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MAY 07 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case No. 297578

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

EAST VALLEY SCHOOL DISTRICT NO. 90,

Petitioner

vs.

MICHELE TAYLOR,

Respondent.

RESPONDENT'S BRIEF

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WASHINGTON CONSTITUTION
(Constitutional/Common Law Writ of Review)

Const. art. IV, § 6 (amend. 87)

§ 6. Jurisdiction of Superior Courts

Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

INTRODUCTION

Petitioner East Valley School District ("EVSD") sought to terminate the teaching contract of Respondent Michele Taylor ("Taylor") pursuant to RCW 28A.405.300, in November 2009. Taylor requested a RCW 28A.405.310(1) statutory hearing. Luella E. Nelson was appointed Hearing Officer pursuant to RCW 28A.405.310(4). A one-week, statutory hearing was held in the Fall of 2010. On November 1, 2010, Hearing Officer Nelson issued a 44-page Decision, "Findings of Fact, Conclusions of Law and Final Decision," which found:

FINAL DECISION

[EVSD] has not shown, by a preponderance of the evidence that sufficient cause existed for [Taylor's] discharge. It has shown that [Taylor] is in need of additional training and/or counseling regarding [EVSD's] medication policy and effective responses to student requests for guidance. Such training and/or counseling can effectively be provided within the employment context.

[Taylor] shall be restored to her employment position and reimbursed for reasonable attorneys' fees.¹

EVSD sought a RCW 7.16.040 statutory writ of review in Yakima County Superior Court ("Superior Court").² On February 18, 2011, the

¹ A copy of Hearing Officer Nelson's 44-page Decision (CP 2216-2259), pursuant to RAP 10.3(a)(8), is included as an Appendix to this Brief.

² EVSD never sought or referenced a constitutional/common law writ of review pursuant to Washington Constitution, Article IV, Section 6, in any of its filings in the Superior Court.

Superior Court issued a 5-page Memorandum Decision holding that only an employee could appeal to the Superior Court under RCW 28A.405. On March 1, 2011, the Superior Court entered Final Judgment dismissing EVSD's Petition for a Statutory Writ of Review pursuant to RCW 7.16.040, because the trial court lacked subject matter jurisdiction. EVSD filed its Notice of Appeal to this Court on March 2, 2011.

On June 9, 2011, EVSD filed its Opening Brief with this Court challenging the Superior Court's decision that only an employee may appeal under RCW 28A.405. EVSD never mentioned a constitutional/common law writ of review³ in its Opening Brief. On September 29, 2011, in Federal Way School District v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011), the Washington Supreme Court held that a school district had no right to use a statutory writ of review (RCW 7.16.040) to appeal to superior court from an adverse hearing officer's decision. Taylor subsequently filed a RAP 18.14(e)(1)(a) Motion to Affirm on the Merits based upon the Vinson decision.

EVSD requested and was granted permission to file an Amended Opening Brief. On February 3, 2012, EVSD filed its Amended Brief. In this Amended Brief, EVSD asked this Court, in its appellate capacity,

³ Constitution, Article IV, Section 6.

"[to] grant a constitutional writ of review to East Valley School District No. 90."⁴

TRIAL COURT DID NOT ERR IN DENYING A STATUTORY WRIT OF REVIEW

The trial court made no error in this case when it dismissed EVSD's request for a statutory writ of review pursuant to RCW 7.16.040 because a school district has no right to use a statutory writ of review to appeal to superior court from an adverse hearing officer's decision. Federal Way School District No. 210 v. Vinson, 172 Wn.2d 756, 765-67, 261 P.3d 145, 150-51 (2011). EVSD did not seek a constitutional writ of review from the Superior Court. None of the "Assignments of Error, with Issues,"⁵ stated by EVSD in its Amended Opening Brief were ever presented to, much less considered by, the Superior Court.

RAP 10.4(d) MOTION TO DISMISS AND REMAND

Rules of Appellate Procedure ("RAP") 10.4(d), "Motion in Brief," provides in pertinent part, "A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits." Taylor requests that this Court dismiss this appeal and remand this matter to superior court "for it to determine whether in its discretion, it will grant limited review [of the statutory hearing officer's] decision under its

⁴ EVSD's February 3, 2012 Amended Opening Brief, at page 22.

⁵ Id., at pages 1-3.

inherent powers." Bridle Trails Community Club v. City of Bellevue, 45 Wn.App. 248, 254, 724 P.2d 1110, 1114 (Div. 1 1986).

EVSD has belatedly requested that this Court grant a constitutional writ of review in order for this Court to review the Statutory Hearing Officer's, November 1, 2010, 44-page Decision in favor of Taylor. However, "the grant of a common law writ of review is entirely discretionary and cannot be mandated by anyone, including an appellate court." Raynes v. City of Leavenworth, 118 Wn.2d 237, 242 fn. 1, 821 P.2d 1204, 1206 fn. 1 (1992), citing Bridle Trails Community Club v. Bellevue, 45 Wn.App. 248, 252, 253-54, 724 P.2d 1110, 1112-13, 1113-14 (Div. 1 1986)⁶:

The common law writ of certiorari embodied in the constitution is distinguished from the statutory writ of review in RCW 7.16.040. The statute requires the superior court to grant the writ only when all four factors are present, and accords the petitioner full review of the issue raised. If any of the factors are absent, there is no jurisdiction for review. The common law writ embodied in the constitution contains no such imperatives. The grant of the common law writ is always discretionary with the superior court as part of its inherent powers; it cannot be mandated by anyone, including a higher court such as this. Nor can the

⁶ Raynes and Bridle Trails were decided before Art. IV, §6 was amended (Amendment 87) in 1993. See, 1993 House Joint Resolution No. 4201, page 3063, approved November 2, 1993. However, this Amendment merely gave the district courts concurrent jurisdiction in equity cases and did not change, in any fashion, the superior court's inherent powers regarding constitutional/common law writs of review.

superior court ever lack the jurisdiction to entertain application for a writ alleging acts in excess of jurisdiction by an inferior body, whether exercising judicial functions or administrative ones. This jurisdiction is inherent in the court, as recognized in the constitution. The superior court may in its discretion refuse to exercise its inherent powers of review so long as tenable reasons are given to support that discretionary ruling.

* * *

[T]he superior court at all times possesses sufficient jurisdiction to evaluate the case before it as to whether to not to grant the limited [constitutional/common law writ of] review. Dismissal of this cause for lack of jurisdiction was thus technically an error.

Appellants' petition for [statutory] certiorari did not specifically request review under the court's inherent [constitutional writ of review] powers. However, the pleadings were sufficient to raise the issue of the court's inherent power to review, at least to the extent that that basis for review should have been explicitly ruled on by the trial court. No such formal ruling was made. We cannot determine from this record whether the trial court considered exercising its inherent power of review. Because the superior court always has jurisdiction for such limited review, we are constrained to remand the case. This result does not imply that the trial court must or should grant such review, since we have noted this form of review is rarely granted where a petitioner has failed to take advantage of another avenue of review without an adequate excuse. This is, however, a discretionary ruling to be made by the superior court on the facts before it rather than by this court.

The case is remanded to the superior court for it to determine whether, in its discretion, it will grant limited review of the planning commission's decision under its inherent [constitutional writ of review] powers. [Emphasis added]

See, also, Klickitat County v. Beck, 104 Wn.App. 453, 458, 16 P.3d 692, 695-96 (Div. 3 2001) ["superior court possesses the power to review . . . decisions by issuing constitutional writs of certiorari"]; Mabe v. White, 105 Wn.App. 827, 829, 15 P.3d 681, 682 (Div. 3 2001) [superior court has jurisdiction to grant a common law writ, citing Bridle Trails, supra]; State v. Epler, 93 Wn.App. 520, 523, 969 P.2d 498, 500 (Div. 3 1999) [superior court issues a constitutional writ of review, citing Bridle Trails, supra]; and, Foster v. King County, 83 Wn.App 339, 346, 921 P.2d 552, 556 (Div. 1 1996) [only superior court can issue a constitutional writ of review, citing Raynes, supra].

EVSD's request for this Court to issue a constitutional common law writ of review in its Amended Opening Brief⁷ is a nullity. This Court cannot undertake, much less mandate, such a review. Only the superior court may issue a constitutional writ of review. Therefore, this appeal must be dismissed and this matter "remanded to the superior court [of Yakima County] for it to determine whether in its discretion, it will grant limited review [of the statutory hearing officer's] decision under its inherent [constitutional writ of review] powers." Bridle Trails, supra, 45 Wn.App at 254, 724 P.2d at 1114.

⁷ EVSD's February 3, 2012 Amended Opening Brief, at page 22.

STATEMENT OF THE CASE

The procedural history of this matter is as follows:

November 1, 2010	Statutory Hearing Officer ⁸ issued her 44-page Decision ordering that Taylor be restored to her employment and reimbursed for her attorneys' fees. (CP 2216-2259)
November 30, 2010	EVSD filed for a statutory writ of review pursuant to RCW 7.16.040 ⁹ in Yakima Superior Court. (CP 1-35)
December 9, 2010	Taylor objected to EVSD's attempt to use RCW 7.16.040 to review the Hearing Officer's Decision of November 1, 2010. (CP 36-46)
January 3, 2011	EVSD responded to Taylor's objection of December 9, 2010. (CP 47-52)
January 7, 2011	Superior Court entered an Order stating that the subject matter jurisdictional issue raised by Taylor's December 9, 2010 filing had to be addressed before proceeding further on EVSD's RCW 7.16.040 request for a statutory writ of review. (CP 53-55)
February 8, 2011	EVSD filed its Stare Decisis Supplemental Response. (CP 56-59)

⁸ Hearing Officer Luella Nelson, who was selected by the Parties, conducted a week-long Hearing pursuant to RCW 28A.405.310 from September 27, 2010 to October 1, 2010, in Yakima, Washington.

⁹ EVSD never sought a constitutional/common law writ of review pursuant to Washington Constitution, Article IV, Section 6, in the Superior Court.

February 9, 2011	Taylor filed Supplemental Filing Regarding <u>Vinson and Holifield</u> Cases. (CP 60-113)
February 11, 2011	Taylor responded to EVSD's Stare Decisis filing of February 8, 2011. (CP 2305-2309)
February 18, 2011	Yakima Superior Court issued a 5-page Memorandum Decision holding that only an employee may appeal to Superior Court under RCW 28A.405. (CP 2310-2314)
March 1, 2011	Yakima Superior Court entered Final Judgment dismissing EVSD's Petition for a [Statutory] Writ of Review pursuant to RCW 7.16.040 because the trial court lacked subject matter jurisdiction. (CP 2315-2316)
March 2, 2011	EVSD filed its Notice of Appeal to This Court with the Yakima Superior Court. (CP 2317-2321)
June 9, 2011	EVSD filed its Opening Brief with this Court. ¹⁰
September 29, 2011	Washington Supreme Court issued its Decision in <u>Federal Way School District v. Vinson</u> , 172 Wn.2d 756, 261 P.3d 145 (2011), holding that a school district has no right to use a statutory writ of review to appeal to superior court from an adverse hearing officer's decision.
November 29, 2011	Taylor filed her RAP 18.14(e)(1)(a) Motion to Affirm on the Merits based upon the <u>Vinson</u> Decision.

¹⁰ EVSD's Opening Brief never made mention of a constitutional/common law writ of review pursuant to Washington Constitution, Article IV, Section 6, but, instead, only cited to the statutory writ of review (RCW 7.16.010 *et seq.*). See, pages *vii*, 19, 20, 21, 22, 25 and 50 of EVSD's Opening Brief, dated June 9, 2011.

January 5, 2012	EVSD filed its Motion to Amend Opening Brief.
January 13, 2012	EVSD filed its Response to Taylor's RAP 18.14(e)(1)(a) Motion to Affirm on the Merits
January 19, 2012	Taylor filed her Motion to Amend/Supplement Her RAP 18.14(e)(1)(a) Motion to Affirm on the Merits.
January 24, 2012	Commissioner entered notation ruling that Taylor's "amended motion on the merits . . . is . . . due 30 days after the amended [EVSD] brief is filed."
February 3, 2012	EVSD filed its Amended Opening Brief. ¹¹
February 29, 2012	Taylor filed her Amended RAP 18.14(e)(1)(a) Motion to Affirm on the Merits or in the Alternative RAP 17.1 Motion to Remand to Trial Court for a Determination Regarding Whether or Not the Trial Court, in its Discretion, Will Grant Limited Review Under its Inherent Powers . ¹²
April 4, 2012	Commissioner denied Taylor's Motion on the Merits. ¹³

¹¹ EVSD's Amended Opening Brief deleted all references and case citations regarding the statutory writ of review. Instead, EVSD asked "this Court [Division III, Court of Appeals] [to] grant a constitutional writ of review to East Valley School District No. 90." See, EVSD's Amended Opening Brief, at page 22.

¹² EVSD never responded or replied to Taylor's February 29, 2012 Amended RAP 18.14(e)(1)(a) Motion to Affirm on the Merits or in the Alternative RAP 17.1 Motion to Remand to Trial Court for a Determination Regarding Whether or Not the Trial Court, in its Discretion, Will Grant Limited Review Under its Inherent Powers.

¹³ The Commissioner's Ruling of April 4, 2012 references Taylor's "motion on the merits [of November 29, 2011] and the School District's reply [of January 13, 2012]" but fails to address or reference Taylor's February 29, 2012 Amended RAP 18.14(e)(1)(a) Motion to Affirm on the Merits or in the Alternative RAP 17.1 Motion to Remand to Trial Court for a Determination Regarding Whether or Not the Trial Court, in its Discretion, Will Grant Limited Review Under its Inherent Powers. [Emphasis added] In her Amended Motion, Taylor requested that this

ARGUMENT

This Matter Must be Remanded to the Superior Court

In a 5-page Memorandum Decision, dated February 18, 2011, the Yakima Superior Court, Honorable Robert Lawrence-Berry presiding, held that, "[T]his court concludes that Bates^[14] controls and that this court lacks subject matter jurisdiction."¹⁵ On March 1, 2011, Judge Lawrence-Berrey entered Final Judgment:¹⁶

Based upon this Court's five-page Memorandum Decision of February 18, 2011, it is ORDERED that the East Valley School District's Petition for a Writ of Review pursuant to RCW 7.16.040 is hereby DISMISSED because this Court lacks subject matter jurisdiction and FINAL JUDGMENT pursuant to Civil Rule 54(e) is hereby entered in this matter.

Seven months later, the Washington Supreme Court agreed with Judge Lawrence-Berrey in Vinson.¹⁷

In reaching its Memorandum Decision of February 18, 2011 on lack of subject matter jurisdiction and entering Final Judgment on March

Footnote 13 Cont'd:

Court remand this matter to the Superior Court in Yakima County "for a determination regarding whether or not the trial court, in its discretion, will grant limited review under its inherent powers [Washington Constitution, Article IV, Section 6]."

¹⁴ State ex rel. Bates v. Bd. of Industrial Insurance Appeals, 51 Wn.2d 125, 316 P.2d 467 (1957).

¹⁵ Memorandum Decision, at page 5. (CP 2314)

¹⁶ CP 2315.

¹⁷ 172 Wn.2d 756, 261 P.3d 145 (2011).

1, 2011 on lack of subject matter jurisdiction, the Superior Court did not determine whether or not to use its inherent powers of limited review under a constitutional/common law writ of review. Hence, the Superior Court did not review the 3,932 pages of the statutory hearing record filed with the trial court. Therefore, the Superior Court did not make any findings of fact regarding the record of the statutory hearing and the Superior Court did not enter any conclusions of law regarding the record of the statutory hearing.

Only six pages of East Valley School District's Amended Opening Brief¹⁸ address the constitutional writ of review/subject matter jurisdictional issue. The other forty-four pages of the Amended Opening Brief deal with the decisions of the Statutory Hearing Officer -- issues never reviewed/addressed by the Superior Court because of the lack of subject matter jurisdiction to grant a statutory writ of review in the matter sub judice.

"Whether a court has subject matter jurisdiction is a question of law reviewed *de novo*." Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 729, 254 P.3d 818, 820 (2011) and Spokane County v. Eastern Washington Growth Management Hearings Board, 160 Wn.App. 274,

¹⁸ See, EVSD's Amended Opening Brief, dated February 3, 2012, at pages 20-26. (Note: In its original, 50-page, Opening Brief, dated June 9, 2011, EVSD only devoted four pages to the jurisdictional issue.)

281, 250 P.3d 1050, 1053 (Div. 3 2011). This Court cannot grant or mandate *sua sponte* a constitutional writ of review in this matter. Compare, Jones v. Department of Corrections, 46 Wn.App. 275, 280, 730 P.2d 112, 115 (Div. 2 1986) ["Having concluded that the trial court was without jurisdiction to entertain the appeal, it is unnecessary for us to consider the Department's contention that the trial court erred in concluding that the [Personnel Appeals] Board's decision was arbitrary and capricious."]

Assuming *arguendo* that the trial court should have considered a constitutional writ of review -- an issue never raised by EVSD before the Superior Court -- this Court must reverse "and remand for further proceedings consistent with [its] opinion." Williams, supra. Appellate courts are not "authorized to make findings of fact in either a civil or criminal case where the trial court has made none." State v. Marchand, 62 Wn.2d 767, 770, 384 P.2d 865, 867 (1963). Therefore, "the cause [must be] remanded to the superior court for the making and entry of findings of fact and conclusions of law, and based thereon . . . any aggrieved party may appeal." Id., 62 Wn.2d at 771, 384 P.2d at 867. See, also, Perry v. Moran, 111 Wn.2d 885, 887-888, 766 P.2d 1096, 1097 (1989) [reasonable amount of liquidated damages clause could not be made on appeal where trial court failed to make reasonableness determination; therefore, matter

reversed and remanded because "it would be premature for [the appellate court] to determine the enforceability of the liquidated damages clause."; Lonsdale v. Chesterfield, 91 Wn.2d 189, 191-192, 588 P.2d 217, 218-219 (1978) [court of appeals decision on jurisdictional issue affirmed, but court of appeals decision on merits reversed because trial court never reached the merits of defendant's case; hence the case was remanded to the trial court for a decision on the merits of the case]; Old Windmill Ranch v. Smotherman, 69 Wn.2d 383, 390-391, 418 P.2d 720, 724-725 (1966) [where trial court did not make material findings of fact, the appellate court "cannot pass upon appellants' assignments of error . . . [hence] the case [is] remanded with instructions to make [] finding[s] of fact When these findings are made and appropriate conclusions of law and judgment are entered based thereon, any aggrieved party may appeal from such judgment"]; Colkett v. Hammond, 101 Wn. 416, 420-421, 172 P. 548, 550 (1918) [appellate courts should not determine questions that have never been determined by the superior court, because to do so "would be exercising original rather than appellate jurisdiction"]; and, McIntyre v. Johnson, 66 Wn. 567, 571, 120 P. 92, 94 (1912) [judgment of nonsuit reversed; "[w]hile, therefore, we are of the opinion that the evidence before us entitles appellants to a judgment in their favor as prayed for, we

cannot enter such judgment here, nor direct its entry in the court below . . . [therefore] the cause [is] remanded for further proceedings."

The Court of Appeals in Bridle Trails Community Club v. City of Bellevue, 45 Wn.App. 248, 254, 724 P.2d 1110, 1113-14 (Div. 1 1986) remanded a case to the superior court for a ruling on the trial court's inherent power of review:

No such formal ruling was made [by the trial court]. We cannot determine from this record whether the trial court considered exercising its inherent power of review. Because the superior court always has jurisdiction for such limited review, we are constrained to remand the case. This result does not imply that the trial court must or should grant such review, since we have noted this form of review is rarely granted where a petitioner has failed to take advantage of another avenue of review without an adequate excuse. This is, however, a discretionary ruling to be made by the superior court on the facts before it rather than by this court.

The case is remanded to the superior court for it to determine whether, in its discretion, it will grant limited review of the planning commission's decision under its inherent powers. [Emphasis added]

Compare, City of Des Moines v. Puget Sound Regional Council, 97 Wn.App. 920, 925, 988 P.2d 993, 997 (Div. 1 1999) [trial court reviewed the entire administrative record and issued a memorandum decision regarding its review of the record].

EVSD, at pages 22-23 of its Amended Opening Brief, cites Federal Way School District No. 210 v. Vinson, supra, for the proposition that "the Court of Appeals can review . . . the entire record of the statutory hearing . . . and render a decision regarding the sufficient cause for discharge of Ms. Taylor . . ." even though the Yakima County Superior Court in the matter *sub judice* never reviewed the record of the statutory hearing. However, in Vinson, the superior court "entered a [Statutory] Writ of Review . . . and reviewed the record of [the statutory hearing], including the hearing transcript, the admitted exhibits, the Memorandum of Decision by the Hearing Officer, the Brief of Petitioner, the Respondent's Brief, and the Petitioner's Reply, after oral argument of this matter and after a full review of the files and records . . ." denied the Writ of Certiorari and upheld the Hearing Officer's decision.¹⁹ Hence, Vinson does not stand for the proposition that review by the Yakima Superior Court can be by-passed in this matter if this Court determines that the trial court should consider whether or not to grant a constitutional writ of review. Instead, in such a situation, this Court must remand this cause to

¹⁹ See, ORDER AND JUDGMENT DENYING WRIT OF CERTIORARI & AFFIRMING DECISION OF HEARING OFFICER, dated May 13, 2008, King County Superior County Court, Judge Mary I. Yu presiding, attached as Exhibit "F" to Taylor's February 29, 2012 Amended RAP 18.14(e)(1)(a) Motion to Affirm on the Merits/RAP 17.1 Motion to Remand, filed with this Court.

the Yakima County Superior Court for its determination regarding whether or not to grant limited review, under its inherent powers, of the decision by the Hearing Officer in favor of Michele Taylor.

Likewise, EVSD has never denied -- and thereby has conceded -- that the trial court in this matter:

- never determined whether or not to grant limited review under its inherent powers by means of a constitutional writ of review;
- never reviewed the statutory hearing record;
- never entered any findings of fact regarding the statutory hearing record; and,
- never entered any conclusions of law regarding the statutory hearing record.

Hence, EVSD is compelled to ignore the substantial body of Washington case law that prohibits appellate courts from making such determinations *ab initio* where the trial court has undertaken no such review and made no such determinations. Instead, EVSD cites Waste Management²⁰ and Herman²¹ for the proposition that the appellate court may make its own findings of fact where none have been made by the trial court -- thereby skipping the step of having the trial court actually review the statutory

²⁰ Waste Management of Seattle, Inc. v. WUTC, 123 Wn.2d 621, 869 P.2d 1034 (1994).

²¹ Herman v. Shorelines Hearings Bd., 149 Wn.App. 444, 204 P.3d 928 (2009).

hearing record in the matter *sub judice*.²² This averment is misplaced and incorrect.

In Waste Management, the trial court reviewed the administrative record of the proceedings before the Utilities and Transportation Commission and entered its own findings and conclusions pursuant to RCW 34.05.574.²³ Likewise, in Herman, the trial court reviewed the agency record and "entered findings of fact, conclusions of law, and issued an order."²⁴ As stated previously and as is uncontested in this matter, Judge Lawrence-Berrey never determined whether or not to grant limited review under the trial court's inherent powers, never reviewed the record of the statutory hearing in this case and, therefore, never entered any findings of fact or conclusions of law. Hence, if EVSD is somehow entitled to a determination on its belated request for a constitutional writ of review, this matter must be remanded to the trial court for a determination as to whether or not to grant the limited review provided under a constitutional writ of review. Bridle Trails, *supra*, 45 Wn.App. at 254, 724 P.2d at 1114. Then, and only then, may there be an opportunity for a review of the 4,000-page statutory hearing record and requisite entry of findings of fact and conclusions of law by Judge Lawrence-Berrey -- if the

²² EVSD's Amended Opening Brief, at page 23.

²³ Waste Management, 123 Wn.3d at 632-33.

²⁴ Herman, 149 Wn.App. at 453.

trial court determines that such review is even warranted. See, Myers v. City of Cheney, Superior Court of Spokane County, "ORDER DENYING CONSTITUTIONAL WRIT OF CERTIORARI," August 31, 2011, Hon. Paul Bastine, Superior Court Judge, presiding, Case No. 01 2 03076-5, pages 12-14, 2001 WL 36158704 [errors of law cannot be challenged by constitutional writ of review; party alleging arbitrary and capricious conduct has a very heavy burden of proof] and Petroni v. Board of Directors of Deer Park School District No. 414, Superior Court of Spokane County, "ORDER [DENYING] PLAINTIFF'S APPLICATION FOR WRIT OF CERTIORARI . . .," January 22, 2004, Hon. Kathleen M. O'Connor, Superior Court Judge, presiding, Case No. 03 2 04776-1, 2004 WL 5565612 [court declined to issue a constitutional writ], *aff'd*, 127 Wn.App. 722, 113 P.3d 10 (Div. 3 2005) *review denied*, 156 Wn.2d 2013 (2006).

**EVSD Does Not Have a Cognizable, Legal Basis
for a Constitutional Writ of Review**

EVSD's Amended Opening Brief evidences a complete misunderstanding of the law regarding the constitutional/common law writ of review. Hence, a careful review of the law on this issue is necessary.

Constitutional Writ Overview

Supreme Court

A constitutional writ of review (also known as a common law writ of review) may only be issued by a superior court if: (1) the decision of the hearing officer was arbitrary and capricious; or (2) the hearing officer's decision was illegal:

The Washington State Constitution recognizes the right to seek discretionary review of an administrative agency decision under the court's inherent constitutional power (also known as constitutional or common law certiorari). Const. art. IV, §§ 4, 6. "The scope of review is limited to whether the hearing officer's actions were arbitrary, capricious, or illegal, thus violating a claimant's fundamental right to be free from such action" Foster v. King County, 83 Wn. App. 339, 346, 921 P.2d 552 (1996); Bridle Trails, 45 Wn. App. at 252; Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983) (constitutional certiorari is limited to a review of the record to determine whether the challenged decision or act was arbitrary and capricious or contrary to law). "The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." Saldin Secs., Inc. v. Snohomish County, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). Thus, a court will accept review only if the appellant can allege facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious. Pierce County Sheriff, 98 Wn.2d at 693-94.

"The scope of court review should be very narrow . . . and one who seeks to demonstrate that action is arbitrary or

capricious must carry a heavy burden." Id. at 695. Arbitrary and capricious action is "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action."¹⁴ Foster, 83 Wn. App. at 347 (quoting Kerr-Belmark Constr. Co. v. City Council, 36 Wn.App. 370, 373, 647 P.2d 684 (1984)). Hearing Officer Cooper conducted a two-day hearing. In a 16-page opinion, he found the District failed to establish sufficient cause to justify termination of Vinson's employment. His detailed findings of fact and conclusions of law demonstrate that he considered the relevant facts and legal authority. His written decision shows careful deliberation and cannot be said to be arbitrary and capricious. We next examine whether the hearing officer's decision was so clearly illegal as to call for revision by constitutional writ.

" '[I]llegality' is a 'nebulous term.' " Wash. Pub. Emps. Ass'n v. Wash. Pers. Res. Bd., 91 Wn.App. 640, 652, 959 P.2d 143 (1998) (quoting King County v. Wash. State Bd. of Tax Appeals, 28 Wn. App. 230, 242, 622 P.2d 898 (1981)). In the constitutional certiorari context, illegality refers to an agency's jurisdiction and authority to perform an act. Id.; Saldin, 134 Wn.2d at 292. "[A]n alleged error of law is insufficient to invoke the court's constitutional power of review." Wash. Pub. Emps. Ass'n, 91 Wn. App. at 658. The District claims the hearing officer committed clear error of law by applying the Hoagland factors, and this error cannot be corrected by any other means. The District's claim does not satisfy any of the requirements necessary for grant of a constitutional writ. The hearing officer's power and authority are outlined in RCW 28A.405.310. RCW 28A.405.310 grants a hearing officer jurisdiction to decide appeals from a school district's determination of probable cause to discharge. Because the hearing officer was within his statutory authority to issue a decision under RCW 28A.405.310, his actions

were not illegal. Accordingly, we deny the request for a constitutional writ.

It was error for the Court of Appeals to address the law of sufficient cause since an alleged error of law is not adequate grounds to invoke the court's constitutional power of review.

Footnote 14:

"Agency action is arbitrary and capricious if there is no support in the record for the action. An agency action is not arbitrary and capricious when there is room for two opinions, despite a belief on the part of the reviewing court that the agency reached an erroneous conclusion." Tim J. Filer, The Scope of Judicial Review of Agency Actions in Washington Revisited -- Doctrine Analysis and Proposed Revisions, 60 Wash. L. Rev. 653, 660 (1985) (footnote omitted).]

Federal Way School District No. 210 v. Vinson, 172 Wn.2d 756, 769-70, 261 P.3d 145, 152-53 (2011). Compare, City of Seattle v. Holifield, 170 Wn.2d 230, 246, 240 P.3d 1162, 1169 (2010) ["[A] mere error of law . . . would not justify issuance of a [statutory] writ of review."]

Division III

Recently, in Coballes v. Spokane County, ___ Wn.App. ___, ___ P.3d ___, 2012 WL 1448220, *4, *5 (Div. 3 2012), this Court dealt extensively with the constitutional/common law writ of review:

¶ 17 Superior courts have the power to issue statutory or constitutional writs of certiorari. Ch. 7.16 RCW; Const. art IV, § 6. Both the statutory and constitutional writs share a common purpose: to enable limited appellate review of a judicial or quasi-judicial action when the remedy of appeal is unavailable. See, Saldin Sec., Inc. v. Snohomish County, 134 Wash.2d 288, 306-07, 949 P.2d 370 (1998) (collecting cases). They are both understood to be extraordinary remedies that should be " 'granted sparingly.' " City of Seattle v. Holifield, 170 Wash.2d 230, 239-40, 240 P.3d 1162 (2010) (statutory writ) (quoting City of Seattle v.

Williams, 101 Wash.2d 445, 455, 680 P.2d 1051 (1984); Torrance v. King County, 136 Wash.2d 783, 793, 966 P.2d 891 (1998) (constitutional writ).

* * *

¶19 A distinct right to petition for a writ of certiorari is recognized by our state constitution. Const. art. IV, § 6. The fundamental purpose of the constitutional writ of certiorari is " ' to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority.' " Fed. Way Sch. Dist. No. 210 v. Vinson, 172 Wash.2d 756, 769, 261 P.3d 145 (2011) (quoting Saldin Sec., Inc., 134 Wash.2d at 292, 949 P.2d 370). Like the statutory writ of review, the scope of review under a constitutional writ of certiorari is more limited than an appeal. Review under article IV, section 6 is limited to " 'whether the hearing officer's actions were arbitrary, capricious^[FN4] or illegal, thus violating a claimant's fundamental right to be free from such action.' " Id. (quoting Foster v. King County, 83 Wash.App. 339, 346, 921 P.2d 552 (1996)). This constitutional, or common law, writ of certiorari is only available as an avenue for review when both direct appeal and statutory writ of review are unavailable. Malted Mousse, Inc. v. Steinmetz, 150 Wash.2d 518, 533, 79 P.3d 1154 (2003).

Footnote 4:

Arbitrary and capricious action is " ' willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.' " Vinson, 172 Wash.2d at 769, 261 P.3d 145 (internal quotation marks omitted) (quoting Foster v. King County, 83 Wash.App. 339, 347, 921 P.2d 552 (1996)).

Arbitrary and Capricious

Prior to Vinson, the Supreme Court dealt extensively with the arbitrary and capricious standard:

- " 'The most that can be said of their action, even from the respondent's point of view, is that they erred in judgment. But this is not arbitrary or capricious action. These terms, when used in this connection, must mean willful and unreasoning action, action without consideration and in disregard of the facts and circumstances of the case. Action is not arbitrary or capricious when exercised honestly and upon due consideration, where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached.' Even if the department was in error in its determination, it exercised its honest judgment in this matter and, therefore, the trial court should not have held that the department acted arbitrarily, capriciously or upon a fundamentally wrong basis in these cases."
Robinson v. Olzendam, 38 Wn.2d 30, 38, 227 P.2d 732, 736-37 (1951)
- "We have consistently defined arbitrary and capricious action on the part of administrative agencies as willful and unreasoning action, without consideration and in disregard of facts or circumstances. Lillions v. Gibbs, 47 Wash.2d 629, 633, 289 P.2d 203, 205 (1955). And, we have summarized the tests to be used in evaluating administrative decisions follows: Did the agency proceed in accordance with and pursuant to constitutional and statutory powers? Were the agency's motives honest and intended to benefit the public? Were they honestly arrived at—that is, free from influence of fraud and deceit? Were they free of any purpose to oppress or injure—even though injury and damage to some may be inherent in accomplishing the particular public benefit? Did the administrative agency

give notice, where notice is due, and hear evidence where hearings are indicated? Did the agency make its decision on facts and evidence? Were its actions in the last analysis rational, that is, based upon a reasonable choice supported by facts and evidence? If the answers to all of these queries are in the affirmative, then the decision of an administrator, unless placed under complete judicial review by law, cannot be held arbitrary, capricious, unreasonable or oppressive by the courts. That the courts may have reached a decision, made a choice or a conclusion different from that of the administrative agency, or taken wiser or more sensible action, does not empower them to do so. . . .If the administrative agency has acted honestly, with due deliberation, within the scope of and to carry out its statutory and constitutional functions, and been neither arbitrary, nor capricious, nor unreasonable, there is nothing left for the courts to review. Deaconess Hospital v. Washington State Highway Comm'n, 66 Wash.2d 378, 405, 406, 403 P.2d 54, 70 (1965)."

Jow Sin Quan v. Washington State Liquor Control Bd., 69 Wn.2d 373, 378-79, 418 P.2d 424, 427-28 (1966)

- "A decision by an administrative commission is not arbitrary and capricious simply because a trial court and this court conclude, after reading the record, that they would have decided otherwise had they been the administrative commission. Where a tribunal has been established to hold inquiries and make decisions as to whether an employee shall be dismissed, review by the judiciary is limited to determining whether an opportunity was given to be heard and whether competent evidence supported the charge. State ex rel. Schussler v. Matthiesen, 24 Wash.2d 590, 166 P.2d 839 (1946), and cases cited therein. The crucial question is whether or not there is

evidence to support the commission's conclusion. A finding or a conclusion made without evidence to support it, is, of course, arbitrary. State ex rel. Tidewater-Shaver Barge Lines v. Kuykendall, 42 Wash.2d 885, 891, 259 P.2d 838 (1953); but it is not arbitrary or capricious if made with due consideration of the evidence presented at the hearing. See Miller v. City of Tacoma, 61 Wash.2d 374, 390, 378 P.2d 464 (1963), and cases cited. The instant case meets this test. Neither the trial court nor this court can substitute its judgment for the independent judgment of the civil service commission. State ex rel. Wolcott v. Boyington, [110 Wash.622, 188 P. 777 (1920)]. The scope of judicial review requires that this cause be reversed and remanded with directions to dismiss it."

State ex rel. Perry v. City of Seattle, 69 Wn.2d 816, 821, 420 P.2d 704, 708 (1966)

- "Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached."

Pierce County Sheriff v. Civil Service Comm'n of Pierce County, 98 Wn.2d 690, 695, 658 P.2d 648, 652 (1983) quoting from State v. Rowe, 93 Wn.2d 277, 284, 609 P.2d 1348 (1980)

- "The next question in reviewing this matter pursuant to a constitutional writ of review is whether the Community Council nevertheless acted arbitrarily or capriciously. A decision is arbitrary and capricious if it is 'willful and unreasoning action, without consideration and in disregard of facts and circumstances.' Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wash.2d 690, 695, 658 P.2d 648 (1983) (quoting State v. Rowe, 93 Wash.2d 277, 284, 609 P.2d 1348 (1980)); Leavitt, 74 Wash.App. at 678, 875 P.2d 681. Where there is room for two opinions,

a decision is not arbitrary and capricious. Pierce County Sheriff, 98 Wash.2d at 695, 658 P.2d 648 (quoting Rowe, 93 Wash.2d at 284, 609 P.2d 1348). The trial court held that the Community Council acted arbitrarily and capriciously." **City of Bellevue v. East Bellevue Community Council**, 138 Wn.2d 937, 947-48, 983 P.2d 602, 607 (1999)

This Court has also dealt specifically with the arbitrary and capricious standard:

- "An error in judgment does not constitute arbitrary and capricious action." **Pease Hill Community Group v. County of Spokane**, 62 Wn.App. 800, 804, 816 P.2d 37, 40 (Div. 3 1991), citing **Washington Waste Sys. v. Clark County**, 115 Wn.2d 74, 81, 794 P.2d 508 (1990)
- "Arbitrary and capricious action is 'willful and unreasoning action, without consideration and in disregard of facts and circumstances[;][w]here there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.' Department of Agric. v. Personnel Bd., 65 Wash.App. 508, 513-14, 828 P.2d 1145 (1992)(quoting Pierce County Sheriff, 98 Wash.2d at 695, 658 P.2d 648)." **Klickitat County v. Beck**, 104 Wn.App. 453, 459, 16 P.3d 692, 696 (Div. 3 2001)
- "*Arbitrary or Capricious*. Dr. Donahue contends the Board's decision was arbitrary or capricious. An order is arbitrary or capricious if it 'is willful and unreasoning and taken without regard to the attending facts or circumstances.' Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n, 149 Wash.2d 17, 26, 65 P.3d 319 (2003) (quoting Rios v. Dep't of Labor & Indus., 145 Wash.2d 483, 501, 39 P.3d 961 (2002)). Where room for two

opinions exists, and the agency acted honestly and upon due consideration, we should not find an action was arbitrary or capricious, even though we may have reached the opposite conclusion. Buechel v. Dep't of Ecology, 125 Wash.2d 196, 202, 884 P.2d 910 (1994)."

Donahue v. Central Washington University, 140 Wn.App. 17, 24-5, 163 P.3d 801, 805 (Div. 3 2007)

Division 1 of the Court of Appeals has dealt with this issue in a similar fashion. See, Matter of Stockwell, 28 Wn.App. 295, 302, 622 P.2d 910, 915 (Div. 1 1981) ["Where there is room for two opinions, action taken by an agency after due consideration is not arbitrary and capricious even though the reviewing court may disagree"]; Dorsten v. Port of Skagit County, 32 Wn.App. 785, 793, 650 P.2d 220, 225 (Div. 1 1982) [an administrative decision "is not arbitrary and capricious even though a reviewing court may believe it to be erroneous"]; Kerr-Belmark Const. Co. v. City Council of City of Marysville, 36 Wn.App. 370, 373-74, 674 P.2d 684, 687 (Div. 1 1984) [citing Dorsten]; and, Concerned Land Owners of Union Hill v. King County, 64 Wn.App. 768, 772, 827 P.2d 1017, 1020 (Div. 1 1992) ["An error in judgment or an unwise decision does not constitute arbitrary and capricious action"]. See, also, Washington Public Employees Assoc. v. Washington Personnel Resources Bd., 91 Wn.App. 640, 658, 959 P.2d 143, 152 (Div. 2 1998) ["Because reasonable minds can differ . . . the PRB's ruling dismissing the unfair

labor procedure complaint [cannot be characterized] as arbitrary and capricious . . . [consequently] the superior court did not abuse its discretion in denying the review by constitutional writ"]. Compare, Nationscapital Mortgage Corp. v. State Dept. of Financial Institutions, 133 Wn.App. 723, 738, 137 P.3d 78, 87 (Div. 2 2006) ["We will not weigh the evidence or substitute our judgment regarding witness credibility for that of the agency"].

Illegality

As stated above in Vinson, "in the constitutional *certiorari* context, illegality refers to an agency's jurisdiction and authority to perform an act." 172 Wn.2d at 770. Likewise, this Court has held:

Illegality in this context refers to the arbitrator's jurisdiction and authority. See Washington Public Employees Ass'n v. Washington Personnel Res. Bd., 91 Wash.App. 640, 657, 959 P.2d 143 (1998). 'Thus, an alleged error of law is insufficient to invoke the court's constitutional power of review.' Washington Pub. Employees Ass'n, 91 Wash.App. at 658, 959 P.2d 143 (citing King County v. Washington State Bd. of Tax Appeals, 28 Wash.App. 230, 242-43, 622 P.2d 898 (1981); Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wash.2d 690, 694, 658 P.2d 648 (1983)).

Klickitat County, *supra*, 104 Wn.App. at 459, 16 P.3d at 696.

Division 1 of the Court of Appeals has dealt with "illegality" in a similar fashion. See, King County v. Washington State Bd. Tax Appeals, 28 Wn.App. 230, 242-43, 622 P.2d 898, 904 (Div. 1 1981) [alleged errors of law insufficient to invoke court's constitutional power of review; "illegal act" does not empower court to review alleged errors of law] and Newman v. Veterinary Bd. of Governors, 156 Wn.App. 132, 142, 231 P.3d 840, 845 (Div. 1 2010) ["Illegality in the context of a constitutional writ refers to the lower tribunal's jurisdiction and authority," citing Klickitat County v. Beck, supra, and "alleged error of law is insufficient to invoke . . . constitutional power of review"]. Likewise, Division 2 has held that "illegality" refers to an agency's jurisdiction and authority to perform an act and an alleged error of law is insufficient to invoke a constitutional writ of review. See, Washington Public Employees Assoc., supra, 91 Wn.App. at 657-58, 959 P.2d at 152 and Gehr v. South Puget Sound Community College, 155 Wn.App. 527, 533-35, 228 P.3d 823, 826-27 (Div. 2 2010).

**Discussion Re: Constitutional Writ of Review by Superior Court
Exercising Its Inherent Powers**

EVSD's averments in its Amended Opening Brief regarding the Statutory Hearing are replete with inaccuracies, false innuendo and blatant misrepresentations of the evidence presented to the Hearing Officer and the Hearing Officer's Findings of Fact and Conclusions of Law. Even a

cursory review of the Hearing Officer's 44-page Decision shows that she conducted a week-long hearing, considered the relevant facts and legal authority, entered detailed findings of fact and conclusions of law and rendered her decision only after careful deliberation.²⁵

EVSD argues that the Hearing Officer committed errors of law by:

- finding Taylor's conduct remediable
- admitting rumor evidence
- finding that Taylor needed additional training
- concluding that Taylor's post-termination e-mails were not a basis for termination
- failing to use the Clarke test or apply the Hoagland factors.²⁶

Taylor does not concede, and the record in this case does not support, that these were actually "errors of law." However -- even if they were -- errors of law are not tenable grounds for issuance of a constitutional writ of review. Vinson, supra, 172 Wn.2d at 770, 261 P.3d at 152-53.

EVSD also disagrees with the Hearing Officer's:

- determination of credibility issues
- finding that Taylor's efforts to counsel/mentor Fernando Valencia were not grounds for discharge
- finding that Taylor's one-time act of giving an ibuprofen to a student was not grounds for discharge
- finding that Taylor was not soliciting a romantic or sexual relationship with Fernando Valencia

²⁵ See, Hearing Officer's Findings of Fact and Conclusions of Law (CP 2216-2259), attached hereto as an Appendix.

²⁶ EVSD's Amended Opening Brief, pages 4-8, 26-35.

- finding that Taylor's two e-mails to school staff in fifteen months (June 2009 to September 2010) were not grounds for discharge.²⁷

However, assuming *arguendo* that such averments are correct, the Hearing Officer's findings that are not in line with EVSD's distorted view of the Statutory Hearing are not willful, unreasoning action. Rather, Hearing Officer Nelson "conducted a [week-long] hearing. In a [44]-page opinion, [s]he found the District failed to establish sufficient cause to justify termination of [Taylor's] employment. [Her] detailed findings of fact and conclusions of law demonstrate that [she] considered the relevant facts and legal authority. [Her] written decision shows careful deliberation and cannot be said to be arbitrary and capricious."²⁸ Even if the Hearing Officer erred in her judgment, that does not constitute arbitrary and capricious action. Robinson, *supra*, 38 Wn.2d at 38, 227 P.2d at 736-37. Obviously, EVSD wants to serve as prosecutor, judge and jury in this matter and substitute its decision on the disputed facts and law in this matter in order to convict Taylor of conduct that two other forums -- a

²⁷ EVSD's Amended Opening Brief, pages 8-18, 36-49.

²⁸ Vinson, *supra*, 172 Wn.2d at 769-70, 261 P.3d at 152.

Yakima County Jury and the Statutory Hearing Officer -- found simply did not take place.²⁹

EVSD's lack of a clear and candid discussion of Vinson in its Amended Opening Brief is telling. In Vinson, the Supreme Court made it abundantly clear that a constitutional writ of review was to be narrowly used in situations such as the matter *sub judice* and set out the parameters for a school district seeking to use such a procedure. See, also, Coballes, *supra*.

EVSD also disingenuously throws around the separate "illegality" prong of the constitutional writ of review standard in its Amended Opening Brief even though the Vinson decision clearly and unequivocally

²⁹ The facts in this case were hotly contested. See, Taylor's Pre-Hearing Brief (CP 1185-1206) and Taylor's Post-Hearing Brief (CP 2189-2214). The five-day hearing (CP 1298-2162) involved, *inter alia*, the Hearing Officer making credibility determinations based upon her first-hand observations of the twenty-three, live witnesses. See, for example, Hearing Officer's credibility determinations regarding Student B [JS] at page 41 (CP 2256) of Hearing Officer's Findings of Fact and Conclusions of Law, dated November 1, 2001, attached hereto as an Appendix. In addition, the testimony of Karlee Harris, Cord Brown and Skyler Leite from the criminal trial, State v. Michele Taylor, No. 09-1-01744-7, Superior Court, Yakima County, was presented pursuant to ER 804(b)(1). (CP 902-933) There was also extensive law and motion practice before and during the hearing. See, for example, CP 390-393 and CP 782-786 (ER 904(c) Objection); CP 520-524 and 583-587 (Motion in Limine re: Law Incident Table); CP 534-542 and CP 633-635 (Motion to Stay Discovery); CP 807-811 (Motion to Strike Re: Amended Notice of Probable Cause); CP 875-877 (Motion to Preclude); and, CP 891-893 (Motion to Exclude Media Articles).

stated, "in the constitutional *certiorari* context, illegality refers to an agency's jurisdiction and authority to perform an act." 172 Wn.2d at 770, 261 P.3d at 152. In this context, the Vinson court held:

RCW 28A.405.310 grants a hearing officer jurisdiction to decide appeals from a school district's determination of probable cause to discharge. Because the hearing officer was within his statutory authority to issue a decision under RCW 28A.405.310, his actions were not illegal. Accordingly, we deny the request for a constitutional writ. 172 Wn.2d at 770, 261 P.3d at 153.

EVSD cannot contend that Hearing Officer Nelson acted illegally by issuing her decision under RCW 28A.405.310. Hence, the "illegality" argument in EVSD's Amended Opening Brief is completely misplaced and cannot be used to request a constitutional writ of review.

When this matter is dismissed and remanded to the Superior Court for its determination as to whether or not the trial court should conduct a limited review under its inherent powers,³⁰ Taylor would respectfully submit that this Court may wish to restate the narrow parameters of a constitutional/common law writ of review to guide the lower court and the Parties during future proceedings in this matter. For this reason, Taylor

³⁰ Const., art. IV, § 6.

has addressed the law governing the consideration of this writ by the Superior Court.

CONCLUSION

This appeal must be dismissed and this matter remanded to the Superior Court for a determination by the trial court as to whether or not a limited review, under its inherent powers pursuant to the Washington Constitution, Article IV, Section 6, should be granted.

Dated this 4th day of May, 2012.

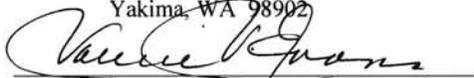


Joseph W. Evans, WSBA #29877
Attorney for Michele Taylor

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was forwarded via USPS, First Class Mail, postage paid, on this 4th day of May, 2012, to the following:

Rocky Jackson
Menke Jackson Beyer Ehlis & Harper, LLP
807 North 39th Avenue
Yakima, WA 98902



Case No. 297578

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

EAST VALLEY SCHOOL DISTRICT NO. 90,

Petitioner

vs.

MICHELE TAYLOR,

Respondent.

APPENDIX TO RESPONDENT'S BRIEF

JOSEPH W. EVANS
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**IN STATUTORY HEARING PROCEEDINGS
PURSUANT TO RCW 28A.405.310**

In the Matter of a Controversy

between

MICHELE TAYLOR,

Appellant,

and

EAST VALLEY SCHOOL DISTRICT,

Respondent.

RE: Statutory Hearing under RCW 28A.405.310

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
FINAL DECISION**

of

**LUELLA E. NELSON,
Hearing Officer**

November 1, 2010

This Hearing arises pursuant to RCW 28A.405.310 between MICHELE TAYLOR (“Appellant” or “Taylor”), and EAST VALLEY SCHOOL DISTRICT (“Respondent” or “District”), under which LUELLA E. NELSON was selected to serve as Hearing Officer and pursuant to which these Findings of Fact, Conclusions of Law, and Final Decision are submitted to the School Board of the Respondent.

Hearing was held on September 27 through October 1, 2010, in Yakima, Washington. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. A certified shorthand reporter attended the hearing and subsequently prepared a verbatim transcript. Both parties filed post-hearing briefs on or about October 22, 2010.

APPEARANCES

On behalf of Appellant:

Joseph W. Evans, Esq.
P.O. Box 519
Bremerton, WA 98337-0124

On behalf of Respondent:

Rocky L. Jackson, Esq.
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RELEVANT STATUTORY PROVISIONS

§ 28A.405.300. Adverse change in contract status of certificated employee - Determination of probable cause - Notice - Opportunity for hearing

In the event it is determined that there is probable cause or causes for a teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with the school district, hereinafter referred to as "employee", to be discharged or otherwise adversely affected in his or her contract status, such employee shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action. Such determinations of probable cause for certificated employees, other than the superintendent, shall be made by the superintendent. Such notices shall be served upon that employee personally, or by certified or registered mail, or by leaving a copy of the notice at the house of his or her usual abode with some person of suitable age and discretion then resident therein. Every such employee so notified, at his or her request made in writing and filed with the president, chair of the board or secretary of the board of directors of the district within ten days after receiving such notice, shall be granted opportunity for a hearing pursuant to RCW 28A.405.310 to determine whether or not there is sufficient cause or causes for his or her discharge or other adverse action against his or her contract status.

In the event any such notice or opportunity for hearing is not timely given, or in the event cause for discharge or other adverse action is not established by a preponderance of the evidence at the hearing, such employee shall not be discharged or otherwise adversely affected in his or her contract status for the causes stated in the original notice for the duration of his or her contract.

...

§ 28A.405.310. Adverse change in contract status of certificated employee, including nonrenewal of contract - Hearings - Procedure

(1) Any employee receiving a notice of probable cause for discharge or adverse effect in contract status pursuant to RCW 28A.405.300, or any employee, with the exception of provisional employees as defined in RCW 28A.405.220, receiving a notice of probable cause for nonrenewal of contract pursuant to RCW 28A.405.210, shall be granted the opportunity for a hearing pursuant to this section.

...

(7) The hearing officer shall preside at any hearing and in connection therewith shall:

(a) Make rulings as to the admissibility of evidence pursuant to the rules of evidence applicable in the superior court of the state of Washington.

(b) Make other appropriate rulings of law and procedure.

(c) Within ten days following the conclusion of the hearing transmit in writing to the board and to the employee, findings of fact and conclusions of law and final decision. If the final decision is in favor of the employee, the employee shall be restored to his or her employment position and shall be awarded reasonable attorneys' fees.

(8) Any final decision by the hearing officer to nonrenew the employment contract of the employee, or to discharge the employee, or to take other action adverse to the employee's contract status, as the case may be, shall be based solely upon the cause or causes specified in the notice of probable cause to the employee and shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action.

...

TESTIMONY AND OTHER EVIDENCE

1. Appellant Michele Taylor has taught at in Respondent's schools since 2004; at the time of the events at issue, she taught .82 FTE at the high school. Her teaching assignments included Physical Education, Health, and Connections. She is 32 years old. Her husband, Kevin Taylor, has taught Physical Education in Respondent's elementary school since 2002; he also coaches high school baseball in the spring.
2. Appellant and Kevin Taylor attended K-12 in Respondent's schools. They have triplets enrolled in first grade in Respondent's elementary school.
3. Much of Appellant's family lives and works in the Yakima Valley, where Respondent is located. Appellant's mother, Vickie Lamar, is head secretary at the high school and has worked for Respondent for 24 years. Appellant's sister, Meranda ("Mandy") Smith, works for the Yakima County Sheriff's Department. Appellant's sister, Gina Maxwell, lives next to Appellant in Terrace Heights.

CHARGES, CRIMINAL AND ADMINISTRATIVE PROCEEDINGS

4. On June 10, 2009,¹ Respondent placed Appellant on paid administrative leave, noting "certain matters have been alleged concerning your inappropriate contact with male students which must be looked into."

The written notice of this action included several directives, including:

1. You are hereby directed to not talk with anyone concerning this matter other than your union representative, your attorney, mental health counselor or doctor, law enforcement conducting an investigation, your clergyperson, and district representative conducting any school district investigation. Talking includes any form of communication, including telephonic, electronic, blogging, and texting communication. Should you need to discuss this matter with anyone other than those listed in this paragraph, you must obtain prior written consent from me to do so.
...
 6. You are directed to refrain from any action which could be construed as retaliation against any person who has complained about you or who has offered any information about you.
...
5. On September 2, Respondent issued a Notice of Pre-Termination Meeting whose stated purpose was

¹ Except as otherwise indicated, all dates refer to 2009.

to allow you the opportunity to respond to allegations of sexual misconduct with a certain East Valley High School student, and to respond to allegations of inappropriate text message or phone conversation with the same student, and another East Valley High School Student.

This Notice referenced an investigative report (not in evidence) that had been provided to Appellant in draft form. It framed eight questions regarding contacts with two students that would be addressed at the meeting, and advised Appellant:

... I am requiring you to answer the following [sic] questions as they relate directly to your employment with East Valley School District. If you fail to answer the questions posed above, you will be subject to discipline including discharge for refusal to respond to the questions posed. It is the District's position as compelled testimony, it is not admissible in any criminal prosecution. Further, the District does not intend to provide your answers to law enforcement or the prosecutor. I suggest you discuss this matter with your attorney.

...

6. On September 10, Appellant submitted a written statement recounting events after she was placed on administrative leave, including the release of information to the media by Respondent and later contacts in which Respondent's attorney informed her attorney that Respondent had made no commitment to provide immunity for her answers and no promise to keep her answers confidential. The statement concluded:

The EVSD has ordered me to answer the EVSD's questions with no immunity commitment and no confidentiality agreement, as required by the CBA. If I do not answer the questions, I face discharge. So, I have a Morton's Fork – answer the questions as framed and posed by the EVSD or be fired, with the end result that my answers will become public information.

After due consideration of this untenable situation, I have elected to provide this written statement to the EVSD. **I deny any communication, whatsoever, with any students at East Valley High School for immoral purposes and I deny that I ever had sexual intercourse with any student at East Valley High School.** If the EVSD does a thorough, proper and effective investigation of these scurrilous and defamatory charges, the EVSD will find that these horrible charges are unsubstantiated and false.

7. On November 2, Respondent issued a Notice of Probable Cause, informing Appellant of its determination that there was probable cause to discharge her based on the following charges:

... Generally stated, I find certain conduct you exhibited in your relationship with students in and out of your classroom to be unacceptable, unprofessional and inappropriate having no legitimate educational value.. The following conduct supports my decision:

1. Sexual Misconduct with a Minor Student. On three (3) separate occasions you were involved in inappropriate sexual contact with a minor student enrolled in the District. Two (2) of the contacts occurred on school premises. The third contact occurred off

school property. Each of the three (3) events justify a finding of probable cause to terminate your employment.

2. Excessive and Inappropriate Text Messaging with Two (2) Students. Cell phone records establish numerous phone messages between yourself and two (2) minor students enrolled in the District. One (1) of the students was the student referred to in paragraph 1. above. The students report the content of some of the text messages were sexual in nature or involved inappropriate solicitation of the students.
3. Prior Training. Based upon prior training you have received either in college or as an employee of East Valley School District in sexual abuse, mandatory reporting duties, combating harassment, and harassment-intimidation-bullying, you either fail or refuse to understand an appropriate student-teacher relationship, and/or appropriate conduct with students.
4. Criminal Charges. You are currently charged with one (1) count of first degree sexual misconduct with a minor, a Class C felony and two (2) counts of communication with a minor for immoral purposes, gross misdemeanors. These charges involve the same students as referred to in paragraphs 1. and 2. above. These charges have contributed to adverse publicity and impairment on your ability to teach.

The sexual misconduct and inappropriate and/or excessive communication with a minor student through text messaging generally described above has had a material and substantial adverse affect [sic] upon your fitness to teach. The described conduct is inherently destructive to the student-teacher relationship and has no legitimate educational purpose. The conduct also adversely affects other teachers, administrators, parents and the community. Adverse publicity has occurred as a result of your conduct, which further impairs your effectiveness to teach. For all of the above-stated reasons, I find probable cause to discharge you from employment with the East Valley School District.

8. On December 10, Appellant e-mailed nine staff members of Respondent, seeking information about the students who made allegations against her. Without naming the students, her e-mail asked

... if anyone has any situations or experiences with either of the boys that is negative in any way. Even if it is something you have heard second or third hand, we still want to hear about it because my lawyer can look into it and find out specific details. If you know of any other staff members that may have helpful information please have them email of [sic] call me. ...

9. By letter dated December 22, Respondent informed Appellant that her December 10 e-mail violated the June 10 directives and directed her “not to have any contact with staff of the East Valley School District regarding this matter.” It added that the directive “does not limit your attorney, or his agents, contact with staff in the preparation of your case.” It did not discuss possible consequences of violating the directive.

10. On June 15, 2010, Appellant was acquitted on all counts of three criminal charges: one count of First Degree Sexual Misconduct with a Minor, a Class C Felony (alleged sexual encounter with Student B); and two counts of Communication with a Minor for Immoral Purposes, a Gross Misdemeanor (alleged inappropriate communications with Students A and B).

11. On July 28, 2010, the District issued an Amended Notice of Probable Cause in which it proffered the following charges as the bases for Appellant's discharge:

Set forth herein is a more detailed description of the actions or conduct I have reviewed and are the reasons or basis for my decision to issue the original letter of probable cause and this amendment to terminate your employment.

1. *Inappropriate Contacts, Communication, Counseling/Mentoring with [Student A].*² These communications occurred primarily through text messaging and phone conversations. I find the following admissions on your part supportive of my decision to issue a notice of probable cause.
 - A. You admit that sometime between April 24, 2009 and April 29, 2009, you text messaged [Student A]. The gist of the text was you were concerned about what [Student A] was saying about having your phone number and what he was telling other students; and as part of that text message, you stated, "Maybe you should delete my number", referring to your cell phone number from [Student A's] cell phone. Subsequent to this statement, you continued on numerous occasions to text with [Student A].
 - B. You admit that you discussed, mentored/counseled [Student A] regarding his family life and the death of his father. This includes discussions with [Student A] regarding his relationship with his mother.
 - C. You admit that you discussed, counseled or mentored [Student A] regarding his relationship with another female, Student [C].
 - D. You admit that you advised, counseled or mentored [Student A] regarding relationships with female students.
 - E. You admit discussing with Student [A] the death of your child and the death of your stepbrother.
 - F. You admit that you discussed with [Student A] being unfaithful to your husband at a bachelorette party in Seattle, Washington.

² Students who were minors at the time of the events in question will be identified as Student x, where x is a letter of the alphabet assigned to the particular student, rather than by name.

- G. You admit calling [Student A] on June 6, 2009 from a bachelorette party in Yakima, Washington.
 - H. You admit inviting [Student A] to your home for dinner.
 - I. You describe that from mid-May to the end of May, [Student A] seemed unstable, that he wasn't handling the stress in his life very well, that he thought he was a terrible person, that he didn't like being home with his family, that he seemed more down or depressed, and that he was just falling apart. In spite of this description, you did not report your observations of [Student A's] demeanor to his mother or family, any district administrator, principal or counselor or any other person trained to address such issues.
 - J. You admit that you have no training or degree in counseling.
 - K. You admit talking to [Student A] about a violent incident in Mexico involving relatives of his family.
 - L. You admit talking to [Student A] about another student, [Student B].
 - M. You admit violating my directive not to contact or communicate with anyone regarding this case pending the investigation. The violation of the directive was an email you sent on December 10, 2009 requesting negative information regarding [Student B] and [Student A].
2. Statement of Student [A] regarding Michele Taylor text messages he received from Michele Taylor and phone conversations he had with Michele Taylor.
- A. Texting with Michele Taylor began after April 24, 2009.
 - B. Michele Taylor began disclosing to [Student A] the following:
 - 1) Michele Taylor disclosed that her stepbrother and she would make out in the kitchen.
 - 2) Michele Taylor disclosed that she felt she missed out on life because she married her husband so young.
 - 3) Michele Taylor disclosed that she had cheated on her husband with a student, ultimately disclosed as [Student B].
 - 4) Michele Taylor told [Student A] she would send him a naked picture on the phone, but never did.
 - 5) Michele Taylor sent a multimedia picture of herself and another woman.
 - 6) Michele Taylor invited [Student A] to her house stating, "her husband wasn't there."

- 7) Michele Taylor once invited him on a weekend stating, “her husband wasn’t there and they should go to a movie.”
- 8) Michele Taylor stated to [Student A] regarding going to her house, that “anticipation of not knowing is really fun.”
- 9) Michele Taylor texted [Student A] that “she wasn’t afraid of the school finding out because she was a big girl and could handle this.”
- 10) Michele Taylor texted [Student A] indicating that “if anybody found out, she would just deny it.”
- 11) [Student A] stated that when he wanted to stop the texting, she stated that she “felt like shit” and that “she felt like she’d been dumped.”
- 12) Michele Taylor texted [Student A] about the Seattle bachelorette party and that she was unfaithful to her husband while at that party.
- 13) Michele Taylor texted [Student A] to give relationship advice about another student, [Student C].

3. Students corroborating statements regarding Michele Taylor text messages and/or phone conversations with [Student A].

A Student [D] makes the following statements regarding text messages he saw from Michele Taylor to [Student A].

- 1) [Student D] saw a text message from Michele Taylor sent to [Student A] indicating that Kevin Taylor, her husband, was gone and that [Student A] should come over to her house.
- 2) [Student D] saw a text message from Mrs. Taylor sent to [Student A] regarding a bachelorette party in Seattle and that Mrs. Taylor may have done something inappropriate or wrong at that party.

B. Student [E] makes the following statements regarding text messages between Michele Taylor and [Student A].

- 1) [Student E] saw and/or discussed with [Student A] the text photograph of Michele Taylor and Aimee Taylor at a June bachelorette party.
- 2) [Student E] saw and/or discussed with [Student A] a text message Michele Taylor texted [Student A] that her husband was sleeping and she was in the garage and her husband was being mean to her.
- 3) [Student E] saw and/or discussed with [Student A] a text message Michele Taylor texted [Student A] that when she was younger she dated a boy that was the son of the man her mother was dating and that they had gotten together in the kitchen late at night and made out.

- 4) [Student E] saw and/or discussed with [Student A] a text message Michele Taylor texted a message to [Student A] that he [sic] had sex with [Student B] in the back of the pick-up truck, and that [Student B] had called Mrs. Taylor to rendezvous at the K-Mart parking lot.
- C. Student [C] makes the following statements regarding text messages she saw received from [Student A], who forwarded the messages [Student A] received from Michele Taylor . Those text messages were as follows:
- 1) If I was in high school, [Student A] would be her type.
 - 2) Fifth period was Michele Taylor’s favorite period because [Student A] was in that class.
 - 3) That Michele Taylor wished to talk to [Student A] about a book, “My Sister’s Keeper”, and that she texted [Student A], “I feel like I’ve been broken up with.”
 - 4) Saw a multimedia text picture of Michele Taylor and Aimee Taylor.
 - 5) [Student C] also stated that [Student A] phoned [Student C] one evening and told [Student C] that Mrs. Taylor had told him that she had cheated on her husband and had sex with [Student B].
- D. [Student F] makes the following statements regarding text messages he received from Michele Taylor .
- 1) Michele Taylor exchanged text messages with [Student F] and one of the text messages was Michele Taylor texting [Student F] and stating, “I don’t want people to think I’m texting students.”
 - 2) [Student F] also received a text from Mrs. Taylor stating, “I’ll text you back, I’m going to a party with my sister and get drunk.”
 - 3) Within the week following the last text message exchange between [Student F] and Mrs. Taylor, Mrs. Taylor saw [Student F] in the hallway and told him, “Hey, shit is going down on [Student A]. Delete my number.” [Student F] replied, “I don’t have your number.”
4. Statements of three adult females present at the Seattle bachelorette party corroborating Statement of [Student A] about the same subject May 16, 2009.
- A. Three (3) women, Heather Clark, Kristen Davie and Rosario Hausske, provided statements about Michele Taylor’s conduct at the bachelorette party in Seattle. May 16, 2009.
 - B. Heather Clark reports Michele Taylor dancing with some random guy at the bar and kissing him, making her uncomfortable as she knew Michele Taylor was a married woman. Heather Clark also heard about a contract stating “What happens

in Seattle, stays in Seattle.” Heather Clark is employed with Comprehensive Mental Health in Yakima, Washington.

- C. Kristen Davie’s statement was that she remembers Michele Taylor kissing two guys, one a “Caucasian” and one a “black” (African American), and that toward the end of the evening Michele Taylor got into an argument with Ashley Ingham; Ashley stating to Michele that she was married. Krissten Davie further states that she knows that Michele Taylor’s conduct bothered Michele Taylor’s mother, because her mother was sitting out in the hall having a hard time with it. Kristen Davie indicated the argument about the “black guy” continued as they were leaving. Michele Taylor rolled down the window of the vehicle and called Ashley a “slut”. The argument continued back to the hotel room where Ashley stated, “I’m the one who’s single.” Kristen Davie reported the conduct of Michele Taylor really surprised her because she taught with Michele Taylor at Lewis and Clark Middle School in Yakima School District. Kristen Davie describes Michele Taylor’s character at Lewis and Clark Middle School as very conservative. Kristen Davie is currently a teacher at Wilson Middle School in Yakima School District.
- D. Rosario Hausske reports that she saw Michele Taylor and another male hugging each other and they were just flat out “making out, kissing all over each other.” Rosario Hausske works in the Attendance Office at Gilbert Elementary in the Yakima School District.

These statements confirm Michele Taylor was with two men in Seattle, kissing both of them, which is conduct consistent with the text messages reported by Students [A] and [D].

I find the above conduct described in paragraphs 1, 2, 3, and 4, in regard to [Student A], to be unprofessional in nature and lacking any legitimate educational purpose or positive educational aspect. I find the above-described incidents to be sufficient cause to terminate your employment.

5. *Inappropriate Communication and Contacts with Student [B]*. These communications occurred primarily through text messaging and phone conversations.
- A. You admit as to Student [B] that in the fall of 2008, you discovered an entry on your cell phone address book with the word “Hottie”. You admit confronting Students [B] and [G] to determine if one of the two students placed that name in your phone address book. In spite of determining that the phone number belonged to Student [B], you continued to have text contacts with Student [B] in 2009. You admit to changing the reference from “Hottie” to “[first name of Student B]”.
- B. You admit that you texted Student [B] regarding your personal involvement in the Bloomsday race competition in Spokane, Washington.
- C. You admit to texting Student [B] about how he should provide gifts or treat his mother for Mother’s Day.

- D. You admit on two occasions you were alone in your office with Student [B]. The first occasion was to provide medication to [Student B] for a headache.
 - E. You admit on the second occasion you were alone with [Student B] in your office was to access your office computer.
 - F. You admit you texted [Student B] about another student, [Student A].
6. Sexual Misconduct with a Minor Student. On three (3) separate occasions, you were involved in inappropriate sexual contact with a minor student enrolled in the district. Two (2) of the contacts occurred on school premises, and are described in 5.D. and 5.E. above. The third contact occurred off school property. You have denied the sexual misconduct with Student [B].
- A. Student [B] reports the following:
 - 1) He had sex with you at the Yakima K-Mart.
 - 2) The sex occurred in the Taylor's Ford F150 red pickup.
 - 3) The act occurred in the back seat of the vehicle.
 - 4) [Student B] described the interior of the vehicle.
 - 5) [Student B] had not been in the vehicle prior to the incident at K-Mart.
 - 6) [Student B] describes intimate details of the sex act.
 - 7) [Student B] indicates he called you when he arrived at the K-Mart parking lot to arrange a rendezvous at the parking lot.
 - B. [Student B] indicates that on two (2) occasions you accompanied [Student B] to your office alone. [Student B] indicates that while at your office, on one occasion, the two of you were physically close and nearly kissed. On the second occasion, the two of you kissed and you placed his hand on your butt and breasts.

I find the conduct described in paragraphs 5 and 6, in regard to [Student B], to be unprofessional in nature and lacking any legitimate educational purpose or positive educational aspect. I find the above-described incidents to be sufficient cause to terminate your employment.

7. Prior Training Involving Appropriate Boundaries with Students/Inappropriate Conduct by School Personnel.

The training record reflects that in August of 2008, prior to the commencement of the 2008-2009 school year, you attended two (2) trainings on appropriate boundaries with students. Specifically, that training included identification of:

- A. Inappropriate behavior for school personnel such as acting as a confidant or "mentor";
- B. Inappropriate to meet a student alone or isolating a student;
- C. Inappropriate to counsel students on personal issues;

- D. Inappropriate to provide or recommend drugs, vitamins or supplements;
 - E. Inappropriate to talk to students about other students;
 - F. Inappropriate to discuss personal issues with students.
8. Criminal Charges. I recognize that you have been acquitted or found not guilty of the criminal charges filed by the State of Washington Yakima County Prosecuting Attorney. These charges involved Student [B] and Student [A], the alleged victims. The acquittal does not change my finding your conduct with students described in this letter was unprofessional, lacked positive educational value, was harmful to students, and violated the training provided to you by the district in 2008.

The conduct generally described in this letter has a material and substantial adverse effect on your fitness to teach. The described conduct is inherently destructive to the student-teacher relationship and has no legitimate educational purpose. The described conduct is directly contrary to the training provided to you at the beginning of the school year in August 2008. Adverse publicity has occurred as a result of your conduct, which further impairs your effectiveness to teach. For all of the above reasons I find there is probable cause to discharge you from employment with the East Valley School District.

12. The detailed allegations in the Amended Notice of Probable Cause were drawn from some of the testimony given in the recently-concluded criminal trial.

EVIDENCE REGARDING STUDENT A

13. Student A was in Appellant's fifth period "Introduction to Fitness" class for freshmen during the 2008-2009 school year. He also played baseball in the spring of 2009.

14. In March, Kevin Taylor disciplined Student A during baseball practice for a remark about Appellant. Specifically, Student A asked Kevin Taylor how his day was; Kevin Taylor responded, "Great;" Student A grinned and replied something to the effect of, "So was Mrs. Taylor" or "Mrs. Taylor's day was good, too." Kevin Taylor interpreted this remark as a sexual innuendo, and admonished Student A about disrespectful behavior. Student A denied any disrespect. Kevin Taylor assigned the baseball team to run two additional laps around the track, then talked to the team about the need to think before reacting. Kevin Taylor recalled talking to Student A again on the following Monday and emphasizing the need to be respectful; he denied apologizing to Student A for his reaction. In his view, the incident was over at that point. Kevin Taylor told Appellant about the incident. According to Appellant, Student A was awkward in her class for the next few

days, until she told him the incident was not a big deal and was just a mistake. According to Student A, Kevin Taylor later apologized for “overexaggerating” the incident.

15. On April 24, Student A acquired Appellant’s cell phone number and exchanged text messages with her in the process of demonstrating how to send text messages from his new cell phone.

16. According to Appellant, within a few days after April 24, she heard rumors that Student A was bragging to other students about having her cell phone number. She testified she was worried he could spread her cell phone number around. She texted Student A and asked that he delete her cell phone number. He later texted her to ask if she could give him advice about a girl he liked, and she agreed to do so.

17. Between April 28 and June 8, more than 1,000 text messages were sent between Student A’s cell phone and Appellant’s cell phone. Most of the text messages occurred in strings in which multiple messages were sent within a few minutes or, in some cases, within the same billing minute. No messages were exchanged during the Mother’s Day weekend of May 9-10 or on May 22-23, the two days immediately before the Memorial Day weekend. With the exception of a multi-media message sent from Appellant’s cell phone to Student A’s cell phone on June 6 that included a photo of Appellant (described below), none of the messages were saved.

18. It is undisputed that the early text messages between Student A and Appellant involved Student A’s requests for advice regarding matters such as how to interact with girls (particularly with Student C), questions about planned activities in the Introduction to Fitness class, and brief social greetings. It is also undisputed that Student A and Appellant later had text conversations about his feelings about his father’s recent death, his brother’s death, his relationship with his mother, and a violent incident he had witnessed in Mexico. A dispute exists regarding the nature and content of text messages after mid-May.

RESPONDENT’S EVIDENCE REGARDING TEXT MESSAGES

19. According to Student A, around mid-May, the text messages from Appellant changed in tone and turned to personal matters about Appellant, including:

- a. that Appellant had an affair with someone whom she identified only by his first initial (later revealed to be Student B);
- b. that, after her mother remarried, Appellant “messed around sexually” or “made out” with her stepbrother while their parents were asleep;
- c. that her first child died shortly after it was born;
- d. that Appellant felt she never got to do anything because she and her husband met when she was 16 and they were together after that;
- e. on three or four occasions, that her husband was out of town with the triplets and that Student A should ride his bike to her house (allegedly sent in late May);
- f. that she wanted Student A to come to her house just to hang out and be together, that they could watch a movie and see where it led, and that “not knowing is half the fun”;
- g. that they could watch a movie and “see what happens”
- h. that she was going to send Student A a nude picture of herself in the hot tub;
- i. that a movie based on the book, “My Sister’s Keeper, was coming out soon and the two of them should see it (Student A had previously loaned that book to Appellant);
- j. that Student A was good looking;
- k. that she kissed a guy at a bachelorette party in Seattle while she and her sister and friends were there dancing;
- l. that during the student led conference (discussed below) she was alone in the office with Student B and kissed him;
- m. that Student A should not send her anything too bad because her husband was the jealous type;
- n. that Student A was “just a teenage boy with raging hormones”;
- o. that, if she was Student A’s age, he would be her type;
- p. that she felt like she had been broken up with, and had never felt that way (allegedly sent the weekend of June 6-7)

20. Student A testified he forwarded some of the troubling text messages from Appellant to Student C and other friends, and showed them to friends as well. He did not know which text messages those were.

21. Student C testified Student A forwarded a group of text messages to her, which he said were authored by Appellant. In addition to normal text conversations along the lines of, “How is your day,” the forwarded messages she recalled receiving included:

- a. I really wish I could talk to you right now.
- b. I feel like I’ve been broken up with.
- c. Fifth period is my favorite because I get to see you.
- d. If I was in high school you would be my type.
- e. I’m sorry if I made you feel uncomfortable (one of the later e-mails).
- f. A text indicating Appellant had just finished a book, “My Sister’s Keeper,” and “really wish I could talk to you” about the book.
- g. A photo of Appellant (described below)

22. Student C testified she advised Student A to talk to someone, e.g., a teacher, about what he had learned.

23. Nathan DeLeon, who is now in college, testified Student A showed him text messages that he said were from Appellant while they were riding in a car together, when they were at the home of a mutual friend, Student D, or at school. His recollection was that he saw these messages approximately two months before school let out. He recalled that he saw these messages during soccer season, and that Student A was playing baseball. Boys’ soccer is a spring sport that ends by Memorial Day.

- a. DeLeon recalled Student A participating in a string of text messages while they were at Student D’s home. He recalled that the string included an invitation from Appellant to come over, saying her husband was gone; a message from Student A that he did not have a ride; and a suggestion that he ride his bike.

- b. DeLeon recalled Student A showing him text messages from Appellant while riding in a friend's car. His recollection was that the text messages talked about a bachelorette party in Seattle, mentioned Appellant was having her nails done, and said she wished Student A had come along. He did not see Student A's replies.

24. David Noel, who is now in college, testified that, while he and Student A were at a passing tournament during the day on June 6, Student A showed him three text messages that he said were from Appellant. His recollection was that Student A was worried about the text messages and wanted to find a way to stop them, and that he advised Student A to tell the coach. The text messages Noel recalled seeing at the passing tournament were:

- a. a playful photo of two women, with one woman pretending to lick the other's chest;
- b. one that said something along the lines of, "Why can't two people be in the same household, one with hormones and one who hasn't done anything for a while"; and
- c. one that expressed worry that Student A was not texting back.

25. Noel recalled talking to Student A in July and August about other text messages and phone calls Student A said he had received, suggesting that Student A come to Appellant's home. Noel testified he did not see text messages to that effect.

26. On June 4 and 6, Appellant had brief text message strings with Student F. Student F testified he received a text message from Appellant on June 4 but did not recognize the sender; he replied and ultimately learned it was Appellant, and that she was trying to contact Student A. He called Student A and told him Appellant was looking for him. Student F did not recall the subject of the June 6 text messages. Student F testified Appellant approached him at school during the week that followed and asked him to delete her phone number, saying "Shit's going down with [Student A]." Student F had lost his cell phone by this time, and replied that he did not have her number.

APPELLANT'S EVIDENCE REGARDING TEXT MESSAGES

27. According to Appellant, Student A did not mention a violent incident in Mexico until they spoke by phone on June 4 (discussed below), and that even then he did not delve into the specifics; rather, he talked about his feelings of guilt over what he witnessed. She learned only in later depositions that the violent incident was a murder. Some of the topics she recalled texting or talking to Student A about included:

- a. After Student A asked whether she had any experience with death, she discussed her stepbrother's death and the death of her first child;
- b. What it was like to have triplets, including the medical difficulties she and the triplets had;
- c. Her educational background;
- d. Her activities, including such things as shopping for a dress for her sister's wedding;
- e. Her decision to turn down an opportunity to play college softball in order to attend a different college closer to Kevin Taylor's college, and her thoughts about how things might have gone if she had played softball at that level;
- f. That she and Kevin Taylor hung out with athletes when they were in high school;
- g. After Student A asked if she had helped any other students, that she had helped a student in her Connections class (referring to Student B);
- h. Student A's worries about his brother, who was in the military and serving in the Middle East;
- i. An incident when Student A was in the eighth grade, when he became violent with another student for no reason;
- j. Student A's difficulty sleeping;
- k. Student A's feelings about his father's death;
- l. A book Student A read and loaned to her, "My Sister's Keeper."

28. Appellant denied texting that fifth period was her favorite period because Student A was there. She testified she did say it was her favorite class, but that was because it included a lot of athletes and had good tournaments. She denied texting anything remotely resembling a promise to send a nude picture of herself

in a hot tub. She denied saying that Student A was her type or was good looking. She denied saying she missed out on sexual experiences because she had not had sex with anyone other than her husband. She denied texting that her husband would be gone with the triplets, that Student A should come over, or that he should come over and see what happens. She denied texting Student A to be careful about the content of his messages because her husband was the jealous type. She denied texting about teenage boys and hormones.

29. Appellant testified that Student A once gave her Student F's cell phone number, telling her his phone was going dead and to use that number to get hold of him. When she was unable to reach Student A, she texted that number, thinking it was Student A's backup phone. She denied telling Student F "shit's going down" or saying anything that would give him that impression.

30. Appellant's nephew, Student H, played football with Student A during the 2008-09 year. Student H testified he heard rumors that Student A was texting Appellant, and asked Student A about the rumors during the first week of June. Student A confirmed that he had been texting Appellant. Student H testified he asked whether the messages included any sexual content or pictures, and Student A responded they did not. Student H testified Student A permitted him to see messages that he said were from Appellant; they were short messages such as "OK," and had nothing sexual or inappropriate in them.

31. Appellant's cousin, Koreena Sedge, testified she was doing Appellant's hair at her hair salon on June 6 in preparation for a bachelorette party. Appellant received a text message from Student A while in the chair at the salon. Sedge testified she glanced at the message and saw nothing inappropriate in it.

32. Kevin Taylor testified his team's spring baseball season ended at the end of April in 2009, because they did not make the playoffs that were held in May. Respondent hosted the last game of the regular season. He testified the triplets do not travel to away games with him, but that Appellant sometimes brings them to games. He testified none of the away games required overnight travel.

33. Appellant testified she did not know her step-brothers before their father married her mother; that they moved in with her only after that marriage occurred; and that she did not have a romantic relationship with either of them.

34. One of Appellant's step-brothers, Rigel, is deceased. The other step-brother, Sean Lamar, testified he did not have a romantic relationship with Appellant, nor did Rigel.

THE JUNE 6 BACHELORETTE PARTY AND PHOTO

35. On June 6, Appellant hosted a bachelorette party for her sister Gina, which began at the Taylor home and moved to Suzy's Bar in Yakima later in the evening. This was the second bachelorette party for Gina; the first was in Seattle on March 15. Appellant received multiple text messages from Student A during the course of the party, including at 9:28 and 9:48 p.m., and placed a two-minute phone call to him at 9:51 p.m. Appellant testified she called Student A in response to a text in which he complained that she had not replied to an earlier text; she told him she was busy with the bachelorette party. Those two incoming text messages, and the outgoing call, were the last three messages or calls on Appellant's cell phone prior to 9:55 p.m.

36. At her criminal trial, Appellant testified she placed the 9:51 call from the car, on the way to Suzy's Bar. In her deposition and in hearing in this matter, she testified she has since realized that testimony was in error, because the schedule for the bachelorette party did not call for the group to leave her house until 10:00, so the call must have been placed from her home.

37. At 9:55 p.m. on June 6, a multi-media message was sent from Appellant's cell phone to Student B's cell phone. The message included a photo of Appellant and a friend, Aimee Taylor (no relation). In the photo, Aimee Taylor's face is close to Appellant's chest; Appellant has turned her head to the side and stuck out her tongue. Student A kept the photo on his cell phone and showed it to friends and, ultimately, to the District and law enforcement staff to whom he reported alleged improprieties by Appellant. Appellant denies sending the photo to Student B or intending to have it sent to him.

38. Meranda Smith took the photo with Appellant's cell phone. Appellant, Meranda Smith, and Aimee Taylor testified the photo was taken to show them having fun; that no contact was made; and that the interaction did not involve sexual overtones. They testified Appellant's cell phone was sitting on the counter in the kitchen for anyone to use while the party was at the Taylor home.

39. Aimee Taylor testified that whoever had the phone sent the photo to her husband, and that he received it. Meranda Smith testified she also sent the photo to her stepbrother, Sean Lamar. Vickie Lamar testified she also attempted to send the photo to her husband, Randy Lamar, but learned it was not attached to the message she sent to him.

40. Vickie Lamar testified she tried a second time to send the photo to Randy Lamar while Appellant and Kevin Taylor were putting the triplets to bed and Appellant's cell phone was unattended. Her recollection was that this was around 10:00, just before the party moved to Suzy's Bar. She later learned that her husband never received a second message. She testified she was unfamiliar with the process for sending photos via cell phone and that she may have accidentally sent it to Student A in selecting from the recent contacts on Appellant's cell phone during her second attempt to send the photo to her husband.

41. Randy Lamar testified he never received the photo, but did get a text message, and that he texted back that no photo was attached to the text message he received that night.

42. Kevin Taylor testified he took the triplets to his father's house for the evening of the bachelorette party, and returned home with them shortly before 10 so they could see Appellant before the party's scheduled move to Suzy's Bar. He recalled that the party moved shortly after 10, after he and Appellant put the triplets to bed. He remained home with the triplets.

43. Appellant testified she deleted the photo from her cell phone shortly after the bachelorette party, along with other photos taken at the party.

44. A Taylor family blog shows the family camping at a cabin owned by Appellant's father over the Memorial Day weekend, May 23-25.

THE JUNE 4 AND 7 TELEPHONE CONVERSATIONS

45. On June 4, Student A called Appellant for a 73-minute phone conversation beginning at 11:45 p.m. According to Student A, during that phone call, Appellant informed him that the affair she had previously mentioned had been at the Kmart parking lot and had been with Student B. He testified he was previously unaware of the details and believed it had been with someone else he knew who had the same first initial.

46. Appellant testified her husband was aware of the June 4 telephone call and the subjects discussed. She testified that, during that call, Student A expressed dismay that she had texted a student in her Connections class; her impression was that he did not feel as special because she was also texting someone else. She recalled that, during the call, Student A suggested her life was perfect. She replied that her life was not perfect and that she had done things she regretted and had issues. When he pressed her for details, she mentioned that she went to a bachelorette party in Seattle and made some mistakes there, and that she kissed a guy there who was not her husband. She testified she selected that incident as an illustration that everyone made mistakes, but that it was important to move on and not dwell on it. She testified she told Student A that she had apologized to her husband for it, in an attempt to tell him what the right thing to do would be – i.e., to apologize and move on. Her purported apology had not, in fact, occurred; her husband did not learn of the kissing event in Seattle until many months later.

47. Appellant and Kevin Taylor testified that Appellant told her husband about her text messages and phone calls with Student A, but that Kevin Taylor did not read any of the messages. Both testified that Kevin Taylor suggested they invite Student A over for dinner. According to Kevin Taylor, Appellant reported that Student A did not have a good home life, and he suggested that seeing their family's interactions at dinner would show how a good family can be run.

48. Appellant testified that, in a phone conversation on June 7, she invited Student A to have dinner with her family. This invitation followed earlier texts in which she told Student A that she had talked to her husband about the things they had been discussing; that her husband was concerned about him; and that they thought it would be a good idea for him to come to dinner. She denied saying that her husband and children would be gone or suggesting that he come over and see what happens. Her recollection was that Student A expressed dismay that Kevin Taylor knew they were talking, commented that he did not trust Kevin Taylor, and said he did not think Kevin Taylor had his best interests in mind. When Student A called to follow up on these texts, he said he felt betrayed, and expressed anger that her husband knew his personal information.

49. Student A testified he did not recall the June 7 conversation, but that it was mostly along the lines of “I don’t want to talk to you.”

EVENTS FOLLOWING THE JUNE 7 TELEPHONE CONVERSATION

50. Appellant testified that Student A attempted to avoid interacting with her in class on June 8. The two of them texted that day and spoke by phone that evening.

51. Appellant recalled texting that she was sorry Student A felt she had betrayed him, but that they needed to work it out and at least be cordial, and that his behavior in class that day had been unacceptable. In a phone conversation later that day, she recalled that Student A was very upset. Appellant recalled him saying she was the only person he trusted, and he now had no one to talk to; that he had enough issues and did not need to deal with her; and that she was backstabbing. Toward the end of the conversation, she recalled that he said he could walk into school and ruin her life. At the time, she testified she thought he was just angry and would get over it, and that she told him he would not do that. When he did not reply, she told him she understood he was upset, that he would have to initiate any future communications, and that she would delete his phone number. She testified she deleted his phone number after that conversation.

52. Student A testified he did not recall the June 8 telephone conversation. He denied saying on June 7 or 8 that he would ruin Appellant’s life.

EVIDENCE REGARDING COUNSELING AND MENTORING STUDENT A

53. Appellant testified she suggested that Student A see a counselor, and that he rejected that suggestion, saying he hated counselors and had a bad experience when he was forced to see one while in the eighth grade. She recalled that he said he had been suspended for the rest of the year when he refused to go to counseling and that he did not like or trust counselors.

54. Craig Hyatt, who teaches physical education and coaches football in the middle school, testified he mentored Student A on his own initiative during the fall of 2007 because Student A was falling behind in math and thereby becoming ineligible to play football. He set up times for Student A to meet with the math teacher before school and during practice to catch up. At the request of a counselor or another staff member,

he worked with Student A again in the spring of 2008, because Student A was making unwise choices and Hyatt had developed good rapport with him during football season. He met with Student A during school hours; he did not text, e-mail, or telephone Student A. He testified that, despite his efforts, Student A continued making unwise choices in an unsuccessful attempt to be removed from his home.

EVIDENCE REGARDING STUDENT B

55. The Connections class is designed to help students complete non-credited requirements and help students plan for their lives after high school; students ordinarily remain with the same Connections teacher while in high school. Connections teachers participate in individual student-led conferences in late April each year, in which the student shows his/her parent what the student has been working on during the year.

56. Student B was in Appellant's Connections class during his freshman and sophomore years, the 2007-2008 and 2008-2009 school years. During his junior and senior years, he enrolled in the "Running Start" program, which permits high school students to enroll in community college and earn college credits while simultaneously satisfying the remainder of their high school graduation requirements.

57. One teacher serves as the Connections teacher for all of the students enrolled in Running Start. This normally involves reassignment from the student's original Connections teacher. It is undisputed that Student B asked to have Appellant continue as his Connections teacher despite his decision to enroll in Running Start. On June 8, Appellant passed on this request, which was approved. She also asked whether it would be acceptable for her to have Student B's cell phone number and use that to call and text him about Connections matters. Appellant testified she had previously deleted Student B's cell phone number from her contacts, and that she wanted to be sure that it was standard procedure for a Connections teacher to use a cell phone to contact students who were in Running Start about graduation requirements they were still required to satisfy. This request was approved, with admonition that she should document such contacts. These approvals occurred before Student A reported his allegations regarding Appellant's conduct toward himself and Student B.

TEXT MESSAGES

58. On October 4, 2008, Appellant found a contact in her cell phone listed as “Hottie.” By texting the number, she was eventually able to determine that the telephone number belonged to Student B’s cell phone. She questioned Student B, as well as his friend, Student G, both of whom had recently had access to her cell phone. Each of them blamed the other for making the entry. Appellant changed the contact name to Student B’s first name.

59. Between October 4, 2008, and March 3, 2009, 24 text messages were sent between Student B’s cell phone and Appellant’s cell phone. Two were sent in February. None were sent between March 4 and April 27. Between April 28 and May 15, 332 text messages were sent between Appellant’s cell phone and Student B’s cell phone. None of the text messages were saved.

60. According to Student B, until late April, all of the text messages with Appellant involved school matters – e.g., homework and class attendance. A dispute exists regarding the content of the text messages from late April onward.

61. According to Student B, in late April, Appellant began texting him about personal matters. He testified none of the texts involved student-led conferences, Running Start, Bloomsday (a race in Spokane with which he testified he was unfamiliar), or Mother’s Day. Subjects he recalled included:

- a. how he looked that day or after the weights class;
- b. whether he was having sex with his girlfriend;
- c. that the only person with whom Appellant had ever had sex was her husband;
- d. that she thought about Student B while she was having sex with her husband;
- e. inviting Student B to come to her house, saying her husband and kids were going to be gone camping or something (allegedly sent after May 9);
- f. between events when the two kissed (described below), that Appellant liked it and wanted to do it again;

- g. that she was going to her sister's bachelorette party in Seattle or Spokane that weekend or sometime soon, was going to go shopping for it, and was going to flirt with other guys. When Student B texted back that it was not right because she had a husband, she replied that, "as long as I look don't touch it doesn't matter." His recollection was that this text string occurred in April or early May.
62. According to Appellant, her text conversations with Student B involved school-related subjects or other innocuous subjects. She recalled texting him about:
- a. Missing a class;
 - b. Preparations for the student-led conference;
 - c. Bloomsday, a 7.5-mile race in Spokane, in which she participated.
63. Appellant denied texting Student B to invite him to her home when her husband was gone.
64. Student G testified in the criminal trial that he and Student B were good friends who hung out together, but that Student B did not brag about receiving text messages from Appellant.

ENCOUNTERS IN APPELLANT'S OFFICE

65. Student B testified he and Appellant kissed on two occasions, and came close to kissing on a third occasion.
- a. Student B testified he complained in class that he had a headache and did not want to lift weights with a headache. Appellant took him to her office to get a pain reliever. While in the office, they talked about personal things, "wanting to have sex" and "stuff." It was awkward and evident to him that something might happen if he stayed, so he left. Student B recalled that this was before the student led conferences.
 - b. Student B testified he went to Appellant's office again a few days later, again because of a headache. He testified that, after a little conversation, they kissed. He felt guilty about his girlfriend, so he said was going to be late to class and left.

- c. Student B testified he kissed Appellant again in her office. On this occasion, he had no reason to be there; his recollection was that Appellant simply wanted to go there so they could kiss.

66. Student B testified he and Appellant were touching, but not fondling one another, while kissing. He denied that either touched the other's breasts, buttocks, or pubic area. However, he recalled grabbing her buttocks on the way out after one of the kissing events. He testified she giggled and told him he could not do that because there were cameras in the area. He did not recall having told investigators that Appellant placed his hands on her buttocks and breasts, or that she tried to kiss him the first time he was in her office but that he turned his head at the last moment, and he testified he did not know why his story had changed.

67. Student B testified he did not register for classes for the 2009-2010 school year, because he had decided to do Running Start. He testified Appellant registered for him. He testified he did not accompany her to her office for that purpose, although he told the weight coach that he was late for class one day because he was in Appellant's office registering. He testified he was not in Appellant's office when she registered him, and had no idea where she was when she registered him. He does not have a computer at home, and therefore could not register from there.

68. Respondent's registration record for Student B indicates the first entries were completed shortly after 10 p.m. on May 6. Guidance Counselor Dawn Young testified those entries would have been done by the student, probably in pre-registration, as a placeholder that he would be in Running Start.

69. Appellant's office is inside the girls' locker room in the auxiliary gym building. The locker room is not used for changing clothes. Appellant testified that students of either gender came to her office at times for various purposes, including making up tests, and that it was not feasible to avoid being alone with students at such times. According to Appellant, she was in her office alone with Student B on two occasions:

- a. The first was on April 29, the day of student-led conferences, while waiting for Student B's mother to arrive. Appellant testified that, when she arrived at her Connections classroom for that conference, Student B was already there, talking to his mother by cell phone. He said he had a headache, and reported that his mother said she was almost at school and did not want to

have to turn around to get him a pain reliever. Appellant agreed to give him an ibuprofen from her purse, and went with him to her office to retrieve that.

- b. The second was at some point after the student-led conferences, when she helped Student B pre-register for classes for the next year. Appellant testified this occurred mid-day.

70. Appellant testified that, at the time pre-registration was due, Student B had not completely decided whether to enroll in Running Start. She recalled assisting Student B and other students in registering before, during, and after classes, and during lunch. She testified she used her office computer because it was faster than the computer in the Connections classroom.

71. Appellant denied looking longingly at Student B while he was in her office, attempting to kiss him, or kissing him. She denied asking him to put his hands on her breasts. She denied that he grabbed her buttocks as they left her office or that she told him not to do that because of cameras.

THE KMART PARKING LOT SEX ALLEGATIONS

72. Appellant and Student B texted multiple times on the morning and early afternoon of May 9, then again starting mid-afternoon that day. Student B also placed a one-minute cell phone call to Appellant at 10:05 p.m. A dispute exists regarding the subject of the texts and call, and the events of that day.

73. Student B testified he and Appellant texted on the morning of May 9, agreeing to meet later in the day; meanwhile, he told her of his plans to spend the day at his girlfriend's house. Student B testified that, as the day wore on, he began to feel guilty about his girlfriend, so he texted Appellant to cancel their assignation. He testified she responded that was fine; however, he later texted her to meet him. He recalled leaving his girlfriend's house around 9:30 p.m., driving to Kmart, and calling Appellant to let her know he had arrived.

74. Student B testified Appellant told him she would be driving her husband's truck, and described the truck to him. He described his car to Appellant. He testified he was not familiar with Kevin Taylor's truck and had not seen him driving it. During the investigation, he accurately described the model of the truck and the color of the exterior and interior.

75. Student B testified Appellant arrived a few minutes after his call and parked next to him. His recollection was that she arrived from the opposite direction from Terrace Heights. His recollection was that she had told him she was going to be out with family or friends that evening.

76. Student B testified he got in the truck; Appellant then drove to the back side of the Kmart and parked against the building. Although there was a light in the area, it was dim. Student B testified Appellant climbed over the center console into the back seat, which was empty, and pulled him along with her. He recalled that they stripped and she performed oral sex on him; then they had intercourse, first with her on top and later with him on top.

77. Student B testified Appellant had blonde pubic hair; he also testified that, if she had shaved that area, it would have looked blonde because she is light-skinned. During the first interview in which he described this incident, during the police investigation, Student B stated that he thought Appellant's pubic hair was disgusting and that he liked his women shaved.

78. Student B testified that, after having sex, he and Appellant dressed and she drove him back to his car. He had multiple texts and messages from his girlfriend on the phone, and called her back. He testified he believed that Appellant texted him later that night, and that he texted her back; however, a review of phone company records reveals no further communications between them until 5:09 the next morning, when Student B texted Appellant.

79. Student B testified he went home and showered after the sexual encounter at Kmart. While showering, he recalled that he sat down and began crying.

80. Student B testified he did not tell anyone about the sexual encounter at Kmart at the time, and did not intend to tell anyone, because Appellant asked him not to and said it would ruin everything for her. He testified he "kind of" intended to tell his girlfriend, but not in the near future. On June 10, when he and his mother met with a detective, he twice denied that any sexual encounter occurred. Only after talking and texting with his girlfriend about the incident did he tell the detective about the sexual encounter at Kmart, later on the same day he was questioned. He testified he decided he should admit that it occurred because

he believed the authorities would be able to get the text of his messages with Appellant; he later learned they could only get the text of his messages with his girlfriend from the past few days.

81. Student B initially told the detective that he believed the sexual encounter at Kmart occurred in February, when it was cold. He testified he picked February because it felt like it was a long time ago, but that a lot had happened in the prior month. He recalled that it was cold, but that there was no snow on the ground. However, the cell phone records showed no phone calls from Student B to Appellant in February. Student B testified the actual date was May 9.

82. Appellant testified her May 9 texts with Student B were about Mother's Day, which was May 10. According to Appellant, Student B texted that he never bought his mother anything; she recalled texting that he should at least get a card. She testified he called her that evening and told her she would be proud of him because he had bought his mother a card.

83. Appellant denied leaving the house after 9 p.m., taking her husband's truck to Kmart, going to Kmart on the evening of May 9, meeting Student B at the Kmart parking lot, or having sex with Student B.

84. Appellant had a mole removed from her groin area for a biopsy on May 7. She testified she shaved her pubic area in preparation for that procedure, and covered the area that had been biopsied with a bandaid. She testified her pubic hair is dark.

85. Kevin Taylor testified that, after returning from dinner around 8:30 p.m., he and Appellant put the triplets to bed, then worked together to prepare for a family trip scheduled for the next morning. Appellant worked inside the house gathering items to be packed and placing them on the kitchen table; he took those items to the garage and packed them in her vehicle. He testified he spent nearly an hour cleaning up her vehicle and setting up the DVD player in the back for their children. His truck was parked in the next bay of the garage while he worked with Appellant's vehicle. He testified he would have noticed if his truck had left the garage, and that it did not.

87. Appellant, Kevin Taylor, and Appellant's father, Terrance Leingang, testified that Leingang stayed overnight at the Taylor home on the night of May 9. Kevin Taylor testified that he finished packing

Appellant's vehicle and returning to the house between 10 and 10:30 p.m. By then, he testified, he knew Appellant was in their bedroom; he did not see her. He recalled sitting in the living room with Leingang and watching television for a few minutes, then going to bed. He testified Appellant did not leave the house while he was in the living room with Leingang.

88. Leingang testified he chatted with Appellant in passing shortly after returning to the Taylor home after dinner, shortly after 8:30 p.m. He spent the evening in the living room watching television and occasionally chatting with Kevin Taylor during brief breaks from packing. He testified Appellant was in the bedroom preparing for bed, and did not leave the house that evening. He testified it would have been obvious if she had left. In this regard, the back door of the house, leading toward the garage, is visible from the couch in the living room; the front door is on the other side of a short wall adjacent to the living room.

89. Appellant and Kevin Taylor testified they have booster seats for their triplets in both of their vehicles, and that those seats are never removed from Kevin Taylor's truck. Both testified Kevin Taylor drives his truck to work, parking in the complex of buildings that includes the elementary school, and to baseball practice in the spring baseball season.

90. Noel testified he heard rumors that Student B had sex with Appellant in the Kmart parking lot much before the June 6 passing tournament. He recalled hearing the rumor within a few months after he started dating his first girlfriend; he began dating that girlfriend in September 2008. The rumor came from his girlfriend's friends, who hung out with Student B; he did not know who started the rumor.

91. DeLeon testified Student B bragged about having sex with girls with whom DeLeon was friendly; when DeLeon later asked those girls about these claims, they denied it.

92. Student I was unavailable to testify in this hearing, but testified in Appellant's criminal trial. She testified she heard rumors that Student B met Appellant at Kmart and had sex with her. She placed the rumor in April, and recalled that it was during tennis season. She also testified to rumors about Student B being involved in texting and encounters in the locker room. She placed those rumors in October 2008, and recalled that they arose during volleyball season. Volleyball is a fall sport.

93. Student J was unavailable to testify in this hearing, but testified in Appellant's criminal trial. She testified she heard from a mutual friend that Student B had said he met Appellant at Kmart, he got into Appellant's truck, Appellant gave him oral sex, then they had sex. She placed this conversation in October 2008.

OTHER ALLEGATIONS

94. Student B testified that he and Student G joked around in class one day about the size of their penises, pretending to use a protractor. Student B testified Appellant was close enough to hear their conversation. Student G was unavailable to testify in this hearing. He testified at the criminal trial that this alleged event never happened. Appellant denied overhearing a conversation between Students B and G regarding the size of their penises, or texting Student B to ask about the size of his penis.

DISTRICT POLICIES

95. Respondent's policy regarding "Medication at School" provides, in relevant part:

Under normal circumstances prescribed oral medication and oral over the counter medication should be dispensed before and/or after school hours under supervision of the parent or guardian.

If a student must receive prescribed or non-prescribed oral medication from an authorized staff member, the parent must submit a written authorization accompanied by written instructions from a licensed physician or dentist.

...

96. Appellant admits that she violated this policy when she gave Student B an ibuprofen. She testified Student B told her he took it all the time, so it did not occur to her that he might be allergic, and that it seemed acceptable because he had just talked with his mother about it on the phone.

97. On August 25, 2008, Assistant Superintendent Mike Messenger conducted a training session for teachers and staff on the subject of Sexual Harassment and Bullying Policy. Appellant attended that training session. The Powerpoint slides for that presentation were not provided to attendees. They included the following examples of "Inappropriate Behavior for School Personnel":

- Fostering a relationship outside of school activities:

...

- Acting as a confidant or “mentor”
- Meeting a student alone or isolating a student.
- ...
- Acting in a manner that creates the perception of inappropriate behavior
- ...
- Fostering a relationship outside of school activities
- Having secluded contact with a student
- ...
- Fostering a relationship outside of school activities
- ...
- Counseling students on personal issues
- ...
- Providing or recommending drugs, vitamins or supplements to athletes
- ...

They also quoted WAC 180-88-060, Sexual Misconduct, including:

1. Any sexually exploitive act with or to a student. Sexually exploitive acts include, but are not limited to, the following:
 - (a) Any sexual advance, verbal, written or physical.
 - (b) Sexual intercourse, as defined in RCW 9A.44.010.
 - ...
 - (d) Any activities determined to be grooming behavior for purposes of establishing a sexual relationship.
 - ...

98. Vicki LaBeau teaches Health, and is certified to teach a curriculum for teachers certified by the National Board of Professional Teaching Standards. She testified students often share personal information with her, largely because of her subject area of teaching. She has shared information about her personal life in her teaching; for example, when teaching a unit on substance abuse, she shares her experiences with a substance abuse issue in her family. Her appraisals have praised her for sharing her personal information with students. She testified her classes cover many sensitive issues involving social, mental, and physical health. She has not shared her personal experiences individually with students outside school hours, and has not e-mailed students. She does not know how to text. She would not send the photo at issue in this case to a student. She testified that, if a student reported having witnessed a violent incident that upset them greatly, she would direct them to a counselor so they could get therapy.

99. Eric Uren teaches Family Health and Foods, and is certified to teach the National Board of Professional Teaching Standards program. She testified she shares her personal experiences and background

with students in her teaching, and that they share personal information with her, both in class and in a school organization for which she is the adviser. Her appraisals have praised her for using her personal experiences to establish rapport with students. Appellant took over her Health class one year when she was on maternity leave. That class addresses physical, mental, emotional, and social health, and includes sex education. In her view, the Connections teacher is responsible for helping students with problems inside and outside school. She has been trained to go over grades with students in private. She also meets privately with students to talk about issues, including after school. She was unaware of any training from Respondent regarding meeting alone with students. She has texted students to ask where they are. She would not text students about her sex life, or to invite them over when her husband was not home. She would not send personal pictures to students, and would not send the photo at issue in this case to a student. If a student reported having witnessed a murder, she would find out whether it had been investigated, whether the student was a witness, whether the student went to court, what kind of counseling the student got, and whether someone was helping with that; she would also report it to a counselor.

CONTACTS DURING HEARING

100. On September 9, 2010, Appellant e-mailed a lengthy list of people, including two staff members of Respondent. Appellant testified the recipients of this e-mail were relatives and close friends; one of the two staff members of Respondent is a fellow member of a bible study group, and the wife of the other is a close friend. The e-mail read:

I have had a lot of people ask me for an update on my job situation so I thought I'd just email everyone to fill you in.

The hearing with the school district is set for Sept. 27th. A hearing officer (like a judge) will decide whether the school district has probable cause to terminate me. She will decide one way or another – there is no in between. The school district is focusing on two things – sexual misconduct and violation of school policy. Sexual misconduct is a terminable offense (obviously) but policy violation is not. There was not a texting or mentoring policy at EVSD so they are trying to say that I should have known based on a combination of college classes and other trainings – a bit of a stretch in my opinion. This means that even if the hearing officer thinks that I did violate a policy, I can not be terminated for it because such an offense is remediable (or fixed by a lesser discipline). So the big issue is the sexual misconduct. Judging by the criminal trial, I don't think the hearing officer is going to buy the crazy story told by the two

boys. Unfortunately the level in this hearing is only probably [sic] cause (more likely happened than didn't), not beyond a reasonable doubt like the criminal trial. Once the hearing is over (about a week), the hearing officer has about 2 weeks to make her decision. Once her decision is made, it is final – I either go back to teaching or find a new career.

Please be praying that the truth will again be revealed and that I will be able to go back to teaching. We have appreciated everyone's support! Thank you.

DISCUSSION

PRELIMINARY MATTERS

Respondent argues on brief that Appellant's e-mail to staff dated December 10, 2009, and her September 24, 2010, e-mail to family and friends (including two staff members), demonstrate a pattern of insubordinate conduct constituting an independent cause for termination. The December 10 e-mail pre-dated the Amended Notice of Probable Cause, but was not cited in that Amended as a basis for termination. While the more recent e-mail post-dated the Amended Notice of Probable Cause, and thus could not have been included, Respondent did not seek to amend the charges against Appellant at or after hearing. It is not surprising, therefore, that Appellant's attorney makes no argument regarding this unannounced additional charge. This charge is not properly before the Hearing Officer and will not be addressed.

The most serious charges in this case turn on credibility. The available tools for gauging credibility all have limitations. Demeanor is overrated as a basis for assessing credibility. The Arbitrator is unfamiliar with the witnesses' usual demeanor. The hearing process puts witnesses in an unnatural situation that affects demeanor for reasons unrelated to veracity. While some witnesses' demeanor can seem to be quite revealing, such observations still must be measured against the internal consistency and logical probability of the story told by each witness and, where available, independent corroborating evidence.

In assessing the internal consistency and logical probability of testimony, it is also necessary to be mindful of normal human limitations on observation and recollection. Unexpected and fast-moving events may be difficult to recall in precise sequence even at the time, much less months after those events. A witness' attention to an event will be affected by the degree to which the event is significant to the witness, as well as by distractions; thus, multiple witnesses generally will perceive and recall different details of the

same event. Indeed, exact matches in testimony tend to be more indicative of witness collusion than of credibility. Many witnesses have difficulty estimating such matters as the passage of time. All of these limitations grow more problematic as time passes after an event. Thus, absolute certainty is rarely possible in resolving a credibility dispute. The most that can usually be said is that the overall picture painted by particular witnesses either was or was not convincing in light of all of the evidence.

Appellant and her accusers live in a relatively small community in which Appellant and her husband have lived for most of their lives. Of all the witnesses, only Appellant has been prohibited from talking to others about this case. Some of the witnesses acknowledged having talked to one another about some of the allegations; this case was also reported in the media, including on news programs that aired while the hearing was in progress. It is therefore risky to draw credibility conclusions from the shared knowledge of multiple witnesses about the details of this case, or of Appellant's personal life.

STUDENT A

Some points regarding Appellant's communications with Student A are not in dispute. One is that it would be inappropriate for a teacher to send the June 6 photo from the bachelorette party to a student. However, on this record, it is more likely than not that the photo was not sent by Appellant, but instead was sent by Vickie Lamar in the process of trying to send it to Randy Lamar. In this regard, the last three times Appellant's cell phone was used prior to sending the photo were contacts with Student A. His cell phone number therefore would have been at the top of the list of contacts. Vickie Lamar credibly testified that she was inexperienced at sending photos via cell phone. Given the history of texting between Appellant and Student A, it would be odd for Appellant to send a photo with no accompanying message. I therefore conclude that a preponderance of the evidence does not show that Appellant was not responsible for the fact that the photo was sent to Student A in addition to adult male family members.

Turning to the disputed testimony regarding other communications with Student A, Student A's testimony was incredible in major respects. He claimed to have particularly curious gaps in recollection regarding the content of text and telephone conversations within the last two days before he reported his

allegations to Respondent. His decision to save the photo sent to him on June 6, but to delete allegedly troublesome text messages sent within the days immediately before and after that photo, tends to undermine the claim that he received such troublesome text messages. That is particularly so in view of testimony from friends that they advised him to report the text messages to Respondent as recently as the weekend of June 6-7. His testimony regarding alleged repeated invitations to come to the Taylor house in late May was improbable in light of the timing of the text messages documented in cell phone records and the activities of Appellant and her family in the last half of May.

The testimony of students to whom Student A forwarded or showed text messages which he said were from Appellant was variable in reliability. For example, Student E was plainly mistaken in recalling that Student A showed him the photo from the June 6 bachelorette party while both were at a passing tournament on June 6, because that photo was not sent until late in the evening of June 6. It may well be that Student A showed Student E that photo at some point; it simply could not have been at the passing tournament, notwithstanding Student E's confident testimony to that effect on direct examination.

The testimony of fellow students regarding Student A's descriptions of text messages that the students did not see themselves is not probative of the content of text messages Appellant sent. It is likely that some of the student witnesses accurately recalled the gist of the text messages they saw. However, the students acknowledged they did not see the full text message strings, nor did they know the context in which those messages were sent. The significance of the testimony regarding the content of those text messages also depends to a large measure on Student A's claim that those messages were genuine messages that Appellant sent. However, if the students accurately recalled their content and timing, it is highly improbable that some of the troublesome text messages were genuine.

The best example is the text messages Noel recalled seeing during soccer season, inviting Student A to hop on his bike and come over while Appellant's husband was gone. Soccer season ends by Memorial Day; Noel testified those text messages may have been as early as two months before school let out, which would put them in April. However, Student A does not assert that he began receiving inappropriate messages

before mid-May, so those messages could not have been as early in soccer season as Noel estimated. The timing is no more likely if one assumes Noel saw those messages later in soccer season. Appellant and Student A did not text at all on Mother's Day weekend or on the two days just before the Taylor family's camping trip over the Memorial Day weekend. The only other weekend in soccer season was the weekend of May 16-17, when Appellant was in Seattle for the bachelorette party. Appellant had no occasion in the relevant timeframe in which she could have texted an invitation to come over in her husband's absence. Thus, any such messages Noel saw during soccer season likely were not genuine.

For all the above reasons, I conclude that Respondent has not shown, by a preponderance of the evidence, that Appellant sent text messages to Student A in which she sought to develop or pursue an inappropriate relationship with him.

Turning to telephone conversations, Student A's testimony about the June 4 conversation did not begin to account for a 73-minute telephone conversation. It is more likely that the conversation covered the wide range of topics that Appellant recalled. As noted above, Student A asserted a curious lack of recollection about the June 7 and 8 telephone conversations. The credible evidence establishes that Appellant invited Student A to the Taylor home for dinner with her family, at the suggestion of her husband, in the June 7 conversation. Respondent has not shown that an invitation for a family dinner was inappropriate or contrary to policy. No credible evidence exists that Appellant invited Student A to the Taylor home for any other purpose, or at a time when her family would not be present.

On this record, Appellant's communications with Student A covered multiple subjects of a sensitive nature, including, e.g., death, dating, Student A's family dynamics, and Appellant's own family, medical, and educational history, as well as an indiscretion in Seattle. However, the credible evidence does not establish that the text messages or telephone conversations included improper solicitations or invitations from Appellant to engage in a romantic or sexual relationship. Rather, it is more likely than not that Appellant discussed these subjects with Student A in response to his requests for advice, in an effort to counsel him.

Appellant's counseling efforts broke down, likely for a number of reasons. It is abundantly clear on this record that, by early June, the issues being raised rapidly became more complex and severe than her training or experience equipped her to counsel effectively. Her attempts to get in front of the situation backfired. She evidently misgauged Student A in disclosing that she had also counseled Student B and had shared information about the subjects on which she was counseling Student A with her husband. It is more likely than not that Student A reacted with great dismay and outrage, as Appellant testified. In this regard, Student A had already had a run-in with Kevin Taylor over what Kevin Taylor perceived to be a disrespectful comment about Appellant. It would not be surprising for a troubled teenager to believe he had a unique and special relationship with a caring adult with whom he had devoted considerable time and energy texting about a variety of personal matters, and to have a strongly negative reaction to news that his relationship was neither as special nor as private as he believed.

Appellant learned of a particularly significant personal issue – Student A's continuing disturbing thoughts about a violent incident he witnessed in Mexico – on the same weekend when her counseling efforts broke down. On this record, the fact that the incident in Mexico was a murder remained unknown to Appellant even at the time Student A reported his allegations to Respondent.

The credible evidence establishes that Appellant suggested that Student A seek counseling, and that Student A rejected that suggestion. It would have been prudent for Appellant to have reported Student A's personal issues to a counselor, despite this refusal. However, the preponderance of the evidence does not establish that Appellant decided not to report these issues to a counselor for inappropriate reasons. At worst, she underestimated his level of distress; at best, she got caught in the snowballing of Student A's personal concerns over the weekend that immediately preceded his report to Respondent. In either case, the deficiency was remediable.

Appellant's activities with other adults at bachelorette parties, in and of themselves, are not probative of the allegations that she engaged in inappropriate behavior toward students. Drinking, clowning around, flirtation, and other raucous conduct in the presence of fellow adults is, and should be, distinct from behavior

with students. Appellant erred in disclosing one of her adult activities – kissing someone who was not her husband while at the bachelorette party in Seattle – to Student A in a clumsy illustration of a mistake she had made. This likely was too much information for a troubled teenager, and an error in judgment that calls for training and/or counseling on strategies in counseling teenagers. However, the preponderance of the evidence does not establish that Appellant disclosed this information in an attempt to foster a romantic or sexual relationship with Student A or for other inappropriate purposes.

The fact that Appellant falsely told Student A that she had told her husband about kissing another man, that she had apologized to her husband, and that they had moved on, does not substantially undermine her credibility in this hearing. Appellant credibly testified that she wanted to encourage Student A to do the right thing by admitting his mistakes and moving on, even though she had not done the same. That being said, Appellant did not show good judgment in using the cleaned-up re-creation of this incident as an illustration of the way to address mistakes. That poor judgment, however, is amenable to correction through training and counseling.

In summary, the record demonstrates well-intentioned but misguided attempts to respond to a student's requests for guidance. It does not demonstrate, by a preponderance of the evidence, that Appellant sought to groom Student A or otherwise develop an inappropriate relationship. It does suggest that Appellant would benefit from training and/or counseling on strategies for responding to student requests for guidance.

STUDENT B

Student B's testimony that Appellant kissed or attempted to kiss him while she was alone with him in her office lacked credibility. His demeanor was strikingly unconvincing in recounting these alleged incidents. The evolution of his story tends to refute his allegations. Notably, he added a third incident in the office between the criminal trial and this hearing; in his testimony at this hearing, he disclaimed his original claims regarding fondling.

Student B's testimony regarding having sexual intercourse with Appellant at Kmart also lacked credibility. In addition to his demeanor, which was unconvincing, his allegations are refuted by the evolution

of his story, the discrepancies in the details, and the logical probabilities. He initially denied that any such event took place. The telephone records that were secured after he changed his story the first time made it impossible for the alleged assignation to have occurred in February, as he claimed in that initial change of story. Unlike in February, the phone records show that he did make a phone call to Appellant in May, but it would be difficult to confuse the weather in February with that in May. Student B's very specific and emphatic earlier claims regarding Appellant's pubic hair were inconsistent with the recently-shaven pubic area that we now know she had a result of her biopsy two days earlier. His claim that Appellant arrived from the opposite direction from her home is unlikely. The hour was late; the credible evidence establishes that she had spent the earlier part of the evening helping to pack for the next morning's drive. It is thus more likely than not that, if she had driven to Kmart, her point of origin would have been her home.

Respondent makes much of Kevin Taylor's testimony that he was unaware that Appellant had run errands on the morning of May 9, suggesting that he also would not have noticed her leaving after 10 p.m. for the alleged assignation at Kmart. However, two people landscaping and gardening on a large property such as the Taylors' might well lose sight of one another at times; that would be much less likely for two people packing or driving away in vehicles parked next to each other in a garage. It also would have been notable if Kevin Taylor's bright red pickup disappeared from its usual spot next to Appellant's vehicle. It is thus unlikely that Appellant left while Kevin Taylor was still packing Appellant's vehicle.

An assignation at Kmart is no more likely if one assumes Appellant left the house after Kevin Taylor came indoors for the night. It is true that neither Appellant's husband nor her father saw her toward the end of the evening, when they testified she was in the bedroom. However, assuming *arguendo* that she was able to slip out shortly after Student B's 10:05 phone call, she also had to return before her husband went to bed around 11 p.m. It would be a considerable feat of stealth to both leave and return in less than an hour without being noticed by either man.

Trying to fit the activities Student B described into the available time on the evening of May 9 also makes Student B's account highly improbable. If Student B's account were credited, Appellant took his call,

left the house, removed three booster seats from the back seat of her husband's pickup truck, drove to Kmart, picked up Student B from his car, drove through the parking lot and around the building, parked, pulled Student B into the back seat, doffed her clothes, performed oral sex, had intercourse in both dominant and subordinate positions, donned her clothes, returned Student B to his car, and returned home, all in less than hour. The timing simply is not plausible.

Credible evidence exists of rumors that Student B claimed to have had sex with Appellant in the Kmart parking lot even earlier than February, as well as in the period between February and April. The testimony regarding those rumors does not suggest that the rumors were true; rather, it demonstrates that all the elements of Student B's current claim, other than the May date, were already in play before May. It is highly likely that Student B's claims prior to May that he had sex with Appellant in the Kmart parking lot were empty boasting at the expense of an attractive young female teacher, and remain empty boasting.

For all the above reasons, I conclude that Respondent has not proven that Appellant had sex with Student B.

Student B's testimony regarding the content of the text messages with Appellant suffered from multiple credibility issues. The credible evidence establishes that Student B did not hesitate to boast about his real or wished-for sexual activities; yet he did not share these alleged juicy tidbits with his friends. The alleged invitations to come to Appellant's home shared the timing issues involved in Student A's testimony alleging similar invitations. Moreover, his imaginative testimony regarding the alleged Kmart assignation casts doubt on his credibility as to other titillating assertions about Appellant.

In discrediting Student B, I am cognizant that his claims led to great disruption of his personal and educational life. Complete certainty is never possible in any credibility resolution. However, taking into account Student B's demeanor and the considerable leaps of faith that would be required to credit his account, I conclude that his account simply was not credible.

STUDENT F

Appellant admittedly texted Student F in attempting to reach Student A on June 4 and 6. No evidentiary basis exists to resolve the credibility dispute regarding the content of the messages or the alleged follow-up request that Student F delete Appellant's number. The specific language Student F asserts Appellant used in asking him to delete her number is characteristic of a student's language. In this he-said-she-said situation, Respondent has not shown by a preponderance of the evidence that Appellant sent inappropriate text messages to Student F, asked Student F to delete her number, or told him that "shit's coming down."

POLICIES REGARDING INTERACTIONS WITH STUDENTS

Finally, the Amended Notice asserts that Appellant was trained to avoid, *inter alia*, counseling, mentoring, acting as a confidante, meeting alone, or talking about personal issues. On this record, the practice, as well as the recollection of other teachers regarding training and policy, is somewhat different from the theory. Credible testimony establishes that a broad policy against meeting alone with a student would be unworkable because of the need for privacy when discussing grades and engaging in other proper educational activities with students. Other credible testimony establishes that teachers are expected to provide guidance to students in a variety of contexts, and have been praised for referring to their personal experiences in their interactions with students. It is fair to say that Appellant strayed into territory that would have been better left to counselors in responding to Student B's requests for advice and counseling. Respondent would be well advised to conduct additional training and counseling on this point. On this record, however, she did not violate clearly established policy or training.

FINDINGS OF FACT

1. The credible evidence does not establish that Appellant's text and telephone conversations with Student A on sensitive subjects included improper solicitations to engage in a romantic or sexual relationship. It is more likely than not that Appellant discussed these subjects with Student A in response to his requests for advice, in an effort to counsel him.

2. Appellant invited Student A to the Taylor home for dinner with her family, at the suggestion of her husband. The credible evidence does not establish that Appellant invited Student A to the Taylor home for any other purpose, or at a time when her family would not be present.
3. The credible evidence establishes that Appellant suggested that Student A seek counseling, and that Student A rejection that suggestion. It would have been prudent for Appellant to have reported Student A's personal issues to a counselor, despite this refusal. However, the preponderance of the evidence does not establish that Appellant decided not to report these issues to a counselor for inappropriate reasons. Any error in judgment demonstrated by this decision was remediable.
4. Appellant exceeded Student A's capacity to process complex emotional material in disclosing to Student A that she had kissed someone who was not her husband. The preponderance of the evidence does not establish that Appellant disclosed this information in an attempt to foster a romantic or sexual relationship with Student A or for other inappropriate purposes. This error in judgment was remediable.
5. The photo that was sent to Student A from Appellant's cell phone on June 6 was an inappropriate photo to send to a student. However, the preponderance of the evidence does not establish that Appellant was responsible for sending the photo to Student A.
6. The credible evidence does not establish that Appellant kissed or attempted to kiss Student B.
7. The credible evidence does not establish that Appellant had sex with Student B.
8. The credible evidence does not establish that the text conversations between Student B and Appellant involved subjects beyond school-related or other innocuous subjects.
9. Appellant mistakenly texted Student F in attempting to reach Student A on June 4 and 6. Respondent has not shown by a preponderance of the evidence that Appellant sent inappropriate text messages to Student F, asked Student F to delete her number, or asserted that "shit's going down."
10. Appellant admittedly violated school policy in providing ibuprofen to Student B on one occasion. This was a remediable violation.

11. It has not been established by a preponderance of the evidence that Appellant violated clearly-established policies or training regarding counseling, mentoring, or discussing personal issues with students.

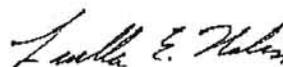
CONCLUSIONS OF LAW

1. Respondent bears the burden of proof by a preponderance of the evidence.
2. Respondent has not shown by a preponderance of the evidence that Appellant engaged in conduct vis-a-vis Student A that was inappropriate or had no positive educational aspect or legitimate professional purpose.
3. Respondent has not shown by a preponderance of the evidence that Appellant engaged in conduct vis-a-vis Student B that was inappropriate or had no positive educational aspect or legitimate professional purpose.
4. Appellant's failure to refer Student A to counseling was, at most, a remediable error in judgment regarding an effective way of responding to his requests for guidance.
5. Appellant's attempt to counsel or mentor Student A, and the means she used, were at most, remediable errors in judgment regarding an effective way of responding to his requests for guidance.
6. Appellant's violation of Respondent's medication policy was a remediable error.

FINAL DECISION

Respondent has not shown, by a preponderance of the evidence, that sufficient cause existed for Appellant's discharge. It has shown that Appellant is in need of additional training and/or counseling regarding Respondent's medication policy and effective responses to student requests for guidance. Such training and/or counseling can effectively be provided within the employment context.

Appellant shall be restored to her employment position and reimbursed for reasonable attorneys' fees.



LUELLA E. NELSON - Arbitrator