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DIVISION III
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No. 315223-III

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

SPOKANE SCHOOL DISTRICT NO. 81

Respondent,

vs.

SPOKANE EDUCATION ASSOCIATION,

Appellant.

RESPONDENT SCHOOL DISTRICT'S RESPONSE BRIEF

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I. INTRODUCTION

The Spokane Education Association (“SEA”) seeks to arbitrate a grievance challenging a provisional employee nonrenewal even though the SEA promised not to do so by the express language in its Collective Bargaining Agreement (“CBA”) with the Spokane School District (“District”). Provisional teachers are teachers in their first three years on the job and are not subject to the same continuing contract laws as “tenured” teachers. The SEA’s arguments are contrary to well-established law, clear language, and the SEA’s own submittals.

The SEA first argues that arbitrability of the Grievance should be decided by an arbitrator rather than by the trial court. The SEA’s position is directly contrary to long-standing state and federal law.

Second, the SEA argues that its challenge to the District’s nonrenewal of the provisional employee is subject to arbitration as a substantive matter. The face of the Grievance says: “**The non-renewal/non-retention of Nikki Easterling ... is what is being grieved.**” The governing CBA says “**nonrenewal of provisional employees**” and “**nonrenewal or discharge matters**” are not subject to arbitration.

Finally, the SEA argues that the Grievance does not just challenge the nonrenewal of the provisional employee, but somehow raises “other issues” that are subject to arbitration. Again, the SEA position is contrary

to the face of the Grievance and the CBA. The Grievance states on its face that the “other issues” (in particular, whether the nonrenewal was “retaliatory” and contrary to “progressive discipline”) are merely the SEA’s **grounds** for challenging the nonrenewal. Moreover, certain other issues (in particular whether the District violated law or policy) are specifically precluded by the CBA provision that limits a grievance to an alleged violations of a **specific term of the CBA** or regarding an **interpretation of the CBA**.

In all, the trial court properly held that SEA’s arguments are contrary to indisputable law, the face of the Grievance itself, the SEA’s own submittals, and unassailable language in the CBA.

II. ASSIGNMENTS OF ERROR

RAP 10.3(g) provides that: “A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” The SEA’s Opening Brief of Appellant (“Opening Brief”) fails to clearly identify the claimed errors at issue. In particular, it is not clear whether the SEA contests Finding/Conclusion II.A (CP 410) pertaining to whether the trial court properly decided arbitrability, and whether the SEA contests

Finding/Conclusion II.B.2 (CP 411) as to the SEA's own characterization of the Grievance. The District thus, respectfully, requests this Court not review any claimed error as to those two "Assignments of Error".

II. STATEMENT OF THE CASE

A. The Nonrenewal.

On May 9, 2012, the District issued to Ms. Easterling a notice of nonrenewal of her provisional teacher contract. CP 150. The reasons for the nonrenewal were Ms. Easterling's persistent late arrival, inappropriate absences, and lack of responsiveness to administrator requests. *Id.* Ms. Easterling admitted in her Declaration below, at paragraph 19, that she received the notice of nonrenewal "in the mail" on May 11th. CP 255. Ms. Easterling also admits that well prior to May 11th, on May 3rd, the District had given her notice of her pending nonrenewal, and also gave her the opportunity to resign in lieu of being nonrenewed. *Id.* These facts, in submittals from the SEA, clearly show that the District had made the nonrenewal decision and actually issued the nonrenewal notice to Ms. Easterling in advance of May 11, 2012.

Not only had the District made the nonrenewal decision in advance of May 11th, the District also, as mentioned, gave Ms. Easterling the opportunity to resign in lieu of being nonrenewed, several days prior. CP 320-21. The District had an agreement and longstanding practice with the

SEA to allow provisional employees to resign in lieu of being nonrenewed. *Id.* Mr. Michael Boyer, who filed the grievance on behalf of Ms. Easterling, was aware of this agreement, as clearly demonstrated by his own statement in paragraph 3 of the original Grievance prepared by him (CP 278). That paragraph shows that Mr. Boyer was aware of the District's agreement with the SEA, to allow provisional employees to resign instead of being nonrenewed.

Indeed, the District has had a long history of giving provisional employees the opportunity to resign in lieu of being nonrenewed. CP 320-21. For the 2011-12 school year, the District gave seven provisional employees the opportunity to resign in lieu of being nonrenewed. *Id.* The SEA leadership expressly approved of the District's decision to allow those employees the opportunity to resign instead of being nonrenewed. *Id.* Six of the seven provisional employees did resign. Ms. Easterling is the only one who did not. *Id.*

The reason for allowing provisional employees to resign rather than be nonrenewed is because the District recognizes that provisional employees (who have not been with the District for more than 3 years) may not be a "good fit" for the District, but might nevertheless have potential to be a satisfactory employee in a different position, with a different employer or with further training. *Id.* Rather than these

employees (most of whom are at the beginning of their newly chosen careers) forever enduring the label of being “nonrenewed,” the District gives these employees the opportunity to resign. *Id.*

B. The CBA.

The trial court correctly held the express terms of the CBA preclude arbitration of any District decision to nonrenew a provisional employee and of any nonrenewal matters. CP 109-110. Still, provisional employees such as Ms. Easterling are not without recourse. They may contest the nonrenewal through statutory procedures under RCW 28A.405.220.¹

The CBA language that expressly precludes arbitration of provisional nonrenewals and nonrenewal matters states as follows:

Section 3 – Limitations on Grievances

Non renewal of provisional employees and matters relating to evaluation and placement of employees on probation shall be grievable only through Step Three of the grievance procedure. Such grievances shall pertain solely to alleged procedural discrepancies. Following Step Three of the grievance procedure, nonrenewal of provisional employees, matters relating to evaluation, placement of employees on probation, and non renewal or discharge matters shall be governed and controlled by the rights, procedures, and remedies afforded by statute.

¹For reasons known only to them, Ms. Easterling and her union representatives failed to pursue the statutory relief within the ten day time line.

CP 109-110 (emphasis added).²

The Limitations section thus includes three simple sentences that mean what they say. The first sentence says that nonrenewal of provisional employees and matters relating to evaluation shall be grievable only through Step Three of the grievance procedure. This means a grievance that challenges a provisional employee's nonrenewal, or that challenges an evaluation matter, is simply not arbitrable. The second sentence says that grievances challenging provisional nonrenewals or matters relating to evaluation shall be grievances that pertain solely to alleged procedural discrepancies. This means that the nonrenewal of provisional employees is not even grievable (let alone subject to arbitration) unless it pertains to procedural discrepancies. So, a provisional employee cannot even grieve—let alone arbitrate—a substantive challenge to a nonrenewal.

The third sentence hammers this point home. It says that “Following Step Three of the grievance procedure, nonrenewal of provisional employees, matters relating to evaluation, and non renewal or discharge matters shall be governed and controlled by the rights, procedures, and remedies afforded by statute.” (Emphasis added). This

² The CBA's grievance procedure provides three internal steps to resolve grievances, subject to the above-quoted “Limitations on Grievances” section. The fourth step (outside of the District) is arbitration. CP 111.

last sentence means the parties discussed, acknowledged, and agreed that challenges to nonrenewals, evaluation matters, procedural discrepancies, and nonrenewal matters all have a separate **statutory** set of procedures and remedies, under RCW 28A, that can be utilized and that **shall** govern **instead of arbitration.**

In three simple sentences, the Limitations section of the CBA manifests a promise made by the SEA not to pursue arbitration of provisional employee nonrenewals, evaluation matters, procedural discrepancies, and nonrenewal matters.

In addition to the above, the parties defined grievances to include only “an alleged violation of a specific term of this Agreement or a dispute regarding an interpretation of the Agreement.” CP 109. This means the parties precluded grievances that allege violations of matters outside the terms of the Agreement or matters not involving an interpretation of the Agreement. Thus, a grievance could not allege violation of policy or law, because an alleged violation of policy or law is not an alleged violation of a specific term of the Agreement.

The inability to arbitrate provisional teacher nonrenewals is not only expressly stated by the CBA, it is also consistent with the parties’ lengthy past practice and course of dealing. CP 190. This prohibition against arbitration of provisional nonrenewal matters has existed in the

various CBA's between these parties for nearly two decades, at least (despite re-negotiations which have occurred at least every three years). *Id.* And over at least that same time period, until now, **SEA has never once sought arbitration of any provisional nonrenewal matter.** *Id.* at 190 & 195.

Not only is the past practice of the parties consistent with the express preclusion of arbitration here, it is revealing that the SEA has recently made proposals to the District during collective bargaining sessions that would delete the above-quoted Limitations section, and also otherwise change the CBA in order to allow arbitration of provisional nonrenewals—all in obvious recognition that the CBA currently precludes just this type of grievance, much less arbitration of it. CP 200-210.

C. The Grievance.

Despite the CBA preclusion of arbitration for provisional nonrenewals, the SEA submitted the Grievance challenging the District's provisional nonrenewal of Ms. Easterling. CP 278-79. On its face, the Grievance expressly alleged: **"The non-renewal/non-retention of Nikki Easterling ... is what is being grieved."** *Id.* The SEA subsequently demanded that the Grievance (after it was amended) be submitted to arbitration, using the American Arbitration Association ("AAA"). CP 158.

The SEA filed the original Grievance on May 11, 2012, the same day that Ms. Easterling received her nonrenewal notice in the mail. CP 255. The SEA later amended the Grievance on May 16, 2012, after the District had a meeting with Ms. Easterling and her union representative regarding her nonrenewal. CP 20. The Grievance was amended to add an alleged procedural discrepancy. CP 266. It is the Amended Grievance that the District refers to as the “Grievance” here.

Again, the original Grievance was filed by Mr. Boyer on behalf of Ms. Easterling on May 11, 2012. CP 278. In that original Grievance, Mr. Boyer admitted in paragraph 3 at the top of page 2 (CP 279) that, as of the date of filing that Grievance, Ms. Easterling and the SEA both knew Ms. Easterling’s “non-renewal/non-retention” was “in the planning stages by the District.” The Grievance thus makes clear that it was the planned and anticipated nonrenewal that was “being grieved.” Ms. Easterling admitted in her Declaration at paragraph 19 that she received this notice of nonrenewal “in the mail” on May 11th. CP 255. Ms. Easterling also admitted that, almost two weeks prior to May 11th, on May 3rd, the District had given her notice of her pending nonrenewal and also gave her the opportunity to resign in lieu of being nonrenewed. *Id.* These facts, in submittals from the SEA, clearly show that the District had made the

nonrenewal decision and actually issued the nonrenewal notice to Ms. Easterling in advance of the District's receipt of the May 11 Grievance.

It is difficult to know why the SEA presses hard in its Opening Brief to establish that the Grievance was filed before Ms. Easterling received her nonrenewal notice. The SEA seems to want to argue that the District nonrenewed Ms. Easterling solely in order to avoid the Grievance. Opening Brief at 27. How the District could have intended to avoid a Grievance it did not know existed remains a mystery.³

In any event, the face of the Grievance makes abundantly clear that it was and is a challenge to Ms. Easterling's "nonrenewal/nonretention." CP 21. The SEA also asserts that the Grievance includes other issues. Opening Brief at 25. It is difficult to pin down exactly what "other issues" are still being asserted by the SEA, since the SEA's Opening Brief is hardly precise. As best the District can tell, the SEA loosely characterizes those "other issues" to include that: (1) the nonrenewal was retaliatory; (2) the nonrenewal failed to follow progressive discipline procedures; (3) the District did not follow procedural requirements for processing the nonrenewal; (4) the District did not follow notice requirements under the federal Family Medical Leave Act. The SEA previously asserted that the

³Recall also that Ms. Easterling's own Declaration at CP 255 admits that the District first told her of her impending nonrenewal on May 3rd (over a week prior to the May 11th receipt of the Grievance by the District) in order to allow her to resign.

Grievance also alleged that the nonrenewal failed to “utilize the Evaluation system” and failed to follow “District policy.” The SEA appears to have dropped those assertions since they are nowhere mentioned in the SEA Opening Brief.

As to the first two “other issues,” it is important to emphasize that the CBA precludes any grievance of nonrenewals and nonrenewal matters unless based on a procedural discrepancy (and even then the challenges are not subject to arbitration). Grieving the nonrenewal on the alleged ground that it was retaliatory or that it failed to follow progressive discipline concepts, is nothing more than grieving the substantive basis for the nonrenewal. As such, when the SEA says that the Grievance includes “other issues” such as progressive discipline and retaliation, the SEA is actually asserting nothing more than that those grounds form a basis for substantively challenging the nonrenewal. In other words, progressive discipline and retaliation are not really “other issues” in addition to the SEA’s nonrenewal challenge, they are the very substantive reasons for the SEA’s nonrenewal challenge.

The face of the Grievance makes this clear. At the top of page two of the Grievance, the Grievance says: “It is the belief of the Grievant that any attempt by the District to non-renew/retain her is retaliatory and violation of both the CBA and the laws in the State of Washington that

make it illegal to retaliate for and engaging in protected union activities under RCW 41.59 et.seq. as well as Article IV, Section 22 [Progressive Discipline].” CP 21. As wordy as this sentence is, it nevertheless makes clear on its face the substantive basis for the Grievance—i.e., that the nonrenewal is allegedly retaliatory and contrary to progressive discipline process.

As to the SEA’s contention that the Grievance alleges “procedural discrepancies” related to Ms. Easterling’s nonrenewal, and thus the Grievance should be arbitrable, the Grievance alleges a procedural discrepancy regarding Ms. Easterling’s nonrenewal due to the principal’s failure to attend a conference regarding her nonrenewal. CP 21. The purpose of the conference was to discuss Ms. Easterling’s nonrenewal. CP 322. The CBA does not contain any requirement for the principal to attend the conference at issue, (the CBA, at Article VII, Section 6.B, states that “the Principal or Supervisor shall **arrange the conference** to discuss the grievance”---CP 110). Still, even if it were a procedural violation of the CBA, the “Limitations” section of the CBA precludes arbitration, because “procedural discrepancies” are expressly limited to Steps 1 through 3 and thus not subject to arbitration (Step 4). CP 109.

As to the final “other issues” in the Grievance, the SEA asserts that the Grievance alleges violations of law and policy. The Grievance itself

does allege that the nonrenewal is in “violation of RCW 41.59 et. seq.”, that the nonrenewal was a “[v]iolation of the grievant’s “state and federal FMLA rights”, and that the nonrenewal violated the District’s anti-bullying policy.” CP 21-22 (Grievance, p. 2, ¶ 2, p. 3, ¶ 3, and p. 3, ¶ 4). Again, however, these types of assertions are nothing more than substantive grounds for challenging the nonrenewal. The face of the Grievance makes this clear when it says: “It is the belief of the Grievant that any attempt by the District to non-renew/retain her is ... in violation of ... laws in the State of Washington” CP 21. Thus, the “other issues” raised by these allegations do nothing other than assert alternative substantive grounds for challenging the provisional nonrenewal.

Beyond the above, the CBA also makes clear that alleged violations of law are not a basis for a grievance, let alone a basis for seeking arbitration. Again, the CBA limits grievances to “an alleged violation of a specific term of this Agreement or a dispute regarding an interpretation of the Agreement.” CP 109. An alleged violation of the FMLA or of any other law is not an alleged violation of a specific term of the Agreement or a dispute regarding an interpretation of the Agreement.

D. The Merits of the Grievance.

As explained to the trial court below, the merits of a Grievance are not relevant to a determination on arbitrability. Instead, the court’s

determination of arbitrability is to be based purely on **the face of the Grievance**. In the proceeding below and in its Opening Brief, the SEA nevertheless presents numerous alleged tales of woe that are nothing other than transparent attempts to address the merits of the underlying Grievance and to improperly prejudice the Court.

By way of example, the SEA makes four spurious and desperate factual allegations in its Opening Brief, each of which attempts to argue the merits and each of which is nothing more than a transparent attempt to prejudice the Court. First, the SEA's Opening Brief asserts that Ms. Easterling supposedly expressed concerns to her Principal about the Principal's alleged failure to comply with 504 accommodations for students. CP 1. Second, the Opening Brief asserts four examples of how the Principal supposedly misrepresented the purpose of a permission slip, failed to inform a parent of a meeting, wrongly approved a student test, and forced Ms Easterling to draft a plan without parental consent. *Id.* at 5-6. Third, the Opening Brief includes an elaborate tale about the Principal's behavior after Ms. Easterling returned from bereavement leave. *Id.* At 7-8. Fourth, the Opening Brief includes a ridiculous assertion that Ms. Easterling "was assigned to the dunk tank" by her Principal. Opening Brief at 11.

These improper allegations of the underlying merits are, in every respect, disputed by the District, and irrelevant. And, to the point of the issue here, the allegations nowhere appear on the face of the Grievance. First, as to the Ms. Easterling's supposed expressions of concern, the face of the Grievance includes a single reference to a single statement made to "staff members" followed by Ms. Easterling's supposed "concerns" about 504 accommodation requests. The face of the Grievance, however, contains not one assertion that Ms. Easterling expressed any concerns to her Principal. Second, the face of the Grievance contains not one of the four examples asserted in the Opening Brief. Third, the face of the Grievance contains not one statement about bereavement leave. And, finally, there is no reference whatsoever anywhere in the Grievance to Ms. Easterling's Principal assigning her to the dunk tank.⁴ The elaborate tales of woe asserted in the Opening Brief are simply not in the Grievance.

Moreover, the SEA filed the Grievance knowing it had no evidence of retaliation. Mr. Boyer admitted to the District's Chief Human Resources Officer that he did not have any "proof" of the allegations, but that he had "supposition" and was confident he would get proof. CP 322.

⁴ The District feels compelled to respond to this defamatory allegation since the SEA knows full well that Ms. Easterling was never assigned to sit in the dunk tank despite the assertion in her Declaration—CP 255, 333. Rather, she was assigned to take tickets at the dunk tank booth. And, her Principal played no role in her assignment to take tickets—the event was entirely organized by the parent teacher organization.

It bears repeating that Mr. Boyer openly admitted to the District's Chief Human Resources Officer that he filed the underlying grievance without any actual evidence or proof of retaliation.⁵

E. AAA's Directive.

Despite all of the above, the SEA demanded arbitration of the Grievance. CP 157. The American Arbitration Association ("AAA") responded to the SEA's demand by directing the parties to select an arbitrator. CP 164. AAA does not make arbitrability decisions and merely serves an administrative function, directing the parties to participate in an arbitrator selection process. CP 167-69. Should either party refuse to participate in that arbitrator-selection process, depending on how the Arbitration demand is filed, AAA could proceed to appoint an arbitrator, without input from that party. CP 26. That arbitrator would then conceivably issue orders potentially adverse to the party that disputes arbitrability—the District in this case. *Id.*; *see also* CP 164. The SEA's demand for arbitration is the activity the District sought to prevent, by its Petition for Declaratory Judgment and Injunctive Relief.

⁵ To date, Mr. Boyer has presented no evidence of any retaliation. Indeed, he also filed an Unfair Labor Practice ("ULP") charge against the District three days after learning that the District had obtained a Temporary Restraining Order in this case. CP 322. PERC dismissed the unfair labor practice charge, issuing what is called a "deficiency notice" because the charge was so lacking of specific evidence that "it was not possible to conclude that a cause of action existed at that time." CP 323

F. Alleged Waiver.

The SEA asserts that the District voluntarily relinquished its right to contest arbitrability of the Grievance. However, at the very first conference to discuss Ms. Easterling's nonrenewal, the District contested arbitrability. CP 323. In particular, the District pressed Mr. Boyer to demonstrate how the Grievance was grievable or arbitrable, given the "Limitations" provision in the CBA. *Id.* This may have been the first time Mr. Boyer was even aware of the "Limitations" provision. In any event, Mr. Boyer's only response to the District was a threat that he would make sure an arbitrator would be the one who ruled on arbitrability, and that, in effect, the District would have to spend money on its legal counsel to go all the way to an arbitration hearing before a decision on arbitrability would be rendered. *Id.*

Indeed, Mr. Boyer subsequently followed up on this threat with an email dated June 15, 2012. In that email, Mr. Boyer stated:

One more quick point...**the district can certainly continue to assert that Nikki's grievance is somehow not arbitrable**...but if the SEA wants the matter to go to arbitration it WILL go before an arbitrator. We have previously had districts think that they could somehow avoid the process of arbitrator decision making. In such cases we simply bring the cases in front of the arbitrator ourselves (without the district in the room). Then if the district tries to avoid the ruling, we go to court to enforce the arbitrators [sic] ruling and request remuneration of legal costs associated.

CP 310 & 313 (Emphasis added).

The District thus asserted, at its very first opportunity after the Grievance was filed, that the Grievance was not arbitrable.

The SEA, however, also argues that the District waived its right to contest arbitration by participating in the AAA arbitrator appointment process. The SEA, however, did not initially ask AAA to appoint an arbitrator. CP 316. Rather, the SEA asked AAA to provide lists of arbitrators to the parties. *Id.* Based on that request, AAA did not have any authority to actually appoint an arbitrator and told the parties just that. *Id.* The District thus struck names from the lists provided by AAA based on its position that the matter was not arbitrable and AAA would not appoint an arbitrator in any event. *Id.* After Mr. Boyer realized that the District would not willingly agree to an arbitrator, he changed his request and asked AAA to actually appoint an arbitrator if the parties were unable to mutually agree on an arbitrator. *Id.* At 316-17. It was at that point when the District immediately moved forward with obtaining injunctive relief because, at that point, the District was about to be subjected to arbitration. *Id.*

III. ARGUMENT

A. Standard of Review.

Granting an injunction is addressed to the sound discretion of the trial court based on the circumstances of each case. *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wash.2d 623, 628, 989 P.2d 524 (1999); quoting *Washington Fed'n of State Employees, Council 28 v. State*, 99 Wash.2d 878, 887, 665 P.2d 1337 (1983). A trial court has “broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it. Appellate courts give great weight to the trial court's exercise of that discretion. *Brown v. Voss*, 105 Wash.2d 366, 372, 715 P.2d 514 (1986). Accordingly, this court’s review of the trial court’s decision is solely for an abuse of discretion.

B. Arbitrability is for the Court to Decide.

While difficult to know for certain, the SEA seems to continue to take the baffling position that arbitrability of the underlying grievance is a decision to be made by an arbitrator rather than by the Court. Opening Brief at 17 (“That is clearly for the arbitrator to determine the arbitration process ...”). This was the position taken by the SEA in its Summary Judgment Response Memorandum at page 11 (CP 300) where the SEA

says “the arbitrator should be deciding the issue of whether the grievance is arbitrable, not the courts.”

The SEA could not be more incorrect. The United States Supreme Court, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964), stated that there is “no doubt” that arbitrability is a question was for the courts. According to the Supreme Court, whether or not an employer is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court on the basis of the contract entered into by the parties. *Id.* at 546-47 (citations omitted).

In *Paper, Allied–Industrial Chemical and Energy Workers Intern. Union, Local 4–12 v. Exxon Mobil Corp.*, 657 F.3d 272, 277 (5th Cir. 2002), the court stated:

The Supreme Court observed that “[w]hether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court, and a party cannot be forced to ‘arbitrate the arbitrability question.’” The Supreme Court expressly held in *Litton* that “we must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement.” . . .

...

We followed *Litton* in *Local Union No. 898 of the International Brotherhood of Electrical Workers v. XL Electric, Inc.*, holding that “the question of arbitrability is

a question for the court ... even if answering the arbitrability question requires a construction of the contract. Other circuits have taken a similar approach (footnotes omitted; emphasis added).

Washington courts have consistently and conclusively ruled the same. Whether a party is subjected to arbitration is a question for the *courts*, unless the parties to the labor agreement “*clearly and unmistakably provided otherwise.*” *Mount Adams Sch. District v. Cook*, 150 Wn.2d 716, 724, 81 P.3d 111 (2003) (citations omitted; emphasis added).

The SEA seems to rely on *North Beach Educ. Assn. v. North Beach Sch. Dist.*, 31 Wn.App. 77, 639 P.2d 821 (1982) for its position. Opening Brief at 17. The SEA, however, appears to completely misunderstand that case, as *North Beach* stands for the very proposition asserted by the District here – that the court decides arbitrability of procedural and substantive grievance allegations. The court in *North Beach* did exactly that. At page 79, the court pointed out that “under the fact pattern presented in this case, RCW 28A.67.072 does not preclude arbitration of grievances outside the final nonrenewal decision.” That is, the *court* (not an arbitrator) there held that the grievances presented were arbitrable. Arbitrability was decided by the court – not by the arbitrator.

North Beach thus stands for the exact proposition asserted by the District, and the exact opposite proposition asserted by the SEA.

C. Procedural Discrepancies are also for the Courts to Decide.

The SEA also seems to make a faulty assertion that the arbitrability of alleged “procedural violations” related to Ms. Easterling’s nonrenewal should be decided by an arbitrator rather than by the judiciary.⁶ The SEA, however, completely misunderstands the difference between a grievance that alleges procedural violations versus an employer’s procedural defenses to arbitrability (i.e., the defense of waiver or missed time lines). As to the latter, courts uniformly hold that those types of procedural defenses by the employer are to be determined by the arbitrator, instead of the courts. For instance, in *Heights at Issaquah Ridge, Owners Ass’n v. Burton Landscape Group, Inc.*, 148 Wn.App. 400, 406, 200 P.3d 254 (2009), the court held that the arbitrator should decide “allegations of waiver, delay, or a like defense to arbitrability” (citing *Yakima County*, 133 Wn.App. at 288 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983))).

Moreover, a grievant’s allegations of procedural violations of the CBA are not to be determined by an arbitrator, any more than allegations

⁶ The main procedural discrepancy asserted by the SEA is the principal’s failure to attend a meeting. CP 21. Another procedural discrepancy is the District’s alleged failure to use progressive discipline procedures and evaluation procedures. *Id.*

of substantive violations of the CBA. Indeed, the SEA provides absolutely no authority for any such a proposition in the face of the numerous and uniform authorities cited by the District. The SEA does not even address the United States Supreme Court's statement of the rule that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court" *John Wiley & Sons, Inc. v. Livingston*. 376 U.S. 543, 547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) (emphasis added). Again, this is well-established authority from more than twenty-five years ago and it clearly stands for the proposition that the arbitrability of the allegations in a grievance is to be determined by the Court, not by an arbitrator.

In all, the SEA presents this Court with an argument that flies in the face of clear, longstanding legal authority. The District cannot be forced to have an arbitrator decide the question of arbitrability unless the District clearly and unmistakably agreed to do so. This principle is true whether the Grievance is based on substantive allegations about the nonrenewal being discriminatory/retaliatory or whether the Grievance is based on procedural allegations, such as a principal not attending a meeting or not using progressive discipline procedures. The SEA provides no authority to the contrary.

D. The CBA Precludes Arbitration of All Nonrenewal Matters.

Once it is established that the Court determines arbitrability, the next issue is, indeed, whether the Grievance is arbitrable. The Washington Supreme Court instructs that courts look at the Grievance “on its face” to determine if it is arbitrable. *Peninsula Sch. Dist. No. 401 v. Public Sch. Employees of Peninsula*, 130 Wn.2d 401, 413, 924 P.2d 13 (1996) (quoting the “*Steelworkers Trilogy*”).

On its face, the Grievance is a challenge to the nonrenewal of a provisional employee. The Grievance says so: **“The non-renewal/non-retention of Nikki Easterling ... is what is being grieved.”** The CBA’s prohibition on arbitration of this Grievance is no less clear: **“Nonrenewal of provisional employees ... shall be grievable only through Step Three of the grievance procedure.”**

The SEA has offered no explanation for how arbitration could be allowed here. Rather than address the issue, the SEA seems to avoid it and equivocate as to it. Several times, the SEA nearly concedes in its Opening Brief that the CBA “may” preclude its Grievance challenging the nonrenewal. What exactly that means is unclear. If ever a “triple dog dare” were justified in a Response Brief, this would be it. The District thus dares the SEA to clearly identify in its Reply Brief whether it: (1) finally concedes that the CBA prohibits its challenge to the Ms.

Easterling's nonrenewal; or (2) refuses to concede that point at risk of sanctions.

Absent a concession by the SEA that the CBA prohibits any substantive challenge to the nonrenewal, the District seeks an award of attorney fees pursuant to RAP 18.9(a). That Rule permits an award of attorney fees when the opposing party files a frivolous appellate action. *Reid v. Dalton*, 124 Wash.App. 113, 128, 100 P.3d 349 (2004). An appeal is frivolous when "there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Fay v. N.W. Airlines, Inc.*, 115 Wash.2d 194, 200-01, 796 P.2d 412 (1990). Here, the SEA's own Grievance states on its face that it challenges the nonrenewal. The CBA, on its face, precludes arbitration of such grievances. Moreover, the District notified the SEA at the very first meeting to discuss the Grievance that the CBA precluded arbitration. The SEA representative, Mr. Boyer, responded that he did not care and that he would force the District to spend money on its legal counsel to go all the way to an arbitration hearing before a decision on arbitrability would be rendered. CP 323. The SEA has persisted in pursuing arbitrability despite having absolutely no basis for doing so.

E. The CBA Precludes Arbitration of All Other Issues.

The SEA asserts that the Grievance raises other issues in addition to the prohibited challenge to the nonrenewal. While the Grievance does raise other issues, on its face, those other issues present nothing more than reasons or grounds for challenging the nonrenewal. The SEA goes to great pains to try to fill in the blanks of the Grievance by providing 10 pages or so of additional alleged facts in the Statement of the Case. None of those facts, however, are set forth on the face of the Grievance. Thus, none of those facts are relevant. The only relevant facts are those on the face of the Grievance.

The SEA has been a moving target in terms of what issues it says are arbitrable. If one were to give the SEA the benefit of the doubt, it seems the SEA now asserts four “other” issues in the Grievance: (1) the nonrenewal was retaliatory; (2) the nonrenewal was contrary to progressive discipline provisions of the CBA⁷; (3) the nonrenewal was subject to procedural discrepancies; and (4) the District violated state and federal FMLA rights. Opening Brief at 9, 21, & 38.

⁷ The SEA originally asserted that the nonrenewal was contrary to evaluation provisions as well, but now seems to have dropped that argument since it shows up nowhere in the SEA Opening Brief.

1. Retaliation/Progressive Discipline.

As to the first two “other issues,” it cannot be emphasized enough that the CBA precludes arbitration for challenges to “nonrenewals” and challenges to “nonrenewal matters.” Challenging the nonrenewal on the alleged ground that it was retaliatory or that it failed to comport with progressive discipline is nothing more than a challenge to the nonrenewal. And, that is exactly what the Grievance here does. The Grievance challenges the nonrenewal on the alleged ground that it was retaliatory and that it failed to comport with progressive discipline.

In particular, at the top of page two of the Grievance (CP 21), the Grievance says on its face: “It is the belief of the Grievant that any attempt by the District to non-renew/retain her is retaliatory and violation of both the CBA and the laws in the State of Washington that make it illegal to retaliate for and engaging in protected union activities under RCW 41.59 et.seq. as well as Article IV, Section 22 [entitled Progressive Discipline].” As wordy as this sentence is, it nevertheless makes clear on its face that the Grievance is challenging the nonrenewal on the basis that the nonrenewal is retaliatory and contrary to progressive discipline. If a more pithy version of this point is needed, in the last paragraph on page 2 of the Grievance (CP 21), the face of the Grievance says “the nonrenewal was for retaliatory reasons” and that the nonrenewal “should have been dealt

with through Article IV, Section 22 [Progressive Discipline].” What more is needed to establish that the face of the Grievance challenges the nonrenewal on the basis of retaliation and progressive discipline concepts? How, then, does the SEA take the position that assertions of retaliation and progressive discipline are anything other than assertions as to the “nonrenewal” itself, and certainly as to “nonrenewal matters”?

2. **Procedural Discrepancies.**

The SEA next contends that the Grievance alleges “procedural discrepancies” related to Ms. Easterling’s nonrenewal, and thus the grievance should be **arbitrable**. The main procedural anomaly alleged by the SEA is that Ms. Easterling’s principal failed to attend a meeting challenging her nonrenewal.⁸ In other words, the SEA alleges a procedural discrepancy regarding Ms. Easterling’s nonrenewal due to the principal’s failure to attend this meeting. Aside from the fact that the CBA does not contain any requirement for the principal to attend this conference, (the CBA, at Article VII, Section 6.B, states that “the Principal or Supervisor shall **arrange the conference** to discuss the grievance”), the purpose of the conference was to discuss Ms. Easterling’s nonrenewal. As such, even if it were a procedural violation of the CBA,

⁸ While not identified by the SEA as a procedural issue, the Grievance nevertheless alleges that the nonrenewal failed to comport with progressive discipline procedures and evaluation procedures.

the “Limitations” section of the CBA precludes arbitration based on the express language that “procedural discrepancies” are not subject to arbitration (they are, instead, limited to Steps 1 through 3 of the grievance process). CP 109-110.

Despite the simplicity and clarity of the above, the SEA seems to argue that this Court should find the Grievance arbitrable because the court in *North Beach* found the grievance there arbitrable – at least as to the “procedural discrepancies” alleged by the *North Beach* teacher’s union. Opening Brief at 15 & 17. The SEA, however, ignores one singular, dispositive factual difference between the *North Beach* case and this case: this case has an express “Limitations” provision that precludes arbitration of “procedural discrepancies” and the *North Beach* case has no such provision. The SEA wholly fails to address this crucial distinction between *North Beach* and the current case. *North Beach* simply does not apply because it does not discuss the dispositive issue in this case: the Limitation provision in the CBA itself.

3. Law and Policy.

As to the final “other issues” the SEA asserts violations of law and policy. The Grievance, on its face, does indeed allege violations of law and policy. As described above, however, the Grievance asserts that the nonrenewal is what caused the violations of law. Specifically, the

Grievance, on its face, alleges that “any attempt by the District to nonrenew/retain” Ms. Easterling is in “violation of RCW 41.59 et. seq.” that the nonrenewal was a “[v]iolation of the grievant’s “state and federal FMLA rights”, and that the nonrenewal violated the District’s anti-bullying policy.” CP 21-22 (Grievance, p. 2, ¶ 2, p. 3, ¶ 3, and p. 3, ¶ 4). Again, however, to the extent that the face of the Grievance is intelligible, these assertions are nothing more than grounds or bases seeking to challenge the nonrenewal. The face of the Grievance says: “It is the belief of the Grievant that any attempt by the District to non-renew/retain her is ... in violation of ... laws in the State of Washington ...” Thus, the issues raised by these allegations do nothing other than assert bases or grounds for challenging the nonrenewal.

Moreover, the CBA makes clear that alleged violations of law or policy (whether asserted as a basis for challenging the nonrenewal or as a standalone grievance) are not a basis for a grievance, let alone a basis for seeking arbitration. The CBA, in Article VII, Section 1.A (CP 109) expressly defines and limits grievances to mean only: “an alleged violation of a specific term of this Agreement or a dispute regarding an interpretation of the Agreement.” Alleged violations of Washington state labor law, FMLA law, and District policy are not alleged violations of a

specific term of the Agreement or disputes regarding interpretation of the Agreement.

The District pointed this out in its very first Brief to the court below, and the SEA has still not explained how the SEA can even file a grievance let alone ask for arbitration of a grievance that does not allege a violation of specific terms of the CBA and that does not assert a dispute regarding interpretation of the CBA itself. Instead, the SEA seems to try to circumvent the clear language of the CBA by asserting “catch-all” phrases in the CBA as a basis for asserting arbitrability of violations of the law and policy. In particular, the SEA relies heavily on the Preamble. Opening Brief at 23-24. This type of argument was rejected by the Fifth Circuit Court of Appeals in the *Baton Rouge Oil and Chemical Workers Union v. ExxonMobil Corp.*, 289 F.3d 373 (5th Cir. 2002). *Baton Rouge* rejected the arbitration of a grievance challenging a probationary employee’s discharge. 289 F.2d at 374-75. The union in *Baton Rouge* argued that catch-all phrases in the CBA provided for arbitration or at least created ambiguity. The Court rejected the union’s arguments and held “**we decline to rely on this catchall phrase** to create a right of arbitration that clearly does not exist under the terms of the CBA, and which would **explicitly conflict** with the CBA’s express provision allowing

ExxonMobil to discharge probationary employees ‘at will.’” *Id.* at 376-77 (emphasis added).

The SEA’s argument that the grievance alleges a violation of law and policies is nothing more than an end-run attempt around the CBA’s Limitations section. Notably, the SEA recently proposed in collective bargaining sessions a change to this provision so that it could grieve violations of law and policy. Obviously, the SEA believes the CBA does not currently allow such grievances, thus prompting the need, from SEA’s own perspective, for such a proposal. CP 200 & 204.

F. SEA’s Arguments Have Been Rejected.

The SEA’s arguments here have been fully analyzed and squarely rejected in a recent arbitration decision by the well-respected arbitrator, Kathryn Whalen, in *Selah Education Ass’n (Lindsay Griffin Grievance)*, AAA No. 75 390 L 00217 09 (2009).⁹ That decision is exactly on point for purposes of all factual and legal purposes in this case. CP 237.

In the *Selah* case, the arbitrator (rather than the court) was tasked with determining arbitrability because the parties there (unlike here)

⁹ While an arbitrator’s opinion is not mandatory precedent, it should be noted that Arbitrator Whalen is a highly-respected arbitrator and, obviously, was chosen by both the WEA and the District in the *Selah* case. In addition to serving as an arbitrator in Washington, Arbitrator Whalen serves on numerous permanent arbitration panels in Oregon, Montana and Alaska and is on several arbitration rosters, including AAA, Washington PERC’s List of Neutrals, the FMCS, and the Los Angeles City Employee Relations Board. CP 190, 197-98.

expressly consented in their collective bargaining agreement to the arbitrator making the arbitrability decision. CP 238 & 243. (“[P]arties may agree that an arbitrator can decide this question, as the Association and District have done in this case.”). It was done in that case based on a collective bargaining agreement provision stating: “If any question arises as to arbitrability, such question will first be ruled upon by the arbitrator selected to hear the dispute.” *Id.*

The collective bargaining agreement grievance provision in *Selah* stated:

“**Grievance**” is a claim by an employee, a group of employees, or the Association that there has been a violation, misinterpretation or misapplication of any provision of this Agreement to the detriment of the claimant and may be processed as a grievance as hereinafter provided.

Id. at 239. The agreement also contained the following provision: “The arbitrator shall have no power to alter, add to or subtract from the terms of this Agreement.” *Id.*

A nearly identical provision exists in the CBA at issue here. The provision here states: “The arbitrator shall limit his/her findings and decision solely to specific terms of this Agreement and application of such terms herein set forth. The arbitrator shall have no power to extend or

limit the Agreement beyond what the parties have agreed upon.” CP 111 (CBA, Article VII, Section 6(E)).

As with the CBA at issue in this case, the collective bargaining agreement in *Selah* contained a limitation provision regarding grievances:

The following are excluded from arbitration:

- A. Non-renewal of provisional employees;
- B. Non-renewal of contract;
- C. The termination of services or failure to reemploy any employee to a position on the supplemental salary schedule; and
- D. Discharge.

Id. at 240.

The grievant in *Selah* alleged “violations of contract sections concerning Definitions, Recognition, Status of the Agreement and Nondiscrimination.” *Id.* Another section relied upon by the Association, like here, was the Due Process section, which required “progressive discipline” with “nonrenewal or discharge as a final resort.” *Id.* at 240-41.

The grievance sought the following relief:

As relief, the Association requested: (1) reduction of discipline to the first step of progressive discipline (verbal warning); (2) reinstatement as a continuing contract employee for the 2009-2010 school year and destruction of the letter dated April 16, 2009 from Superintendent Howard regarding non-renewal; (3) immediate removal of employee from administrative leave so she may return to her teaching duties; and (4) any other remedy mutually agreed to by the parties or so ordered by an Arbitrator.

Id. at 242. In response to the grievance, the district in *Selah* did exactly what the District here has done. It denied the grievance on the ground that “non-renewal of provisional employees is specifically excluded from arbitration; and applicable Washington law provides the exclusive avenues/procedures for reconsideration of Grievant’s non-renewal.” *Id.*

Arbitrator Whalen recognized that the “critical question in this case is whether the parties specifically excluded arbitration as an available avenue, or remedy, for alleged contract violations that challenge non-renewal of a provisional employee like Grievant. As found above, the parties agreed exactly to such an exclusion” *Id.* at 244-45. Relying on the *Steelworkers Trilogy*, Arbitrator Whalen rejected the exact same arguments made by the Association in this case:

The Association argues the District’s non-renewal of Grievant is disciplinary and is a discharge under the terms of Article III, Section 5. As indicated above, the record here convinces me the District’s action was a bona fide non-renewal. The District followed its usual procedures and statutory notification requirements for non-renewal; not discharge. There is nothing in the parties’ Agreement that indicates non-renewal of a provisional employee cannot be for legitimate conduct-related reasons. (*Also see: Petroni v. Deer Park School District*, 127 Wash. App. 722, 729-733 (2005)). (Legitimate concerns with a provisional teacher’s conduct are a proper basis for non-renewal under Washington law.)

Id. at 245. The arbitrator also pointed out how common this type of exclusion is in school employment collective bargaining agreements,

noting that this provision in the Selah agreement had “been in the parties’ Agreement since the early 1980’s.” *Id.* The arbitrator also noted that the Association had “tried to negotiate this language out of the Agreement in following contract negotiations.” *Id.* at 246.

Arbitrator Whalen further noted the past history in Selah of no “prior arbitration of a non-renewal; or, for that matter, any grievances over District non-renewals. Consequently, there is nothing in the actions of the parties that is inconsistent with or contrary to the specific exclusionary language of [the Selah CBA].” *Id.* at 246-47.

This case is on “all fours” with Arbitrator Whalen’s carefully-considered *Selah* decision. Here, as in *Selah*, the CBA expressly removed from arbitration any matter related to nonrenewal of a provisional employee teacher, and the Association’s desperate, transparent attempt to confuse the argument by relying on other provisions of the agreement was rejected. Here, like there, the result was consistent with uniform, decades-long historical provisions in the parties’ agreed-upon CBA’s. As well here, like there, this result was consistent with the fact that the SEA had never before attempted to force the District into arbitration of a provisional employee nonrenewal. And finally here, like there, the SEA had recently attempted through negotiations, unsuccessfully, to remove the

controlling express contract provisions from the parties' CBA. CP 190, 200 & 204-210.

The SEA is expected to attack (and has attacked) Arbitrator Whalen's opinion in the *Selah School District* case for being non-precedent setting.¹⁰ The SEA, though, has thus far done nothing to actually distinguish the analysis utilized by Arbitrator Whalen. Arbitrator Whalen's opinion is a well-written, thorough analysis of the issue and – precedential or not – that analysis is on “all fours” with this case.

G. Summary of Preclusive Effect of the CBA.

At bottom, the Court is urged to ask itself if the SEA and School District here could have spelled out any more clearly that they intended to prohibit arbitration of the very Grievance presented here. How could the parties have said any more clearly that grievances challenging the nonrenewal of provisional employee are not subject to arbitration? And how could any result that allows arbitration here give any meaning to that provision? The parties hypothetically could have said, “And we REALLY

¹⁰ The SEA incorrectly cited GR 14 for the proposition that an unpublished opinion lacks precedential value. The Rule to which the SEA likely refers is GR 14.1. However, even that rule does not say what the SEA wants it to say. GR 14.1, applies to unpublished opinions of the Court of Appeals. It says: “A party may not cite as an authority an unpublished opinion of the Court of Appeals.” For good reason there is no prohibition, anywhere, for citation to the analytically careful, logical, and well-informed dispositions of identical matters by tribunals with original jurisdiction, whether that be a trial court or a highly-qualified arbitrator who is routinely agreed upon by unions and employers as a fair and neutral decision maker.

mean it,” but that level of silliness does not make the parties’ express promise to preclude arbitration of provisional nonrenewals any more clear—it just makes it more emphatic. Likewise, the parties could have repeated themselves by saying “Non renewal of provisional employees... shall be grievable only through Step Three of the grievance procedure. That means, the nonrenewal of provisional employees shall not be grievable after Step Three.” Again, though, that level of silliness does not make the parties’ intent any more clear, it just makes the intent redundant.

H. Under Injunctive Relief Standards, the District Has a Right Not To Be Subjected to Arbitration.

1. Clear Legal Right.

Stated in terms of injunctive relief standards, the District has a clear legal right not to be subjected to arbitration of a Grievance that is not authorized by the express terms of the CBA. Of the three elements necessary for issuance of a Preliminary Injunction, the first is that the District must have a clear legal or equitable right not to be subjected to arbitration. Here, the District has such a right because it has not agreed to arbitrate the Grievance and because the law is clear that “a party cannot be required to submit to arbitration any dispute to which he has not agreed to so submit.” *Meat Cutters Local No. 494 v. Rosauer’s Super Markets, Inc.*, 29 Wn.App. 150, 154, 627 P.2d 1330 (1981), *quoting Atkinson v. Sinclair*

Ref. Co., 370 U.S. 238, 241, 8 L.Ed 2d 462, 82 S. Ct. 1318 (1962); *see also Mount Adams School Dist. v. Cook*, 150 Wn.2d 716, 723, 81 P.3d 111 (2003) (where the parties “expressly or by clear implication” negated arbitration, the presumption of arbitrability does not apply).

The SEA asserts that equitable factors should be used by the Court in deciding whether the District has a protectable right. The factors listed by the SEA are however factors used for determining the appropriateness of issuing injunctive relief as a remedy for tortious misconduct, not as a remedy for enforcing a contractual promise. The “Scope Note” to the Restatement makes this abundantly clear.¹¹

In any event, the SEA points out that one of the factors for the Court to consider is the “character of the interest to be protected.” Opening Brief at 29. The District’s interest to be protected by issuance of injunctive relief is an interest in ensuring that its CBA is adhered to and that the SEA keeps its promises made in the CBA. The District obtained a valuable concession from the SEA by ensuring that it would not be subjected to provisional employee arbitrations. Allowing provisional employees to arbitrate nonrenewals would allow the employee “two bites

¹¹ The Scope Note says: “This Chapter deals with injunction as a remedy against ... torts.” The Scope Note goes on: “Among the torts, defined and discussed in the Restatement of this Subject, which are less frequently the subject of suit for injunction are: assault and battery; false imprisonment; wrongful arrest; negligent injuries to persons; harms caused by wild or vicious animals; misrepresentation and non-disclosure; malicious prosecution and abuse of process.”

at the apple,” by being able to arbitrate their nonrenewal and additionally being able to appeal their nonrenewal pursuant to statute under RCW 28A.405.220. The District addressed this important interest by bargaining the language in the “Limitations on Grievances” provision of the CBA. That is, the District prevailed upon the SEA, nearly 20 years ago, to promise that it would not arbitrate provisional employee nonrenewals, since provisional employees already have a statutory appeal process. At that time, the SEA agreed to this provision (and, no doubt, thereby obtained some reciprocal concession from the District). The SEA’s position in this case represents nothing less than the SEA going back on its promise. In short, the District’s interest to be protected here is an important one, negotiated decades ago in the exchange of labor bargaining, and one that this Court is indeed urged to weigh heavily as it determines whether to affirm the District’s requested relief.

The other equitable factors, again assuming *arguendo* that that they even apply, are equally favorable to the District. For instance, as to the relative adequacy of injunctive relief in comparison to other remedies, the District has no other remedies. The SEA says the matter can be resolved through arbitration Opening Brief at 29-30. This, of course, is circular logic and ignores that once the District is subjected to arbitration, it means the District would be subjected to a process to which it did not agree.

Moreover, it means the SEA would reap the benefits of arbitration despite not negotiating such benefits and, indeed, despite that the District obtained a precise, specific, and affirmative promise from SEA that it would not seek arbitration of such matters. For all SEA's hollow cries for equitable relief, there is no equity in forcing the District into a process that the SEA could have obtained through collective bargaining but instead expressly chose to forego.

The SEA also asserts, as a supposed equitable factor, the alleged "misconduct" of the District in supposedly using nonrenewal to "usurp" the purpose of the CBA. Opening Brief at 30 & 34. In the Grievance and in its Opening Brief, the SEA attempts to elaborate on this argument that the District should have disciplined Ms. Easterling instead of nonrenewing her and thus Ms. Easterling could have grieved her discipline. CP 21 and Opening Brief at 33. The District frankly questions whether the SEA fully appreciates the argument it makes. After all, the SEA essentially says the District should have issued discipline against one of its dues-paying members, a provisional employee, instead of giving that member an opportunity to resign without having been issued any discipline, and without having been subjected to nonrenewal. The District, however, did not issue discipline against Ms. Easterling for several reasons, not the least of which was that it had no obligation to do so. Moreover, the District

considered progressive discipline to be undeserved for this employee precisely because she was a provisional employee entitled to another chance in a different school district. CP 321. The District obviously did not believe that Ms. Easterling, as a provisional employee, deserved progressive discipline for her attendance issues (even though those attendance issues were a valid “reason” under RCW 28A.405.220 to be concerned about whether she should be given tenure status).¹² Moreover, a progressive discipline letter would have been subject to public disclosure under the Washington State Public Records Act.¹³ The SEA is urged to explain to this Court how that would be in Ms. Easterling’s interest and how the District engaged in “misconduct” as the SEA alleges, by sparing Ms. Easterling the embarrassment and potentially career-ending result that the SEA urges here. In all, the SEA’s argument is nonsense. Indeed, it is difficult to believe that the SEA’s own members would have anything to

¹² Under RCW 28A.405.220, a district need only have a “reason” for nonrenewal of the provisional employee. The District need not have “sufficient cause” and the employee need not even engage in misconduct rising to the level of discipline. See *Petroni v. Deer Park Sch. Dist.*, 127 Wn.App. 727, 113 P.3d 10 (2005).

¹³ In *Petroni, supra*, the Washington State Court of Appeals expressly acknowledged that the approach by the District here is in the interest of the provisional employee and hardly an indication of bad faith. In particular, the *Petroni* Court recognized that a nonrenewal decision (and even more so a resignation), as opposed to discipline or discharge, “prevents[s] adverse information from getting into [the provisional employee’s] file.” *Petroni*, 127 Wn.App. at 728. Moreover, the *Petroni* Court noted that written documentation of the reason for a school district’s concern about a provisional employee is, indeed, “a public record subject to disclosure.” *Id.* at 732.

do with the SEA if they knew what type of argument the SEA is actually making here.

Beyond the above and more to the point of injunctive relief standards, the SEA has not explained the logic of how its argument (that the District should have disciplined Ms. Easterling) has any bearing on whether the District had and has a clear right not to be subjected to arbitration of a grievance challenging a nonrenewal. If the District had decided to discipline Ms. Easterling (as the SEA contends it **should** have done) and then the District sought injunctive relief to prevent arbitration of a grievance challenging the actual discipline, the SEA might have a point. After all, issuance of an actual discipline letter would have been, hypothetically, subject to arbitration. However, the District did not issue discipline. Whether the SEA believes the District **should** have issued discipline, the District did not. As such, there is no discipline letter for the SEA to grieve. What the SEA grieves is a nonrenewal letter and that letter is not subject to arbitration by the express terms of the CBA.

The SEA next says that the hardship to the SEA is much greater than to the District because Easterling has no venue for airing her grievances. The SEA ignores that Easterling could have sought review of her nonrenewal through statutory procedures under RCW 28A.405.220. Moreover, the Restatement makes clear that the Court should look to

which party is actually responsible for the situation. See 4 Restatement of Torts §941 (“Insofar as one of the parties is responsible for the situation, that is an element which weighs against that party.”). There is no question that the SEA is the sole party responsible for this situation because, again, the SEA had every right and opportunity to encourage and assist Ms. Easterling in appealing her nonrenewal pursuant to RCW 28A.405.220. Why did the SEA and Ms. Easterling fail to take advantage of those rights? Did they miss the statutory timelines? Were they unaware of the “Limitations” section of the CBA? The SEA has never answered those questions. Moreover, had the SEA believed the “Limitations on Grievances” section of the CBA was manifestly unfair to its members (despite that the SEA agreed to that provision through collective bargaining), nothing precluded the SEA from proposing a change to the CBA in years prior. The SEA is solely responsible for this situation and has no basis for arguing equities or trying to lay blame on the District.

In all, there are simply no equitable factors favoring the SEA (or Ms. Easterling) here or precluding the fairness of issuing injunctive relief.

2. The District Has A Well-Founded Fear.

The second element necessary for injunctive relief is a well-grounded fear of invasion of the District’s right to not be compelled to arbitrate. This element has been easily established given that the SEA

already submitted an arbitration demand to AAA and AAA initiated the arbitrator-selection process. The SEA makes the illogical argument that the District does not have a well-grounded fear of invasion of its rights because “arbitration is preferred by the courts.” The SEA also seems to want to discuss its rights. Opening Brief at 35. The District has a difficult time responding to these arguments. They make no sense.

Once the District establishes a clear legal right, the inquiry turns to whether the District has a good reason to fear that its right will be invaded. The SEA’s argument does not even address this issue. As explained previously, the District’s clear legal right is the right not to be subject to arbitration. So, the appropriate question to be asked is: Does the District have a well-grounded fear of invasion of that right? Of course it does. Absent the injunction entered below, the District will be subjected to arbitration despite having established the right not to be subjected to arbitration. It could not be any more simple than that. The SEA’s failure to grasp such a simple concept is befuddling and, frankly, frustrating.

3. Arbitration Will Result in Substantial and Actual Injury.

The third element needed for injunctive relief is that the acts complained of will result in substantial and actual injury to the District. As explained above, if the SEA were allowed to arbitrate this dispute (and

thus every subsequent provisional nonrenewal), the District would be subject to provisional employees having “two bites at the apple” to appeal their nonrenewals. Provisional employees could both appeal through the statutory appeal process and they could arbitrate. That would cause substantial injury to the District simply by virtue of the fact that the District would be required to expend time and substantial human and economic resources (and attorney fees) processing and defending not only the arbitration proposed in this case, but countless others in the future, to which the District and SEA did not agree.

Moreover, were this Court to allow this grievance to proceed to arbitration, the Court would essentially provide provisional teachers in the Spokane School District with greater appeal rights than tenured, non-provisional teachers. Tenured, nonprovisional teachers are not allowed to arbitrate their nonrenewal or discharge. Instead, they must utilize the statutory appeal process applicable to them. CP 109-110. Allowing provisional employees to utilize both arbitration and a statutory appeal thus would provide provisional employees with greater appeal rights than nonprovisional employees. This again is directly contrary to the Legislature’s statutory scheme, which authorizes school districts to easily nonrenew certificated employees, like Ms. Easterling, when they are in their early and non-tenured years of employment.

In addition, as explained previously, absent the injunction entered below, the District would now be required to either agree to an arbitrator (under risk of the very waiver argument the SEA has tried to make here) or, if the District does not participate in AAA's arbitrator selection procedure, the District would subject itself to appointment of an arbitrator without input from the District.

Clearly, subjecting the District to arbitration would result in substantial and actual injury to the District.

I. The District Has Not Waived Its Right to Seek Injunctive Relief.

As mentioned above, the SEA asserts that the District somehow waived its right to seek injunctive relief because the District participated in the AAA "strike process" by striking names of arbitrators on lists provided to the District by AAA. As explained above, the record is undisputed that the SEA knew at the first meeting discussing the nonrenewal that the District believed the Grievance was not arbitrable. Mr. Boyer admitted this very point in an email (CP 313):

One more quick point...the district can certainly **continue to assert that Nikki's grievance is somehow not arbitrable...**

The District has never taken a position inconsistent with its original position, communicated to (and obviously understood by) Mr. Boyer.

The SEA also asserts waiver based on the District's participation in the AAA strike process. As explained above, Mr. Boyer's initial request of AAA was for nothing other than lists of arbitrators. The District's act of striking names was based on its position that the matter was not arbitrable. The District thus acted consistent with its position that the underlying grievance is not arbitrable.

Moreover, based on Mr. Boyer's request, AAA did not have any authority to actually appoint an arbitrator. CP 316. The District thus struck names from the lists provided by AAA based on its position that the matter was not arbitrable. The District struck names knowing that, based on Mr. Boyer's initial request of AAA for nothing other than lists of arbitrators, AAA would not appoint an arbitrator. *Id.* There is nothing about the District's act of striking names that indicates an unequivocal act of waiving its arbitrability argument. Indeed, the District acted consistent with its position that the Grievance is not arbitrable.

At the same time, the District was not in a position to seek injunctive relief. This is because AAA was not in a position to appoint an arbitrator based on Mr. Boyer's odd request to AAA. As such, the District was unable at that time to show a well-grounded fear of invasion of the right not to be subjected to arbitration (after all, the District would not be subjected to arbitration unless and until Mr. Boyer asked AAA to actually

appoint an arbitrator—something it had no authority to do based on Mr. Boyer's initial request).

After Mr. Boyer realized that the District would not willingly agree to an arbitrator, he changed his request to AAA and asked AAA to actually appoint an arbitrator if the parties were unable to mutually agree on an arbitrator. *Id.* It was at that point when the District immediately moved forward with obtaining injunctive relief because, at that point, the District was about to be subjected to arbitration and had a well-grounded fear of invasion of its right not to be subject to arbitration. Prior to that time, based on the requests Mr. Boyer made to AAA, there would never have been an appointment of an arbitrator by AAA and, again, the District would not have been able to demonstrate a well-grounded fear of invasion of its right not to be subjected to arbitration.

IV. CONCLUSION

The District conclusively demonstrated that it should not be required to arbitrate any aspect of the SEA's Grievance challenging the nonrenewal of Ms. Easterling. Arbitration would result in a clear invasion of the District's negotiated right to not be compelled to involuntary arbitration—arbitration the SEA expressly promised not to undertake. Moreover, the District has a well-grounded fear of invasion of its rights, which will result in substantial and actual injury. The District thus

requests that this Court uphold the trial court's Order for Preliminary Injunction.

DATED this 13th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies and declares at Spokane, Washington, under penalty of perjury under the laws of the State of Washington, this 13th day of August 2013, that on this day the above and foregoing Spokane School District's Response Brief was served on the following person(s), by the method(s) indicated, deliverable as indicated:

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