

**FILED**



JUL 15 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**No. 315223-III**

**COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION NO. III**

**SPOKANE SCHOOL DISTRICT NO. 81,  
a Washington state municipal corporation**

**Respondent**

**-vs-**

**SPOKANE EDUCATION ASSOCIATION,  
a Washington state unincorporated labor organization**

**Appellant**

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**OPENING BRIEF OF APPELLANT**

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## I. INTRODUCTION

Spokane Education Association (hereafter “SEA”) is the exclusive bargaining representative for certificated employees of Spokane School District No. 81 (hereafter “District”). **CP 4; 263.** Nikki Easterling (hereafter “Easterling”) was a certificated employee, working at Regal Elementary in the District. **CP 251.** Easterling was a provisional employee pursuant to RCW 28A.405.220. **CP 263.**

Easterling’s duties at Regal Elementary involved work as an elementary counselor. **CP 251.** Part of her duties included complying with accommodation for students under the Federal 504 program. **CP 252.** Easterling raised concerns about Regal Elementary’s failure to comply with 504 accommodations to the principal, which went unheeded. **CP 252.** Shortly after Easterling expressed her concerns about the school’s failure to comply with 504 accommodations, and after she took properly-allowed bereavement leave, she received critical emails from the Regal Elementary principal and the working relationship soured. **CP 253-254.**

SEA, on behalf of Easterling, filed a grievance concerning alleged retaliatory actions by the school's principal and which also included issues involving progressive discipline, grievance procedures, and the Family Medical Leave Act (FMLA). **CP 278-280.** Shortly thereafter the District issued a notice of nonrenewal to Easterling, terminating her contract and employment relationship with the District. **CP 148.** SEA then filed an amended grievance and delivered it to the District. This amendment included as a grievance the nonrenewal of Easterling. **CP 284-287.**

SEA, on behalf of Ms. Easterling and consistent with the arbitration provision of the Collective Bargaining Agreement (hereafter "CBA"), submitted the grievances to arbitration. **CP 267.** The District then filed with the Spokane County Superior Court a petition for declaratory judgment and injunctive relief. The District requested a temporary restraining order be entered prohibiting arbitration of those grievances. The basis for the petition was that Easterling's nonrenewal was allegedly not subject to arbitration under the CBA. **CP 1-23.** A temporary restraining order was entered on November 2, 2012 prohibiting

SEA from proceeding further with the grievances through the arbitration process. **CP 180-184.** On March 1, 2013 final orders were entered enjoining SEA from pursuing the grievances on behalf of Ms. Easterling through the arbitration process. **CP 405-414.**

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in refusing to allow the arbitration process to be used in addressing SEA's grievances.
2. The trial court erred in entering an injunction preventing SEA from pursuing grievance procedures through arbitration.

## **III. STATEMENT OF THE CASE**

Nikki Easterling (hereafter "Easterling") graduated from Whitworth University and received her Masters Degree in Guidance and Counseling in December of 2004. **CP 251.** Easterling also received her ESA certification for counseling in December of 2004. **CP 251.** She was employed by the District as a Student Assistant Specialist Counselor from September 1, 2001 through August of 2009. **CP 251.** Her duties included participation in leadership roles and as a trainer for the District

and for Educational Service District No. 101. **CP 251.** Easterling's duties also included student counseling with an emphasis on prevention, intervention, and education in drugs, alcohol and violence. **CP 251.** Easterling received excellent evaluations from the District while employed as a Student Assistant Specialist. **CP 251.**

Effective August 2009, Easterling was employed as an Elementary Counselor for the District in a .5 position at Westview Elementary. **CP 251.** She also completed a .5 long-term sub position for a portion of the school year at Balboa Elementary. **CP 251.** In both positions she received excellent evaluations from her supervisors. **CP 251.**

Easterling was hired by the District as an Elementary Counselor at Regal Elementary commencing August 2010. **CP 251.** Her duties at Regal included individual and group counseling, classroom lessons, parent education, consultation with staff, facilitating with staff and parents, facilitating child study team and management and facilitation of all child protective service matters. **CP 251-252.** She continued in the position of Counselor through June of 2012 when her contract was

nonrenewed by the District. **CP 252.** Easterling, in her employment at Regal Elementary and at the time of her nonrenewal, was a provisional employee pursuant to RCW 28A.405.220. **CP 263.**

Easterling's supervisor at Regal Elementary was the principal, Mallory Thomas (hereafter "Thomas"). **CP 252.** There were a number of students at Regal Elementary who fell under the Federal 504 Program, requiring accommodation for those students. **CP 252.** Upon employment at Regal Elementary, Easterling expressed a number of concerns to Thomas as principal concerning the failure of the school to meet requirements under the Federal 504 Program. These included 1) Thomas misrepresenting the purpose of a permission slip to be signed by a parent by indicating it was not for a behavioral prevention program when in fact it was; 2) the school's failure to inform a student's parent that the student was being presented for a district review committee ("DRC") to determine whether the student should be placed in a behavioral intervention program ("BI"); 3) the approval of a student's MSP, which is a standardized test for students without any formalized accommodation plan for

the student; 4) being instructed by Thomas to write a 504 accommodation plan in a student's case without parental consent. That same student was subsequently not accepted for the behavioral informational program because Regal had not adverse therapy plan on file for the student. Only after the failure to be accepted into the Behavioral Intervention program, did Thomas and Easterling meet with the parent to obtain consent to the accommodation plan. **CP 252.**

On or about June 16, 2011 Thomas provided a memo to Easterling containing substantial inaccuracies including that Easterling was counseled for attendance issues which in fact was not the case. **CP 253.** Unfortunately, Easterling was never given the opportunity to rebut the allegations contained in the memo, prior to her nonrenewal. **CP 253.**

Commencing in school year 2011-2012, the District's central administration informed Easterling that in fact Regal Elementary had no 504 Student Accommodation Plan on file at all. **CP 253.** On December 6, 2011 a meeting was held between Thomas, Easterling and Bonnie Ducharme, Supervisor of Elementary Counselors, to address the goals of serving the 504

students. **CP 253.** However, the subsequent memo issued by Thomas made no mention of the school's intent to serve behavioral students under 504. **CP 253.** The memo contained disciplinary matters related to Easterling's attendance, which were taken out of context and were inaccurate reflections of what was actually said during the meeting. **CP 253.**

In January of 2012, Easterling took bereavement leave due to the death of her aunt. **CP 254.** Immediately after returning from the bereavement leave, Thomas' tone and the nature of the interactions between herself and Easterling markedly changed. **CP 254.** Instead of face-to-face contact, Thomas began a pattern of emailing questions or concerns to Easterling. **CP 254.** The emails by Thomas were one-sided and contained numerous factual inaccuracies or complete misstatements. **CP 254.** A sample of the inaccuracies/inconsistencies contained in the emails from Thomas include but are not limited to: 1) that Thomas was not able to locate Easterling on the school campus, even though Easterling's schedule had previously been provided to her; 2) a requirement that Easterling carry a walkie-talkie even if she left the classroom for the restroom, which was not previously

required; 3) condemnation of Easterling for taking a student out for a walk to deescalate behavior, Thomas indicated a parent permission slip was required for that walk, even though none had been required in the past; and 4) a demand that Easterling remove items from the school that had been received as a result of a donation drive for displaced families. **CP 254.**

On February 1, 2012 Easterling received notice from Thomas that she wanted to hold a meeting; the basis for the meeting was not indicated to Easterling. **CP 254.** Thomas then issued an email cancelling the meeting. **CP 254.** Shortly after the cancellation of that meeting, Easterling became concerned about her job and contacted her union, the SEA. **CP 254.** SEA appointed Mike Boyer (hereafter “Boyer”) to represent her interests. **CP 254.**

Easterling received a phone call from Brent Perdue of the Human Resources Department of the District on May 3, 2012 indicating that she should contact her SEA representative concerning her provisional status. **CP 254.** Between May 3 and May 15, 2012 Mr. Perdue, on behalf on the District, attempted to force Easterling into resigning her position, indicating that if she

did not do so that she would never teach or substitute in the district again. **CP 254.** Mr. Perdue continued to contact Easterling during this time period even though he knew she was represented by the union. **CP 255.**

On May 11, 2012 Boyer filed a grievance on behalf of Easterling, the basis for which was concerns about retaliation by administrators, failure by the District to follow grievance procedures, and issues regarding progressive discipline. **CP 278-280.** Later that same day, Easterling received a Notice of Nonrenewal of her contract from the District. **CP 148.** On May 16, 2012 an informal grievance hearing was held with Boyer, SEA President Jenni Rose, Easterling, and District representatives Tennile Jeffries-Simons and Brent Perdue. **CP 255.** Principal Thomas was not in attendance. **CP 255.** The District attempted to show at that time that the nonrenewal was not retaliatory in nature. **CP 255.** Easterling attempted to raise the grievance issues of violations of progressive discipline and retaliation, however, the District could not provide an adequate reply to her response. **CP 255.** On May 16, 2012 an amended grievance was filed by Boyer on behalf of Easterling under Title VII of the CBA

which again addressed issues of progressive discipline, FMLA, violation of grievance procedures, and retaliation issues. **CP 284-287.**

The retaliation involved Thomas' actions against Easterling as a result of her complaints of the school's failure to properly follow 504 mandates and taking bereavement leave. Easterling also raised as a defense to attendance issues that she was not informed of the availability of leave available under FMLA (Family Medical Leave Act) to take care of her ill daughter. The progressive discipline issues involved the fact that Thomas provided no indication to Easterling that her job was in jeopardy. She received no discipline whatsoever until she received the notice of nonrenewal. **CP 256.** The issue of violation of grievance procedures contained in the amended grievance was in reference to the fact that all parties involved who were supposed to attend the grievance meeting did not attend. This included Thomas, who was not present. **CP 285.**

On May 31, 2012 Thomas made an announcement in the school wide bulletin that Easterling would no longer be at Regal and that a new counselor had been hired. **CP 255.** As further

evidence of retaliation, on June 7, 2012, which was a play date for the students, Easterling was assigned to the dunk tank by Thomas. **CP 255.**

On June 11, 2012 Easterly was contacted by Brent Perdue from the District who wanted to know if she wanted to change anything stated in the grievance procedure. Easterling indicated she was not going to change her statements and then was told by Perdue that she was being immediately placed on administrative leave. **CP 255.** Throughout Easterling's employment with the District at Regal Elementary, she received satisfactory evaluations and there was no indication to indicate that her work performance was deficient. **CP 256.**

Easterling last grievance procedure was on August 29, 2012 which involved a conciliation hearing with Boyer, Rose and Tennile Jeffries-Simons. **CP 256.** A demand for arbitration was served and filed by SEA on September 14, 2012. **CP 157.** As of June 2012, Easterling was a provisional employee with the District. **CP 256.** Her provisional status would have been removed at the beginning of the next school year in August of

2012 had she continued to be employed with the District. **CP 256.**

Paul Clay, attorney for the District, was involved in the arbitration process with SEA's representative, Boyer, concerning selection of the arbitrator. Clay requested a continuance of the process of selection of an arbitrator on October 24, 2012. **CP 289.**

As the process of appointing an arbitrator was being discussed, **CP 267**, the District on November 2, 2012 filed a petition for declaratory relief and injunction, and requested an immediate restraining order prohibiting any further action concerning the arbitration process. **CP 3-23.** The District's position is that Easterling was a provisional employee and therefore subject to nonrenewal. The District alleged nonrenewal of a provisional employee is not subject to arbitration pursuant to Title VII, Section 3.(B) of the CBA. **CP 109-110.** SEA contended that nonrenewal was only one of many grievance issues and that even if nonrenewal was not arbitrable, the nonrenewal was issued as an attempt to avoid addressing the other valid grievance issues which are subject to arbitration under Title VII, Section 6.(E) of the CBA. **CP 111.**

A temporary restraining order was entered on November 2, 2012 after giving SEA a few hours' notice of the request to obtain the order ex parte. The hearing on the court's order to show cause why the restraining order should not be extended was originally to be held on November 16, 2012. **CP 180-184.** By agreement of the parties an order extending the temporary restraining order and continuing the order to show cause and establishing a briefing schedule was entered on November 15, 2012. The show cause hearing was continued to December 14, 2012. **CP 187-188.** On December 14, 2012 a show cause hearing was held before the Honorable Ellen Kalama Clark. **CP 380.** Judge Clark took that matter under advisement and issued a Memorandum Decision on December 24, 2012 granting the District's request for a preliminary injunction prohibiting any further action in the arbitration process. **CP 381-383.** On March 1, 2013 an order was entered containing findings of fact, conclusions of law, and an order making the temporary order permanent for purposes of appeal to this court. **CP 405-414.** On March 20, 2013 SEA filed Notice of Appeal in this matter. **CP 415-427.**

#### IV. STANDARD OF REVIEW

In this instance the Appellate Court should apply the abuse of discretion standard in reviewing the ruling of Judge Clark.

*Turner v. City of Walla Walla*, 10 Wn. App. 401, 517 P.2d 985 (1974). Judge Clark's order enjoining the arbitration of the

grievances by SEA/Easterling constitutes an abuse of discretion.

A trial court abuses its discretion when it's decision is based on untenable grounds, is manifestly unreasonable, or is arbitrary.

*San Juan County v. No New Gas Tax*, 160 Wn. 2d 141, 157 P.3d 831 (2007). The issuance of an order enjoining the arbitration

process is a dramatic and far-reaching equitable relief which

should take into consideration the balancing of the relative

interests of both parties not just the party seeking the injunctive

relief. *Rabon v. City of Seattle*, 135 Wn. 2d 278, 284, 957 P.2d 621 (1998). Judge Clark did not consider this balancing interest. The

District as the moving party in this matter has failed to meet their

burden of proof in requesting an order enjoining the arbitration.

*Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 587 P.2d 1087 (2007).

## V. ARGUMENT

### **A. The trial court erred in refusing to allow the arbitration process to be used in addressing Easterling's grievances.**

#### **1. The grievances submitted by SEA cannot be fully addressed without arbitration.**

The District has basically taken the position that regardless of whether a grievance is filed by an employee under the CBA, those grievances are not arbitrable if it simply elects to nonrenew the provisional employee. That is not the law in the state of Washington. While a nonrenewal of a teacher may not be subject to arbitration, that does not prevent arbitration of other grievances under the CBA. *North Beach Ed. Assn. V. North Beach School District No. 64*, 31 Wn. App. 77, 79, 639 P.2d 821 (1982). If the CBA is to be construed in that manner then the arbitration of grievances by a provisional employee could potentially never occur.

Specifically in Easterling's case, she received all satisfactory/excellent reviews and evaluations during her employment with the District. **CP 251, 256**. The principal, after becoming upset with Easterling's questioning of the school's failure to adhere to the federal mandates of the 504 Student

Accommodation program, and taking her legally allowed bereavement leave, started to make indirect and inaccurate accusations about Easterling's attendance and work. **CP 254.** Those complaints were rarely face-to-face, involved de minimus actions by Easterling, and in some cases involved a unilateral change in policy by the principal involving behavior by Easterling which was not sanctioned or determined to be misconduct prior to raising concerns about the 504 mandate and taking bereavement. **CP 254.**

The first grievance filed by Easterling in this matter occurred prior to her receipt of the notice of nonrenewal. **CP 278-280.** The amended grievance was filed shortly thereafter. **CP 284-287.** The District makes no mention in its petition of the fact that the first grievance was filed prior to the receipt of the notice of nonrenewal. **CP 1-23.**

It is clear under the guidelines of the CBA, specifically at Title VII, Section 6, that the four step process of a grievance should be followed concerning Easterling's complaints of failure to follow progressive discipline, retaliatory actions by her principal and failure to follow procedural processes in the grievance

procedure itself. **CP 110-111.** It is not for this court to determine the merits of those grievances. *Peninsula School District No. 401 v. Public School Employees of Peninsula*, 130 Wn. 2d 401, 413, 924 P.2d 13 (1996). However, the trial court did just that in its Findings of Fact and Conclusions of Law, at paragraph 3, **CP 411**, when it found

SEA still contends there are several other issues listed in the grievance which are grievable. But the District points out that those other issues are part of the nonrenewal process, or are procedural discrepancies and thus are not subject to arbitration; as they are not alleged violations of the CBA in the first instance, meaning they are not subject to the grievance procedure at all.

That is clearly for the arbitrator to determine in the arbitration process under Title VII, Section 6.(E) of the CBA. **CP 111.** It is not within the province of the court to enjoin the arbitration of those very issues which were agreed to between the parties to be submitted to arbitration and any issues involving interpretation or application of the CBA. *North Beach, supra*, at page 83 (1982). Arbitration has always been the favored procedure when the alternative is litigation through the court system. *Hanson v. Shim*, 87 Wn. App. 538, 943 P.2d 322 (1997). Also, what constitutes a grievance, and appropriate handling of

that grievance should be handled through the arbitration process. Interpreting the application of the CBA is within the province of the arbitrator. *Clark County Public Utility District No. 1 v. IBEW*, 150 Wn. 2d 237, 247-251, 70 P.3d 248 (2003). The only limitation that applies in this situation prohibiting arbitration of a grievance is the issue of nonrenewal. While that was a component of the grievance, the fact that one item may not be grievable under CBA should not exclude arbitration of other grievable items. See, *North Beach, supra*. An injunction should not issue in a doubtful case. *Federal Way Family Physicians v. Tacoma Stands Up For Life*, 106 Wn. 2d 261, 265, 721 P.2d 946 (1980).

The arbitrator should be the final judge of both facts and law. *DSHS v. State Personnel Board*, 61 Wn. App. 778, 785, 812 P.2d 500 (1991). The court erred in this analysis by effectively throwing the baby out with the bathwater. While it may have been appropriate to exclude arbitration of the nonrenewal, the other issues contained in the grievance, whether valid or not, should be determined through the Step 4 arbitration process. **CP 111.** This opportunity to arbitrate was denied by the blanket injunction issued by Judge Clark.

**2. The CBA agreement between the District and SEA allows the arbitration of most of the issues contained in the grievances filed.**

The settlement of grievances under Title VII of the CBA is addressed in three short pages. **CP 109-111.** An initial grievance was filed by Boyer on behalf of Easterling on May 11, 2011. **CP 278-280.** The grievance clearly states at page 2, lines 35-36: "As of the date of this grievance, Ms. Easterling has not received any type of legal nonretention nonrenewal letter." **CP 279.** The grievance goes on to state the concerns about retaliation by the grievant and also states at page 1, lines 12-13: "This grievance is being formally filed at this time due to lack of response from the district on when an informal meeting will be held." **CP 278.** This informal meeting was to deal with progressive discipline issues as governed by Title IV, Section 22 of the CBA. **CP 90-91.** Easterling also raised a number of issues concerning the actions of the building principal toward her which she wished to grieve.

Page 2 of the initial grievance states:

As stated above earlier this school year the grievant brought issues to the district's attention concerning her treatment at the hands of her building principal. These are issues which would be addressed by appropriate grievances. **CP 279.**

Boyer's declaration filed on December 7, 2012, at paragraph 18, indicates that he became aware of the nonrenewal only after he had prepared and filed the initial grievance for Easterling. **CP 266.** Consequently, the grievance had been filed prior to the notice of nonrenewal being effective. An amended grievance was filed on behalf of Easterling by Boyer. **CP 284-287.** That amended grievance also references the fact that the grievances involved complaints about Easterling's principal and working conditions at Regal Elementary. That amended grievance, at page 2, lines 43-48, states:

Further, even if the arbitrator were to rule that the grievant did not have the right to use this grievance procedure to challenge her nonrenewal, several other rights the grievant owns as a bargaining unit member were violated by the building principal and the Spokane School District. Also the failure of the building principal to attend the informal grievance meeting is in itself a violation of Title VII of the CBA. **CP 285.**

The amended grievance again goes into the basic issues of the grievance which involve the retaliation and issues brought by the grievant concerning her treatment at the hands of the building principal. The amended grievance, at page 2, lines 66-71, addresses this:

In other words, any problems with the performance of the grievant should have utilized the Evaluation system (i.e., observation notes, conferences related to observations and actual arbitration ranking themselves) and any discipline should have been dealt with through Title IV, Section 22.

This addresses the complaint of the progressive discipline issue. **CP 285.**

The amended grievance goes on to state at page 2, lines 73-76:

In other words emails were to build a record against her and did not fully reflect the purpose or responses appropriate to the meetings held. If the notes had been either voluntary or intended to discipline the grievant then the SEA should have the ability to defend them. **CP 285.**

Another issue of the grievant, as indicated in the amended grievance, at page 3, lines 92-93, was that:

At a minimum the district should have notified the grievant of her state and federal FLMA rights in regards to taking time off for her sick child. **CP 285.**

Consequently, these two grievances although in part indicate they are objecting to the nonrenewal; they also raise a number of issues regarding progressive discipline, retaliation, procedural inconsistencies, FMLA, and other issues which are certainly grievable under the CBA.

Title VII, Section 1, paragraph 8, of the CBA states:

A grievance is defined as an alleged violation of a specific term of this agreement or a dispute regarding an interpretation of this agreement. **CP 109.**

Section 3, under Title VII, provides limitations on grievances. **CP 109.** Those limitations of items which cannot be grieved under Section 3 include nonrenewal of provisional employees (Section 3.(B)). Again, Easterling's grievance included but was not limited to retaliatory issues, progressive discipline issues, and procedural discrepancies. Procedural issues are within the province of the arbitrator to address. *North Beach, supra*, at pages 79-80. Only matters related to nonrenewal of provisional employees and matters relating to evaluation, placement of employees on probation, and nonrenewal of discharge matters, are not subject to grievance. (Title VII, Section 3.(B) of the CBA). **CBA 109.**

Whether a grievance is subject to arbitration under the parties' collective bargaining agreement is for determination by the arbitrator under the CBA. *The Council of County & City Employees v. Spokane County*, 32 Wn. App. 422, 424-426, 647 P.2d 1058 (1982). This includes whether the actions grieved are "procedural" or not.

Title VII, Section 6 of the CBA provides four grievance steps.

**CP 110-111.** It is undisputed in Easterling's situation that Steps 1 through 3 were held without success concerning Easterling's progressive discipline, retaliatory issues, and procedural issues.

**CP 266-267.** All of these issues are subject to Step 4 grievance.

Under Title VII, Section 6.(E), Step 4 states that

The parties to the agreement agree to submit to arbitration any grievance which has not been resolved through the use the above enumerated grievance steps and procedures. . . .

**CP 111**

While Title VII, Section 3.(B) states that the nonrenewal of a provisional employee is not grievable, progressive discipline, retaliation, and procedural issues all raised by the initial and the amended grievance require arbitration under Step 4.

The District has taken the position that while those issues are grievable through Step 3, since Easterling was issued a notice of nonrenewal and she was a provisional employee, even though those issues may exist and are subject to arbitration, the notice of nonrenewal effectively "trumps" any other grievances subject to arbitration. This was not intended by the CBA. The preamble of the CBA, at page 4, states:

The District and the Association are committed to the development of a trusting, respectful environment where the participation of all school employees in the work of improving student learning is encouraged and expected. Our joint efforts to develop trust and respect in the organization will focus on a strong commitment to:

engage in open, honest and appropriate communication

share information, knowledge and experience

address concerns through collaborative problem solving

refrain from making judgments until we have a clear understanding of those issues involved

provide individuals with the opportunity to be involved in those decisions that directly affect the work situation

value each individual in the organization, respect individual differences

encourage innovation and risk taking with a focus on the improvement of student learning. **CP 33.**

The District's position by issuing a nonrenewal to Easterling, to avoid the grievance procedure, violates most if not all of the concepts stated in the preamble of the CBA.

**3. The District's alleged progressive discipline and procedural violations of the CBA, as well as retaliatory conduct, should be addressed through arbitration.**

The parties went through Step 3 of the grievance procedure. Step 4 is clear in fact and has strict limitations on what cannot be grieved. **CP 11.**

The only limitation on Step 4 is contained in Title VII, Section 3.(B):

Nonrenewal of provisional employees and matters related to evaluation and placement of employees on probation shall be grievable only through Step 3 of the grievance procedure. **CP 109.**

Again, this only applies to the nonrenewal, not the other issues raised by Easterling. An order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not susceptible of an interpretation that covers the issue in dispute. Doubts in that regard should be resolved in favor of coverage. *Meat Cutters Local 494 v. Rosauers Super Markets, Inc.*, 29 Wn. App. 150, 627 P.2d 1330 (1981).

Matters relating to evaluation and placement of employees on probation does not apply to Easterling either. She was not on probation. The limitation does not preclude grievances of retaliatory conduct, progressive discipline, or procedural issues. In the absence of a specific exclusion, the CBA must be held to authorize arbitration over another interpretation. See *Council of*

*County & City Employees, supra*, at 426. The District by escaping arbitration on the nonrenewal issue is attempting to eliminate all other grievance issues which should properly be before the arbitrator. This is contrary to the principle that all questions upon which parties disagree are presumptively within the arbitration provisions of the collective bargaining agreement unless expressly negated or by clear implication. *Local Union No. 77 IBEW v. Public Utility District No. 1*, 40 Wn. App. 61, 63, 696 P.2d 1264 (1985).

**4. Use of nonrenewal to prevent arbitration of grievances is bad faith under the CBA and should not be allowed.**

The purpose of the CBA is to provide a dispute process through grievances when those grievances fail through alternate dispute resolution process for grievance through arbitration. Arbitration as an alternative to litigation should be favored and employed. *General Teamsters Local No. 234 v. Whatcom County*, 38 Wn. App. 715, 717, 687 P.2d 1154. If you take the District's logic, which is that nonrenewal of a provisional employee eliminates all opportunities for that employee to grieve other matters arbitrable under the CBA, it leaves the CBA grievance

procedure for nonprovisional employees a hollow shell. The CBA is clear that there are specific matters that are not arbitrable after Step 3 of the grievance procedure. They include nonrenewal. Easterling's first grievance was filed prior to the notice of nonrenewal being received. **CP 266.** If it is found through the arbitration of those grievances the District has violated the CBA in dealing with that employee, the arbitrator has almost total discretion in forming a remedy for those violations. *Endicott Education Association v. Endicott School District No. 308*, 43 Wn. App. 392, 395-396, 717 P.2d 763 (1986).

In every contract there is an implied covenant of good faith and fair dealing. *Metropolitan Park District of Tacoma v. Griffith*, 106 Wn. 2d 425, 437, 723 P.2d 1093 (1986). It is bad faith for the District to unilaterally dismiss any provisional employee in the district, even with pending grievance matters to be arbitrated under the CBA, by simply issuing a nonrenewal. This tactic which clearly was done in Easterling's case does nothing to further the relationship between the employee and the District and flies in the face of the purposes stated in the preamble of the CBA. **CP 33.** See *Rabon, supra*, at p. 284 (1998). Nor does it do anything to

address the deficiencies that may have been brought to light with the District in the grievance procedure. The District may argue that it has the ultimate and qualified right to terminate a provisional employee but that right should not be used to avoid arbitration of all other grievances under the CBA. Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective bargaining agreement. *Endicott Ed. Assn, supra*, at page 394.

**B. The District failed to meet the requirements of obtaining an injunction in this matter.**

The trial court improperly entered an order enjoining SEA from proceeding with arbitration of all grievances on behalf of Easterling. The trial court incorrectly held that the District met its burden of satisfying the elements for obtaining a restraining order and thus prevented SEA from proceeding through the grievance process for procedural, progressive discipline, FMLA, and retaliatory issues.

The facts do not support the proposition that the District, whether under the CBA or equity, had a right to enjoin arbitration

of all of Easterling's grievances. The factors that the court must look at in deciding whether injunctive relief is appropriate includes

a) the character of the interest to be protected, b) the relative adequacy to the plaintiff of injunction in comparison with other remedies, c) the delay, if any, in bringing suit, d) the misconduct of plaintiff, if any, e) the relative hardship likely to result to the defendant if an injunction is granted to the plaintiff is denied, f) the interest of the third parties and the public, and g) the practicability of framing and enforcing the order or judgment.

*Holmes Harbor Water Co. v. Page*, 8 Wn. App. 600, 603, 508 P.2d 628 (1973).

The character of the interest to be protected is the District's alleged right not to have to arbitrate one issue of the grievances, namely the nonrenewal of Easterling. From the SEA's perspective the right the District is attempting to protect is really the avoidance of arbitration of all grievances outlined in the CBA. SEA argues that the avoidance of arbitration of grievance procedures by issuing a notice of nonrenewal should not be an interest to be protected.

The next element is the relative adequacy to the plaintiff of injunction in comparison with other remedies. In this matter the District clearly could have arbitrated the grievances filed by

Easterling. They chose not to. They are not harmed by proceeding with arbitration of those grievances. The District has the remedy of the arbitration for those grievances, which is the preferred method. Furthermore, under Title VII, Section 6.(E) of the CBA, both parties retain their usual right to seek legal relief regarding any arbitrator's decision. **CP 111.**

The next element of delay does not apply as there was no delay to either party if arbitration was allowed. In fact, arbitration is a more expedited manner in which to resolve the issues than litigation.

The next factor to review is misconduct of the party seeking the injunctive relief. SEA believes there is misconduct in this matter by the District in the fact that it issued a notice of nonrenewal in order to avoid the possibility of addressing arbitrable grievances in this matter.

The hardship to SEA as a result of granting injunction is much greater than the harm to the District if it was denied. If the injunction had been denied, the matter would have gone to arbitration and been heard by an independent third party as to Easterling's grievances. Either party could have had the

arbitration decision reviewed. In this case, with the injunction being granted, the harm to SEA is that Easterling has no venue for the airing of those legitimate grievances and effectively has lost property rights of employment.

There is an interest to third parties and the public that good faith in all contracts be followed. The District has failed to exhibit good faith under the CBA by terminating a teacher to avoid arbitration of her grievances.

The final element of the practicality of enforcing the order or judgment really has not applicability in this case.

One who seeks relief by temporary or permanent injunction must show

1) That he has a clear, legal or equitable right; 2) that he has a well-grounded fear of immediate invasion of that right; and 3) the acts complained of are resulting in or will result in actual and substantial injury to him.

*Kucera v. State Dept. of Transportation*, 140 Wn. 2d 200, 209, 995 P.2d 63, 68 (2000), citing *Tyler Pipe Industries, Inc. v. Dept. of Revenue*, 96 Wn. 2d 785, 792, 638 P.2d 1213 (1982).

All three elements for an injunction must be proven or the relief should be denied. *Washington Federation of State Employees, Council 28, AFL-CIO v. State of Washington*, 99 Wn.2d 878, 882, 665 P.2d 1337 (1983). The District has failed to show

that it has met any of these requirements and therefore the court erred in granting the injunction prohibiting arbitration of grievances under the CBA. The failure to establish any of the elements requires the denial of injunctive relief. *Kucera, supra*, at page 210.

**1. The School District has failed to show that it has a clear or equitable right for an injunction.**

Easterling was a provisional certified employee and as such she had bargained for rights under the CBA.

This matter first started as a grievance filed by Easterling alleging among other things a violation of progressive discipline and procedural processes, as well as retaliation and bad faith by the District. These matters are arbitrable and proper grievances to be determined by arbitration under the CBA. The District has turned the matter on its head and attempts to avoid arbitration of the grievance procedures by simply nonrenewing Easterling. While nonrenewal of a provisional employee is not subject to arbitration under the CBA, the act of nonrenewal should not be reviewed in a vacuum when there are other pending arbitrable grievances. The District does not have a clear or equitable right to

enjoin all the grievances submitted by SEA. See, *Endicott Ed. Assn, supra; North Beach, supra.*

While the parties argue about the legalities of whether the injunction is appropriate, it is whether the District, in good faith, followed the intended processes of the CBA. Those processes for a provisional employee are that adequate notice of misconduct or problems with the employee be communicated to the employee. (Title IV, Section 22 of the CBA); **CP 90**. The employee then is given an opportunity to respond to those allegations. Title IV, Section 22.(C) states:

After a supervisor concludes that the actions of an employee may be cause for discipline, he/she shall notify the employee of the nature of the concern which has come to his/her attention and allow the employee an opportunity to meet with the supervisor and respond. **CP 90**.

This did not occur in the present case. Under the CBA, the process would be that if disciplinary actions are taken by the District or actions taken against the employee in violation of the CBA, then the employee should have the right to grieve those matters. If Easterling was allowed to grieve those matters and demonstrate to an arbitrator that a violation of the CBA had

occurred, then the arbitrator has the authority to fashion a remedy for those violations. *North Beach, supra*, at pages 84-86.

The District states in its reply memorandum to the trial court that the CBA is a promise and that the District is upholding its end of the promise in this matter but SEA is not. **CP 343-344.** SEA argues to the contrary that in fact the District is not upholding its promises of good faith and what was intended by the CBA. If there is a problem with the employee, that employee should have the opportunity to respond and address that alleged problem. Title IV, Section 22 of the CBA, **CP 90-91.** If violations of the CBA occurred the employee should have the right to submit those grievances to arbitration. Title VII, Section 6.(E) of the CBA, **CP 111.** This was not allowed in Easterling's case simply by the District issuing a notice of nonrenewal and thereby usurping all purpose of the CBA. This is the basic argument of SEA in requesting that the grievances of Easterling should have been heard through arbitration. After those matters are arbitrated, if it is deemed appropriate a remedy should be imposed against the District for violations of the CBA.

**2. The District does not have a well-grounded fear of invasion of a right.**

RCW 7.40.020 requires that in order for an injunction to be allowed, there must be a well-grounded fear of invasion of an equitable right. Again, arbitration is preferred by the courts and where there is any authority for application of arbitrability, it should be enforced. *Seattle School District No. 1, King County v. State of Washington*, 97 Wn.2d 534, 647 P.2d 25 (1982). The District argued that it has a clear right not to allow the arbitration of the nonrenewal of a provisional employee as guaranteed by the CBA. The District clearly in its petition for relief was requesting an injunction to prohibit arbitration of the nonrenewal of Easterling. **CP 7.** The District was not seeking an injunction of arbitration of the issues involving progressive discipline, retaliation, FMLA, and failure to abide by grievance procedures.

SEA also has the clear right to see that grievances subject to arbitration under the CBA are arbitrated. That clear right has been violated by the District. The right of nonarbitrability of the nonrenewal of provisional employees should not be given more force and authority than the arbitrability of other valid grievances by that same provisional employee.

**3. The District has failed to demonstrate arbitrating the grievances would result in an actual or substantial injury to it.**

The party seeking an injunction must show that at minimum the act of arbitrating the grievances of Easterling would result in actual and substantial injury to the District. *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 435, 260 P.3d 245, 249 (2011). See also, *Washington Federation of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 665 P.2d 1337 (1983). The injury that would happen to the District is that it would have to arbitrate the issues which Easterling grieved. By obtaining the injunction it is avoiding addressing the actual merits of the grievances raised under the CBA. The arbitration of the grievances would not necessarily prohibit the nonrenewal of Easterling's employment if the grievances were to be unfounded. Courts routinely deny injunctive relief where no likelihood of substantial injury can be proven. *Brown v. Voss*, 105 Wn.2d 366, 715 P.2d 514 (1986).

**4. The District waived the right to injunctive relief.**

As late as October 24, 2012 the District was engaged in correspondence with SEA concerning the selection of an

arbitrator. If the District's position all along had been that Easterling's grievances under the CBA were not arbitrable, why did it not immediately inform SEA of that position, but rather it waited until the point where the arbitration association was requesting submission of names for an arbitrator? By its actions, the District has waived the right to seek a remedy from the court.

Waiver "is the voluntary relinquishment of a known right." *Cornerstone Equipment Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 909, 247 P.3d 790, 796 (2011), citing *Seattle-First National Bank v. Westwood Lumber Int'l.*, 65 Wn. App. 811, 826, 829 P.2d 1152. Waiver is an "equitable principle that can apply to defeat someone's legal rights where the facts support an argument that the party relinquished their rights by delaying in asserting or failure to assert an otherwise available adequate remedy." *Albice v. Premier Mtg. Services of Washington, Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012). Waiver may be express or implied. *Vehicle/Vessel LLC v. Whitman County*, 122 Wn. App. 770, 778, 95 P.3d 394 (2004), citing *Jones v. Best*, 134 Wn. 2d 232, 241, 950 P.2d 1 (1998). SEA reasonably relied on the District's

participation in the matter with the understanding that the grievances would be arbitrated. **CP 267.**

## **VI. CONCLUSION**

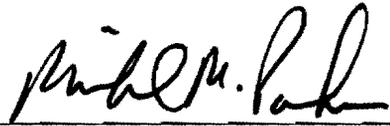
Based upon the facts and arguments set forth above, the trial court erred in prohibiting the arbitration of grievable issues presented by SEA on behalf of Easterling under the CBA. While the notice of nonrenewal issued to Easterling itself may not have been subject to arbitration under the CBA, the issues of progressive discipline, procedural irregularities in the grievance on the part of the District, claims of retaliation, and violation of FMLA are all grievable under Title VII, Section 6.(E) (Step 4) of the CBA and should be submitted to the arbitrator for determination.

Consequently, this court should reverse Judge Clark's order of March 1, 2013 granting an injunction in favor of the District and prohibiting SEA from arbitrating the grievances under the CBA. SEA requests this court enter an order removing the injunction as to all grievances except nonrenewal and that said grievances be subject to arbitration.

Dated this 15<sup>th</sup> day of July, 2013.

Respectfully submitted:

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