waiver, he did not do so in this case. In this case, he says a selection was made in the first paragraph of Ms. McNair's letter, and that the second paragraph was superfluous. However, as Judge O'Connor noted in her Oral Ruling, the second paragraph was hardly superfluous. RP 6-7. Instead, it entirely gutted the first paragraph, leaving no reasonable communication of plaintiff's actual "desired path." *Id.* The second paragraph made clear that the first paragraph was not an actual selection by plaintiff, and that the selection by plaintiff would come at a later date. There is nothing superfluous about the meaning of that paragraph.

6. Plaintiff Argues that Final Selection Need Not Be Made for 30 days.

Plaintiff also seems to argue that, once he selects the statutory procedure, the District must wait at least 30 days to learn whether that selection really is a selection. Indeed much of plaintiff's argument throughout his briefing is premised on this singular assertion. Plaintiff says "the District knew it had to wait at least 30 days under the Collective Bargaining Agreement to determine whether Cronin might elect to proceed with filing a grievance during the 30 day window." *Appellant's Brief* at 13. Plaintiff tries to try to parlay the assertion that he can make a **preliminary** selection of the statutory procedure within ten days and later make a **final** selection of the grievance procedure within 30 days, thus forcing the District to wait 30 days for a final selection. Plaintiff essentially asks this Court to allow him to change his mind after making a selection, and ignore the ten-day deadline mandated by the State Legislature.[3]

The problems with this argument echo the problems discussed above. First, the CBA contains a disjunctive requirement for selection of

[3] Allowing plaintiff to extend the statutorily mandated ten-day timeline to a 30 day timeline would frustrate the purpose and deadlines imposed in RCW 28A.405.310. Specifically, RCW 28A.405.310 requires a school district to (1) appoint a hearing nominee within 15 days of plaintiff's selection; (2) mutually agree upon a hearing officer; and (3) hold a prehearing conference within 5 days of the appointment of a hearing officer – all of which the statute contemplates will be done within less than the 30-day timeline during which plaintiff purports the District should wait.

procedures with each procedure standing alone. Nothing in the CBA allows plaintiff to borrow the 30-day grievance procedure deadline for the ten-day statutory procedure deadline. If the employee selects the statutory procedure, he or she must meet the ten-day deadline.[4]

Second, plaintiff's argument would result in new language in the CBA. Had the CVEA wanted to extend the ten-day deadline for the statutory procedure, the CVEA could have done so. The CVEA obtained no such language in the bargain and should not be permitted to now have a Court add such language without quid pro quo bargaining.

Third, even if plaintiff were to convince the Court to extend the ten-day deadline for selection of the statutory procedure to 30 days (as argued by plaintiff), plaintiff did not make a selection prior to the 30-day deadline. The 30-day deadline was February 6, 2012. Ms. McNair's email was not sent until February 8, 2012, two days after the deadline.

7. Plaintiff's Argues Waiver by the School District.

Plaintiff asserts that the District waived its right to rely on his failure to select a procedure as required by the CBA.[5] He goes so far as to argue

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[4] Indeed, there are trade-offs for an employee as to each procedure and one of the trade-offs is that the statutory procedure contemplates a prompt hearing with specific timelines in the statutes. The grievance process is more flexible allowing for several grievance steps prior to an actual arbitration hearing. Plaintiff wants the best of both worlds, allowing him to select the statutory procedure without the statutory procedure deadline.

[5] Plaintiff has alternatively characterized his waiver claim as one of estoppel or lack of clean hands.

that the District was somehow required to sue him for failing to properly make a selection. *See Appellant's Brief* at 15. Again, there are numerous problems with this argument.

First, this argument fails to consider that, when the District received Ms. McNair's letter on January 11, 2012, six days remained until expiration of the ten-day deadline for selecting the statutory procedure (January 17, 2012) and 18 working days remained until expiration of the deadline for selecting the grievance procedure (February 6, 2012). As of January 11, 2012, the District thus faced three choices:

1. The District could have accepted Ms. McNair's letter as a selection of the statutory procedure, just as plaintiff asserts it should have. This choice, however, made no sense given the following: (1) Ms. McNair's notice to the District, in the letter itself, that plaintiff had not yet made a "decision"; (2) Ms. McNair's notice that plaintiff had not yet "determine[d] his desired path"; (3) Ms. McNair's notice that plaintiff would let the District know "on or before February 10th, 2012" as to which "procedure" or "desired path" plaintiff would pursue; (4) Ms. McNair's notice that she had a "lack of access" to plaintiff and thus needed to "preserve timelines to both procedures"; and (5) plaintiff still had six days to select the statutory procedure and had 18 days to select the grievance procedure.

2. The District could have contacted Ms. McNair and/or plaintiff. However, this choice likewise made little sense given that Ms. McNair's letter made clear she or plaintiff would subsequently notify the District of plaintiff's final decision. In other words, the District could have inquired further even though Ms. McNair as much as said "don't call us, we'll call you."

3. The District could have waited. This choice made perfect sense. After all, Ms. McNair asked the District to do so. She said that someone would get back to the District to let the District know

> plaintiff's "desired path." Under this choice, the District would reasonably be waiting for: (1) plaintiff to select the hearing procedure since he could do so prior to January 17, 2012; or (2) plaintiff to select the grievance procedure since he could do so by orally presenting a grievance by February 6, 2012.

As of January 11, 2012, the District thus made the reasonable choice to wait, just as Ms. McNair asked it to do.

Second, plaintiff's waiver argument is inconsistent with his own briefing to this Court. Plaintiff says the District "had to wait at least 30 days" after issuance of a notice of probable cause because, according to plaintiff, he could later waive that selection in favor of a subsequent selection of the grievance procedure. At the same time, plaintiff is quite critical of the District for not contacting plaintiff or Ms. McNair within that same 30-day timeline. *Appellant's Brief* at 12 (the District waived its right to contest the January 11th letter when it "chose to wait"). Indeed, plaintiff says that District should have sued him during that 30-day timeline instead of waiting. *See Appellant's Brief* at 15. Again, choosing to wait was the most reasonable course of action based on the choices described above. Of equal importance, plaintiff cannot criticize the District for waiting and, in the same breath, argue that the District "had to wait."

Third, plaintiff's waiver assertion fails to note that, as of January 17th (the deadline to select the statutory hearing procedure), the District had no obligation (nor good reason) to contact Ms. McNair. Plaintiff's argument

fails to consider that, in the notices of probable cause, the District had already described for plaintiff how and when to select the statutory procedure. The argument also fails to consider that plaintiff still had time to file a grievance, and Ms. McNair had said in her letter that she would be filing a grievance.[6] Despite these undisputed facts, plaintiff would have this Court conclude that the District waived its right to contest the January 11th letter, and that the District instead needed to contact Ms. McNair on January 17, 2012 to tell her what she said she already knew (i.e., that the CBA required a selection of procedures and that she needed to make that selection according to the timelines in the CBA and the RCW).[7]

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[6] Indeed, as of January 17, 2012, plaintiff still had the right to select the grievance procedure, as the deadline was still 14 working days away. CP 229 (Rowell Decl., Ex. A). To select the grievance procedure, plaintiff simply needed to orally present a grievance by February 6, 2012. *Id.*

[7] Plaintiff's argument, akin to an estoppel argument, has previously been rejected by our Court of Appeals in *Greene v. Pateros School Dist.*, 59 Wash.App. 522, 799 P.2d 276 (1990):

> '[I]n order to create an estoppel, the party claiming to have been influenced by the conduct or declarations of another must have been unaware of the true facts.' Luna v. Gillingham, 57 Wash.App. 574, 582, 789 P.2d 801, review denied, 115 Wash.2d 1020 (1990).
>
> Mr. Greene can hardly complain he was unaware of the true facts necessary to perfect his appeal. The notice of nonrenewal informed him of his right to appeal his contract nonrenewal pursuant to RCW 28A.67.070 [recodified as RCW 28A.405.210].

Id. at 535. Here, plaintiff and Ms. McNair cannot claim to be unaware of what was needed "to perfect his appeal." The District notified plaintiff in the notice of probable cause the proper process and enclosed copies of both statutes (even though there is no requirement in the law that the District do so).

Fourth, plaintiff's waiver argument ignores that, on February 8, 2012 when the District received Ms. McNair's email stating that plaintiff had finally decided to select the statutory hearing procedure instead of the grievance procedure, it would have served no purpose to notify plaintiff of anything. After all, the deadlines for selecting either procedure had passed. Plaintiff, however, is again critical of the District for not immediately notifying Ms. McNair that the District determined her February 8th email to be invalid. Again, though, Ms. McNair's selection of the statutory procedure as of February 8, 2012, was well after the ten-day deadline for selection of the statutory procedure. Thus, it would have served no purpose for the District to notify Ms. McNair of the need to select a statutory procedure (or even a grievance procedure).

Additionally, as of February 8, 2012, the District was a week away from a District-wide levy election—one of the busiest (if not the busiest) times in any school district. CP 297 (Rowell Second Decl. ¶ 4). With all due respect to the importance of this matter, it should not be surprising that District administrators did not immediately respond to Ms. McNair's email.

Likewise, on February 21, 2012 when Mr. Kuznetz faxed a letter to the undersigned (while on vacation), the undersigned immediately shared Mr. Kuznetz' inquiry with Mr. Rowell. Given that the undersigned was unavailable, Mr. Rowell communicated directly with Ms. McNair, who then

communicated with Mr. Kuznetz. CP 214 (Rowell Decl. ¶ 5). Mr. Rowell made this contact on February 22, 2012 (the day after the undersigned received the inquiry from Mr. Kuznetz), and Mr. Rowell sought assurance that Ms. McNair would connect with Mr. Kuznetz.[8] *Id.*

On February 28, 2012, the District followed up with Ms. McNair in writing. Plaintiff is critical of the District for notifying Ms. McNair rather than notifying plaintiff directly. Again however, Mr. Rowell was simply extending a courtesy to Ms. McNair. *Id.*

In addition to the above criticism of the District, plaintiff is also critical of the District's content in the February 28, 2012 letter to Ms. McNair. Plaintiff alleges that the District failed to object to the lack of a timely selection of procedures and that, again, this alleged failure amounts to a waiver. CP 172 (Plaintiff's Response Memorandum at 10). Again, however, the deadlines for selection of both procedures had passed as of February 8th, and Mr. Rowell was under no obligation (moral or otherwise) to have stated to Ms. McNair each of the legal theories for the District's conclusion that plaintiff had not fulfilled the requirements to contest his termination. Recall that the undersigned was on vacation, and that Mr.

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[8] Mr. Kuznetz never again attempted to contact the undersigned to discuss this matter, and waited almost a month after his inquiry to file the underlying action. Clay Second Decl. ¶ 4.

Rowell, who is not an attorney, was simply extending a courtesy to Ms. McNair with his February 28th letter. Indeed, had the District wanted to do nothing, no law (or even principle of equity) would have been violated, and nothing would have changed if Mr. Rowell had sent nothing to plaintiff. Plaintiff still would have brought this action and the parties would still be arguing over the same issues.

In all, plaintiff asserts that the District "sat on this" for some 40 odd days before notifying Ms. McNair that her January 11, 2012 letter was invalid. CP 35 (Cronin Decl. ¶ 19). Nothing could be further from the truth. The District waited for plaintiff to "determine his desired path" just as Ms. McNair had instructed the District to do in her letter. After hearing from Ms. McNair on February 8, 2012, Mr. Rowell contacted Ms. McNair within two weeks (on February 22, 2012). This contact was made personally by Mr. Rowell despite post-levy election schedules and despite that the deadlines for both procedures had passed. The District's silence between January 11, 2012 and February 22, 2012 was hardly a waiver of rights. Instead, it was the result of Ms. McNair telling the District to wait, the District waiting, and then Ms. McNair and plaintiff failing to select a procedure until after all deadlines had passed. There is no reasonable interpretation of the undisputed, documented facts that would have required the District to do anything other than what it did.

8. The Selection of Procedures Requirement in this Case is Different from Common Law Election of Remedies.

Plaintiff tries to draw a comparison between the common law election of remedies doctrine and the selection of procedures requirement in the CBA. Again, there are several problems with plaintiff's argument.

First, the purpose of the common law election of remedies doctrine is different from the CBA provision. The common law doctrine, as stated by plaintiff, is to prevent a plaintiff from recovering twice. *Brief of Appellant* at 21. While the CBA provision shares that purpose, the CBA provision is also clearly intended on its face to prevent an employee from wasting public resources on two procedures when the parties have mutually agreed that either procedure should suffice. At a policy level, rather than disfavoring the CBA provision, it should be favored as a tool for judicial efficiency and taxpayer cost savings.

Second, the CBA is a selection of "procedures" requirement; it is not an election of "remedies" requirement (even though both parties here have loosely used the latter phrase). The CBA requires the employee to select a procedure in order to avoid duplicate procedures. Had the parties sought to allow an employee to pursue both procedures at the same time, they could have done so in negotiations. They did not and, instead, imposed a requirement to select one procedure over another.

Third, to the extent an analogy can be made to the common law election of remedies doctrine, the trial court decision in *Oak Harbor* provides analogous support for the District's position. The trial court in *Oak Harbor* applied the common law election of remedies doctrine and issued a decision preventing an employee from trying to pursue both a statutory procedure and a CBA grievance procedure at the same time. *Oak Harbor,* 162 Wn. App. at 261. The Court of Appeals never reached the election of remedies issue, leaving the trial court's decision as the only known decision on this very issue. *Id.* at 266. That decision (while obviously not precedent) is nonetheless instructive because it rejects the very argument asserted by plaintiff here. Ms. McNair tried to pursue both procedures in her January 11th letter. Attempting to do so is not allowed under either the CBA or, by analogy, the common law election of remedies doctrine.

9. Prejudice to the School District.

As Judge O'Connor aptly noted, selection of the statutory procedure within the ten-day deadline is based on fairness to the District. RP 7. The District needs to know promptly whether an employee will be appealing his or her termination so that the District can know whether to continue paying the employee beyond the ten-day deadline and whether it can hire a substitute or a regular employee to replace the terminated employee. An

employee continues to receive pay if the employee selects the statutory procedure. By imposing a prompt deadline for selection of the statutory hearing procedure, the legislature protects the taxpaying public from a lengthy and costly procedure. Again, Judge O'Connor aptly noted that holding plaintiff accountable to the ten-day timeline and to an unequivocal selection of procedures does not elevate form over substance. RP 7-8. Rather, it is a matter of fairness. *Id.*

10. Summary.

Plaintiff's Complaint is based on the need to properly select a statutory procedure. He failed to do so. As such, the District respectfully requests that this Court uphold Judge O'Connor's dismissal of his Complaint. Allowing plaintiff a statutory hearing would ignore the content of Ms. McNair's letter, the ten-day deadline mandated by the Washington State Legislature, and the selection of procedures requirement in the CBA.

C. Ms. McNair Lacked Actual or Apparent Authority to Act As Plaintiff's Agent for Selecting a Procedure.

If this Court were to conclude that Ms. McNair timely selected the statutory procedure (despite the above), the District respectfully requests that this Court hold Ms. McNair lacked agency authority to select one procedure over another. Plaintiff has submitted no evidence that Ms. McNair had actual authority to select one procedure over another. The only

actual communication to Ms. McNair was a cryptic hearsay statement from a "friend" of plaintiff's to "take whatever steps [Ms. McNair] felt necessary to appeal the termination and preserve his job." CP 97 (Anderson Decl. ¶ 5). Had there been no need for a selection of procedures, this hearsay statement might have sufficed. However, the hearsay statement gave Ms. McNair **no actual authority to select one procedure over another** because she had no idea which procedure was plaintiff's "desired path." CP 93 (McNair Decl. Ex. 4). Moreover, Ms. McNair indisputably **lacked apparent authority to select one procedure over another** as demonstrated by her own statement in the January 11th letter that she lacked any "access" to plaintiff, and that she needed "time to consult" with plaintiff so "he can determine his desired path." *Id.*

1. A Union Representative Has No General Authority to Select a Statutory Hearing Procedure.

Plaintiff argues that Ms. McNair, as his union representative, had authority as a general litigating agent to request a statutory hearing procedure. However, as properly determined by Judge O'Connor, and as demonstrated below, no such general agency authority exists as to a union representative. RP 4. Indeed, the law is clear that the statutory procedure is not a union matter and the union is "not the real party in interest."

Plaintiff argues that he did not need to direct Ms. McNair as to selection of one procedure over another since she was a general agent with authority to represent him as his "union representative." *See* CP 169 (Plaintiff's Response Memorandum at 7). Judge O'Connor, in her Oral Ruling, rejected plaintiff's argument, and pointed out that it is "not a function of the union" to select the statutory procedure over the grievance procedure. RP 4.

Despite Judge O'Connor's Oral Ruling regarding Ms. McNair authority as union representative to select a procedure for plaintiff, plaintiff has contended in numerous briefs, that a union representative has such authority. However, plaintiff has never cited a single case, statute, or other authority that gives a union representative the unfettered right to select a statutory hearing procedure for an individual employee.

In contrast, the District has cited an abundance of authority to show that a union representative is not a "general litigating agent of its members." *See, e.g., United Brotherhood of Carpenters v. Woerful Corp.,* 545 F.2d 1148, 1151 (1976); *Drilling Local Union No. 17 v. Mason & Hanger Co.,* 90 F.Supp. 539, 541-542 (S.D.N.Y.1950), aff'd, 217 F.2d 687, 693 (2d Cir. 1954); *Local Union No. 185 v. Copeland Electric Co.,* 273 F.Supp. 547, 549 (D.Mont. 1967); *see also Taylor v. Fee*, 233 F.2d 251, 254-55 (7th Cir. 1956), *judgment aff'd*, 353 U.S. 553 (1957) (certain rights are personal to

employees themselves, and the union representation does not "extend into the distinctly different field of representing plaintiffs in a court action where their individual rights as employees, under the contract, were being attacked.").

Plaintiff has tried to distinguish the cases cited by the District. In doing so, however, he actually makes the District's case stronger. Plaintiff argues that the cases cited by the District are different from this case because the cases cited by the District were "brought by a union in a representative capacity in which it was determined that they were not the real party in interest." CP 170 (Plaintiff's Response Memorandum at 8). In this case, however, the union is also not a real party in interest. A statutory hearing procedure is a procedure to determine **individual employee rights accorded solely by statute.** The procedure is not to determine any individual employee rights under the CBA nor any other rights accorded to an employee by virtue of union membership. Indeed, if the Union were a real party in interest as plaintiff asserts, under Superior Court Civil Rule 17, the union would need to be joined **in this action** seeking a statutory hearing procedure. CR 17 ("Every action shall be prosecuted in the name of the real party in interest"). This action is not in any way being prosecuted by the union, nor would the union have any right or interest to do so.

Moreover, in one of the cases cited by both parties, *United Brotherhood of Carpenters v. Woerful Corp.*, 545 F.2d 1148, 1151 (8th Cir. 1976), the union was not a real party in interest in a case seeking employees' unpaid wages. The Court stated that the "right to the payment of money . . . remains with the individual employees for it is they, not the unions, who performed the services." *Id.* Here, two of plaintiff's causes of action are claims for unpaid wages. As in the *Woerful* case, the "right to [continued employment] remains with the individual employee for it is [plaintiff], not the union, who performed the [contract]" and had an interest in employment. *Id.*

In all, neither Ms. McNair nor the union is a real party in interest in filing a hearing request to determine an individual employee's rights under a discharge or nonrenewal statute. As such, Ms. McNair in her role as a union representative had no general authority to request a statutory hearing to protect plaintiff's statutory rights.

Plaintiff has nevertheless attempted to analogize Mr. McNair's general authority as a union representative to the authority of an attorney. Plaintiff cites *Russell v. Maas*, 166 Wn. App. 885, 890, 272 P.3d 273 (2012), for the argument that because an attorney can request a trial de novo, Ms. McNair, as a union representative, should have authority to request a hearing for plaintiff. CP 56 (Plaintiff's Memorandum in Support of

Summary Judgment at 15). *Russell* actually provides that not even an attorney can "surrender a substantial right of a client without special authority granted by the client." *Id.* The *Russell* court holds that such substantial rights include the right to "accept service of process; to settle or compromise a claim; and to waive a jury trial." *Id.* (internal citations omitted). Just as an attorney cannot surrender substantial rights (such as selecting a trial with or without a jury) without special authority from the client, surely a union representative cannot surrender a substantial right (such as selecting a hearing and thus foregoing a grievance procedure) without special authority.

Additionally, several cases have held that an attorney has no right to pick one forum over another, including electing arbitration, without express specific client consent. *See Blanton v. Womancare, Inc*, 38 Cal.3d 396, 407, 696 P.2d 645 (1985) (California Supreme Court holding "an attorney, merely by virtue of his employment as such, has no apparent authority to bind his client to an agreement for arbitration."); *Kanbar v. O'Melveny & Meyers*, 849 F. Supp. 2d 902, 913 (N.D. Cal. 2011) (holding "a waiver of the right to a judicial forum is a decision that belongs to the client and not the client's attorney . . . the personal decision to waive the right to a judicial forum must have been knowingly made, at least where, as here, statutory employment rights are at issue."). Given that a lawyer is prohibited from

selecting one judicial forum over another without express, specific client authority, a union representative must likewise be prohibited from the same. Plaintiff has cited no authority to the contrary.

Plaintiff has made an additional argument by trying to analogize a union representative's authority to the authority of one who has power of attorney status. CP 55. (Plaintiff's Memorandum in Support of Summary Judgment at 14). Plaintiff seems to make the argument that anyone with general power of attorney status could request a hearing on behalf of an employee. Plaintiff, however, vastly misstates power of attorney law. First, a power of attorney is a written instrument. *Arcweld Mfg. Co. v. Burney*, 12 Wn.2d 212, 221, 121 P.2d 350 (1942). The instrument must specify that one person is appointed to act in the place of another. *Id.* Powers of attorney are also strictly construed. *In re Springer's Estate*, 97 Wn. 546, 551, 166 P. 1134 (1917). Thus, a power of attorney has only those powers specified and may not go beyond the expressly specified powers. *Thomle v. Soundview Pulp Co.,* 181 Wash. 1, 24, 42 P.2d 19 (1935). Finally, one dealing with a power of attorney is not bound to look beyond the instrument itself or to make any further inquiry unless there is ambiguity or uncertainty. *Auwarter v. Kroll,* 79 Wn. 179, 181, 140 P. 326 (1914).

This case is in no way similar to a case where a written power of attorney gives express power to select a statutory hearing process. In the

current case, plaintiff provided no specific grant of authority and certainly nothing in writing to Ms. McNair. Indeed, Ms. McNair was operating on nothing other than an assumption that she could speak for plaintiff based on general "union representative" status and based on hearsay from a supposed friend of plaintiff's (Ms. Anderson). The District, of course, had no knowledge of the hearsay from the friend. Instead, Ms. McNair represented to the District in the January 11th letter that she had a complete "lack of access" to plaintiff and did not know what his "desired path" would be. The District did not have the benefit of plaintiff's Declaration, Ms. McNair's Declaration, or Ms. Anderson's Declaration. What the District had was an agent who admitted to having no access at all to her principal and no knowledge as to her principal's "decision" about whether he wanted his agent to select "the statutory hearing or the grievance" procedure. CP 93. As Judge O'Connor aptly noted, the facts here are completely distinguishable from a situation involving a power of attorney. RP 3.

2. Ms. McNair Did Not Have Actual or Apparent Authority to Select the Statutory Hearing Procedure.

After agreeing with the District that Ms. McNair did not have general authority as a union representative to select the statutory procedure, Judge O'Connor nevertheless concluded that Ms. McNair had actual or apparent authority (i.e., as a special agent) to select the statutory hearing

procedure on behalf of plaintiff. RP 5. The District respectfully submits that Ms. McNair had no such actual or apparent authority to select the statutory procedure for plaintiff.

a. Ms. McNair had no Actual Authority to Select the Statutory Procedure.

First, as to actual authority, there is no evidence in the record that Ms. McNair had actual authority to select one procedure over another. While plaintiff argues that Ms. McNair was given authority to "preserve" his job, she admitted in her January 11, 2012 letter that she had no actual authority to select plaintiff's "desired path." CP 93. By Ms. McNair's own admission she did not have actual authority to select one procedure over another. *Id.* Moreover, plaintiff admits that Ms. McNair never spoke with him regarding whether he wanted to select a statutory hearing procedure instead of a grievance procedure as of January 11, 2012. CP 34-35 (*See* Cronin Decl. ¶ 15); CP 74-76 (McNair Decl. ¶¶ 8-9). How can an agent have actual authority to select the principal's "desired path" when the agent herself never communicated with the employee as to what his "desired path" would be?

Second, again as to actual authority, plaintiff improperly relies on a cryptic, second-hand, hearsay message from him to his friend (Ms.

Anderson) to his supposed agent (Ms. McNair). [9] More specifically, plaintiff argues that Ms. McNair had actual authority to select the statutory procedure based on his vague statement to Ms. Anderson to tell Ms. McNair to "take whatever action Ms. McNair felt was necessary to preserve my job and appeal my termination." CP 34-35 (Cronin Decl. ¶ 15). This is not factually sufficient to clothe Ms. McNair with actual authority to select the statutory hearing procedure over the grievance procedure. Indeed, Ms. McNair would have to read plaintiff's mind to know, based on this second-hand message, which of the two procedures was plaintiff's "desired path." While Ms. McNair may be a fine union representative, there is no evidence in the record that she is a mind-reader. Moreover, the District was unaware of any communication between plaintiff, Ms. Anderson, and Ms. McNair at the time it received Ms. McNair's January 11th letter. As such, Ms. McNair was not given actual authority to select the statutory procedure for plaintiff in this case.

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[9] The District objects to the hearsay submitted by plaintiff: (1) Paragraph 8 of the McNair Declaration where Ms. McNair offers out of court statements by Ms. Teresa Anderson (who supposedly told Ms. McNair to appeal plaintiff's termination); (2) Paragraph 9 of the McNair Declaration where plaintiff supposedly confirmed, after the fact, his desire to appeal; (3) Paragraph 15 of the Cronin Declaration where plaintiff offers out of court statements used to try to prove the truth of his supposed authorization to Ms. McNair to preserve his job and appeal his termination; and (4) Paragraphs 5 and 6 of the Anderson Declaration where Ms. Anderson offers an out of court statement from plaintiff ("Mike asked me to immediately contact Ms. McNair") as well as double hearsay statements ("**I told**" Ms. McNair what Mr. Cronin **told me** about wanting to appeal).

Third, both statutes at issue (RCW 28A.405.210 and .300) make clear that it is the employee who must request a hearing. No actual authority exists by law for anyone else to make such a selection. "Every such **employee** so notified, at **his or her** request," must request a hearing, within ten days. The discharge statute states that "[i]f such **employee** does not request a hearing as provided herein, such **employee**" shall be discharged. RCW 28A.405.300 (emphasis added). The nonrenewal statute further allows an employee to delay the hearing process under certain conditions and provides for such extension from the date "the **employee** submits the request for a hearing." RCW 28A.405.210 (emphasis added).[10] Thus, by the express terms of the statute, the employee himself is the only person who can request a hearing. Neither statute gives anyone else actual authority to select the statutory procedure on behalf of an employee.

Finally, Ms. McNair's letter proves that she had no actual authority to make a selection on behalf of plaintiff as to his "desired path." It is well settled that "[o]ne is not entitled to rely on an agent's representation when he has been put on notice that a question exists as to the agent's authority."

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[10] The statutory scheme, when read in pari materia, specifies the very limited agency roles to be played by a representative of an employee. RCW 28A.405.310 specifies that an employee can have a representative serve as a designee for jointly appointing a hearing officer, and can have legal counsel beginning with a prehearing conference. Had the legislature intended for a representative to be able to request a hearing as plaintiff argues, the legislature could have done so just as it do so for other situations.

Glendale Realty, Inc. v. Johnson, 6 Wn. App. 752, 756, 495 P.2d 1375 (1972). Here, Ms. McNair put the District on notice in her January 11th letter that plaintiff's "desired path" was unknown by Ms. McNair. CP 93. At that point, Ms. McNair objectively manifested that she had no actual authority to make a selection, and the District was thus "not entitled to rely on" any selection she made. *Id.*

b. Ms. McNair had no Apparent Authority to Select the Statutory Procedure.

In addition to the lack of any actual authority given to Ms. McNair to select the statutory procedure, Ms. McNair's also lacked apparent authority to do so. To create apparent authority, a principal's objective manifestations must result in a belief by a third person "that the agent has authority to act for a principal." *Ranger Ins. Co. v. Pierce County,* 164 Wn.2d 545, 555, 192 P.2d 886 (2008). Moreover, the belief (by the third person) that the agent has such authority must be "objectively reasonable." *Id.* (citing *Smith v. Hansen, Hansen, & Johnson, Inc.,* 63 Wn.App. 355, 363, 818 P.2d 1127 (1991)). In this case, it is indisputable that there was no objective manifestation by the principal (plaintiff) to the District as to Ms. McNair (the supposed agent) having authority to make a selection. In fact, just the opposite occurred. Ms. McNair objectively manifested to the District in her January 11th letter that she had **no authority** to select one

procedure over another and that she needed more time in order to obtain any such authority. CP 93.

The Washington State Supreme Court long ago recognized this principal:

> Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, What did such third person dealing with the agent believe, and have a right to believe, as to the agent's authority from the acts of the principal?

Galbraith v. Weber, 58 Wn. 132, 136, 107 Pac. 1050 (1910). Here, the District believed, and had every right to believe, exactly what Ms. McNair said in her letter: That she had no access to plaintiff (her supposed principal); that she did not know what procedure would be plaintiff's (her principal's) "desired path"; and that she needed more time to learn plaintiff's (her principal's) "decision." CP 93. Clearly, Ms. McNair presented no apparent authority.

Finally, if Ms. McNair were allowed to act as an agent here, larger policy implications arise. After all, anyone could request a hearing for an employee, even without having ever spoken with the employee. If one agent could request one procedure on behalf of an employee, it follows that other agents (such as spouses, parents, friends, or even complete strangers) could request a separate procedure on behalf of the employee. It is

incomprehensible that a selection of procedures provision should be interpreted to allow one person to request a statutory procedure on behalf of an employee (without access to the employee) and then allow another person to request a grievance procedure on behalf of the same employee.

This is especially so when considering that the legislative purpose for the statutory hearing procedure is to eliminate uncertainty:

> [T]he purpose of statutes such as RCW 28.67.070 [predecessor to RCW 28A.405.201] . . . is to eliminate uncertainty in the employment plans of both the teacher and the school district for the ensuing term ...

Robel v. Highline Public Schools, 65 Wn.2d 477, 483, 398 P.2d 1 (1965). Adopting plaintiff's position would mean that one agent could select a hearing procedure while another agent selects the grievance procedure at the same time. The District, meanwhile, is left with uncertainty as to which procedure should prevail. The result is the exact opposite of the statutory purpose to "eliminate uncertainty."

c. Plaintiff's Ratification and Equity Theories Fail.

Plaintiff asserts a "ratification" theory in order to try to clothe Ms. McNair with agency authority after the passage of the ten-day statutory procedure deadline. According to plaintiff, any person can request a hearing on behalf of an employee, and then the employee can ratify the hearing request ... even if the ratification comes after the ten-day deadline for

hearing requests. Plaintiff fails to specify how much time an employee should be given to ratify. Again, plaintiff's ratification theory is contrary to the statutory purpose of eliminating uncertainty. The statute requires selection of a hearing within ten days, yet plaintiff wants to be able to make that selection via ratification, days, months or years after the ten-day deadline has passed.

Plaintiff also appears to take the position that he needed an agent to select a hearing procedure because it is inequitable to require him to do so while incarcerated. The Washington Supreme Court rejected a similar argument in *Robel v. Highline Public Schools*, 65 Wn.2d 477, 398 P. 2d 1 (1965). In *Robel,* the Court noted a district made several attempts to deliver the notice of nonrenewal which the teacher failed to respond to. The Court held that:

> [I]t is undisputed appellant was not bedfast; that she received her regular mail and at least one notice of the arrival or certified or registered mail; that she was aware of the principal's recommendation relating to the nonrenewal of her contract; and that, as a teacher with several years' experience, she had reason to know, of the notice provisions relating to nonrenewal of teacher contracts.

Id. at 484. The Supreme Court continued:

> As we have heretofore indicated, the statutory notification to appellant of the proposed nonrenewal was complete by April 15th. The requirements of RCW 28.67.070 [predecessor to current RCW 28A.405.210] in this respect had been fully complied with. Appellant had 10 days within which to file a

> written request for a hearing before the school board following actual or constructive receipt of the notice. She did not do so. Failing in this, the ultimate decision of the school board not to renew the contract became final and conclusive.

Id. at 485 (emphasis added). As in *Robel*, the District here made several attempts to provide the Notice of Probable Cause for Discharge and Nonrenewal to plaintiff. The District used certified mail to send the Notices to his place of usual abode as well as to the jail where the District last met with him. Plaintiff was not bedridden and, by his own account, plaintiff states that he was "eligible to work at all times while [he] was at Geiger." CP 33 (Cronin Decl. ¶ 11). Moreover, the Geiger Corrections inmate mail policy specifies that inmates are allowed wide latitude to send mail. CP 313-314 (*See* Lake Decl.). Plaintiff fails to explain how he was unable to personally request a hearing by putting a letter in a mailbox saying "I request a hearing to contest my discharge and nonrenewal."

Furthermore, plaintiff was not incarcerated at the end of the ten-day deadline. Plaintiff admits in his declaration that he was "discharged from Geiger on January 16, 2012," which was still within the ten-day timeline for requesting a hearing. CP 35 (Cronin Decl. ¶ 17). Again, nothing prevented plaintiff from personally delivering a request for a hearing to the District.

3. Prejudice to the District and Its Taxpayers.

Plaintiff asserts that the District suffered no prejudice by his failure to properly select a procedure. The District submits that prejudice is irrelevant when an employee is required to select a procedure under a negotiated CBA. After all, the District is entitled to the benefit of its bargain. Nevertheless, the District and the taxpaying public most certainly suffered prejudice by plaintiff's failure to properly select a procedure.[11]

First, requiring the District to show prejudice as a result of plaintiff's failure to timely select the statutory procedure would result in this Court ignoring a bargained-for promise made in the CBA and would deprive the District as to the benefit of its bargain. The CBA requires a selection of remedies and precludes access to the grievance procedure if an employee selects a statutory hearing. CP 5. Plaintiff's argument that this provision is only enforceable if the District shows prejudice would allow an employee to ignore the contractual provision and wait months to make a selection.

Second, under plaintiff's argument, District taxpayers would be required to pay him salary beyond what the legislature mandated. The legislature allows a school district to stop pay, on day ten, when an

[11] On its face, the bargained-for language in the CBA is intended to prevent an employee from wasting public resources by pursuing two costly procedures (a hearing and grievance procedure) at one time. Allowing an employee to do so would unilaterally deprive the District, and the tax-paying public, of the benefit of its bargain.

employee fails to select the statutory procedure. Plaintiff argues that he was entitled to force the District to wait 30 days (i.e., the grievance timeline) before the District would treat his selection as a final selection. Plaintiff's argument would result in an additional month of pay beyond what the District is obligated to pay.

In addition, the applicable statutory scheme contemplates prompt resolution of teacher terminations. The timelines in RCW 28A.405.310 contemplate about 75 days from the request for hearing to the actual hearing date. During this time, a school district must hire a substitute teacher to teach its students. If the District also pays the teacher pending the hearing, the cost of the substitute teacher is an additional cost that must be borne by the taxpaying public. Additionally, students suffer as they are deprived during that time of the benefit of a regularly hired employee.

Moreover, if the Court accepts plaintiff's argument, it would allow an employee to notify its employer that the employee will decide at some point after the ten-day statutory deadline whether the employee will select the statutory procedure or the grievance procedure. Under such a rule, when an employee is discharged or non-renewed, the ten-day deadline would be unilaterally extended by every single employee (if no other reason than to obtain extra salary). Again, given that the District must pay an employee

after issuance of the notice of probable cause while awaiting the employee's selection, prejudice to the District would occur in every case.

Aside from the above, plaintiff fails to note for the Court that he is the one who has suffered no prejudice by being required to select a procedure as required by the CBA. The selection of a procedure, after all, is hardly "slavish," nor is it a difficult procedure.

D. Plaintiff's Objection to the Clay Declaration Is Meritless.

Plaintiff asserts the Trial Court erred in "failing" to grant his Motion to Strike portions of the Declaration of Paul E. Clay. *Appellant's Brief* at 3. The contention is meritless for numerous reasons. First, the Trial Court never reached a ruling on Plaintiff's Motion to Strike. Thus, there is thus no ruling for this court to "reverse." *See* RP 1-10.

Second, the Trial Court ruled against the District on the only issue to which the Declaration testimony was relevant (i.e., whether Ms. McNair had authority to select the statutory procedure on plaintiff's behalf). RP 4-5. The Trial Court granted partial summary judgment **in favor of plaintiff** on this argument, concluding that Ms. McNair did have such authority. CP 311; RP 4-5.

Third, the evidence is not expert opinion testimony as contended by plaintiff. *Appellant's Brief* at 25-26. It is testimony of factually observed events regarding how plaintiff's fellow union members selected the

statutory procedure and how speaking agents for plaintiff discussed such selections. *See* ER 601, 602 (any person is competent to testify to a matter if it is based on the witness's personal knowledge); *Glesener v. Balholm*, 50 Wn. App. 1, 4-5, 747 P.2d 475 (1987), *citing American Linen Supply Co. v. Nursing Home Building Corp.*, 15 Wn. App. 757, 763, 551 P.2d 1038 (1976) ("An attorney's affidavit is entitled to the same consideration as any other affidavit based on testimonial knowledge").

Fourth, the testimony is not argument dressed up as testimony. *Appellant's Brief* at 26-27. The testimony was, again, purely factual. *Compare Glesener, supra, 50 Wn. App.* at 5 (court selectively excised from attorney's affidavit arguments and upheld admissibility of the attorney's factual statements and authentication of attached documentary exhibits).

Fifth, the testimony is not inadmissible hearsay. *Appellant's Brief* at 26. Testimony as to one's own observations is not hearsay. *E.g.*, ER 601, 602. Moreover, evidence of practices and statements by plaintiff's speaking agents are excluded from the definition of hearsay under ER 801(d)(2)(iii) and (iv).[12]

Sixth, the statutory procedure selection letters by plaintiff's fellow union members are not within the definition of hearsay at the threshold,

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[12] Of note, plaintiff's case is largely premised on his contention that Ms. McNair was a speaking agent for him on the very subjects at issue. Any insistence by him that WEA was not his speaking agent would be inconsistent with that contention.

because they were not offered to prove the truth of any matter asserted in them. ER 801(c). They were instead offered to show –by reference to the signatures upon them – that each was signed by the employee and not by a representative.

Seventh, even if the WEA's general counsel's publication were hearsay, it would still be excepted by ER 803(17) as a publication "generally used and relied upon and used by the public or persons in particular occupations" – i.e., teachers in Washington state. *See also, Nordstrom v. White Metal Rolling and Stamping Corp.*, 75 Wn.2d 629, 633-34, 453 P.2d 619 (1969) (publication admissible if produced by a group with specialized knowledge with no motive to falsify).

Eighth, plaintiff's objection based on authentication (*Appellant's Brief* at 26-27) ignores that the Declaration established, under penalty of perjury, personal-knowledge that the exhibits were as claimed (pursuant to the authentication standard of ER 901). As to the selections from other WEA members, these came from the undersigned's own files and business records in personally handled litigation matters. As to WEA's general counsel's publication, the Declaration demonstrated that the undersigned receives publications of this type from the WEA and that he personally knows that this document is indeed what he claims it to be.

Lastly, the evidence in the Declaration is clearly relevant to the arguments below and the cross-appeal in this Court. ER 401 (evidence is relevant if it has any tendency to make the existence of a consequential fact more or less probable than without the evidence). The evidence shows custom and practice (as well as admissions by speaking agents) of how teachers themselves and not agents or representatives select the statutory procedure. The evidence also refutes plaintiff's contention that requiring him to make the selection is tantamount to imposing a draconian obligation. It also refutes plaintiff's suggestion that the District had "unclean hands." After all, the evidence shows at least 25 years of direct experience where identically-situated teachers never once had an agent or representative select the statutory procedure on their behalf.

In all, the objection to the evidence in the Declaration is not based on any well-founded evidentiary rule or principal.

V. CONCLUSION

The District thus respectfully requests that this Court uphold the Trial Court's decision to grant the District's motion for summary judgment, or alternatively, that this Court reverse the Trial Court's decision to grant the plaintiff's motion for summary judgment.

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DATED this 13th day of July, 2015.

Respectfully submitted,

STEVENS CLAY PS

By: _____

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CERTIFICATE OF SERVICE

I do hereby certify that on this 13th day of July 2015, I served a true and correct copy of the above and foregoing SCHOOL DISTRICT'S RESPONSE BRIEF on the following, in the method indicated:

Larry J. Kuznetz
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Tanya L. Barton
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