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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY                       
DEPUTY

Case No. 46067-0-II

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

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**TERI CAMPBELL,**

**Respondent.**

vs.

**TACOMA PUBLIC SCHOOLS, a/k/a  
TACOMA PUBLIC SCHOOL DISTRICT NO. 10**

**Petitioner**

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**RESPONDENT'S BRIEF**

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## RCW 28A.405.340

### **28A.405.340 – Adverse change in contract status of certificated employee, including nonrenewal of contract – Appeal from – Scope.**

Any appeal to the superior court by an employee shall be heard by the superior court without a jury. Such appeal shall be heard expeditiously. The superior court's review shall be confined to the verbatim transcript of the hearing and the papers and exhibits admitted into evidence at the hearing, except that in cases of alleged irregularities in procedure not shown in the transcript or exhibits and in cases of alleged abridgment of the employee's constitutional free speech rights, the court may take additional testimony on the alleged procedural irregularities or abridgment of free speech rights. The court shall hear oral argument and receive written briefs offered by the parties.

The court may affirm the decision of the board or hearing officer or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the employee may have been prejudiced because the decision was:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the board or hearing officer; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or
- (6) Arbitrary or capricious.

[1975-'76 2nd ex.s. c 114 § 6; 1969 ex.s. c 34 § 15; 1969 ex.s. c 223 § 28A.58.480. Prior: 1961 c 241 § 5. Formerly RCW 28A.58.480, 28.58.480.]

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## RCW 28A.405.350

### **28A.405.350 – Adverse change in contract status of certificated employee, including nonrenewal of contract – Appeal from – Costs, attorney's fee and damages.**

If the court enters judgment for the employee, and if the court finds that the probable cause determination was made in bad faith or upon insufficient legal grounds, the court in its discretion may award to the employee a reasonable attorneys' fee for the preparation and trial of his or her appeal, together with his or her taxable costs in the superior court. If the court enters judgment for the employee, in addition to ordering the school board to reinstate or issue a new contract to the employee, the court may award damages for loss of compensation incurred by the employee by reason of the action of the school district. [1990 c 33 § 399; 1975-'76 2nd ex.s. c 114 § 7; 1969 ex.s. c 34 § 16; 1969 ex.s. c 223 § 28A.58.490. Prior: 1961 c 241 § 6. Formerly RCW 28A.58.490, 28.58.490.]

## INTRODUCTION

Appellant Tacoma Public Schools (“TPS”) seeks to discipline Respondent Teri Campbell (“Campbell”) for alleged misconduct involving TPS Policy No. 5201, to wit: “[she] failed to report to [her] supervisor that [she was] taking drugs or medications that may adversely affect [her] ability to perform work in a safe or productive manner, including drugs that are known or advertised as possibly affecting judgment, coordination, any of the senses or those which may cause drowsiness or dizziness.”<sup>1</sup> TPS wants to impose a 15-day suspension without pay and three (3) years of random drug testing as discipline for Campbell’s alleged failure to follow TPS Policy No. 5201. The sole, factual predicate TPS relies on for this alleged policy violation and subsequent discipline was a Google-type search in an unknown database by the TPS Director of Employee and Labor Relations for purported side-effects information regarding

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<sup>1</sup> CP 1291, TPS’s December 5, 2012, RCW 28A.405.300 Notice of Probable Cause (“NOPC”), at page 1, first paragraph. *Nota bene*: the NOPC contained two other, additional grounds for discipline. See, CP 1291. However, the RCW 28A.405.310(4) Statutory Hearing Officer (“Hearing Officer”) found that “[w]hile the [TPS] alleged three bases for issuance of the [December 5, 2012] Probable Cause Letter, only one was proven by a preponderance of the evidence.” CP 19, the August 22, 2013 Hearing Officer’s Findings of Fact, Conclusions of Law and Final Decision [Corrected], at page 7. Therefore, the two unproven bases – factually and legally – were not before the Pierce County Superior Court and cannot be considered by this Court, either. “Under Title 28A RCW the legislature has given district *employees*, but not the district, the right to appeal a hearing officer’s decision to superior court. RCW 28A.405.320.” Federal Way School District v. Vinson, 172 Wn.2d 756, 765-66, 261 P.3d 145, 150 (2011).

medications being taken by Campbell.<sup>2</sup> TPS did not call any medical witnesses or medical experts at the Statutory Hearing.<sup>3</sup>

**SUPERIOR COURT DID NOT ERR IN REVERSING THE  
DECISION OF THE STATUTORY HEARING OFFICER**

The only issue before the Superior Court on the RCW 28A.405.320 appeal by Campbell was whether Campbell had violated TPS Policy No. 5201<sup>4</sup> which provided in pertinent part:

Any staff member who is taking a drug or medication whether or not prescribed by the staff member's physician, which may adversely affect that staff member's ability to perform work in a safe or productive manner is required to report such use of medication to his or her supervisor. This includes drugs which are known or advertised as possibly affecting judgment, coordination, or any of the senses, including those which may cause drowsiness or dizziness. The supervisor in conjunction with the district office then will determine whether the staff member can remain at work and whether any work restrictions will be necessary.

After reviewing the 940-page administrative record in this matter,<sup>5</sup> the briefs of the Parties<sup>6</sup> and holding oral argument,<sup>7</sup> the Superior Court

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<sup>2</sup> CP 76, lines 4-8, May 31, 2013 Statutory Hearing, testimony of Gayle Elijah, TPS Director of Employee and Labor Relations.

<sup>3</sup> The only witnesses called by TPS at the Statutory Hearing on May 30, 2013 and May 31, 2013, other than Teri Campbell, were Patrice Sulkosky, Principal at Mason Middle School (CP 559 – CP 564), Carla Santorno, TPS Superintendent (CP 571 – CP 585), Gayle Elijah, TPS Director of Employee and Labor Relations (CP 73 – CP 92), Lynne Rosellini, TPS Assistant Superintendent for Human Resources (CP 167 – CP 175) and Tacoma Police Department Officer Jeffery Robillard (CP 158 – CP 166).

<sup>4</sup> CP 809 – CP 810, TPS Policy No. 5201, at CP 809, at page 1 of 2.

<sup>5</sup> CP 4 – CP 9, TPS Notice of Filing Administrative Record filed in Pierce County Superior Court, dated September 30, 2013.

<sup>6</sup> CP 975 – CP 997, Campbell's December 3, 2013, Opening Brief in Superior Court, CP 1019 – CP 1038, TPS's January 22, 2014 Corrected Responsive Brief in Superior Court and CP 998 – CP 1018, Campbell's January 21, 2015 Reply Brief in Superior Court.

<sup>7</sup> RP, February 28, 2014, Oral Argument on Appeal, pages 1 – 49.

found:TPS's Policy No. 5201 was vague and enforcement would be arbitrary and violate public policy<sup>8</sup>

- there was no cognizable evidence to support allegations that Campbell violated TPS Policy No. 5201<sup>9</sup>
- the choice of disciplinary sanction by a school district is reviewed on appeal by the Superior Court to determine if it is arbitrary, capricious, or contrary to law<sup>10</sup>
- a mandatory 3-year, random drug-testing regimen for a teacher as part of an RCW 28A.405.300/.310 process would be *ultra vires*, but the Superior Court did not need to reach this issue because the Hearing Officer's decision was reversed<sup>11</sup>

As a result of these findings and conclusions of law, the Superior Court:

- reversed the Hearing Officer's Decision<sup>12</sup>
- awarded Campbell damages for her lost compensation<sup>13</sup>

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<sup>8</sup> CP 1346 – CP 1348, March 17, 2014 Superior Court Judgment and Final Order Reversing Hearing Officer's Decision, at page 7 of 13 to page 9 of 13 of that Order.

<sup>9</sup> CP 1348 – CP 1351, Id., at page 9 of 13 to page 12 of 13 of that Order.

<sup>10</sup> CP 1352, Id., at page 13 of 13 of that Order

<sup>11</sup> CP 1351 – CP 1352, Id., at page 12 of 13 to page 13 of 13 of that Order.

<sup>12</sup> CP 1352, Id., at page 13 of 13 of that Order.

<sup>13</sup> Id.

- awarded Campbell reasonable fees and costs for her appeal<sup>14</sup>

### **STATEMENT OF THE CASE**

The cognizable evidence in this matter regarding Campbell's violation *vel non* of TPS Policy No. 5201 consisted of the pertinent testimony presented and exhibits admitted by the Hearing Officer during the May 30/31, 2013 RCW 28A.405.310 Statutory Hearing in this matter.

### **Testimony**

Teri Campbell was called as a witness in TPS's case-in-chief on May 30, 2013 and in her own case on May 31, 2013. She testified as follows:

- started teaching in 2002<sup>15</sup>
- taught U.S. history, language arts, highly capable program, reading and social studies at TPS's Mason Middle School since 2004<sup>16</sup>
- was diagnosed with Guillain-Barre Syndrome ("GBS") in 2006<sup>17</sup>

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<sup>14</sup> Id.

<sup>15</sup> CP 92, lines 23-24, Statutory Hearing, May 31, 2013.

<sup>16</sup> CP 93, lines 17-22, Statutory Hearing, May 31, 2013 and CP 523, lines 1-9, Statutory Hearing, May 30, 2013.

<sup>17</sup> CP 95, lines 3-24, Statutory Hearing, May 31, 2013.

- had an intrathecal pump installed in October 2007<sup>18</sup>
- reported to her principal, in 2007, that she had an intrathecal pump that administered pain medications<sup>19</sup>
- in the ensuing years, the principal always asked, “How is your health, how are you doing?”<sup>20</sup>
- had no side-effects from using the intrathecal pump, “I don’t know that it’s going.”<sup>21</sup>
- had thyroid cancer and thyroidectomy in summer of 2011<sup>22</sup>
- had a new intrathecal pump installed in April 2013<sup>23</sup>
- had no health issues that prevented her from working<sup>24</sup>
- her medications, except the Novolog pen (insulin), stayed at home<sup>25</sup>
- never had a fainting spell at work<sup>26</sup>
- did not go to work if she felt dizzy<sup>27</sup>

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<sup>18</sup> CP 96, lines 11-25, and CP 97, lines 1-13, Statutory Hearing, May 31, 2013.

<sup>19</sup> CP 535, lines 10-25, CP 536, lines 1-25 and CP 537, lines 1-15, Statutory Hearing, May 30, 2013.

<sup>20</sup> CP 536, lines 15-20, Statutory Hearing, May 30, 2013.

<sup>21</sup> CP 97, lines 11-16, Statutory Hearing, May 31, 2013.

<sup>22</sup> CP 524, lines 15-18, Statutory Hearing, May 30, 2013.

<sup>23</sup> CP 98, lines 1-4, Statutory Hearing, May 31, 2013.

<sup>24</sup> CP 523, lines 20-23, Statutory Hearing, May 30, 2013.

<sup>25</sup> CP 525, line 25 and CP 526, lines 1-3, Statutory Hearing, May 30, 2013

<sup>26</sup> CP 557, lines 14-15, Statutory Hearing, May 30, 2013.

<sup>27</sup> CP 126, lines 21-25, Statutory Hearing, May 31, 2013.

- only took “drowsy-type” medications after work<sup>28</sup>
- did not take oral pain medications before start of the work day or during the work day; had to wait until she got home after work and then could take oral pain medication at home, if needed<sup>29</sup>
- never had any fainting spells, dizziness, nausea at work<sup>30</sup>
- never had any problems, no auto accidents, no driving tickets<sup>31</sup>
- never had another “black out” episode like the one on November 2, 2011<sup>32</sup>

Patrice Sulkowsky testified as follows:

- had been the principal at Mason Middle School since 2004<sup>33</sup>
- Campbell told her that she (Campbell) had a pain pump<sup>34</sup>
- knew Campbell “was on painkillers”<sup>35</sup>

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<sup>28</sup> CP 557, lines 19-20, Statutory Hearing, May 30, 2013.

<sup>29</sup> CP 102, lines 3-18 and CP 148, lines 3-15, Statutory Hearing, May 31, 2013.

<sup>30</sup> CP 130, lines 24-25 and CP 131, lines 1-3, Statutory Hearing, May 31, 2013.

<sup>31</sup> CP 131, lines 2-3, Statutory Hearing, May 31, 2013.

<sup>32</sup> CP 186, lines 20-25, Statutory Hearing, May 31, 2013.

<sup>33</sup> CP 559, lines 14-16, Statutory Hearing, May 30, 2013.

<sup>34</sup> CP 560, line 2, Statutory Hearing, May 30, 2013.

<sup>35</sup> CP 561, line 10, Statutory Hearing, May 30, 2013.

Carla Jo Santorno testified as follows:

- had been TPS Superintendent since January 2012<sup>36</sup>
- “if [Campbell] had medication in her system that’s been prescribed for her [by] her doctor, and if that medication is known to have an effect on her body and she has reported that to the administrator, then under those conditions, then she can be in the classroom.”<sup>37</sup>
- did not know where medication’s side-effects information came from that TPS relied upon in its December 5, 2013 Notice of Probable Cause<sup>38</sup>
- when employee reports medications to principal, principal handles it and does not call Human Resources; employee reports it to principal and says whether or not there are any “ill effects”<sup>39</sup>

Gayle Elijah testified as follows:

- had been Director of Employee and Labor Relations for TPS since March 2008<sup>40</sup>

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<sup>36</sup> CP 571, lines 13-17, Statutory Hearing, May 30, 2013.

<sup>37</sup> CP 580, lines 9-13, Statutory Hearing, May 30, 2013.

<sup>38</sup> CP 581, lines 16-25 and CP 582, lines 1-14, Statutory Hearing, May 30, 2013.

<sup>39</sup> CP 583, lines 23-25, CP 584, lines 1-25 and CP 585, lines 1-7, Statutory Hearing, May 30, 2013.

<sup>40</sup> CP 73, lines 9-14, Statutory Hearing, May 31, 2013.

- used an unidentified website to obtain side-effects information on medications taken by Campbell<sup>41</sup>
- Campbell had no prior disciplinary matters and was “a teacher in good standing”<sup>42</sup>
- an employee may be required to provide diagnosis and prognosis information to TPS Human Resources from her treating physician<sup>43</sup>
- once employee reports medications with side-effects to supervisor, supervisor then reports to Human Resources; Human Resources takes no action “unless there was conduct that interfered in the school or with the . . . students or caused the safety hazard in some way . . . .”; no file is kept by Human Resources on this type of information<sup>44</sup>

Campbell’s medical expert, Dr. Asokumar Buvanendran, testified that:

- he is a full professor at Rush University Medical Center in Chicago<sup>45</sup>

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<sup>41</sup> CP 76, lines 4-8, Statutory Hearing, May 31, 2013.

<sup>42</sup> CP 77, lines 10-12, Statutory Hearing, May 31, 2013.

<sup>43</sup> CP 78, lines 22-25, Statutory Hearing, May 31, 2013.

<sup>44</sup> CP 79, lines 1-23, Statutory Hearing, May 31, 2013.

<sup>45</sup> CP 104, lines 17-18, Statutory Hearing, May 31, 2013.

- he is a physician<sup>46</sup>
- Campbell was on a stable dose of opioid therapy in November 2011<sup>47</sup>
- Campbell's stable opioid therapy would not adversely affect her judgment, coordination and senses<sup>48</sup>
- Campbell's diabetes, Guillain-Barre Syndrome, hypertension, on-going thyroid cancer treatment – “any of them could lead to the [November 2, 2011 black-out] episode that she had,” not her opioid therapy<sup>49</sup>

Lynne Rosellini testified as follows:

- had been Assistant Superintendent for Human Resources at TPS since September 2012<sup>50</sup>
- Campbell could return to teaching for the 2012-2013 school year<sup>51</sup>
- Campbell taught in the 2012-2013 school year with no problems<sup>52</sup>

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<sup>46</sup> Id.

<sup>47</sup> CP 109, lines 19-25 and CP 110, line 1, Statutory Hearing, May 31, 2013.

<sup>48</sup> CP 110, lines 2-25 and CP 111, lines 1-14, Statutory Hearing, May 31, 2013.

<sup>49</sup> CP 113, lines 4-19, Statutory Hearing, May 31, 2013.

<sup>50</sup> CP 167, lines 20-24, Statutory Hearing, May 31, 2013.

<sup>51</sup> CP 174, lines 14-18, Statutory Hearing, May 31, 2013.

<sup>52</sup> CP 174, lines 19-22, Statutory Hearing, May 31, 2013.

**Exhibits**

Campbell's primary care physician, Diane Reineman, MD, stated in a January 13, 2012 letter to TPS:

Campbell's "current medications taken as directed, that I regulate do not impair Teri's ability to teach or her fitness for duty. Her medications or their interactions, do not affect her behavior to the extent that would impair her ability to work physically, mentally and emotionally with student[s] in the Tacoma school district."<sup>53</sup>

Campbell's pain treatment was through the Seattle Pain Center, which stated in a January 20, 2012 letter to TPS:

Campbell's "medical treatment, including the [pain] prescriptions that I regulate for Teri's use, does not impair Teri's level of fitness for duty on a usual basis . . . I am confident that Teri is able to work physically, emotionally, and mentally with the students in the Tacoma School District while taking her usual medications as prescribed. During the three plus years that I have been treating her, the patient has been on a stable medication regimen and has been able to work without impairment to her fitness for duty."<sup>54</sup>

**ARGUMENT**

**WHETHER A POLICY IS VOID FOR VAGUENESS IS MADE ON AN AS-APPLIED BASIS**

TPS's citation of Arnett and its federal progeny is inapposite in the context of reviewing TPS Policy No. 5201 for a challenge of vagueness

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<sup>53</sup> CP 287, January 13, 2012 letter from Dr. Reineman to TPS, admitted as part of Campbell's Exhibit "F," page 005, at the Statutory Hearing. See, CP 179, lines 7-25 and CP 180, lines 1-5, Statutory Hearing, May 31, 2013.

<sup>54</sup> CP 290, January 20, 2012 letter from Sandra Dawson, ARNP, Seattle Pain Center, to Gayle Elijah, TPS director of Human Resources, admitted as part of Campbell's Exhibit "F," page 008, at the Statutory Hearing. See, CP 179, lines 7-25 and CP 180, lines 1-5, Statutory Hearing, May 31, 2013.

where there is ample Washington case law directly on point.<sup>55</sup> The law in Washington regarding a challenge to a policy or regulation is set out in

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<sup>55</sup> Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). The Arnett case has been cited in thirteen (13) Washington cases, none of which are referenced or cited in TPS's Opening Brief, dated November 14, 2014. See, Mills v. Western Washington University, 150 Wn.App. 260, 271-73, 208 P.3d 13, 20 (Div. 1 2009) [tenured professor challenged suspension for violation of a policy set out in the Faculty Code of Ethics; citing Arnett, Court held that fair, actual notice of the type of conduct that may result in discipline was required and professor who was repeatedly told by University officials his conduct was unacceptable and, yet, who "repeatedly disregarded these warnings and, unsurprisingly, was disciplined"]; Binkley v. City of Tacoma, 114 Wn.2d 373, 386-87, 787 P.2d 1366, 1376 (1990) [employee brought civil rights and constructive discharge claims; citing Arnett, court held prolonged retention of disruptive, unsatisfactory employee not required and reassignment of employee was appropriate]; Gibson v. City of Auburn, 50 Wn.App. 661, 666-68, 748 P.2d 673, 676 (Div. 1 1988) [police chief sought review of dismissal; noting that there was no majority opinion in Arnett, but rather six Justices concurred in the plurality opinion with respect to the vagueness issue, the Court in Gibson cited the oft-quoted "ordinary person exercising ordinary common sense can sufficiently understand" standard and the fair notice of what is required mandate]; Danielson v. City of Seattle, 108 Wn.2d 788, 795, 742 P.2d 717, 721 (1987) [police officer dismissal case; citing Loudermill which quoted Arnett, the Court held that property interests in public employment once conferred may not be deprived without appropriate procedural safeguards]; Sinnott v. Skagit Valley College, 49 Wn.App. 878, 886-87, 746 P.2d 1213, 1219 (Div. 3 1987) [discharged, tenured instructor challenged dismissal; Arnett cited for the proposition that an employee cannot be punished for protected activity but an employee can be discharged for intemperate and defamatory cartoons disseminated to the public]; Plumbers and Steamfitters Union v. Washington Public Power Supply System, 44 Wn.App. 906, 916-17, 724 P.2d 1030, 1037 (Div. 3 1986) [discharged workers sued WPPSS; Arnett cited for the proposition that a post-termination hearing is sufficient for due process purposes]; Punton v. City of Seattle Public Safety Commission, 32 Wn.App. 959, 964 fn. 3, 650 P.2d 1138, 1142 fn.3 (Div. 1 1982), *overruled on other grounds*, Danielson v. City of Seattle, *supra* [after discharged police officer won reinstatement, Civil Service Commission appealed; Arnett cited for the proposition that a permanent, civil service employee possesses a property right in his continued employment]; Stastny v. Board of Trustees of Central Washington University, 32 Wn.App. 239, 254-55, 647 P.2d 496, 506-07 (Div. 3 1982) [discharged university professor challenged his discharge; citing Arnett, the Court held that the term "misconduct" and phrase "violation of rules and regulations" as used in the Faculty Code were "not so vague that persons of common intelligence must guess at [their] meaning and differ as to [their] application."; Ritter v. Board of Commissioners of Adams County Public Hospital, 96 Wn.2d 503, 512, 637 P.2d 940, 946 (1981) [physician's hospital privileges suspended; Arnett cited approving procedure for post-suspension hearing "is all that is constitutionally required."; Matter of Powell, 92 Wn.2d 882, 892-93, 602 P.2d 711, 716-17 (1979) [personal restraint petition; citing Arnett, Court held due process analysis of governmental and private interests required in challenge to sufficiency of administrative procedures]; Ticeson v. Department of Social and Health

this Court's decision in Longview Fibre Co. v. State, Dept. of Ecology, 89 Wn.App. 627, 633, 949 P.2d 851, 854 (Div. 2 1998):

Unless the challenge involves First Amendment concerns, the determination of whether a regulation or statute is void for vagueness is made on an as applied basis. *City of Seattle v. Montana*, 129 Wn.2d 583, 919 P.2d 1218 (1996).

The challenge in this case does not involve First Amendment concerns. Hence, the inquiry for the vagueness challenge is made, as the Superior Court did in its decision<sup>56</sup> “on an as applied basis” once fair and actual notice has been demonstrated, it can be shown that ordinary persons exercising ordinary common sense can sufficiently understand what is required of them and it is not necessary to guess at the meaning and differ as to its application.<sup>57</sup>

Teri Campbell's case provides a clear and convincing illustration as to why it is essential that information and decisions regarding the potential side-effects of medications and their appropriateness for any

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Footnote 55 – Cont'd

Services, 19 Wn.App. 489, 495-96, 576 P.2d 78, 81-82 (Div. 1 1978) [termination of permanent, civil service employee; Arnett cited to support holding that pre-termination hearing not required]; Porter v. Civil Service Commission of Spokane, 12 Wn.App. 767, 773, 532 P.2d 296, 300 (Div. 3 1975) [city employee challenged dismissal; Arnett cited to support discharging an employee for “conduct unbecoming”]; and, Lines v. Yakima Public Schools, 12 Wn.App. 939, 944, 533 P.2d 140, 143 (Div. 3 1975) [discharge teacher challenged dismissal; Arnett cited for right to “*de novo*” hearing].

<sup>56</sup> CP 1323 – CP 1335, Judgment and Final Order Reversing Hearing Officer's Decision, March 17, 2014, at Page 7 of 13 to Page 9 of 13 (CP 1329 – CP 1331) of that Order by Pierce County Superior Court Judge Kathryn J. Nelson.

<sup>57</sup> See, Mills, Gibson and Stastny, *supra*, in footnote 55. Also, as admitted at the Statutory Hearing, TPS has disciplined no employees within the past ten years for violating the failure to report requirements of TPS Policy No. 5201. CP 414, TPS's Answer to Interrogatory No. 2, at page 5 of 11, Campbell Exhibit “O,” at page 005.

given patient should not be relegated to School Superintendents, Human Resource Directors, Principals or Crossing Guards. In the nearly eight (8) years that Campbell has been on the regimen of medications needed to control her various conditions (2007 to the present) she has experienced one brief episode of apparent loss-of-consciousness (“LOC”), on November 2, 2011. The one and only time it has every happened. It is an episode that has not been repeated and her testifying medical expert agreed was not caused by Campbell’s medications.<sup>58</sup>

Without any cognizable evidence,<sup>59</sup> TPS avers that this LOC episode “plainly illustrates” that the medications Teri Campbell was taking “had the potential to adversely affect her ability to perform work in a safe and productive manner.”<sup>60</sup> This attempt by TPS to imply that the LOC was caused by the medications Teri Campbell was prescribed is an empty and misleading observation when one considers the fact that Campbell’s medical experts all agreed that the regimen she is on would not interfere with her ability to perform work in a safe and productive

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<sup>58</sup> CP 113, lines 4-19, Statutory Hearing, May 31, 2013, testimony of Dr. Asokumar Buvanendran.

<sup>59</sup> At page 10 of Brief of Appellant, PTS references a medical doctor who opined that Campbell’s medications could impact her ability to teach, citing CP 825. However, CP 816 – CP 825 was TPS’s Exhibit No. 15 at the Statutory hearing and was the subject for Campbell’s Motion in Limine at CP 972 – CP 974, which was argued before the Hearing Officer at CP 507 – CP 520. The Hearing Officer ultimately ruled, at CP 177, lines 6-13, that the non-testifying TPS expert’s comments on interactions of drugs was not cognizable evidence and he admitted this report only on the reliance issue.

<sup>60</sup> Brief of Appellant, dated November 14, 2014, at pages 25-26.

manner and did not cause the LOC.<sup>61</sup> Since Campbell has been on this regimen for such an extended period of time, it is safe to assume that, if the medications were the cause of her LOC, she would have experienced additional episodes due to the fact that her meds have been a constant in her life for nearly eight (8) years.

TPS maintains that “[a]nyone of ordinary intelligence is capable of verifying whether a drug or medication is ‘known or advertised’ to have these side-effects by reading the prescription for the medication, by reading the container the medication was in, by consulting widely published consumer information, or by discussing the potential side-effects with a physician.”<sup>62</sup> TPS makes it appear that several avenues will provide correct and conclusive information regarding any medication’s possible side-effects. However, it fails to recognize that: (1) the prescription for the medication does not address any side-effects, it merely identifies the medication, dose and frequency; (2) prescription drug containers often have limited warnings regarding possible side-effects but are not comprehensive; (3) “widely published consumer information” can obviously only address topics in a generalized manner. However, TPS’s final suggestion -- “discussing the potential side-effects with a physician”

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<sup>61</sup> CP 113, lines 4-19, (Dr. Buvanendran); CP 287 (Dr. Reineman); and CP 290 (Seattle Pain Center).

<sup>62</sup> Brief of Appellant, November 14, 2014, at page 25.

is the only method that allows a patient to ascertain pertinent information regarding potential side-effects inherent in medications, based upon a particular patient's medical condition and the specific dose(s) prescribed. This was precisely Campbell's research method-of-choice and she relied upon the advice and information provided by her attending physicians to TPS<sup>63</sup> – and continues to do so.

TPS's observes that "[t]here was no testimony or evidence that Campbell was confused or otherwise uncertain whether Policy 4201 required that she report to the District . . . ."<sup>64</sup> TPS is absolutely correct. Ms. Campbell had no confusion over what was required of her and she fulfilled those requirements when she alerted her Principal, Patrice Sulkowsky, of the fact that she was receiving pain medications through an intrathecal pump.<sup>65</sup> If Ms. Campbell's attempt to fulfill the requirements of Policy No. 5201 was deficient, she was never apprised of such deficiency. To the contrary, Campbell was responsible in her efforts to inform her supervisor of her condition and very appreciative of her Principal's repeated, ongoing inquiries and observations regarding her

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<sup>63</sup> CP 287 (Dr. Reineman) and CP 290 (Seattle Pain Clinic).

<sup>64</sup> Brief of Appellant, November 14, 2014, at page 23.

<sup>65</sup> CP 559, lines 14-16; CP 560, line 2; and, CP 561, line 10.

health issues. Hence, Campbell was confident that she was in complete compliance with the District's policies.<sup>66</sup>

**TPS's SO-CALLED VERITIES ON APPEAL ARE A MOVING,  
EVER-EVOLVING NON SEQUITUR ARGUMENT**

In its Corrected Brief before the Superior Court,<sup>67</sup> TPS identified Hearing Officer Findings of Fact Nos. 6, 14, 17, 20, 21, 22, 23, 26, 30, 31, 33 and 35 as verities on appeal.<sup>68</sup> TPS also identified the same Hearing Officer Findings of Fact as verities on appeal in its proposed Judgment and Final Order Affirming Hearing Officer's Decision.<sup>69</sup> However, at the oral argument on Campbell's appeal in Pierce County Superior Court on February 28, 2014,<sup>70</sup> TPS advanced only Hearing Officer Findings of Fact Nos. 6, 17, 20, 21, 22, 23, 31 and 33 as verities on appeal.<sup>71</sup> Then, in its Opening Brief before this Court, TPS identified Hearing Officer Findings

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<sup>66</sup> TPS avers that "[n]otwithstanding the absence of a constitutional challenge to Policy 5201 as vague, the Superior Court held that it was unenforceable on this basis." Brief of Appellant, dated November 14, 2014, at page 15. Nevertheless, TPS goes on to brief the vagueness argument at length in its Brief. *Id.*, at pages 15-16, 18-26 and 37-38. The Superior Court raised the vagueness issue at oral argument on February 28, 2014 and discussed it at length with counsel at that time. RP, February 28, 2014, at pages 14-19, 25-34, 38-41 and 43-46. "[T]his court has inherent authority to consider all issues necessary to reach a proper decision." Heidgerken v. State Dept. of Natural Resources, 99 Wn.App. 380, 387 fn. 3, 993 P.2d 934, 939 fn. 3 (Div. 2 2000), quoting from Nielsen v. Employment Sec. Dept. of State, 93 Wn.App. 21, 43, 966 P.2d 399, 410 (Div. 3 1998) and citing Shoreline Community College v. Employment Sec. Dept., 120 Wn.2d 394, 402, 842 P.2d 938, 943 (1992).

<sup>67</sup> CP 1019 – CP 1038, District's Corrected Brief (with Appendix A), dated January 22, 2014, filed in Pierce County Superior Court.

<sup>68</sup> *Id.*, at CP 1024 – CP 1025.

<sup>69</sup> CP 1432 – CP 1439, TPS [Proposed] Judgment and Final Order Affirming Hearing Officer's Decision, submitted April 7, 2014, at CP 1434 – CP 1435.

<sup>70</sup> RP, February 28, 2014, at pages 1 – 49.

<sup>71</sup> *Id.*, at pages 21 – 23.

of Fact Nos. 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 as verities on appeal.<sup>72</sup> Several of the verities now raised by TPS in this appeal -- 24, 25, 27, 28, 29, 32 and 34 -- were never raised by TPS in the Superior Court proceedings in this matter and the so-called verities 6, 14, 17, 20, 21 and 22 raised in the Superior Court proceedings have been abandoned in this appeal.

Verities 24, 25, 26 and 28, raised by TPS in this appeal<sup>73</sup> deal with issues of probable cause rejected by the Hearing Officer as not proven by a preponderance of the evidence.<sup>74</sup> Therefore, these so-called verities were not before the Superior Court nor are they before this Court.<sup>75</sup>

Verities 30, 31, 32, 33, 34 and 35 raised in this appeal<sup>76</sup> deal with TPS's Loudermill/grievance argument. However, these findings regarding the Loudermill letter and Loudermill hearing are factually and legally inapposite because Campbell had her treating physicians provide letters<sup>77</sup> - at the request of TPS - to TPS eight (8) months earlier, in January 2012, which disputed the unidentified, website-provided side-effects proffered

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<sup>72</sup> Brief of Appellant, dated November 14, 2014, at pages 12 – 13.

<sup>73</sup> Brief of Appellant, dated November 14, 2014, at pages 12 – 13.

<sup>74</sup> CP 18 and CP 19, Hearing Officer's [Corrected] Findings of Fact, Conclusions of law and Final Decision, dated August 22, 2013, at pages 6 and 7. "[T]he District alleged three bases for issuance of the [December 5, 2012] Probable Cause letter, [but] only one [Policy No. 5201, failure to report] was proven by a preponderance of the evidence." CP 19.

<sup>75</sup> See, footnote 1, *supra*, at page 1 of this Brief.

<sup>76</sup> Brief of Appellant, dated November 14, 2014, at page 13

<sup>77</sup> CP 287 and CP 290 – CP 291.

by TPS during the Loudermill process. Hence, the Hearing Officer's purported findings regarding an averred "failure to report" medications that "may affect" must fail because Campbell's treating physicians had proffered undisputed medical opinions that Campbell's medications would not affect her ability to safely perform her work duties.<sup>78</sup>

**SUPERIOR COURT DID NOT SUBSTITUTE ITS JUDGMENT  
FOR THAT OF THE HEARING OFFICER**

The Superior Court, in its March 17, 2014 decision in this matter,<sup>79</sup> followed the statutory mandate of RCW 28A.405.340 for an appeal from an erroneous Hearing Officer decision and correctly applied the case law developed regarding sufficient cause for suspension.

**RCW 28A.405.340**

The appeal of this matter to the Superior Court is governed by RCW 28A.405.340, which provides in pertinent part:

**28A.405.340 Adverse change in contract status of certificated employee, including nonrenewal of contract – Appeal from – Scope.** Any appeal to the superior court by an employee shall be heard by the superior court without a jury. Such appeal shall be heard expeditiously. The superior court's review shall be confined to the verbatim transcript of the hearing and the papers and exhibits admitted into evidence at the hearing . . . . The court shall

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<sup>78</sup> Id.

<sup>79</sup> CP 1323 – CP 1335, Superior Court Judgment and Final Order Reversing Hearing Officer's Decision, dated March 17, 2014.

hear oral argument and receive written briefs offered by the parties.

The court may affirm the decision of the board or hearing officer or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the employee may have been prejudiced because the decision was:

\* \* \*

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or

(6) Arbitrary or capricious.

[1975-'76 2<sup>nd</sup> ex.s. c 114 § 6; 1969 ex.s. c 34 § 15; 1969 ex.s. c 223 § 28A.58.480. Prior: 1961 c 241 § 5. Formerly RCW 28A.58.480, 28.58.480.]

RCW 28A.405.340(4), (5) and (6)<sup>80</sup> are identical to those contained in an earlier version of the Administrative Procedure Act, RCW 34.04.130(6)(d), (e) and (f).<sup>81</sup> “[RCW 28A.405.340] sets forth the

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<sup>80</sup> RCW 28A.58.480 was enacted in 1976. See, Substitute House Bill No. 1364, 1975-76 Washington Session Laws, 2<sup>nd</sup> Extraordinary Session, Forty-Fourth Legislature, Chapter 114, Section 6, at page 403. It has remained unchanged in the past 37 years except in 1990 it was recodified as RCW 28A.405.340. See, 1990 Washington Session Laws, Regular Session, Fifty-First Legislature, Chapter 33, Section 4, at pages 170-172 and 187.

<sup>81</sup> The original version of RCW 34.04.130(6) was enacted in 1959. See, 1959 Washington Session Laws, Regular Session, Thirty-Sixth Legislature, Chapter 234, Section 13, at page 1088. In 1967, RCW 34.04.130(6) was amended. See, 1967 Washington Session Laws, Regular Session, Fortieth Legislature, Chapter 237, Section 6, at page 1216. This 1967 version of RCW 34.04.130(6) (a)-(f) is virtually identical to RCW 28A.405.340(1)-(6). The 1977 amendment to RCW 34.04.130 did not change

appropriate standards of review to be employed in teacher [disciplinary] cases. These standards are identical to those contained in RCW 34.04.130(6) of the Administrative Procedure Act . . . cases construing that statute are therefore applicable by analogy.” Carlson v. Centralia School District No. 401, 27 Wn.App. 599, 603 fn.3, 619 P.2d 998, 1001 fn. 3 (Div. 2 1980), citing Sargent v. Selah School District No. 119, 23 Wn.App. 916, 919, 599 P.2d 25, 27 (Div. 3 1979).

**28A.405.340(4)**: The Court may “reverse the decision [of the hearing officer] if the substantial rights of the employee have been prejudiced because the decision was . . . [a]ffected by other error of law . . . .” Review is *de novo* in “determining whether the decision contains a legal error.” Kittitas County v. Kittitas County Conservation, 176 Wn.App. 38, 308 P.3d 745, 748 (Div. 3 2013), citing RCW 34.05.570(3)(d) [formerly RCW 34.04.130(6)(d)] and Kittitas County v. Eastern Washington Growth Management Hearings Board, 172 Wn.2d

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*Footnote 81 – Cont’d*

RCW 34.04.130(6)(a)-(f). See, 1977 Washington Session Laws, First Extraordinary Session, Forty-Fifth Legislature, Chapter 52, Section 1, at page 274. The 1988 amendments to RCW 34.04.130(6) substantially rewrote this section and recodified it as RCW 34.05.570(3). See, 1988 Washington Session Laws, Regular Session, Fiftieth Legislature, Chapter 288, Sections 516 and 706, at pages 1388 and 1398. The 1989 amendments to the recodified RCW 34.05.570(3) primarily rewrote RCW 34.05.570(3)(g) regarding disqualification. See, 1989 Washington Session Laws, Regular Session, Fifty-First Legislature, Chapter 175, Section 27 at pages 791-792. The 1995 and 2004 amendments to RCW 34.05.570 made no changes to RCW 34.05.570(3). See, 1995 Washington Session Laws, Regular Session, Fifty-Fourth Legislature, Chapter 403, Section 802, at page 2204 and 2004 Washington Session Laws, Regular Session, Fifty-Eighth Legislature, Chapter 30, Section 1, at pages 129-130.

144, 155, 256 P.3d 1193, 1198 (2011). See, also, Spokane County v. Eastern Washington Growth Management Hearings Board, 176 Wn.App. 555, 309 P.3d 673, 678 (Div. 3 2013) and Property Holding & Development, Inc. v. Employment Security Department, 15 Wn.App. 326, 331-32, 549 P.2d 58, 60-61 (Div. 2 1976).<sup>82</sup>

**28A.405.340(5)**: The Court may “reverse the decision [of the hearing officer] if the substantial rights of the employee have been prejudiced because the decision was . . . [c]learly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order . . . .” Citing the APA’s RCW 34.04.130(6)(e) clearly erroneous standard (which is identical to RCW 28A.405.340(5)), this Court, in Johns v. Employment Security, 38 Wn.App. 566, 569-70, 686 P.2d 517, 520 (Div. 2 1984), held that, “An administrative finding is ‘clearly erroneous’ when, though there is supporting evidence, a reviewing court considering the entire record, and the public policy of the legislation concerned, is left with a definite and firm conviction that a mistake has been made.” See, also, State Department of Revenue v. Martin Air Conditioning and Fuel Company,

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<sup>82</sup> In the Property Holding case, this Court dealt extensively with the appropriate scope of review and nature of the ruling sought to be reviewed, citing *inter alia* Leschi Improvement Council v. State Highway Comm’n, 84 Wn.2d 271, 525 P.2d 774 (1984) and Department of Revenue v. Boeing Co., 85 Wn.2d 663, 538 P.2d 505 (1975). See, CP 985 – CP 986, for a thorough discussion in Property Holding on these issues.

Inc., 35 Wn.App. 678, 682, 668 P.2d 1286, 1289-90 (Div. 2 1983) [factual questions associated with an issue of law means "[t]he clearly erroneous standard of review for factual questions governs."]; Norway Hill Preservation and Protection Association v. King County Council, 87 Wn.2d 267, 274-75, 552 P.2d 674, 678-79 (1976) [clearly erroneous standard is broader than arbitrary or capricious standard because it mandates a review of the entire record and all the evidence; clearly erroneous standard also requires consideration of public policy which means that public policy is part of the standard of review]; and, State, Department of Ecology v. City of Kirkland, 8 Wn.App. 576, 580, 508 P.2d 1030, 1032 (Div. 2 1973) [clearly erroneous standard requires evaluation of the entire record, not just findings and/or conclusions].

In Ancheta v. Daly, 77 Wn.2d 255, 258-61, 461 P.2d 531, 534-36 (1969), the Supreme Court discussed at length the pre-1967 standard for judicial review under RCW 34.04.130(6)(e) ["unsupported by material and substantial evidence is view of the entire record as submitted"] with the post-1967 standard for judicial review under RCW 34.04.130(6)(e) – which is, as previously noted, identical to RCW 28A.405.340(5) ["clearly

erroneous: in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order”].<sup>83</sup>

**28A.405.340(6)**: The Court may “reserve the decision [of the hearing officer] if the substantial rights of the employee have been prejudiced because the decision was . . . [a]rbitrary or capricious.” Under the arbitrary and capricious standard of review for administrative decisions, “this court ‘determines whether the evidence presented adequately supports the action of the [hearing officer].’” Snider v. Board of County Commissioners of Walla Walla County, 85 Wn.App. 371, 377, 932 P.2d 704, 707 (Div. 3 1997), citing Norquest/RCA-W Bitter Lake Partnership v. City of Seattle, 72 Wn.App. 467, 476, 865 P.2d 18, 24 (Div. 1 1994), *review denied*, 124 Wn.2d 1021 (1994).

### **Sufficient Cause for Suspension**

Although sufficient cause for suspension, as mandated in RCW 28A.405.310(8), is not defined in the RCW, sufficient cause for discharge is well-defined by case law. See, Griffith v. Seattle School District, 165 Wn.App. 663, 266 P.3d 932 (Div. 1 2011); Federal Way Sch. Dist. No. 210 v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011); Clarke v. Shoreline

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<sup>83</sup> In Ancheta, the Supreme Court relied upon United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948) and United States v. Oregon State Medical Society, 343 U.S. 326, 72 S.Ct. 690 (1952) for the “clearly erroneous” test. See, CP 987 – CP 989 for a thorough discussion in Ancheta on this issue.

Sch. Dist. No. 412, 106 Wn.2d 102, 720 P.2d 793 (1986); and, Hoagland v. Mount Vernon Sch. Dist. No. 320, 95 Wn.2d 424, 623 P.2d 1156 (1981).

In Hoagland v. Mt. Vernon School District, 95 Wn.2d 424, 428-430, 623 P.2d 1156, 1159-60 (1981), the Supreme Court set out the standards for sufficient cause to discharge a teacher:

Sufficient cause [for discharge], though not statutorily defined, has been interpreted to mean a showing of conduct which materially and substantially affects the teachers' performance.

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Moreover, it would violate due process to discharge a teacher without showing actual impairment to performance.

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[Dismissals should be determined] in light of :

(1) the age and maturity of the students; (2) the likelihood the teacher's conduct will have adversely affected students or other teachers; (3) the degree of the anticipated adversity; (4) the proximity or remoteness in time of the conduct; (5) the extenuating or aggravating circumstances surrounding the conduct; (6) the likelihood that the conduct may be repeated; (7) the motives underlying the conduct; and (8) whether the conduct will have a chilling effect on the rights of the teachers involved or of other teachers.

[A] teacher should not be dismissed without a showing of the presence of these factors. They are obviously relevant to any determination of teaching effectiveness, the touchstone for all dismissals. Moreover, a consideration of them may avert an improvident dismissal and its consequences. As observed in Wojt v. Chimacum School Dist. 49, 9 Wn.App. 857, 862, 516 P.2d 1099 (1973):

Where a teacher is discharged . . . the consequences are severe. Chances of other employment in the profession are diminished, if not eliminated. Much time, effort, and money has been expended by the teacher in obtaining the requisite credentials. It would be manifestly unfair to allow a discharge for a teaching or classroom deficiency which is reasonably correctable.

Likewise, it would be manifestly unfair, besides illegal, to allow a discharge for insufficient cause. [Citations omitted.]

Several years later, in Clarke v. Shoreline School District, 106 Wn.2d 102, 113-115, 720 P.2d 793, 800-801 (1986), citing, *inter alia*, Hoagland, *supra*, the Supreme Court reaffirmed the Hoagland factors set out above in a classroom deficiencies case:

Read together, the general rule emanating from Washington case law is this: Sufficient cause for a teacher's discharge exists as a matter of law where the teacher's deficiency is unremediable and (1) materially and substantially affects the teacher's performance, or (2) lacks any positive educational aspect or legitimate professional purpose. In such cases, the teacher is deemed to have materially breached his promise to teach, and can be discharged without compliance with the probation procedures of RCW 28A.67.065. [Citations omitted.]

A common thread running through many Washington cases is a concern for the health, safety and welfare of the students. [Citations omitted.]

In Hoagland v. Mount Vernon Sch. Dist. 320, 95 Wash.2d 424, 429-30, 623 P.2d 1156 (1981), this court enunciated eight factors for consideration in teacher discharge cases because "[t]hey are

obviously relevant to any determination of teaching effectiveness, the touchstone for all dismissals."

\* \* \*

In determining whether a teacher's conduct substantially undermines his effectiveness, thereby justifying discharge, this court in Hoagland stated it would consider the propriety of the dismissal in light of:

(1) the age and maturity of the students; (2) the likelihood the teacher's conduct will have adversely affected students or other teachers; (3) the degree of the anticipated adversity; (4) the proximity or remoteness in time of the conduct; (5) the extenuating or aggravating circumstances surrounding the conduct; (6) the likelihood that the conduct may be repeated; (7) the motives underlying the conduct; and (8) whether the conduct will have a chilling effect on the rights of the teachers . . . [Citations omitted.]

At this juncture, two observations must be made. First, not all eight factors will be applicable in every teacher discharge case. Second, these factors are not necessarily applicable when the cause for dismissal is the teacher's improper performance of his duties. They were designed to ensure that "when a teacher's status or conduct outside his profession is the basis for his dismissal, that cause is related to his performance of his duties as a teacher." Nevertheless, these factors are helpful in determining whether a teacher's effectiveness is impaired by his classroom deficiencies. [Emphasis added/citations omitted]

More recently, in Federal Way School District No. 210 v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011), the Supreme Court discussed, at length, the "sufficient cause" standard set out in RCW 28A.400.300(1):

¶ 29 The employment contract of a nonprovisional teacher may not be terminated except for "sufficient cause." RCW 28A.400.300(1).

Sufficient cause is *not* defined by statute; thus, our courts have construed the phrase to give it meaning.

¶ 30 This court in *Hoagland* interpreted sufficient cause to mean "a showing of conduct which *materially and substantially* affects the teacher's performance." *Hougland*, 95 Wash.2d at 428, 623 P.2d 1156 (emphasis added). "[I]t would violate due process to discharge a teacher without a showing of actual impairment to performance." *Id.* at 429, 623 P.2d 1156. We noted that "because the statutes do not stipulate certain conduct as per se grounds for dismissal, it will be a question of fact whether the complained of acts constitute sufficient cause." *Id.* at 428, 623 P.2d 1156. We listed eight factors that should be considered prior to dismissal of a teacher, noting that they are relevant to any determination of teacher effectiveness, "the touchstone for all dismissals." *Id.* at 430, 623 P.2d 1156. These factors were designed to ensure that if a teacher's conduct outside the profession is the basis for dismissal, the conduct has some nexus to performance of duties as a teacher. *Id.* at 428, 623 P.2d 1156. We have, however, observed that, "in some instances, teacher misconduct can be so egregious that the sufficient cause determination can be made as a matter of law." *Mott v. Endicott Sch. Dist. No. 308*, 105 Wash.2d 199, 203, 713 P.2d 98 (1986).

¶ 31 Our decision in *Clarke* harmonizes these two concerns: "[s]ufficient cause for a teacher's discharge exists as a matter of law where the teacher's deficiency is unremediable [*sic*] and (1) materially and substantially affects the teacher's performance, *Hoagland*, [95 Wash.2d at 428, 623 P.2d 1156], *Mott*, [105 Wash.2d at 203, 713 P.2d 98]; or (2) lacks any positive educational aspect or legitimate professional purpose, *Pryse [v. Yakima Sch. Dist. No. 7]*, 30 Wash.App. [16.] 24, 632 P.2d 60 [(1981)]; *Potter [v. Kalama Pub. Sch. Dist. No. 402]*, 31 Wash.App. [838], 842, 644 P.2d 1229 [(1982)]." *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wash.2d 102, 113-14, 720 P.2d 793 (1986) (first emphasis added). We consider the *Hoagland* factors to determine whether a teacher's conduct substantially undermines a teacher's

effectiveness. We also noted in *Clarke* that "[f]irst, not all eight [*Hoagland*] factors will be applicable in every teacher discharge case. Second, these factors are not necessarily applicable when the cause for dismissal is the teacher's improper performance of his duties . . . . Nevertheless, these factors are helpful in determining whether a teacher's effectiveness is impaired by his classroom deficiencies." *Id.* at 114, 720 P.2d 793 (internal citations omitted).

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¶ 33 The ramifications of the modified -- *Clarke* rule are glaringly apparent in *Vinson*. The *Clarke* rule as modified by *Vinson* holds that any time a teacher, in the course of his job, engages in conduct lacking any "professional purpose," that teacher may be discharged. *Vinson*, 154 Wash.App. at 230, 225 P.3d 379. This creates a per se rule of discharge under which any school-day lapse, no matter how minor and no matter the context, will always constitute sufficient cause for the teacher's discharge. Essentially, the *Vinson* court, relying on *Sauter*, removes the required nexus between alleged teacher misconduct or deficiency and teaching performance. We reject this alteration of our *Clarke* rule. The nexus requirement finds root in the constitution. *See, e.g., Hoagland*, 95 Wash.2d at 429, 623 P.2d 1156 ("[I]t would violate due process to discharge a teacher without showing actual impairment to performance.").

¶ 34 Sufficient cause may be found as a matter of law, without applying the *Clarke* test or *Hoagland* factors, in only the most egregious cases. We hold that where a teacher engages in sexually exploitive conduct or physical abuse of a student, sufficient cause is established as a matter of law; the *Clarke* test and *Hoagland* factors (if applicable, see *Clarke*, 106 Wash.2d at 114, 720 P.2d 793) must be applied in all nonflagrant instances of misconduct.

*172 Wn.2d at 771-774, 261 P.3d at 153-154 [footnotes omitted and emphasis added]*

Most recently, in Griffith v. Seattle School District, 165 Wn.App. 663, 673-674, 266 P.3d 932, 938 (Div. 1 2011), the Court of Appeals dealt with "sufficient cause" in the context of a 10-day suspension for insubordination:

While sufficient cause is not defined by statute, sufficient cause for discharge is well-defined by case law. See, RCW 28A.405.300; See, also, Federal Way Sch. Dist. No. 210 v. Vinson, 172 Wash.2d 756, 261 P.3d 145 (2011); Clarke, 106 Wash.2d 102, 720 P.2d 793; Hoagland v. Mount Vernon Sch. Dist. No. 320, 95 Wash.2d 424, 623 P.2d 1156 (1981). Under Clarke, sufficient cause for discharge exists where the teacher's deficiency is unremediable and (1) materially and substantially affects the teacher's performance, or (2) lacks any positive educational aspect of legitimate professional purpose. 106 Wash.2d at 113-14, 720 P.2d 793. The hearing officer considers (1) the age and maturity of the students; (2) the likelihood the teacher's conduct will have adversely affected students or other teachers; (3) the degree of the anticipated adversity; (4) the proximity or remoteness in time of the conduct; (5) the extenuating or aggravating circumstances surrounding the conduct; (6) the likelihood that the conduct may be repeated; (7) the motives underlying the conduct; and (8) whether the conduct will have a chilling effect on the rights of the teachers. Hoagland, 95 Wash.2d at 429-30, 623 P.2d 1156. But, not all eight factors are applicable in every case, and they may not apply at all when the cause for discipline is the teacher's improper performance of her teaching duties. Clarke, 106 Wash.2d at 114, 720 P.2d 793.

Here, the hearing officer applied the Hoagland factors, but noted that they are not all that relevant because the issues are the improper performance of the teachers' duties and insubordination. See, Clarke, 106 Wash.2d at 114, 720 P.2d 793. We share the hearing officer's reservations. First, the factors were developed to ensure that when a teacher's conduct outside her profession is the

basis for dismissal, that the conduct is related to the performance of her duties as a teacher. Id., at 114-15, 720 P.2d 793. But, they may also be helpful in determining whether a teacher's effectiveness is impaired by her classroom deficiencies. Id. at 115, 720 P.2d 793. Griffith and Quartos' insubordination concerned their refusal to perform their teaching duties. This occurred outside of the classroom, but their nonperformance, not administering the test, could constitute a classroom deficiency. Thus, it is debatable whether the factors apply in this case. Second, because the issue is whether the teachers refused to perform required duties, as opposed to how they performed their duties, the teacher's conduct could be a violation of either prong of the Clarke test. Under the second prong, it is unclear to what extent the factors apply. Third, when determining if there is sufficient cause for discipline less than discharge, it is likewise unclear to what extent, if at all, the Clarke test and the eight Hoagland factors apply. We need not resolve these issues here. Clarke at least indicates that considering the factors may be helpful. Id. [Emphasis added]<sup>84</sup>

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<sup>84</sup> The Griffith decision also dealt with the level of sufficient cause for suspension, "In Denton, the court determined that conduct that constitutes sufficient cause for revocation of a license to teach is also sufficient cause for discharge from a teaching position, which is less severe than revocation. Denton v. S. Kitsap Sch. Dist. No. 402, 10 Wash.App. 69, 72, 516 P.2d 1080 (1973). At a minimum, Denton leads to the common sense conclusion that sufficient cause for discharge is also sufficient cause for suspension. The hearing officer's further determination that less sufficient cause is necessary for suspension is logically and legally sound. The consequences of suspension are not as severe as the consequences of discharge and the sufficient cause necessary for suspension is accordingly lower." [Footnote omitted] However, the complete lack of cognizable evidence in this matter to support the one remaining allegation of probable cause makes this standard inapplicable.

### Discussion

The Superior Court reviewed the 940-page administrative record in this matter<sup>85</sup> and the briefs of the Parties,<sup>86</sup> held oral argument<sup>87</sup> and, then, issued its March 17, 2014 Judgment and Final Order Reversing Hearing Officer's Decision.<sup>88</sup> The Superior Court found that: (1) enforcement of TPS Policy 5201 would be arbitrary and would violate public policy<sup>89</sup>; (2) there was no cognizable evidence that Campbell violated TPS Policy 5201<sup>90</sup>; and, the drug-testing regimen sought by TPS would be *ultra vires*.<sup>91</sup> In doing so, the Superior Court properly followed the statutory mandates and the case law developed thereunder, as set out above.

### APPROPRIATENESS OF SANCTION

TPS opines that “the District’s choice of sanction is not a proper subject of review [by] the Hearing Officer or the court . . . [n]either the court nor the Hearing Officer has authority to substitute its judgment for that of the District to determine whether or not the sanction imposed was appropriate,<sup>92</sup> citing Simmons v. Vancouver School District, 41 Wn.App. 365, 704 P.2d 648 (Div. 2 1985). Therefore, according to TPS, regardless

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<sup>85</sup> CP 4 – CP 9.

<sup>86</sup> CP 975 – CP 997; CP 1019 – CP 1038; and CP 998 – CP 1018.

<sup>87</sup> RP, February 28, 2014, Oral Argument on Appeal, pages 1 – 49.

<sup>88</sup> CP 1323 – CP 1335.

<sup>89</sup> CP 1329 – CP 1331.

<sup>90</sup> CP 1331 – CP 1334.

<sup>91</sup> CP 1334 – CP 1335.

<sup>92</sup> Brief of Appellant, dated November 14, 2014, at pages 31 – 32.

of the nature, extent or severity of the sanction, a reviewing Court has no ability to review the sanction to determine if it is arbitrary, capricious or contrary to law.

The Superior Court has inherent power to review “*any* arbitrary and capricious action.” Pierce County Sheriff v. Civil Service Commission of Pierce County, 98 Wn.2d 690, 694, 658 P.2d 648, 651 (1983), citing Williams v. Seattle School District, 97 Wn.2d 215, 221-22, 643 P.2d 426, 430-31 (1982). “The choice of sanctions remains subject to review under the Court’s inherent authority applying the arbitrary, capricious, or contrary to law standard of review.” Butler v. Lamont School District, 49 Wn.App. 709, 712, 745 P.2d 1308, 1311 (Div. 3 1987). “Once sufficient cause is established, the choice of sanction is a policy decision made by the district that is reviewed to determine if it is arbitrary, capricious, or contrary to law.” Griffith v. Seattle School District, 165 Wn.App. 663, 675, 266 P.3d 932 (Div. 1 2011).

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## RANDOM DRUG TESTING

As a preliminary matter, in Superior Court, TPS abandoned its demand for a random three-year drug testing regimen: (1) in its Brief to the Superior Court<sup>93</sup> and (2) in its proposed Judgment and Final Order Affirming Hearing Officer's Decision.<sup>94</sup> Therefore, the Superior Court found that "TPS made no effort to support this particular sanction and omitted it in the proposed decision for this Court."<sup>95</sup> West v. Gregoire, \_\_\_ Wn.App. \_\_\_, 336 P.3d 110, 113 (Div. 2 2014) [issue presented, but not pressed, is abandoned].

Assuming *arguendo* that TPS has not waived its right to pursue a three-year random drug testing regimen as a sanction at this late date, TPS argues that Campbell should have filed a grievance under the CBA concerning the discipline of random drug testing and having failed to do so has now waived her right to challenge any drug-testing sanction.<sup>96</sup>

As a matter of public policy, Washington has statutory protections for teachers, RCW 28A.405.300 *et seq.*, which have been codified and in

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<sup>93</sup> CP 1030. District's Corrected Brief, dated January 22, 2014, at page 12. "[t]he Hearing Officer [sic] should affirm the Superintendent's decision that probable causes [sic] existed to impose a ten-day [sic] sanction for her actions on November 2, 2012 [sic]." No random drug-testing was sought by TPS.

<sup>94</sup> CP 1438. TPS [Proposed] Judgment and Final Order Affirming Hearing Officer's Decision, at page 7, "... there was sufficient cause to impose a fifteen (15) day sanction against [Campbell] as identified in the letter of probable cause." No mention of a drug-testing sanction is made anywhere in this TPS submittal. See, CP 1432 – CP 1439.

<sup>95</sup> CP 1335, Superior Court Judgment and Final Order Reversing Hearing Officer's Decision, dated March 17, 2014, at page 13 of 13.

<sup>96</sup> Brief of Appellant, dated November 14, 2014, at pages 32 – 34.

place in their present form for the past thirty-seven years.<sup>97</sup> As such, Campbell was "granted the opportunity for a hearing pursuant to [RCW 28A.405.310]." <sup>98</sup> The procedures for that hearing are detailed in RCW 28A.405.310 (2) - (10). Therefore, "[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 . . . [and as such] the requirements of a statute enacted for the public good may not be nullified or varied by contract." Shoreline Community College v. Employment Security Department, 120 Wn.2d 394, 410, 842 P.2d 938, 947 (1992), citing Kelso Education Association v. Kelso School District, 48 Wn.App. 743, 749, 740 P.2d 889, 893 (Div. 2 1987), *review denied*, 109 Wn.2d 1011 (1987) and Grandview Inland Fruit Company v. Hartford Fire Insurance Company, 189 Wn. 590, 66 P.2d 827 (1937). Furthermore, as stated in Noe v. Edmonds School District, 83 Wn.2d 97, 103, 515 P.2d 977, 980-81 (1973), the power to adversely affect a teacher's contract status "cannot lawfully be delegated . . . by negotiations with a professional organization under the guise of RCW

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<sup>97</sup> Originally enacted in 1976, as RCW 28A.58, this provision was re-codified as RCW 28A.405 in 1990.

<sup>98</sup> RCW 28A.405.310(1).

28A.72.030."<sup>99</sup> Compare, Shoreline School District v. Shoreline Association of Educational Office Employees, 29 Wn.App. 956, 958, 631 P.2d 996, 997 (Div. 1 1981) ["A waiver will not be found . . . absent conduct inconsistent with any other intention but to forego that right"].

Hence, TPS's argument that Campbell waived her right to challenge drug testing and the Hearing Officer's decision that the three-year random drug testing can be imposed as discipline are inapposite and contrary to law. Campbell properly challenged this drug testing regimen as illegal in the statutory hearing and she was not required to "fil[e] [a] grievance pursuant to the CBA . . . [or] file an unfair labor claim before the Public Employees Relations Commission pursuant to RCW 41."<sup>100</sup> The "Grievance Procedure" in the CBA<sup>101</sup> does not mention the RCW 28A.405.300 *et seq.* statutory hearing process. However, the CBA does specifically note that "[a]ny matter involving . . . discharge, non-renewal,

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<sup>99</sup> RCW 28A.72.030. "Negotiations by representatives of employee organization -- Authorized -- Subject matter" was repealed by Washington Session Laws, 1975 First Extraordinary Session, Chapter 288, § 28, at page 1238, and replaced with a new commission on education employment relations. However, in the same year, the act creating this education employment relations commission was "superseded by the [creation of a] new commission on public employment relations designated by Substitute Senate Bill No. 2408." *Id.*, at page 1239. Senate Bill No. 2408 was codified as 1975 Washington Session Laws, First Extraordinary Session, Chapter 296 §§ *et seq.*, at page 1327-1342 and, *inter alia*, created the Public Employees Relations Commission ("PERC") which was modified by House Bill No. 1230 and further codified a few months later in 1976 Washington Session Laws, 2nd Extraordinary Session, Chapter 5, §§ 1-9, at pages 7-10. These legislative enactments relating to PERC became RCW 41.58.010 - 41.58.050, 41.58.800 - 41.58.803 and 41.58.900 - 41.58.901, Public Employees Relations Commission.

<sup>100</sup> CP 1030, TPS's Corrected Brief, dated January 22, 2014, at page 12.

<sup>101</sup> See, CBA, CP 590 – CP 755, at pages 103-107 of the CBA (CP 703 – CP 707).

adverse effect" -- the matters covered by RCW 28A.405.300 *et seq.* -- is outside the scope of the grievance process. And "the arbitrator shall have no power or authority to rule on [such]" for certificated employee grievances.<sup>102</sup> Compare, Holloway v. Shambaugh & Son, Inc., 988 F.Supp.2d 901, 911 (N.D. Ind. 2013) [CBA contained specific "Drug and Alcohol Testing Policy" that required employee "to appear for a mandatory random drug test"] and Brown v. City of Pompano Beach, 969 F.Supp. 1317 (S.D. Fla. 1997) [CBA required all police officers to undergo random drug testing].

#### **FEES AND COSTS FOR APPEAL BEFORE SUPERIOR COURT**

This Court applies a dual standard of review to a trial court's award of attorney's fees:<sup>103</sup>

We review a trial court's initial determination of the legal basis for an award of attorney fees *de novo*. Gander, 167 Wash.App. at 646-47, 282 P.3d 1100. And "we review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion." Gander, 167 Wash.App. at 657, 282 P.3d 1100. A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. In re Marriage of Littlefield, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). "An error of law constitutes an untenable reason." In re Marriage of Farmer, 172 Wash.2d 616, 625, 259 P.3d 256 (2011).

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<sup>102</sup> CP 707, Article XIV -- Grievance Procedure, Section 94 -- Supplemental Conditions of CBA, at page 107 (CP 707).

<sup>103</sup> Citing to Gander v. Yeager, 167 Wn.App. 638, 647, 282 P.3d 1100, 1104 (Div. 2 2012).

¶13 When a question of law requires us to interpret a statute, “our objective is to ascertain and carry out the legislature’s intent.” Spring Spectrum, LP v. Dep’t of Revenue, 174 Wash.App. 645, 658, 302 P.3d 1280, *review denied*, 178 Wash.2d 1024, 312 P.3d 651 (2013) (citing Lake v. Woodcreek Homeowners Ass’n, 169 Wash.2d 516, 526, 243 P.3d 1283 (2010)). We begin by looking to the statute’s plain meaning. Spring, 174 Wash.App. at 658, 302 P.3d 1280. “We discern the plain meaning from the ordinary meaning of the language at issue, the statute’s context, related provisions, and the statutory scheme as a whole.” Spring, 174 Wash.App. at 658, 302 P.3d 1280. If the language of the statute is unambiguous, we discern the legislature’s intent from the plain language alone. Spring, 174 Wash.App. at 658, 302 P.3d 1280 (citing Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm’n, 123 Wash.2d 621, 629, 869 P.2d 1034 (1994)). Statutes concerning the same subject matter must be read together to give effect and to harmonize each with the other. US West Commc’ns, Inc. v. Utils. & Transp. Comm’n, 134 Wash.2d 74, 118, 949 P.2d 1337 (1997).

*Cook v. Brateng*, 180 Wn.App. 368, 375-76, 321 P.3d 1255, 1259 (Div. 2 2014)

After briefing by the Parties,<sup>104</sup> submission of billing records by Campbell’s counsel,<sup>105</sup> submission of a declaration by Campbell’s counsel<sup>106</sup> and oral argument,<sup>107</sup> the Superior Court awarded Campbell her fees and costs<sup>108</sup> finding that:

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<sup>104</sup> CP 1353 – CP 1371, Campbell’s Application for Reasonable Fees and Costs, dated April 15, 2014, CP 1441 – CP 1450/CP1501 – CP 1521 (with Moberg declaration), TPS’s Response to [Campbell’s] Fees and Costs Request, dated March [sic] 9, 2014 and CP 1451 – CP 1479, Campbell’s Reply Regarding Fees and Costs (with Exhibits “A,” “B” and “C”), dated May 29, 2014.

<sup>105</sup> CP 1381 – CP 1401, Campbell’s Counsel’s Billing Statements, submitted April 15, 2014.

<sup>106</sup> CP 1372 – CP 1380, Declaration of Campbell’s Counsel Re: Fees and Costs, dated April 15, 2014.

<sup>107</sup> RP, August 15, 2014, pages 1 – 17.

<sup>108</sup> CP 1482 – CP 1483, Superior Court’s Order on [Campbell’s] Fees and Costs Request, dated August 15, 2014.

- there was no rebuttal regarding the size of the administrative record on appeal to the Superior Court<sup>109</sup>
- questions regarding the fee deductions proffered by TPS's expert were properly addressed by Campbell's counsel<sup>110</sup>
- disciplinary action was based upon insufficient legal grounds<sup>111</sup>
- \$46,800.00 in fees was appropriate<sup>112</sup>
- \$2,676.11 in unchallenged costs was warranted<sup>113</sup>
- a total award of \$49,476.11 was proper<sup>114</sup>

In making this fees and costs award, the Superior Court used a proposed Order prepared and submitted by TPS.<sup>115</sup>

The Superior Court reversed the Hearing Officer's Decision citing, *inter alia*, under "Standard of Review," the following:

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<sup>109</sup> RP, August 15, 2014, at page 14, lines 21 – 23. (TPS's expert, Jerry Moberg, based his opinion on, "The record on appeal [in this matter before the Superior Court] was only 226 pages." CP 1516, at line 15, Declaration of Jerry Moberg. However, the administrative record on appeal of this matter before the Superior Court was, in fact, 940 pages. CP 4 – CP 9, TPS Notice of Filing Administrative Record, dated September 30, 2013.)

<sup>110</sup> RP, August 15, 2014, at page 14, lines 23 – 25. See, also RP, August 15, 2014, at page 3, line 13 to page 7, line 19; page 12, lines 10 -15 and lines 22-25; page 13, line 9 to page 14, line 10; and CP 1460 – CP 1472, Exhibit "A," Table of Time Entries/Moberg's Deductions/Campbell's Rebuttal, attached to Campbell's Reply Re: Fees and Costs, dated May 29, 2014, at CP 1451 – CP 1459.

<sup>111</sup> RP, August 15, 2015, at page 15, lines 1-7.

<sup>112</sup> *Id.*, at page 15, line 9.

<sup>113</sup> *Id.*, at page 15, lines 9-10.

<sup>114</sup> *Id.*, at page 15, lines 11 –12.

<sup>115</sup> CP 1482 – CP 1483, order on Appellant's Fee and Cost Request, used by Superior Court on August 15, 2014.

“Under the arbitrary and capricious standard of review for administrative decisions, ‘this court determines whether the evidence presented adequately supports the action of the [hearing officer].’” Snider v. Board of County Commissioners of Walla Walla County, 85 Wn.App. 371, 377, 932 P.2d 704, 707 (Div. 3 1997), citing Norquest/RCW-W Bitter Lake Partnership v. City of Seattle, 72 Wn.App. 467, 476, 865 P.2d 18, 24 (Div. 1 1994) *review denied*, 124 Wn.2d 1021 (1994).<sup>116</sup>

The Superior Court found that “[t]here was no [cognizable] evidence to support allegations that Ms. Campbell violated [TPS] Policy 5201,”<sup>117</sup> citing, *inter alia*, “[A] finding or conclusion . . . made without evidence to support it is arbitrary.” Richard A. Finnigan *et al.*, Washington Administrative Law Practice Manual 9-38 (2006).<sup>118</sup>

The Superior Court did not find that there was a mere lack of evidence to support the allegations in the TPS Notice of Probable Cause – rather, this Court held that there was no cognizable evidence to support the charges that Teri Campbell violated TPS Police 5201. This is more than a mere failure to carry the burden of proof. *Compare*, Fischer-McReynolds v. Quasim, 101 Wn.App. 801, 808, 6 P.3d 30, 34 (Div. 2 2000) [“Where there is ‘a complete failure of proof concerning an essential element of the

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<sup>116</sup> CP 1323 – CP 1335, Judgment and Final Order Reversing Hearing Officer’s Decision, dated March 17, 2014, at page 6 of 13, CP 1328.

<sup>117</sup> *Id.*, at Page 9 of 13, CP 1331.

<sup>118</sup> *Id.*, at Page 10 of 13, CP 1332.

non-moving party's case,' all other facts become immaterial and the moving party is entitled to judgment as a matter of law"].

TPS now argues that its complete failure of proof to substantiate the allegations in the Notice of Probable Cause and its abortive attempt to selectively enforce a vague, arbitrary policy do not constitute insufficient legal grounds so as to allow an award of attorney's fees under RCW 28A.405.350. Such a position is wholly inappropriate under the facts and circumstances of this case.

As noted above, this Court found that there was no cognizable evidence to support the allegations that Teri Campbell violated the vague, arbitrary TPS Policy 5201. As such, any finding or conclusion to the contrary is arbitrary and capricious.

**RCW 28A.405.350**

**Statute**

The genesis of the current-day RCW 28A.405.350 was the 1961 version of RCW 28.58.490, which provided:

The court in its discretion may award to a teacher, principal, supervisor or superintendent a reasonable attorney's fee for the

preparation and trial of his appeal, together with his taxable costs in the superior court.<sup>119</sup>

In 1969, this version of RCW 28.58.490 was recodified as RCW 28A.58.490<sup>120</sup> and amended to read:

The court in its discretion may award to (~~a teacher, principal, supervisor or superintendent~~) an employee a reasonable attorney's fee for the preparation and trial of his appeal, together with his taxable costs in the superior court. If the court enters judgment for the employee, in addition to ordering the school board to reinstate or issue a new contract to the employee, the court may award damages incurred by the employee by reason of the action of the school district.<sup>121</sup>

The present day version of RCW 28A.405.350 (at the time codified as RCW 28A.58.490) was amended in 1975-76 to read as follows:

If the court enters judgment for the employee, and if the court finds that the probable cause determination was made in bad faith or upon insufficient legal grounds, the court in its discretion may award to (~~an~~) the employee a reasonable attorney's fee for the preparation and trial of his appeal, together with his taxable costs in the superior court. If the court enters judgment for the employee, in addition to ordering the school board to reinstate or issue a new contract to the employee, the court may award

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<sup>119</sup> 1961 Session Laws of the State of Washington, Volume 2, Regular Session, Chapter 241, Sec. 6, at page 2083 [Sub. H.B. 421].

<sup>120</sup> 1969 Session Laws of the State of Washington, Volume 2, 1<sup>st</sup> Extraordinary Session, Chapter 223, New Section, Sec. 28A.58.490, COSTS AND ATTORNEYS' FEES ON APPEAL, at pages 1880-81 [HB 58].

<sup>121</sup> 1969 Session Laws of the State of Washington, Volume 1, 1<sup>st</sup> Extraordinary Session, Chapter 34, Sec. 16, at page 585 [Engrossed House Bill No. 490].

damages for loss of compensation incurred by the employee by reason of the action of the school district.<sup>122</sup>

In 1990, RCW 28A.58.490 was recodified as RCW 28A.405.350 and made gender neutral by adding “or her” after “his” in the recodified RCW 28A.405.350.<sup>123</sup>

The 1975-76 amendment was “a significant departure from the predecessor statute which allowed for [fees and costs] awards at the discretion of the trial judge, thus raising the possibility of an award to an unsuccessful party. See, e.g., Goodman v. Bethel School Dist. No. 403, 84 Wn.2d 120, 524 P.2d 918 (1974).” Bradfute v. Renton School District, 19 Wn.App. 638, 640 fn. 2, 577 P.2d 157, 159 fn.2 (Div. 1 1978). Therefore, the fees and costs statute (RCW 28A.405.350) – as it presently exists – “requires two distinct elements [to wit] success in litigation and bad faith or inadequate grounds for action.” Id., 19 Wn.App. at 641, 577 P.2d at 159.

Since the recodification and amendment of RCW 28A.405.350 in 1975-76, *supra*, two other appellate cases have dealt with reasonable attorney’s fees and costs. Although these two cases dealt with different

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<sup>122</sup> 1975-76 Session Laws of the State of Washington, 2<sup>nd</sup> Extraordinary Session, Chapter 114, Sec. 7, at pages 403-04 [Substitute House Bill No. 1364].

<sup>123</sup> 1990 Session Laws of the State of Washington, Regular Session, Chapter 33, NEW SECTION, Sec. 4 [recodification] and Sec. 399, at pages 187 and 348 [House Bill No. 2276].

factual scenarios – involuntary retirement at age 65 and non-renewal of a principal’s contract – the discussion of RCW 28A.58.490 (now RCW 28A.405.350) is instructive.

Cases

In Tondevold v. Blaine School District, 91 Wn.2d 632, 590 P.2d 1268 (1979), the Supreme Court held that a refusal to renew a teaching contract constituted “insufficient legal grounds” within the meaning of RCW 28A.405.350 and, thereby, authorized the award of attorney’s fees to the successful teacher. However, the school district had claimed that no award of fees and costs was authorized under the statute. The Supreme Court disagreed and held that attorney’s fees were properly awarded to the teacher:

Finally, defendants argue plaintiff should not have been awarded reasonable attorney’s fees under RCW 28A.58.490. While the reasonableness of the award is not contested, defendants claim no award is authorized under the statute. The statute provides:

If the court enters judgment for the employee, and if the court finds that the probable cause determination was made in bad faith or upon insufficient legal grounds, the court in its discretion may award to the employee a reasonable attorney’s fee for the preparation and trial of his appeal, together with his taxable costs in the superior court.

Defendants urge us to interpret the phrase “or upon insufficient legal grounds” as referring only to those situations where the basis for nonrenewal or discharge of the employee would be insufficient on legal grounds even though proved at the time of trial. As examples, defendants mention that the persons may have been nonrenewed on the basis that they were black or Jewish or bachelors. The argument is ingenious but unpersuasive. Plaintiff was nonrenewed on “insufficient legal grounds.” The trial court acted properly in awarding attorney’s fees to plaintiff. Affirmed.

*Tondevoid, 91 Wn.2d at 637-38, 590 P.3d at 1271.*

Likewise, in Hyde v. Wellpinit School District, 32 Wn.App. 465, 472-73, 648 P.2d 892, 896 (Div. 3 1982), the employee maintained he was entitled to attorney’s fees and the Supreme Court agreed:

Mr. Hyde next maintains he is entitled to attorney’s fees under our ruling in Hyde I and under RCW 28A.58.490. We agree.

RCW 28A.58.490 sets forth a two-pronged test before attorney’s fees may be awarded: the aggrieved party must be successful at trial and a probable cause determination for nonrenewal must be made in bad faith or upon insufficient legal grounds. This court in Hyde I stated:

We conclude that the establishment of evaluative criteria and prior evaluation of Mr. Hyde’s performance as principal are necessary prerequisites to avoid an unjust termination of his contract. Finding a complete failure of the school district to comply with the requirements and intent of the statute, the attempted nonrenewal was based upon a fundamentally defective foundation . . . .

Judgment of the Superior Court is reversed; Mr. Hyde is reinstated to the position of principal; the case is remanded to the Superior Court for a determination of damages and reasonable attorney's fees under RCW 28A.58.490.

(Citations omitted.) Hyde, supra at 26 Wash.App. 289, 611 P.2d 1388. Both criteria of RCW 28A.58.490 are met; Mr. Hyde was successful at trial and the probable cause determination was based upon "a fundamentally defective foundation" tantamount to insufficient legal grounds under the statute. The school district cites *Bradfute v. Renton Sch. Dist.* 403, 19 Wash.App. 638, 577 P.2d 157 (1978) for the proposition that our determination in Hyde I was not based upon "legally insufficient grounds" under RCW 28A.58.490. In *Bradfute* the financial exigency of the district was the foundation for nonrenewal, but the school district could not prove the teacher's nonrenewal as actually based on funding or program reductions. That case is distinguishable. This court inferentially held Mr. Hyde's nonrenewal was based upon a "fundamentally defective foundation" due to the district's disregard of its statutory obligation to use evaluation criteria contained in RCW 28A.67.065(2) as a condition precedent to nonrenewal. This disregard constituted legally insufficient grounds, not merely a failure of proof. Consequently, we remand for a finding of reasonable attorney's fees under the statute.

The judgment of the Superior Court is affirmed in part and reversed in part; the case is remanded for determination of reasonable attorney's fees, travel expenses and interest.

**Briefs in *Tondevoid v. Blaine School District***

As noted above, in *Tondevoid v. Blaine School District*, 91 Wn.2d 632, 590 P.2d 1268 (1979), the Supreme Court held that a refusal to renew a teaching contract constituted "insufficient legal grounds" within the

meaning of RCW 28A.405.350 and, thereby, authorized the award of attorney's fees to the successful teacher.

The Blaine School District, in its Appellate Brief, took a position similar to that advocated by TPS in this matter:

The district submits that the term "insufficient legal grounds" refers to those situations where the basis for nonrenewing or discharging the employee would be insufficient on legal grounds even though proved at the time of trial, i.e., a person who was nonrenewed on the basis that they were "black," "Jewish," "a bachelor," or some other impermissible grounds. Since the initial draft of the bill did not permit any attorney's fees to an employee regardless of whether he was successful or not, it would seem that the compromise language and use of the term "upon insufficient legal grounds" must be considered under the principal of "*ejusden generis*" in the same sense as "bad faith" before the court would be authorized, in its discretion, to award attorney's fees to a successful employee. [Citation omitted] If this was not the legislature's intent, it would have been an easy matter for it to have simply said, "If the court enters judgment for the employee, the court, in its discretion, may award the employee a reasonable attorney's fee." By failing to do so supports the view the legislature intended through the use of the term "insufficient legal grounds" to subject the school district to the possible payment of attorney's fees in those very limited situations where the board acted with without any legal justification or in bad faith.

Since the legal grounds set forth in the notice of probable cause in the present case was that the respondent had reached mandatory retirement age, which is undisputed that she had, and since there is no showing that in the State of Washington mandatory retirement polices are per se unconstitutional, insufficient legal grounds have

not been established and the trial court lacks statutory authority to award any attorney's fees to the respondent in this case.

*Appellant Blaine School District's Brief, filed November 4, 1977, at Tab 2, pages 45-46, Briefs 91 (2<sup>nd</sup>) Washington, Vol. 10, 616-697.*

In response to the Blaine School District's argument regarding attorney's fees in Superior Court, the teacher responded in her Brief before the Appellate Court:

The trial court correctly awarded plaintiff reasonable attorneys' fees under RCW 28A.58.490 . . . . Defendants . . . contend that this statute does not authorize an award of any attorney's fees in this case. Defendants argue that the phrase "insufficient legal grounds," means bad faith is necessary to permit an award. This argument is without merit. There is hardly room for argument that when a superior court finds that the sole grounds for the board's determination of probable cause and sufficient cause – the existence of a mandatory retirement policy – did not in fact exist, nothing could more accurately fit the definition of "insufficient legal grounds."

*Respondent Catharine Tondevold's Brief, at Tab 2, pages 70-71, Briefs 91 (2<sup>nd</sup>) Washington,*

*Volume. 10, 616-697.*

In its Reply Brief, the Blaine School District cited the Bradfute case and stated, again, that the teacher was not entitled to attorney's fees under RCW 28A.58.490 [now RCW 28A.405.350]:

Should the appellate court affirm the trial court, under the recent holding of the Court of Appeals in Bradfute v. Renton School

District, 19 Wn.App. 638, 577 P.2d 157 (1978) respondent would still not be entitled to attorney's fees in the absence of a showing that mandatory retirement policies in the State of Washington are per se unconstitutional. There is no contention that the school district acted in bad faith in the present case as was noted by the trial court:

“ . . . and certainly there is no hint of bad faith on the board's part in this case.” (Oral Dec. May 20, 1977, p. 24) [C.P., p. 2]

Respondent contends that since the court had found that no mandatory retirement policy existed, this constituted “insufficient legal grounds” under the statute and entitled her to reasonable attorney's fees.

\* \* \*

Therefore, it is clear that retirement of a public employee under a mandatory retirement policy constitutes a legally sufficient probable cause for nonrenewal of employment under RCW 28A.67.070. Essentially the same argument, now advanced by the respondent, was summarily rejected in Bradfute v. Renton School District . . . .

*Appellant Blaine School District's Reply Brief, filed September 28, 1978, at Tab 2, pages 17-18, Briefs 91 (2<sup>nd</sup>) Washington, Vol. 10, 616-697.*

Based upon this briefing, the Court of Appeals, Division I, held that the trial court acted properly in awarding attorney's fees to the teacher:

Finally, [the school district] argue[s] that [teacher] should not have been awarded reasonable attorney's fees under RCW 28A.58.490 [now RCW 28A.405.350]. While the reasonableness of the award is not contested [the school district] claim[s] that no award is authorized under the statute . . . . [The school district] urge[s] us to interpret the phrase ‘or upon insufficient legal grounds’ as referring only to those situations where the basis for the

nonrenewal or discharge of the employee would be insufficient on legal grounds even though proved at the time of trial. As examples, [the school district] mention[s] that the persons may have been nonrenewed on the basis that they were black or Jewish or bachelors. The argument is ingenious but unpersuasive. [The teacher] was nonrenewed on ‘insufficient legal grounds.’ The trial court acted properly in awarding attorney’s fees to [the teacher].

*Tondevoid, 91 Wn.2d at 637-38, 590 P.2d at 1271.*

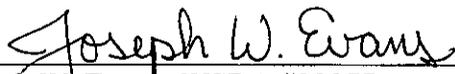
**REQUEST FOR ATTORNEY’S FEES AND COSTS ON APPEAL  
TO THIS COURT**

Rules of Appellate Procedure (“RAP”) 14.2, 14.3 and 18.1 set out the rules for the award of attorney’s fees and costs in this Court. RCW 28A.405.310(7)(c) awards a teacher her “reasonable attorneys’ fees” if the Hearing Officer’s decision is in her favor. RCW 28A.405.350 provides the Superior Court discretion to “award to the employee a reasonable attorneys’ fee for the preparation . . . of . . . her appeal, together with . . . her taxable costs in the superior court.” Fees and costs during the RCW 28A.405.320 - .350 process militate for fees and costs for Campbell in this Court. Federal Way School District v. Vinson, 172 Wn.2d 756, 774, 261 P.3d 145, 154 (2011). *Compare*, Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area, 134 Wn.2d 825, 842-43, 844, 953 P.2d 1150, 1158-59 (1998) [RCW 7.25.020, pertaining to taxpayers’ suits, applicable to fees and costs on appeal].

## CONCLUSION

The Superior Court's decision on Campbell's RCW 28A.405.320 appeal<sup>124</sup> and its RCW 28A.405.350 award of fees and costs to Campbell<sup>125</sup> were just and proper. The Superior Court reviewed the extensive administrative record and detailed briefing and held oral argument on both matters – the substantive RCW 28A.405.320 appeal and the RCW 28A.405.350 fees and costs application – before rendering the decision on Campbell's appeal and her request for an award of fees and costs. As such, it is respectfully requested that this Court affirm those decisions for the reasons set out herein.

Dated this 22<sup>nd</sup> day of January 2015.

  
\_\_\_\_\_  
Joseph W. Evans, WSBA #29877  
Attorney for Teri Campbell

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<sup>124</sup> CP 1323 – CP 1335.

<sup>125</sup> CP 1482 – CP 1483.

**Case No. 46067-0-II**

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

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**TERI CAMPBELL,**

**Respondent.**

**vs.**

**TACOMA PUBLIC SCHOOLS, a/k/a  
TACOMA PUBLIC SCHOOL DISTRICT NO. 10**

**Petitioner**

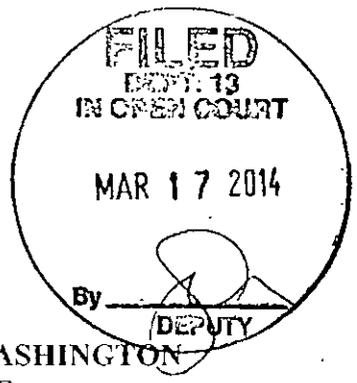
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**APPENDIX TO RESPONDENT'S BRIEF**

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3/20/2014



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

|                              |   |                            |
|------------------------------|---|----------------------------|
| TERI CAMPBELL,               | ) |                            |
|                              | ) |                            |
| Appellant,                   | ) | JUDGMENT AND FINAL ORDER   |
|                              | ) | REVERSING                  |
| vs.                          | ) | HEARING OFFICER'S DECISION |
|                              | ) |                            |
| TACOMA PUBLIC SCHOOLS,       | ) |                            |
| a/k/a TACOMA SCHOOL DISTRICT | ) | Case No.: 13-2-12835-2     |
| No. 10,                      | ) |                            |
|                              | ) |                            |
| Respondent.                  | ) |                            |

Introduction

This is an RCW28A.405.320 appeal from the Statutory Hearing Officer's ("Hearing Officer") Findings of Fact, Conclusions of Law and Final Decision [Corrected] ("Decision"), dated August 22, 2013.<sup>1</sup> The appeal is governed by RCW 28A.405.340, "Adverse change in contract status of certificated employee . . . - Appeal from - Scope." Teri Campbell seeks reversal of the Hearing Officer's Decision of August 22, 2013, because it is "[a]ffected by... error of law" [RCW 28A.405.340(4)], "clearly erroneous" [RCW 28A.405.340(5)] and/or "arbitrary or capricious" [RCW 28A.405.340(6)].

<sup>1</sup> Administrative Record Pages (hereinafter "ARP") 0004-0012. (Each page of the Administrative Record has been numbered in the lower, left-hand corner, i.e., "Administrative Record Page 0004, No. 13-2-12835-2.")

The Court has thoroughly considered the administrative record on appeal, the briefs of the parties and the argument of counsel. For the reasons set out herein, the Hearing Officer's Decision is reversed, Teri Campbell is awarded damages for her lost compensation, and Teri Campbell is awarded attorney's fees and costs for the prosecution of her appeal pursuant to RCW 28A.405.350.

### Facts

Teri Campbell started teaching in 2002. She has taught U.S. history, language arts, highly capable program, reading and social studies for Tacoma Public Schools ("TPS") at Mason Middle School since 2004.<sup>2</sup> In 2006, Teri Campbell was diagnosed with Guillain-Barré Syndrome, a debilitating disorder affecting the peripheral nervous system with symptoms of ascending paralysis and weakness in the feet, legs and hands.<sup>3</sup> Teri Campbell has treated symptoms with an intrathecal pump since 2007.<sup>4</sup> In 2007, Teri Campbell reported to her principal at Mason Middle School, Patrice Sulkosky, that she had an intrathecal pump that administered pain medications.<sup>5</sup>

On November 2, 2011, Ms. Campbell blacked out while driving to work and drove into oncoming traffic, causing an accident. As a result of this accident, she was placed on paid administrative leave from early-January 2012 through August 2012. Teri Campbell has never

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<sup>2</sup> ARP 0489, lines 1-9, and ARP 0084, lines 17-22.

<sup>3</sup> Id.

<sup>4</sup> ARP 0087, lines 18-19.

<sup>5</sup> ARP 0501, lines 10-25; ARP 0502, lines 1-25; ARP 0503, lines 1-15, ARP 0526, line 2; and, ARP 0527, line 10.

had another "black out" episode as she did on November 2, 2011.<sup>6</sup> In August 2012, she returned to work at Mason Middle School.<sup>7</sup>

On December 5, 2012, the TPS issued a Notice of Probable Cause to Teri Campbell. This appeal concerns the only allegation that was affirmed by the Hearing Officer:

- Teri Campbell failed to report to her supervisor that she was taking drugs or medications that may adversely affect her ability to perform in a safe or productive manner."<sup>8</sup>

TPS sought to impose a sanction of fifteen (15) day suspension without pay and random drug testing for three years.

#### The Hearing Officer's Decision

Following receipt of the December 5, 2013 Tacoma Public Schools Notice of Probable Cause, Teri Campbell filed a timely request for a RCW 28A.405.310 statutory hearing. That Hearing was held on May 30<sup>th</sup> and 31<sup>st</sup>, 2013, before Judge Terry Lukens (Ret.), who was selected by the parties to serve as the Statutory Hearing Officer. After Post-Hearing Briefing<sup>9</sup> and oral argument on Monday, July 29, 2013,<sup>10</sup> the Hearing Officer issued his Decision on August 22, 2013.<sup>11</sup>

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<sup>6</sup> ARP 0134, lines 20-25.

<sup>7</sup> Teri Campbell finished the school year with no problems, she continues to teach at Mason Middle School for the 2013-2014 school year. ARP 0165, lines 14-22.

<sup>8</sup> ARP 0765.

<sup>9</sup> Post-Hearing Briefing in this matter consisted of the following: Teri Campbell's Post-Hearing Brief (ARP 0821-0859), TPS's Post-Hearing Brief (ARP 0861-0882), Teri Campbell's Supplemental Brief Regarding "Conjunctive" Probable Cause (ARP 0813-0816) and TPS's Supplemental Authority (ARP 0818-0819).

<sup>10</sup> See, transcript of July 29, 2013 oral argument at ARP 0024-0058.

<sup>11</sup> ARP 0004-0012.

As to the allegation that Ms. Campbell violated TPS policy by failing to report the use of medications, the Hearing Officer stated:

**“Failure to Report**

Ms. Campbell acknowledges that she did not report her possession and use of Xanax, a controlled substance, to her supervisor or to human relations. She also takes many other medications, including pain medications, the identities and quantities of which were also not reported to her supervisor or to human relations.

In the *Loudermill* letter (Ex. 8) the District outlined the medications that were used by Ms. Campbell and their side effects and potential impacts on her ability to teach. None of those conclusions was challenged either at or before the *Loudermill* meeting or this hearing.

Policy 5201 is clear that any such use must be reported. The admitted side effects of the medications could adversely affect Ms. Campbell’s ability to perform work in a safe or productive manner and thus the second basis for the Probable Cause Letter has been supported.”<sup>12</sup>

The Hearing Officer entered the following Conclusion of Law:

- “There is sufficient cause for discipline of Ms. Campbell on the basis that Ms. Campbell failed to report to her supervisor that she was taking drugs or medications that might adversely affect her ability to perform work in a safe or productive manner.”<sup>13</sup>

Therefore, in the Final Decision portion of his Decision, the Hearing Officer “found sufficient cause for [:(1)] discipline [;(2)] the decision of the District to suspend Ms. Campbell [for fifteen working days without pay[;] and [,(3)] impos[ing] a [random drug] testing requirement [for a period of three (3) years]. . . .”<sup>14</sup>

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<sup>12</sup> Id., ARP 0009.

<sup>13</sup> Id., ARP 0010.

<sup>14</sup> Id., ARP 0011.

### Standard of Review

Any final decision of the Hearing Officer must be established by a preponderance of the evidence. RCW 28A.405.310(8). Gaylord v. Tacoma School District, 84 Wn.2d 348, 350, 535 P.2d 804, 806 (1975) [burden of proof is placed on the district and cause for discipline or discharge must be established by a preponderance of the evidence at the hearing] and Wojt v. Chimacum School District, 9 Wn.App. 857, 862 fn. 4, 516 P.2d 1099, 1103 fn.4 (Div. 2 1973) ["[B]urden of establishing sufficient cause . . . is upon the school district."]. The legislative purpose of these types of statutes is to prevent injustice from occurring. Wojt, supra, 9 Wn.App. at 862, 516 P.2d at 1103.

The Court may "reverse the decision [of the hearing officer] if the substantial rights of the employee have been prejudiced because the decision was . . . [a]ffected by other error of law . . . ." RCW 28A.405.340(4). Review is *de novo* in "determining whether the decision contains a legal error." Kittitas County v. Kittitas County Conservation, 176 Wn.App. 38, 308 P.3d 745, 748 (Div. 3 2013), citing RCW 34.05.570(3)(d) [formerly RCW 34.04.130(6)(d)] and Kittitas County v. Eastern Washington Growth Management Hearings Board, 172 Wn.2d 144, 155, 256 P.3d 1192, 1198 (2011). See, also, Spokane County v. Eastern Washington Growth Management Hearings Board, 176 Wn.App. 555, 309 P.3d 673, 678 (Div. 3 2013).

The Court may "reverse the decision [of the hearing officer] if the substantial rights of the employee have been prejudiced because the decision was . . . [c]learly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order...." RCW 28A.405.340(5). The APA's RCW 34.04.130(6)(c) clearly erroneous standard is identical to RCW 28A.405.340(5). See, Johns v. Employment

Security, 38 Wn.App. 566, 569-70, 686 P.2d 517, 520 (Div. 2 1984), which held that, "An administrative finding is 'clearly erroneous' when, though there is supporting evidence, a reviewing court considering the entire record, and the public policy of the legislation concerned, is left with a definite and firm conviction that a mistake has been made." See, also, State, Department of Revenue v. Martin Air Conditioning and Fuel Company, Inc., 35 Wn.App. 678, 682, 668 P.2d 1286, 1289-90 (Div. 2 1983) [factual questions associated with an issue of law means "[t]he clearly erroneous standard of review for factual questions governs."]; Norway Hill Preservation and Protection Association v. King County Council, 87 Wn.2d 267, 274-75, 552 P.2d 674, 678-79 (1976) [clearly erroneous standard is broader than arbitrary or capricious standard because it mandates a review of the entire record and all the evidence; clearly erroneous standard also requires consideration of public policy which means that public policy is part of the standard of review]; and, State, Department of Ecology v. City of Kirkland, 8 Wn.App. 576, 580, 508 P.2d 1030, 1032 (Div. 2 1973) [clearly erroneous standard requires evaluation of the entire record, not just findings and/or conclusions].

The Court may reverse the decision of the hearing officer if the substantial rights of the employee have been prejudiced because the decision was... [a]rbitrary or capricious. RCW 28A.405.340(6). Under the arbitrary and capricious standard of review for administrative decisions, "this court 'determines whether the evidence presented adequately supports the action of the [hearing officer]'." Snider v. Board of County Commissioners of Walla Walla County, 85 Wn.App. 371, 377, 932 P.2d 704, 707 (Div. 3 1997), citing Norquest/RCA-W Bitter Lake Partnership v. City of Seattle, 72 Wn.App. 467, 476, 865 P.2d 18, 24 (Div. 1 1994), *review denied*, 124 Wn.2d 1021 (1994).

### Issues on Appeal

Ms. Campbell appeals the Hearing Officer's finding that she was subject to discipline for violation of policy 5201 "Drug-Free Schools, Community and Workplace." First, Ms. Campbell argues that the policy is void for vagueness. Second, Ms. Campbell argues that if the policy is not void, TPS did not provide cognitive evidence that Ms. Campbell had violated that policy. Third, Ms. Campbell argues that requiring her to submit to three years of mandatory drug testing is contrary to Washington State law and public policy.

### Decision

**A. Policy 5201 "Drug-Free Schools, Community and Workplace" reporting requirement is vague so that enforcement would be arbitrary and violate public policy.**

Tacoma Public Schools' Policy No. 5201, "Drug-Free Schools, Community and Workplace," is the *sine qua non* for the District's efforts to impose discipline in this matter. Yet, this policy is fatally flawed due to vagueness. The policy is vague, meaning that persons of ordinary intelligence are obliged to guess as to what conduct the ordinance proscribes. City of Spokane v. Douglass, 115 Wn.2d 171, 795 P.2d 693 (Wash. 1990). There are several reasons that the policy is vague.

First, the policy leaves persons of ordinary intelligence guessing who determines which drugs or medications "may adversely affect [a teacher's] ability to perform work in a safe or productive manner", by failing to identify such a person. If it is the teacher or her treating physicians that identify whether a drug may adversely affect her ability to perform, the record overwhelmingly supports a finding that Ms. Campbell did not fail to report.

Ms. Campbell testified that the painkillers administered by her pump did not affect her ability to perform.<sup>15</sup> She also testified that she had never taken Xanax for her anxiety while she was at school.<sup>16</sup> Ms. Campbell's treating physician provided letters reporting that she was on a stable opioid treatment that would not negatively affect her ability to perform her job.<sup>17</sup>

If the supervisor or HR department determines which drugs must be reported, that determination should be supported by expert medical testimony. TPS's failure to present expert medical testimony at the hearing is discussed below at greater length.

Second, the policy fails to mandate any degree of specificity for reporting, leaving persons of ordinary intelligence to guess at what would constitute sufficient reporting. There is no language specifying a requirement to report specific names of drugs or dosages. The purpose of the policy is to make supervisors aware of the situation so that the teacher could be monitored for adverse affects.<sup>18</sup> This is not a case in which the employee's supervisor had no knowledge that she was taking drugs for chronic pain. Ms. Campbell's supervisor was aware of that Ms. Campbell was on a pump of "pain killers" and frequently used that knowledge to monitor Ms. Campbell.<sup>19</sup> It is unclear that further reporting, including greater

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<sup>15</sup> ARP 0088, lines 11-16.

<sup>16</sup> ARP 0141, lines 20-24.

<sup>17</sup> Dr. Frank Li, Seattle Pain Clinics, wrote, "medical treatment, including the [pain] prescriptions that I regulate for Teri's use, does not impair Teri's level of fitness for duty on a usual basis . . . . I am confident that Teri is able to work physically, emotionally, and mentally with the students in the Tacoma School District while taking her usual medications as prescribed. During the three plus years that I have been treating her, the patient has been on a stable medication regimen and has been able to work without impairment to her fitness for duty." ARP 0279-0281.

<sup>18</sup> ARP 0540-0541.

<sup>19</sup> ARP 0502, lines 15-20.

specificity, would have made any difference in the supervisor's response. This vagueness of the policy leads to arbitrary enforcement.

Third, the word "taking" is similarly vague. It leaves persons of ordinary intelligence to guess about what "taking" means. This word could be interpreted as broadly as requiring employees to report having taken medication one time during summer vacation or over the weekend, or as narrowly as meaning actively taking the medication while reporting to work. The Hearing Officer appears to fault Ms. Campbell under Policy 5201 for having Xanax readily available for her on a morning before she set foot on the school grounds and before she would have had the occasion to tell her principal that she had taken or was to take said prescribed medication. There is no cognizable evidence of what Teri Campbell intended to do with the Xanax found in her car after the accident on November 2, 2011, nor is there any cognizable evidence of what she would or would not have reported to Principal Patrice Sulkosky or left school had she then needed to take her Xanax medication.

This problem with Policy No. 5201 is made apparent by the unanswered testimony that the District has never disciplined an employee in the past ten years for failing to report "a drug or medication . . . which may adversely affect that staff member's ability to perform work in a safe or productive manner."

**B. There is no cognitive evidence to support allegations that Ms. Campbell violated Policy 5201.**

The rules of evidence applicable in the Superior Court apply to the admissibility of evidence. RCW 28A.405.310(7)(a). A Hearing Officer must rely on duly admissible evidence, not mere fiat, to support a decision. Jepson v. Department of Labor and Industries, 89 Wn 2d

394, 401, 573 P.2d 10 (1977). "[A] finding or conclusion... made without evidence to support it is arbitrary." Richard A. Finnigan *et al.*, Washington Administrative Law Practice Manual 9-38 (2006).

Physician's Deskbook Reference-type effects, without expert medical testimony, are not cognizable evidence. Clousing v. State, 90 Wn.App. 863, 869, 955 P.2d 394, 397 (Div. 1 1998) [expert testimony referencing Physician's Deskbook References dosages was cognizable evidence]. Speculation and/or conjecture by non-medical personnel is not cognizable evidence. Miller v. Staton, 58 Wn.2d 879, 886, 365 P.2d 333, 337 (1961) [medical testimony necessary to establish causal relationship -- speculation and conjecture not enough]; O'Donoghue v. Riggs, 73 Wn.2d 814, 824, 440 P.2d 823, 829 (1969) [medical testimony is necessary to prevent fact-finder from resorting to speculation or conjecture]; and, Bruns v. PACCAR, Inc., 77 Wn.App. 201, 214-217, 890 P.2d 469, 477-478 (Div. 1 1995) [medically complex reactions "lie[] beyond ordinary lay knowledge and require[] expert medical testimony to demonstrate a causal link"]

TPS Director of Employee and Labor Relations Gayle Ruth Elijah was the only source of the side-effects information on the medications that Teri Campbell was taking, and she obtained that information from an unknown, unidentified website.<sup>20</sup>

TPS Superintendent Carla Jo Santorno did not know where Tacoma Public Schools' side-effects information for the medications that Teri Campbell was taking came from.<sup>21</sup>

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<sup>20</sup> ARP 0064, lines 9-14, and ARP 0067, lines 4-8.

<sup>21</sup> ARP 0547, lines 16-25, and ARP 0548, lines 1-14.

TPS did not call any medical experts or medical witnesses to explain or substantiate the "side-effects" of Teri Campbell's medications that TPS Director of Employee and Labor Relations Gayle Elijah downloaded from an unknown, unidentified website.<sup>22</sup>

The letters from Teri Campbell's treating physicians were evidence that was properly before the District, the Hearing Officer and is properly before this Court in the form of impeachment by contradiction. Jacqueline's Washington, Inc. v. Mercantile Stores Company, 80 Wn 2d 784, 789, 498 P.2d 870, 873 (1972). "The substantive facts contained in [these] exhibits (variant statements . . . ) have direct and independent relevance to a material fact in issue." Id. The probative value of the statements made in the letters of Dr Reineman and Dr. Li cannot be ignored because "[such] evidence . . . to impeach by mere contradiction constitutes an exception to the general rule and is competent to prove the substantive facts encompassed in such evidence." Id. Compare, Erickson v. Nationwide Mutual Insurance Company, 97 Idaho 288, 291, 543 P.2d 841, 844 (1975) [letter by doctor written to insurance company, at the request of the insurance company, was substantive evidence even though the doctor did not testify at trial].

The evidence shows that Teri Campbell was on a stable opioid therapy and other medications that would not adversely affect her judgment, coordination and senses.<sup>23</sup>

At the request of TPS, Teri Campbell's primary treating physician, Dr. Diane Reineman, in a letter dated January 13, 2012, eight (8) months before the *Loudermill* hearing in September 2012 and eleven (11) months before the TPS issued its December 5, 2012, Notice of Probable Cause, stated that Teri Campbell's "current medications taken as directed, that I

<sup>22</sup> ARP 0450 and ARP 0062-0063.

<sup>23</sup> ARP 0101, lines 2-25, and ARP 0102, lines 1-14.

regulate, do not impair Teri's ability to teach or her fitness for duty. Her medications or their interactions, do not affect her behavior to the extent that would impair her ability to work physically, mentally and emotionally with student[s] in the Tacoma School District."<sup>24</sup>

At the request of TPS, Teri Campbell's pain physician, Dr. Frank Li, Seattle Pain Clinic, in a letter dated January 20, 2012, eight (8) months before the *Loudermill* hearing and eleven (11) months before the TPS issued its December 5, 2012 Notice of Probable Cause, stated that Teri Campbell's "medical treatment, including the [pain] prescriptions that I regulate for Teri's use, does not impair Teri's level of fitness for duty on a usual basis . . . I am confident that Teri is able to work physically, emotionally, and mentally with the students in the Tacoma School District while taking her usual medications as prescribed. During the three plus years that I have been treating her, the patient has been on a stable medication regimen and has been able to work without impairment to her fitness for duty."<sup>25</sup>

**C. A mandatory three-year, random drug-testing regimen for a teacher as part of a Title 28A RCW process is *ultra vires*.**

Ms. Campbell argues that requiring drug-testing as part of a disciplinary action is contrary to Washington State law and public policy. She contends that drug-testing is a mandatory subject of collective bargaining, and because it was never negotiated in the collective bargaining agreement, TPS cannot require her to comply. *City of Tacoma*, 4539-A (PECB, 1994). *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn.App. 541, 547-548, 222 P.3d 1217, 1221-1222 (Div. 2 2009).

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<sup>24</sup> ARP 0276.

<sup>25</sup> ARP 0279-0281.

This Court agrees, "The choice of sanction is a policy decision made by the district that is reviewed to determine if it is arbitrary, capricious, or contrary to law." Griffith, *supra*, 165 Wn.App. at 675, 266 P.3d at 939, citing Butler v. Lamont School District, 49 Wn.App. 709, 712, 745 P.2d 1308, 1311 (Div. 3 1987). However, the cases cited by Ms. Campbell indicate that such a determination is applicable only after the Court has determined that probable cause existed for discipline. Here, the Hearing Officer's decision is reversed, because there is not substantial evidence to support disciplinary action. Additionally, TPS made no effort to support this particular sanction and omitted it in the proposed decision for this Court. Although Ms. Campbell's argument may have merit, the Court does not need to reach a conclusion regarding the argument.

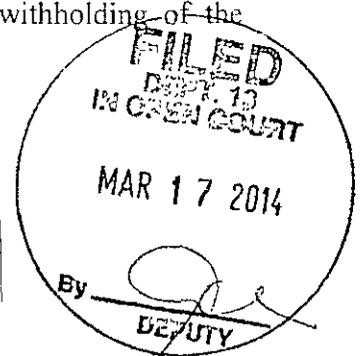
**Conclusion**

For the reasons set out above, based on a review of the entire record in this matter, based upon the briefing of the parties in the appeal and the oral argument held on Friday, February 28, 2014, this Court hereby: (1) reverses the Decision of the Hearing Officer pursuant to RCW 28A.405.340(4), (5) and (6); (2) awards Teri Campbell damages for the loss of compensation;<sup>26</sup> and, (3) awards Teri Campbell reasonable attorney's fees and costs for the preparation and prosecution of her appeal pursuant to RCW 28A.405.350. Teri Campbell shall submit her Application for Fees and Costs within thirty (30) days of the date of this Order.

DATED this 17 of March, 2014.

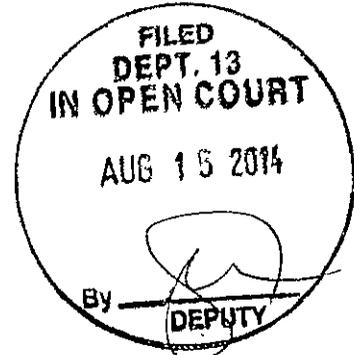
  
HONORABLE KATHRYN J. NELSON

<sup>26</sup> TPS withheld one week's pay, then agreed to voluntarily stay the withholding of the remaining two weeks' pay during the pendency of this appeal.





13-2-12835-2 43109396 OR OR-18-14



The Honorable Kathryn J. Nelson  
Hearing Date: August 15, 2014 at 10 a.m.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE**

TERI CAMPBELL,

Appellant,

v.

TACOMA PUBLIC SCHOOLS, a/k/a  
TACOMA SCHOOL DISTRICT No. 10,

Respondent.

NO. 13-2-12835-2

ORDER ON APPELLANT'S FEE AND  
COST REQUEST

~~(Proposed)~~

THIS MATTER came before the Court on Appellant's Request for Attorney Fees and Cost and the Court having reviewed the record herein and to the extent deemed relevant and admissible, reviewed the material submitted by the parties concerning this motion, including:

1. Teri Campbell's RCW 28A.405.350 Application for Reasonable Attorney's Fees and Cost in This Superior Court Appeal;
2. Teri Campbell's Counsel's Billing Statement for Superior Court Appeal in Support of RCW 28A.405.350 Application for Fees and Costs;
3. Declaration of Joseph W. Evans in Support of RCW 28A.405.350 Application for Reasonable Attorney's Fees and Costs in this Superior Court Appeal;
4. Respondent's Response to Appellant Fee and Cost Request; and

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5. Teri Campbell's Reply to Tacoma Schools' Response to Campbell's RCW 28A.405.350 Application for Reasonable Attorney's Fees and Costs.

6. \_\_\_\_\_

7. \_\_\_\_\_

IT IS NOW HEREBY ORDERED, ADJUDGED, AND DECREED that

1. Appellant Teri Campbell's RCW 28A.405.350 Application for Reasonable Attorney's Fees and Cost in This Superior Court Appeal is:

X Granted \_\_\_\_\_ Denied

2. Appellant Teri Campbell is award reasonable attorney fees and cost in the amount of:

\$ 46,800 fees + \$ 2,676.11 costs  
for a total award of  
\$ 49,476.11

FILED  
DEPT. 13  
IN OPEN COURT  
AUG 15 2014  
By [Signature]  
DEPUTY

DONE IN OPEN COURT this 15 day of August, 2014.

[Signature]  
JUDGE KATHRYN J. NELSON

Presented by:

FREIMUND JACKSON & TARDIF, PLLC

[Signature]  
GREGORY E. JACKSON, WSBA #17541  
Attorney for Tacoma Public Schools

OFFICES OF JOSEPH W. EVANS

[Signature]  
JOSEPH W. EVANS, WSBA #29877  
Attorney for Teri Campbell

**CERTIFICATE OF SERVICE**

The undersigned hereby swears under penalty of perjury and under the laws of the State of Washington, that the following is true and correct; that I am a citizen of the United States and of the State of Washington; over the age of 18 years of age; not a party of interest in this case. That on January 22, 2015, I caused to be served a true and correct copy of *Respondent's Brief (with Appendix)* to Counsel, as noted below:

**Via E-mail /Original Mailed**

Gregory E. Jackson  
Freimund, Jackson & Tardif  
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Joseph W. Evans

FILED  
COURT OF APPEALS  
DIVISION II  
2015 JAN 23 PM 1:18  
STATE OF WASHINGTON  
BY  DEPUTY