FILED
Court of Appeals
Division II
State of Washington
11/1/2019 2:03 PM

NO. 53665-0-II

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

NORMAN HALL,

Appellant,

v.

YELM SCHOOL DISTRICT,

Respondent.

BRIEF OF RESPONDENT

Kathleen J. Haggard, WSBA #29305
Tevon Edwards, WSBA #54119
Attorneys for Yelm School District

Porter Foster Rorick llp
Attorneys at Law
800 Two Union Square
601 Union Street
Seattle, Washington 98101
Tel: (206) 622-0203
Fax: (206) 223-2003

TABLE OF CONTENTS

I. INTRODUCTION **1**

II. ASSIGNMENTS OF ERROR **1**

III. STATEMENT OF THE CASE **1**

IV. ARGUMENT **5**

A. As a matter of law, Mr. Hall acquired no enforceable right to employment for the 2018-19 school year. **5**

1. The objective language of the contract requires approval of the Board. *5*

2. Washington law requires Board approval of all certificated contracts. *6*

B. Superintendent Wharton's May 15 letter nullified Mr. Hall's rights to continuing employment. **9**

V. CONCLUSION **12**

TABLE OF AUTHORITIES

Cases

Amy v. Kmart of Wash., LLC, 153 Wn. App. 846, 223 P.3d 1247 (2009) 9

Barnes v. Treece, 15 Wn. App. 437, 549 P.2d 1152 (1976) 8

Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 115 P.3d 262 (2005) 5

Hopp v. Oroville Sch. Dist., 31 Wn. App. 184, 639 P.2d 872 (1982) 11

Lake Wash. Sch. Dist. v. Lake Wash. Educ. Ass'n, 109 Wn.2d 427, 745 P.2d 504 (1987) 7

McCormick v. Lake Wash. Sch. Dist., 99 Wn. App. 107, 992 P.2d 511 (1999) 8

Meyer v. Newport Consol. Joint Sch. Dist., 31 Wn. App. 145, 639 P.2d 853 (1982) 10

Noe v. Edmonds Sch. Dist., 83 Wn.2d 97, 515 P.2d 977 (1973) 8

Petroni v. Bd. of Dirs., 127 Wn. App. 722, 113 P.3d 10 (2005) 10

Statutes

RCW 28A.150.203 1

RCW 28A.405.100 10

RCW 28A.405.200 1

RCW 28A.405.210 ..... 6, 9, 11

RCW 28A.405.220 ..... 3, 9, 10, 11

RCW 405.210.300 11

RCW 405.210.350 11

Other Authorities

Basics of School Law: A Guide for School Directors, Wash. State Sch. Dirs. Ass'n 24 (2010) 10

Regulations

Chapter 181.79A WAC 1

I. INTRODUCTION

Respondent Yelm School District (hereinafter "District") respectfully requests that this Court deny Appellant Norman Hall's appeal and affirm the superior court's grant of summary judgment in favor of the District. Appellant alleges the District violated his contractual rights; yet, as a matter of law, no enforceable contract rights were perfected. Even if such rights did exist, the District's Superintendent nullified them by properly giving notice of nonrenewal by May 15. Accordingly, Appellant's arguments fail, and his action was properly dismissed.

II. ASSIGNMENTS OF ERROR

The District is not seeking review of the trial court's Order granting summary judgment, and accordingly does not assign error to the trial court's decision or findings.

III. STATEMENT OF THE CASE

In April of 2018, Appellant Norman Hall, who had never before held a certificated[1] educational position with a Washington State school district,

[1] By statute, certificated employees "means those persons who hold certificates as authorized by rule of the Washington professional educator standards board." RCW 28A.150.203(3). Certificated employees are all school district employees who carry a certificate that is required for their employment, such as a teaching certificate or educational staff certificate. *See generally* ch. 181.79A WAC. School psychologists, along with teachers, counselors, and librarians, are certificated employees. *Id.* It is uncontested that Mr. Hall was a provisional certificated employee because he was in the first three years of employment in Washington State. RCW 28A.405.220.

began working for the District as a school psychologist. CP at 30. He signed a provisional contract for the 2017-18 school year, which the District's Board of Directors (hereinafter "Board") considered then approved at open public meetings. CP at 30, 64, 66. It quickly became apparent that Appellant was not a good fit for the position or the District. CP at 47.

On May 10, 2018, District Human Resources Director Greg Davis provided Appellant with the District's standard provisional contract for the 2018-19 school year, which Appellant signed and returned. CP at 30. The standard contract states as follows:

> THIS CONTRACT SHALL BE SUBJECT TO THE TERMS AND CONDITIONS OF ANY COLLECTIVE BARGAINING AGREEMENT BETWEEN THE DISTRICT AND THE YELM EDUCATION ASSOCIATION AS THE NEGOTIATING REPRESENTATIVE FOR THE CERTIFICATED EMPLOYEE. IN THE EVENT THAT ANY OF THE PROVISIONS OF THIS INDIVIDUAL EMPLOYEE CONTRACT SHALL BE INCONSISTENT WITH THE PROVISIONS OF ANY SUCH COLLECTIVE BARGAINING AGREEMENT, THEN THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT SHALL PREVAIL.

CP at 45 (all caps in original).

The Collective Bargaining Agreement ("CBA") provides certificated employees until late July to walk away from any contract they sign, should they find employment elsewhere or for any other reason. CP at 40 ("Employees who submit a written request to the District no later than

July 25th shall be released from their employment contract for the upcoming year without penalty or question.").[2] More importantly, the CBA unambiguously states, "No contract is effective until approved by a majority of the Board of Directors." CP at 39.

Unlike his contract for the 2017-18 school year, the Board never approved a contract with Appellant for 2018-19. Instead, Superintendent Brian Wharton, after consulting with Appellant's direct supervisor Shannon Powell, determined that Appellant's employment should not be renewed. CP at 23-24, 26. Superintendent Wharton informed Mr. Hall of the nonrenewal via letter on May 15, 2018. CP at 26.

As a provisional employee, Mr. Hall's rights were limited to seeking reconsideration from Superintendent Wharton and then making his case to the Board.[3] Appellant sought reconsideration, and the District denied it at the Superintendent and Board levels. CP at 27-28. Through counsel, Appellant contended the nonrenewal was a breach of contract. CP at 122. The District found his arguments to be legally untenable and rejected his request that the District honor his "contract." CP at 123.

---

[2] Appellant's assertion that he was not free to leave Yelm on his own volition after signing the contract for the 2018-19 school year is obviously inaccurate. Br. of Appellant at 14.

[3] *See* RCW 28A.405.220 and Part IV.B of this brief.

On August 3, 2018, Appellant sued the District for allegedly breaching the contract to employ him for the 2018-19 school year. CP at 1-3. The District sought summary judgment, which the Honorable Chris Lanese granted on May 10, 2019. CP at 138-39. The following colloquy, which occurred at oral argument, captures the legal simplicity of this case:

> THE COURT: So my first question to you is are you aware of any authority in Washington, appellate authority, that has found a school employment contract to be effective and valid before the Board of Directors has approved it, whether through consent agenda or otherwise?
>
> MR. GASPER [Counsel for Mr. Hall]: No, Your Honor.
>
> THE COURT: Okay. And so you may proceed with your presentation at this time.
>
> MR. GASPER: Okay. Which particular part of that argument would you like me to focus on?
>
> THE COURT: That's my entire focus.
>
> MR. GASPER: That's your entire focus. Okay.
>
> THE COURT: It appears potentially dispositive.

RP at 4.

IV. ARGUMENT

A. As a matter of law, Mr. Hall acquired no enforceable right to employment for the 2018-19 school year.

1. The objective language of the contract requires approval of the Board.

As noted, the District's form contract unambiguously incorporates the CBA by reference. The CBA, in turn, plainly states that teaching contracts are not binding absent Board approval. To the extent teaching contracts are interpreted according to traditional principles of contract law (Br. of Appellant at p. 11), the Court must look to the objective language of the contract rather than the subjective intent of any party. *Hearst Comm'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). With contract interpretation:

> [S]ubjective intent of the parties is irrelevant if the intent can be determined from the actual words used. We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. We do not interpret what was intended to be written but what was written.
>
> *Id.* (citations omitted).

The objective terms of the contract require Board approval, which never occurred.[4] In fact, the one and only time the Board considered Appellant's 2018-19 contract was when the Board sustained the Superintendent's nonrenewal decision. Accordingly, Appellant acquired no enforceable right to employment for the 2018-19 school year.

2. Washington law requires Board approval of all certificated contracts.

Objective contractual language notwithstanding, under state law the Board has the sole authority to bind the District to a teaching contract. RCW 28A.405.210. The Board can only exercise this authority by written order in an open public meeting. *Id.* ("No teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with a school district . . . shall be employed except by written order of a majority of the directors of the district at a regular or special meeting thereof."). As noted, while the Board considered and then approved Appellant's 2017-18 contract at two separate public meetings, this did not occur for the 2018-19 contract.

[4] Appellant suggests the trial court improperly focused on whether the Board ratified the contract *subsequent* to Appellant signing it. But the operative fact is that the Board *never* approved the contract, before, during or after.

Appellant argues that Board approval is not actually required because typically, approval occurs in a perfunctory manner, such as through the consent agenda. Br. of Appellant at 12. However, no authority supports the contention that a customary lack of fanfare overrides the clear statutory requirement for Board approval—at some time and in some form. The statute unambiguously provides that no teacher may be employed unless the Board blesses that employment at an open public meeting. That never occurred here; the Board's only blessing was on the Superintendent's decision to nonrenew the Appellant.

Appellant further contends that the Board delegated its hiring authority to Superintendent Wharton or other administrators. Br. of Appellant at 17-18.[5] Appellant produces no facts to show that the Board delegated anything to anyone. In fact, case law would prohibit such a delegation. *See Lake Wash. Sch. Dist. v. Lake Wash. Educ. Ass'n*, 109 Wn.2d 427, 432, 745 P.2d 504 (1987) ("These statutes explicitly confer the authority to employ teachers upon school boards. Thus, the power to hire is

[5] Appellant even argues that the Assistant Human Resources Coordinator, Kari Polzin, had implied authority to bind the District to a contract with the Appellant. Br. of Appellant at p. 16. No legal authority supports this contention. Moreover, the context of the email—answering questions from Appellant as to *whether he would even sign the contract he had been offered*—belies any assertion that the communication somehow created an enforceable contract. CP at 124-25.

a nondelegable prerogative of the board."); *Noe v. Edmonds Sch. Dist.*, 83 Wn.2d 97, 100, 515 P.2d 977 (1973) ("Discretionary duties specifically imposed upon the board by statute cannot lawfully be delegated to the superintendent either by direct board action or, as respondent seems to suggest, by negotiations with a professional organization."); *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 113, 992 P.2d 511 (1999) (finding that "as a matter of law," an administrator "could not have apparent authority" over hiring decisions).

A good portion of Appellant's brief focuses on the concept of "implied ratification." Appellant appears to be arguing that an agent, in this case a school administrator, can bind the principal, in this case the District, through actions evidencing an intent to contract. The above-referenced statutes and case law clearly refute any notion that anyone except the Board can bind the District to an employment contract. Regardless, implied ratification cannot occur when the principal repudiates, rather than acquiesces to, the contract. *Barnes v. Treece*, 15 Wn. App. 437, 443-44, 549 P.2d 1152 (1976) ("The basic inquiry to determine whether an implied ratification has occurred is whether the facts demonstrate an intent to affirm, to approve, and to act in furtherance of the contract."). In this case, no reasonable fact-finder could determine that the District did anything to

acquiesce in the contract. Within days, the Superintendent canceled it, and the Board never acted on it except to sustain the Superintendent's decision.

Both the contract's objective terms and state law unambiguously require the Board to approve the employment of any teacher in an open public meeting. Such consideration and approval occurred for Appellant's 2017-18 contract, but indisputably not for his 2018-19 contract. No conceivable set of facts indicates the District ever ratified the contract, either by explicit Board action as required by law, or impliedly as Appellant suggests.

B. Superintendent Wharton's May 15 letter nullified Mr. Hall's rights to continuing employment.[6]

RCW 28A.405.220 governs nonrenewal of "provisional" employees, who are considered as such when they have been employed by the district for fewer than three years. To nonrenew a provisional employee for the upcoming school year, the superintendent must give the employee written notice containing "reason or reasons" for nonrenewal before May 15. RCW 28A.405.210. The employee may then request that the

[6] In granting summary judgment, the trial court appeared to base its reasoning primarily on the conclusion that no contractual rights existed due to the lack of Board approval. The Court may affirm a grant of summary judgment "on any basis supported by the record, whether or not the trial court considered that basis." *Amy v. Kmart of Wash., LLC*, 153 Wn. App. 846, 868, 223 P.3d 1247 (2009).

superintendent meet informally to reconsider the nonrenewal. RCW 28A.405.220. The superintendent may reconsider the decision and reinstate the provisional employee, or the superintendent may submit a report to the Board recommending that the Board sustain the nonrenewal decision. *Id.* The Board makes the final call; its decision "to nonrenew the contract of a provisional employee *shall be final and not subject to an appeal*." *Id.* (emphasis added).

The purpose of this relatively expedient process is to allow school districts to release provisional employees that have performance or professional problems and to avoid lengthy and costly legal fights. *See Petroni v. Bd. of Dirs.*, 127 Wn. App. 722, 724, 113 P.3d 10 (2005).[7] Provisional employment is an extended tryout process to determine if a certificated employee is a good fit. *See Basics of School Law: A Guide for School Directors*, Wash. State Sch. Dirs. Ass'n 24 (2010), available at https://www.wssda.org/Portals/0/Resources/Publications/BasicsSchoolLaw.pdf; *see also Hopp v. Oroville Sch. Dist.*, 31 Wn. App. 184, 639 P.2d 872

[7] Nonrenewal of a provisional employee is proper for dealing with behavioral issues as well as evaluative issues. *Petroni*, 127 Wn. App. at 724. As noted in *Petroni*, the word "determination"—in reference to a superintendent's decision to nonrenew a provisional teacher—does not limit the superintendent to the evaluative criteria of RCW 28A.405.100. *Id.* at 731–32. The superintendent can consider the teacher's conduct divorced from the evaluative framework or additional concerns such as funding or residency requirements. *Id.* (citing *Meyer v. Newport Consol. Joint Sch. Dist.*, 31 Wn. App. 145, 148, 639 P.2d 853 (1982)).

(1982) ("The rational purpose behind [the provisional nonrenewal statute] was to afford a means of assuring effective teachers and proper education."). Once a provisional employee has graduated to nonprovisional status, it is far more difficult to release him or her. *Compare* RCW 28A.405.220 (provisional employee nonrenewal statute) *with* RCW 28A.405.210, .300-.350 (bestowing formal hearing, appeal rights, and a fee-shifting provision upon nonprovisional employees).

The District followed the requirements of RCW 28A.405.220, and under the plain language of that statute, this cancelled any right Appellant had to a contract for the 2018-19 school year. On May 15, 2018, Appellant was served with a copy of his nonrenewal letter. He requested and was granted a meeting with Superintendent Wharton. Superintendent Wharton declined to reconsider his nonrenewal decision. After considering the Superintendent's recommendation and the Appellant's input, the Board sustained the nonrenewal. The Board's decision is now final.

Appellant argues that when he signed a 2018-19 contract the Superintendent somehow lost the authority to nonrenew him for that year. He provides no legal authority supporting this assertion. In fact, the argument ignores the carefully-crafted statutory scheme. The legislature gave the Superintendent wide latitude over nonrenewals, imposing only the

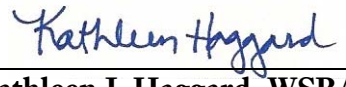
requirement to provide written notice by May 15th. Accepting Appellant's arguments would usurp the Superintendent's authority in this case, by allowing the actions of a subordinate administrator to override what is, by statute, the Superintendent's decision. This is not what the legislature contemplated when it created such a detailed process.

V. CONCLUSION

As a matter of law, Appellant neither acquired nor retained a contractual right to employment for the 2018-19 school year. Even if he had, as a provisional employee the District was free to let him go with a written notice of nonrenewal on or before May 15th. The Superintendent provided such notice, thereby cancelling all rights to employment for 2018-19. As the Board's only action on his contract was not to approve the contract but to sustain the Superintendent's nonrenewal decision, Appellant is now without recourse. The trial court properly dismissed his case on summary judgment.

RESPECTFULLY SUBMITTED this 1st day of November, 2019.

PORTER FOSTER RORICK LLP



By: Kathleen J. Haggard, WSBA #29305
Tevon Edwards, WSBA #54119
Attorneys for Yelm School District

CERTIFICATE OF SERVICE

I hereby certify that on **November 1, 2019**, I filed the **Brief of Respondent** with the Clerk of the Court.

I certify under penalty of perjury under the laws of the State of Washington that I sent the **Brief of Respondent** to the following:

Sent via E-mail/U.S. Mail to:
James A. Gasper
Washington Education Association
P.O. Box 9100
Federal Way, Washington 98063-910
Email: JGasper@WashingtonEA.org
Email: rsanchez@washingtonea.org
Attorney for Plaintiff Norman Hall

DATED this 1st day of November, 2019.

By: Cynthia Nelson, Legal Assistant
Porter Foster Rorick LLP

g:\yelm\003\wf\191101.dist.response.brief.docx

PORTER FOSTER RORICK

November 01, 2019 - 2:03 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53665-0
Appellate Court Case Title:	Norman Hall, Appellant v. Yelm community Schools No 2, Respondent
Superior Court Case Number:	18-2-03835-6

The following documents have been uploaded:

- 536650_Briefs_20191101135948D2472730_6814.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was 191101.dist.response.brief.pdf

A copy of the uploaded files will be sent to:

- jgasper@washingtonea.org
- rsanchez@washingtonea.org
- tevon@pfrwa.com

Comments:

Sender Name: Cynthia Nelson - Email: cyndi@pfrwa.com
Filing on Behalf of: Kathleen J Haggard - Email: kathleen@pfrwa.com (Alternate Email: cyndi@pfrwa.com)

Address:
601 Union Street
Suite 800
Seattle, WA, 98101
Phone: (206) 622-0203 EXT 127

Note: The Filing Id is 20191101135948D2472730