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IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION III
No. 355861

Appeal from Okanogan County Superior Court No. 14-2-00526-3

RYAN FRAZIER,

Plaintiff/Appellant

vs.

**STEVE QUICK and JANE DOE QUICK, husband and wife,
and OROVILLE SCHOOL DISTRICT NO. 410,**

Defendants/Respondents.

**RESPONSE BRIEF OF
DEFENDANTS/RESPONDENTS**

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I. INTRODUCTION

This appeal is based in large part on Mr. Frazier's contention that there was not substantial evidence to support the Court's Findings of Fact. A major issue was whether Mr. Ryan was instructed to prepare daily lesson plans but neglected to prepare them.

The trial testimony record that was submitted consists of (1) **Volume 1** -- Trial Day 1 and 2: Dr. Scott Finnie, Ryan Frazier, Principal Kristin Sarmiento, Dr. Steven Smedley and Amy Wise (VRP 1-498), (2) **Volume 2** -- Trial Day 3 and 4: David Lindeblad, Linda Colvin, Supt. Steve Quick, Arnie Marchand, Lisa Cone, Ryan Frazier, Todd Hill, Brad Scott, Travis Loudon, Erin McKinney, Dr. Debra Howard and Ryan Frazier (VRP 499-1000) and **Volume 3** -- Trial Day 4: Ryan Frazier (VRP 1001-1033).

Dr. Howard's trial testimony is set forth at Vol. 2, VRP 907-981. Dr. Howard testified that she reviewed all of the documents that Mr. Frazier produced that he claimed were daily lesson plans. (VRP 931.) She testified that she reviewed every page of reams of paper. (*Id.* at 933.) She concluded that **none of the documents produced by Mr. Frazier -- other than the plans that he prepared during his student teaching -- were daily lesson plans.** (*Id.*) She testified: "What I saw was evidence of

some planning, but it looked like more brainstorming kinds of plans and thinking through lots of activities. . . . **but nothing I would say was a daily lesson plan.**” (*Id.* at 933-34.) (Emphasis added.) Dr. Howard testified “if I asked to see the lesson plans and that’s what was provided, I would return it with directions to do a daily lesson plan.” (*Id.* at 935.) Dr. Howard testified that the District’s teacher handbook required teachers to prepare a daily written lesson plan. (*Id.*) She testified that some of Mr. Frazier’s documents “would be considered the material that was going to be used during the lesson, but it’s not the plan.” (*Id.* at 962.) She testified about what is included in a daily lesson plan:

What standard are you going to address? What’s the learning target? what might be some key vocabulary you’d have to preset for the students, what’s gonna be your entry task connecting yesterday’s learning to today’s anticipated outcome. How are you going to organize the students for the outcome? . . . [Y]ou do different things based on what you want to accomplish and then what’s your exit. Then, within that, what’s your differentiation to or scaffolding strategies to reach all students.

(*Id.* at 916.) She testified that a daily lesson plan would show each day how you’re achieving and working toward standards. (*Id.* at 918.) She testified that the “bare essentials” would be “[t]he learning target, which would be tired [*sic*] to a standard . . . – the expectation for a learning target.” (*Id.*) She testified that a learning target “is what you want the student to know and understand at the end of the day.” (*Id.*) As an

example, she testified: “[At] the end of today, you’ll be able to understand mean as a measure of central tendency – when to use it, how to use it. . . . [S]o, at the end of today, you’re going to know this.” (*Id.* at 918-19.) As to another fundamental part of a lesson plan, she testified: “Then you would tie it to whatever is the standard. . . . The standard is defined by the Washington State Learning Standards. . . . [T]hat is a document that outlines the scope of what you’re supposed to learn for the year.” (*Id.* at 919.) She testified: “So, in Language Arts, for example, there’s *[sic]* 12 literate standards . . . and 12 non-fiction standards for each grade level. So, there’s *[sic]* 24 things that have to be addressed” (*Id.*) She testified that the standards are set forth at a website. (*Id.* at 920.) She further testified about “a reasonable” daily lesson plan:

Then you would identify what you’re going to do for your entry task. Then, within the body of the lesson, what would be your strategies for addressing that standard. . . . [W]hat we try to encourage is that the teachers actually build a lesson plan that looks at the what am I going to do to reach that same standard for my kids that are above – functioning, you know, high-cap kids, the highly capable. What about the kids that are right at that standard? And then what about my struggling learners.

(*Id.* at 921-22.) She testified that there is a “formative assessment” and a “summative assessment.” (*Id.* at 923.) “Formative assessment is . . . do the kids look like they’re getting what I’m just asking, you know? (*Id.*) The strategy of the assessment would be in the daily lesson plan. (*Id.* at

923-24.) The summative assessment “would be like at the end of the unit, we’re doing a test. Or summative – a quiz could be considered that.” (*Id.* at 924.) She testified the lesson plan would include the class being taught, the date of the class and the different elements she discussed. (*Id.* at 925.) She testified: “There’s a requirement that the lesson plans be kept for a year and are sent to the archive records.” (*Id.*) She testified if there was a substitute teacher then a basic lesson plan would allow the substitute to be able to know what to teach and how to teach it from the lesson plan itself. (*Id.* at 925-26.) Dr. Howard testified that if there are 180 school days then it would be expected there would be 180 lesson plans. (*Id.* at 926.) She qualified her answer by testifying “it may be that . . . your lesson plan for the day really bombed and you’re going to repeat it tomorrow, so they span a couple of days but you have a plan.” (*Id.*) She testified that lesson plans are “pretty important for all teachers. The first-year teacher will spend . . . more time in planning because it’s all new to them and the content that they’re covering.” (*Id.*) Dr. Howard was asked about the correlation between the standards in the daily lesson plan and the overall standards and she responded: “I’ve got this standard that I’m operating under. It’s the learning target that should change from day to day . . . because the standard is so big, it’s how have you past-analyzed that standard to get it taught.” (*Id.* at 928.) She testified that ELRs and GLEs

are examples of standards. (*Id.* at 929.) She testified that the expectation is for each teacher to teach the published standards. (*Id.*) Dr. Howard also testified that there are also year-long plans. (*Id.* at 917.) She testified that the planning “insur[es] that you’ve covered all the standards throughout the year.” (*Id.* at 918.) Dr. Howard testified that a lesson plan would include the date of the lesson, the class, the target of the lesson, the standards that were being taught (EALR’s and GLE’s), the body of the material to be presented and an assessment to determine whether the students were actually learning the material. (*Id.* 925.) She testified that while evaluators could not consider as an evaluation criterion whether a teacher used the online planner program, the program did provide teachers with a good format for the completion of daily lesson plans. (*Id.* 956.) Dr. Howard testified that at the end of the year a teacher would have 80-180 daily lesson plans. (*Id.* at 960.)

The substantial evidence rule provides that a trial court’s findings of fact will not be disturbed on appeal if they are supported by “substantial evidence.” *In re Hall*, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983); *Sylvester v. Imhoff*, 81 Wn.2d 637, 639, 503 P.2d 734 (1972); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). As stated in *Thorndike*, the leading case on the substantial evidence rule: “If we were of the opinion that the trial court should have resolved the factual

dispute the other way, the constitution does not authorize us this court to substitute its finding for that of the trial court.” 54 Wn.2d at 575. “Substantial evidence” means “evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding.” *Blackburn v. Dep’t of Soc. & Health Servs.*, 186 Wn.2d 250, 256, 375 P.3d 1076 (2016).

As a provisional teacher, Mr. Frazier’s teaching contract could be non-renewed under the provisions of RCW 28A.405.220(2), which sets forth how a school district non-renews a provisional contract and what the employee must do in an attempt to get the school district to reconsider its decision. The statute applies to “provisional employees” – persons employed in a teaching position during the first three years of employment by the school district. RCW 28A.405.220(2) provides:

In the event the superintendent of the school district determines that the employment contract of any provisional employee should not be renewed by the district for the next ensuing term such provisional employee shall be notified thereof in writing on or before May 15th preceding the commencement of such school term . . . which notification shall state the reason or reasons for such determination. . . . The determination of the superintendent shall be subject to the evaluation requirements of RCW 28A.405.100.

Non-renewal of a provisional teacher is a much different procedure than non-renewal of a non-provisional teacher. When non-renewing a non-provisional teacher, a school district is required to follow the

procedures set forth in RCW 28A.405.210 and the non-provisional teacher has appeal rights set forth in RCW 28A.645.010. For non-renewal of a provisional teacher, RCW 28A.405.220(6) specifically provides:

This section provides the exclusive means for nonrenewing the employment contract of provisional employees and **no other provision of law shall be applicable thereto**, including, without limitation, RCW 28A.405.210 and chapter 28A.645.

(Emphasis added.) Under RCW 28A.405.220, a provisional teacher who is non-renewed has limited rights such as (a) *an informal meeting* with the superintendent and (b) the right to submit *written communication* to the District’s school board. RCW 28A.405.220(3), (4). **“The decision of the board of directors to nonrenew the contract of a provisional employee shall be final and not subject to appeal.”** RCW 28A.405.220(5).

(Emphasis added.)

This Court’s opinion in *Petroni v. Bd. of Directors of Deer Park Sch. Dist. No. 414*, 127 Wn.App. 722, 113 P.3d 10 (2005), is one of this state’s most comprehensive opinions on non-renewal of a provisional teacher. The opinion held that a teacher who is non-renewed may *only under certain circumstances* be allowed to challenge the non-renewal decision. The challenge must be made under a constitutional writ of certiorari “to enable the reviewing court to determine whether the proceedings were within the lower tribunal’s jurisdiction and authority.”

Id. at 726. (Here, the lower tribunal would be the District’s school board.) Moreover, the superior court will accept the petition for certiorari only if “the lower tribunal’s decision was illegal, arbitrary, or capricious.” *Id.* In *Petroni*, “the superior court determined that the Board’s decision was not illegal, arbitrary, or capricious.” *Id.* This Court affirmed the superior court.

RCW 7.16.040 pertains to a statutory writ of review involving a tribunal’s exceeding of its jurisdiction, illegal actions and proceedings not according to the course of the common law. A statutory writ under RCW 7.16.040 “is a party’s only avenue to appeal an agency’s decision where the agency exercises judicial or quasi-judicial functions.” *Hood Canal Sand and Gravel, LLC v. Goldmark*, 195 Wn.App. 284, 305, 381 P.3d 95 (2016). “Constitutional writs of certiorari are issued under the courts’ inherent constitutional power to review ‘illegal or manifestly arbitrary and capricious action violative of fundamental rights.’” *Id.* at 307. (Internal punctuation omitted.) “A constitutional writ of certiorari is not a matter of right, but discretionary with the court.” *Torrance v. King Cnty.*, 136 Wn.2d 783, 787, 966 P.2d 891 (1998). Statutory and constitutional writs of certiorari are “extraordinary remedies” that should be “granted sparingly.” *Coballes v. Spokane Cnty.*, 167 Wn.App. 857, 865, 274 P.3d 1102 (2012).

Mr. Frazier did not specifically challenge Findings of Fact ## 16-34. Mr. Frazier challenged Findings of Fact No. 9 (Brief of Appellant at 9, 15) and Findings of Fact ## 1-15 (Brief of Appellant at 15).¹ Findings of fact not challenged on appeal must be taken as stating the established facts of the case. *City of Burlington v. Kutzar*, 23 Wn.App. 677, 680, 597 P.2d 1387 (1979); *Guay v. Wash. Natural Gas Co.*, 62 Wn.2d 473, 477, 383 P.2d 296 (1963). *See also Narrows Real Estate, Inc. v. MHDRP, Consumer Protection Div.*, 199 Wn.App. 842, 852, 401 P.3d 346 (2017):

Rainier Vista broadly referenced specific findings of fact challenged in this appeal; however, Rainier Vista provides no argument in its briefing as to how findings of fact 6.11.4, 6.11.8, 6.23, 6.24, 6.25, and 6.29 are erroneous. Therefore, [these] findings of fact . . . are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992) (holding that where claimed errors are not supported by argument, the assignments of error are waived).

The appellate court “will not substitute its judgment on witnesses’ credibility or the weight to be given conflicting evidence.” *W. Ports Transp., Inc. v. Employ. Sec. Dep’t of State of Wash.*, 110 Wn.App. 440, 449, 41 P.3d 510 (2002).

¹ Mr. Frazier stated: “The Findings of Facts are also incorrect and misleading regarding testimony from members of the OSD board of directors.” (Brief of Appellant at 19.) Mr. Frazier also stated: “Finally, the Findings of Fact fail to record that the superintendent, Steve Quick, was biased and did not act as a fair and neutral supervisor as required by state law.” (*Id.* at 25.) Mr. Frazier did not offer specific arguments as to how or why Findings of Fact ## 16-34 are not supported by substantial evidence.

II. COUNTER STATEMENT OF THE CASE

On Aug. 3, 2013, Mr. Frazier was hired by Oroville School District to teach during the 2013-2014 school year. He was a first-year provisional teacher. (CP 1944.) On May 14, 2014, Supt. Steve Quick personally served Mr. Frazier with a written notice that his provisional teaching contract was not going to be renewed because, *inter alia*, he did not create daily lesson plans. (CP 1945; Exhibit 8.) On May 28, 2014, Supt. Quick met for approximately one and one half hours with Mr. Frazier and Linda G. Colvin, who was a math and science teacher for the District and a former union president. (VRP 514-15, 559.) Mr. Frazier was given the opportunity to refute any facts upon which Supt. Quick's determination was based and Mr. Frazier was allowed to make an argument in support of his request for reconsideration. (*Id.* at 816-19.) During the meeting, Mr. Frazier became belligerent. (*Id.* at 817-18.). On May 29, 2014, Ms. Colvin sent an email to Supt. Quick "thanking him for taking the time to let Ryan review his request to be reconsidered" (*Id.* at 561.)

On June 5, 2014, Supt. Quick provided a letter to the District's school board recommending that Mr. Frazier's provisional teaching contract not be renewed. (Exhibit 13.) Supt. Quick mentioned Mr. Frazier's "defiant attitude toward formal planning," his poor attendance at staff meetings and that Mr. Frazier's "actions and attitudes towards

collaboration with the staff and planning lessons consistent with District educational goals made Ryan less successful than he otherwise could have been.” (*Id.*)

On or about June 23 2014, Mr. Frazier provided a one-page letter to the school board stating that he did not intend to submit any evidence about the nonrenewal of his provisional teaching contract. (CP 1864-1899; Exhibit G.) “Instead, this is a letter of protest,” Mr. Frazier stated. (*Id.*) On the back of the letter, Mr. Frazier also included the lyrics from a song titled *The Times They Are A-Changing* by Bob Dylan. (*Id.*, VRP 821-22.)

On June 23, 2014, the school board met. The record before the school board consisted of Mr. Frazier’s evaluation, some positive letters of recommendation, Supt. Quick’s letter to the school board and the materials filed by Mr. Frazier. (*Id.* at 769-71, 788-90, 802, 822 and Exhibit 81.) The school board voted to not renew Mr. Frazier’s provisional teaching contract. (*Id.* at 822-26; CP 1864, Exhibit H and I.)

On Nov. 18, 2014, Mr. Frazier filed a lawsuit against Supt. Quick. (Mr. Frazier’s original complaint did not sue the school district.) Mr. Frazier’s lawsuit against Supt. Quick alleged six common law causes of action: (1) tortious interference with contract, (2) negligent infliction of emotional distress, (3) intentional infliction of emotional distress, (4)

negligence, (5) defamation and (6) ultra vires conduct. (Comp. §§ 3.1-3.5; CP 1964-69.)

On June 9, 2015, Mr. Frazier filed an amended complaint that also named the District. (CP 1943-50.) Mr. Frazier's amended complaint alleged the same six common law causes of action against Supt. Quick. (*Id.*) Mr. Frazier's amended complaint alleged four common law causes of action against the District: (1) negligent infliction of emotional distress, (2) intentional infliction of emotional distress, (3) negligence, (4) defamation (libel or slander). (*Id.*) Mr. Frazier also prayed for a writ of certiorari pursuant to RCW 7.16.040. (*Id.* at 8.)

On June 24, 2015, Supt. Quick and the District brought motions for summary judgment. (CP 1900-1932.) On Feb. 12, 2016, the trial court denied the motions for summary judgment. (CP 462-65.) On Feb. 19, 2016, Supt. Quick and the District brought a motion for reconsideration. (CP 449-59.) On Jan. 9, 2017, the trial granted in part and denied in part the motion. (CP 445.) The trial court dismissed Mr. Frazier's claims against the District for defamation and dismissed claims against Supt. Quick for intentional infliction of emotional distress, *ultra vires* conduct and defamation. The trial court's order set forth some inconsistent language on the issue of arbitrary and capricious: (1) Plaintiff made a "showing of material facts in dispute as to . . . [whether] [t]he decision of

the Oroville School Board was made ‘arbitrary and capricious’ based upon the facts as ‘subjectively’ submitted to them by the Superintendent Steve Quick” and (2) “While the Oroville School Board acted ‘arbitrary and capricious’, it did not do so maliciously or intentionally or with slander or libel, nor with the intent to inflict intentional harm or emotional distress”

On the first day of trial, the trial court stated that Mr. Frazier raised an issue of “material facts in dispute” as to whether the District acted arbitrary and capricious and Mr. Frazier’s counsel responded: “Um the Court has ruled that the actions of the Board were arbitrary and capricious” (VRP at 42.) The trial court responded: “Well, that’s a factual issue now at this point.” (*Id.*) The trial court noted that Mr. Frazier did not bring a motion for summary judgment for a ruling as a matter of law that there was arbitrary and capricious conduct. (*Id.* at 42-43.) Defendants’ counsel stated: “The Court has acknowledged in its order that [the issue of arbitrary and capricious] is a disputed material fact for which we need to have a trial.” (*Id.* at 47.) The trial court responded: “I think he’s right, Mr. Miller. I think he’s right.” (*Id.*) There was this discussion:

MOBERG: If the Court makes a finding of facts are material in dispute, the Court cannot make an arbitrary and capricious finding in summary judgment.

JUDGE: We're hung up on the fact that I said a showing of material facts in dispute. I know, that's where the issue is.

MOBERG: Yeah and then you describe the disputed material facts under subsection one.

JUDGE: And that's why, you know, down below that's where I then state that in B the Court grants the motion in part and, you know, why the Oroville School Board acted "arbitrary and capricious" and the Court will admit, it's not artfully drafted I suppose in that sense. What the Court feels though, Mr. Miller, the Court should go forward and hear the issue of arbitrary and capricious.

(*Id.* at 52-53.)

On May 19, 2017, Supt. Quick and the District filed motions in limine. (CP 252-82.) The motions included, *inter alia*, to exclude evidence in connection with Mr. Frazier's claims for tortious interference and negligent infliction of emotional distress because as a matter of law he did not have such a claim. (*Id.*) The motions were also to exclude evidence that Mr. Frazier and members of the public were allegedly wrongfully excluded from speaking at the dispositive school board meeting. (*Id.*) The motions were also to exclude evidence that Principal Sarmiento wrote a letter or email to the school board stating she recommended the renewal of Mr. Frazier's teaching contract.² (*Id.*)

² It was stated a p. 17 of Defendants' motions in limine: "Ms. Sarmiento has never produced the letter/email that she allegedly sent to the District's school board. Moreover, Ms. Sarmiento testified in her deposition that she does not recall wither her letter/email actually stated that she recommended that Plaintiff's contract be renewed."

A bench trial took place from May 23, 2017 to May 26, 2017. On the first day of trial, there was a hearing on motions in limine. (VRP 17-59.) The trial court earlier acknowledged that Supt. Quick and the District maintained “it’s not the jury’s decision to determine whether the Board’s decision was arbitrary and capricious.” (*Id.* at 7.) The trial court stated: “I think [the issue of arbitrary and capricious] is an issue the Court has to determine, Mr. Miller.” (*Id.* at 14.) The trial still appeared to be going to be a jury trial. For example, the trial court stated there would be two alternate jurors and there would be four preemptory challenges. (*Id.* at 17.) However, after prospective jurors were brought into the courtroom, the trial court stated:

[W]hat I want to tell you right now is that based on certain rulings I made this morning, the matter will not be presented to a jury. The matter will go forward to a Judge trial based on my rulings [Y]ou will be excused

(*Id.* at 61.)

On June 2, 2017, Supt. Quick and the District filed a post-hearing brief in which it was stated that the school board’s decision to not renew Mr. Frazier’s provisional teacher contract must be upheld unless the court finds that the schoolboard’s decision was illegal, arbitrary or capricious. (CP 430-44.) On Aug. 22, 2017, the trial court entered Findings of Fact, Conclusions of Law and Judgment and dismissed of all Mr. Frazier’s claims. (CP 23-33.)

The trial court stated in No. 27 of its **Findings of Facts** that before the school board meeting when it was determined that Mr. Frazier’s teaching contract should not be renewed:

The only document that Ryan Frazier filed with the Secretary of the Board was a two-sided letter of protest. . . . The front page of the letter specifically advised the Board: “I am sorry to inform you that I wish not to turn in any evidence in regards to my renewal for Oroville Junior and Senior High School. Instead, this is a letter of protest.” The back side of the letter of protest contained the lyrics to Bob Dylan’s song “The Times They Are A Changin”.

The trial court stated in No. 16 of its **Conclusions of Law**: “The decision of the Oroville School Board and its members [to non-renew Mr. Frazier’s contract] was not arbitrary, capricious or illegal.”

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN GRANTING DEFENDANTS’ MOTIONS IN LIMINE.

Mr. Frazier contends that the trial court “totally backtracked” from its previous decisions that the school board’s actions were arbitrary and capricious and that Mr. Frazier stated a claim for tortious interference and negligence. (Brief of Appellant at 5.) Mr. Frazier contends that Defendants’ motions in limine “were no more than a surrogate for an improper request to reconsider the earlier reconsideration decision.” (*Id.*) Once the trial court concluded that it erred when it originally held that a jury would need to determine the issue of arbitrary and capricious, the trial

court had the absolute duty to correct its error. Moreover, after hearing the evidence, the trial court concluded that Mr. Frazier's tortious interference and negligence claims should be dismissed as a matter of law. Because there was no legal basis for Mr. Frazier's common law claims, the trial court did not err by not having a jury pass on those claims.

On June 24, 2015, Supt. Quick and the District filed a motion for summary judgment. (CP 1910-32.) Defendants argued that the issue of arbitrary and capricious was an issue of law for the Court and that, as a matter of law, there was no arbitrary and capricious conduct. On Feb. 12, 2016, the trial court denied Defendants' motion for summary judgment. (CP 462-65.) On Feb. 19, 2016, Defendants filed a motion for reconsideration. (CP 449-54.) On Jan. 9, 2017, the trial court granted in part and denied in part Defendants' motion for reconsideration. (CP 445.) The trial court's order was inconsistent by stating (a) there was a material issue of fact as to whether the actions of the District were arbitrary and capricious and (b) the District's acts were arbitrary and capricious. Mr. Frazier argued that the trial court expressly found that the acts of the District were arbitrary and capricious. (Appellant's brief at 5.) The facts concerning Mr. Frazier's assertion are discussed above in Defendants' "Counter-Statement of the Case."

The trial court set a jury trial in the case. Supt. Quick and the District continued to argue that because the issue of arbitrary and capricious was a matter of law a jury could not consider the issue. On the first day of trial, before there was *voir dire* of the prospective jurors, the trial court concluded that the issue of arbitrary and capricious was, in fact, an issue of law for the trial court and not a jury question. The trial court also took testimony on Mr. Frazier's common law claims. (The District had argued – and continues to maintain -- that Mr. Frazier was not entitled to bring common law claims.)

Mr. Frazier was not entitled to a jury trial on his common law tort claims because Mr. Frazier was only permitted to challenge his non-renewal pursuant to a constitutional writ of certiorari. Moreover, even if Mr. Frazier was allowed to bring common law claims, his common law claims were without merit as a matter of law. See discussion below on the merits of Mr. Frazier's common law claims.

B. THE DISTRICT'S NON-RENEWAL DECISION DID NOT VIOLATE STATE LAW.

Mr. Frazier inaccurately argued: "The only grounds on which a school board is permitted to decide to nonrenew a teacher are set forth in RCW 28A.405.100." (Appellant's brief at 6.) This is not a correct statement of law. RCW 28A.405.100 is a statute titled "Minimum criteria

for the evaluation of certificated employees.” **Mr. Frazier was a provisional employee whose nonrenewal was governed by RCR 28A.405.220.**

Mr. Frazier argued that the trial court erred “by failing to recognize that the superintendent and the OSD board of directors ignored the clear duty to limit the evaluation of Ryan Frazier to only the elements defined in [RCW 28A.405.100(1)(a)].” (Brief of appellant at 6.) Sub(1)(a) of the statute states:

For classroom teacher the [evaluation] criterial shall be developed in the following categories: instructional skill, classroom management, professional preparation and scholarship; effort toward improvement when needed; the handling of student discipline and attendant problems; and interest in teaching pupils knowledge of subject matter.

However, to District was entitled to non-renew Mr. Frazier’s contract under RCW 28A.405.220 for any reason as long as the nonrenewal was not arbitrary and capricious or contrary to law. The District was not constrained by any requirements set forth in RCW 28A.405.100. Supt. Quick’s recommendation to non-renew Mr. Frazier and the school board’s decision to accept Supt. Quick’s recommendation were proper under RCW 28A.405.220.

Mr. Frazier cited *Pierce v. Lake Stevens Sch. Dist.*, 84 Wn.2d 772, 529 P.2d 810 (1974), which involved the nonrenewal of **non-provisional**

teachers due to financial reasons after the failure of three special school levies. 84 Wn.2d at 773. The Court affirmed summary judgment entered in favor of the school district because it was proper for the school board to rely on the school administrators to determine which teaching positions should be eliminated due to the financial crisis. *Id.* at 482-83. Mr. Frazier argued that the trial court’s Conclusion of Law No. 6 was incorrect where the trial court stated that the school board’s decision “was not a review of an action that was ‘judicial’ in nature and therefore Ryan Frazier’s claim for review under RCW 7.16.040 is without legal merit” In *Lake Stevens Sch. Dist.*, the Court stated at 787 that “the school directors perform a function quasi-judicial in nature.” RCW 7.16.040 set forth the ground for a writ of review.

However, in *Petroni v. Bd. of Directors of Deer Park Sch. Dist. No. 414*, 127 Wn.App. 722, 113 P.3d 10 (2005), this Court stated that that a challenge to the nonrenewal of a provisional employee’s contract is made under a “constitutional writ,” which is not a writ of review under RCW 7.16.040. 127 Wn.App. at 726. This Court stated: “A court has the right to refuse to exercise its inherent power to grant a [constitutional] writ, but the court must provide tenable reasons for its decision.” *Id.* This Court further stated: “Here, the superior court determined that the Board’s decision was not illegal, arbitrary, or capricious.” *Id.*

In the case at bar, the trial court stated at Conclusion of Law No.

16:

The decision of the Oroville School Board and its members **was not arbitrary, capricious or illegal.** The Court therefore has determined that it will not exercise its inherent right of “constitutional writ of certiorari” to review the decision of the Oroville School Board to not renew Ryan Frazier’s contract.

(Emphasis added.) Here, the fact that the trial court stated that the actions of the school board were not judicial in nature did not negate the fact that the trial court applied the correct legal standard as set forth in *Petroni*.

C. SUPT. QUICK’S NON-RENEWAL DECISION DID NOT VIOLATE THE COLLECTIVE BARGAINING AGREEMENT.

Mr. Frazier contends that the trial court’s Findings of Fact No. 9 is not supported by the evidence. (Brief of Appellant at 9.) This finding stated that Mr. Frazier was evaluated by Ms. Sarmiento, in the first pre-evaluation report “Frazier answered one of the questions with a paraphrase from a Dr. Seuss rhyme and refused to answer other questions claiming that it violated student privacy rights.” This finding further stated that Ms. Sarmiento noted that “Frazier was wasting her time, that he needed to drop the sarcasm, take the evaluation seriously and that that his response was a ‘smart aleck’ one.” This finding further stated: “Frazier met with Ms.

Sarmiento and apologized for his remarks.” There is nothing erroneous about the trial court’s Findings of Fact No. 9.

Mr. Frazier argued that a Memorandum of Understanding (MOU) controlled the use of a new method of evaluation of teachers and the District violated the MOU. (Brief of Appellant at 8.) Mr. Frazier argued:

Steve Quick relied on information provided in eVal report which indicated Ryan was not doing lesson planning. But Ms. Sarmiento admitted it was an error for her to include this information in the report, because of the prohibition in the MOU.

Id. at 8-9.) Supt. Quick became aware that Mr. Frazier was not doing his lesson planning independent of Mr. Frazier’s eVal. (VRP 839, 880-81.) Supt. Quick was entitled to make his own determination that Mr. Frazier’s conduct was “unsatisfactory” regardless of whether Principal Sarmiento would have made changes “but she was locked out of the program and could not make corrections.” (Brief of Appellant at 9.)

Moreover, if Mr. Frazier concluded that there was a violation of the collective bargaining agreement (CBA), his remedy was to file a grievance under the terms of the CBA. *See* Article IX of the CBA at pp. 43-46. (Exhibit 1.) The CBA provided for four steps: (1) an attempt to resolve problems at the immediate supervisor level, (2) an appeal to the Superintendent, (3) an appeal to the school board and (4) binding

arbitration. The appeal to the school board was required to be made within five days after a decision by the Superintendent.

D. THE TRIAL COURT DID NOT ERR IN ENTERING ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Mr. Frazier contends that the trial court “cherry-picked” the trial testimony “creating an inaccurate and unfair characterization.” (Brief of Appellant at 14.) Mr. Frazier cited to testimony by Arne Marchand, Lisa Cone, Dr. Scott Finnie, Dr. Steven Smedle, Dr. David Lindeblad, Linda Colvin, Principal Kristen Sarmiento, board members Todd Hill, Brad Scott and Travis Loudon; board president Rocky Devon and Supt. Steve Quick. (*Id.* at 14-27.) The testimony of Dr. Howard was summarized above. Dr. Howard’s testimony together with the testimony of Supt. Quick, Principal Sarmiento and the other trial witnesses support the trial court’s Findings of Fact and Conclusions of Law.

Testimony of Supt. Quick

Supt. Quick’s testimony is set forth at Volume 2 of the record: VRP 720-768 and 816-1003. Supt. Quick explained what is required to prepare daily lesson plans. Supt. Quick testified that daily lesson plans are “the meat and potatoes of how . . . we get our students to learn” and daily lessons plans mean “every single day, every single period, for every single class.” (VRP 725.) Supt. Quick testified:

[I]f you go in there without a plan, to me you're planning to fail. You have to have a very precise, not minute by minute, but you need to have some activities that are planned out, that are very organized, very targeted at what you want to teach because if you don't target what you're trying to teach in a classroom, you're gonna end up in chaos. And I think the other thing you end up is with random learning and what we're trying to get teachers to do is to focus their learning on the standards and on the targets so that at the end of the year they can actually learn things that are important.

(*Id.* at 726-27.) Supt. Quick testified that all teachers are trained on how to prepare a daily lesson plan. (*Id.* at 727.) Supt. Quick testified about what is included in a daily lesson plan:

I would say you always have an objective or a target of the lesson, something that is going to be related . . . to a standard. So, your target and your standard are . . . very much connected. Your standard is more of a general, here's what we need to get done, but the target is this particular day, here's what I want students to learn by the end of this class period.

(*Id.*) Supt. Quick testified that standards include grade level expectations (GLEs). (*Id.* at 728.) Supt. Quick testified that it is important to include standards in a daily lesson plan “[b]ecause if you ignore them, you just happen to get somewhere. Whereas, if you have a standard, you're always shooting for the target at the end.” (*Id.*) Supt. Quick testified:

Here are the exact things that we want our students to know by the end of the school year and if you go through even a day or two without focusing on a standard, you're gonna get nowhere really fast. You need to target those standards so you can actually teach the material to the students.

(*Id.*) Supt. Quick testified that the EALRs are published by the state and “common core State standards have been . . . replaced [by] the EALRs.”

(*Id.* at 729.) Supt. Quick testified that “all students are expected to meet those standards” (*Id.*) As to daily lesson plans, Supt. Quick also testified:

I would say most lesson plans would have some type of an initial activity to start off the class period and that’s not to say that has to happen, but generally a lesson plan will have some sort of an attention getting activity and then the bulk of that lesson is the how. What activities are you gonna do with your students to help them meet that target that will help them reach that standard.

(*Id.* at 729-30.) Supt. Quick testified about the “formative assessment” and the “summative assessment.” (*Id.* at 730.) Supt. Quick testified: “Without that assessment at the end of the day to know, did they get it or not, you’re not gonna know. You’re just gonna go on and leave kids behind.” (*Id.*) Supt. Quick testified that after reviewing Mr. Frazier’s material the only documents that would qualify as daily lesson plans were what Mr. Frazier prepared during his student teaching. (*Id.* at 731.) Supt. Quick testified:

I didn’t see anything having to do with standards, targets, maybe there were some targets in there, questionable at best, but no . . . standards, no assessment and no real idea to read that lesson plan, . . . what was the overall picture of the unit, how did it fit in with the other lesson plans. There

was no assessment. So, no, I didn't see any lessons plans other than the ones he produced in student teaching.

(*Id.* at 732.) Dr. Quick testified: "There is no way [Mr. Frazier] could graduate from college in the State of Washington or any other state for that matter without knowing how to write a formal lesson plan." (*Id.*) Supt. Quick testified that early on in Mr. Frazier's teaching at the District he visited Mr. Frazier's classroom "and I did have some concerns." (*Id.* at 733.) Supt. Quick testified that in an email dated September 11 (Exhibit 40) he asked Mr. Frazier whether he had a lesson plan for the day. (*Id.* at 433-34.) Supt. Quick testified that "it didn't seem like he was following a particular plan. It seemed like he was kinda winging it a little bit so that's why, well, hey, just wondering." (*Id.* at 434-35.) Supt. Quick testified that he did not care whether Mr. Frazier used the on-line lesson program. "I was looking for planning." (*Id.* at 735.) Supt. Quick testified that "one of the focuses of the high school has been . . . posting a clear student target and student language of what was expected to be learned that particular day." (*Id.*) Supt. Quick testified that Mr. Ryan "never really answered the question . . . did you have a learning target?" (*Id.* at 736.) Supt. Quick testified that when Mr. Frazier stated he did not have time to type out lesson plans "a major red flag went shooting up into the sky." (*Id.* at 737.) Supt. Quick testified that for Mr. Frazier to say "I'm just too busy to do a

lesson plan because I'm here until five every night, I just wasn't buying that." (*Id.*) Supt. Quick testified: "My expectation was that all teachers lesson plan, especially my first year teachers." (*Id.* at 737-38.) Supt. Quick testified that he discussed Mr. Frazier's situation with the principal and told her: "It doesn't appear that he's doing any kind of lesson plans. Can you please follow up, as an evaluator, and see if he's planning or not and if he's not, please direct him to plan." (*Id.* at 738.) Supt. Quick sent an email to Mr. Frazier stating that "the only thing I would ask you to do is have a written plan for each and every period, as well as a long term written plan to help direct you." (*Id.* at 739.) Supt. Quick testified that after giving this direction to Mr. Frazier it was "definitely" his expectation that Mr. Frazier would prepare daily lesson plans every day for each class period. (*Id.*) Supt. Quick was directed to material contained in certain exhibits in which Mr. Frazier claimed were daily lesson plans. (*Id.* at 739-42.) Supt. Quick testified that he did not see a single daily lesson plan that would meet the basic educational requirements of a lesson plan in the state of Washington. (*Id.* at 740, 743.) Supt. Quick testified that during October Mr. Frazier's principal told him "she was continuing to talk to Mr. Frazier for the need to have daily lesson plans." (*Id.* at 744.) Supt. Quick testified that he left it up to Mr. Frazier's principal to deal with his directive for her to work closely with Mr. Frazier – including his daily

lesson planning. (*Id.* at 744-45.) Supt. Quick testified that on April 25 he sent an email to Mr. Frazier’s principal (Exhibit 20) to learn how Mr. Frazier was doing because by May 15 he needed to make a decision as to whether Mr. Frazier’s contract should be renewed. (*Id.* at 745-46.) Supt. Quick testified: “As of that date, my biggest concern was the lesson planning. I wanted to make sure that he was doing lesson plans and that she had followed up with him on that particular item.” (*Id.* at 446.) Mr. Frazier’s principal advised Supt. Quick that she would provide Mr. Frazier’s evaluation the next week. (*Id.* at 747.) Supt. Quick testified: “The main issue she reported were the lesson planning as well as his participation in staff activities.” (*Id.* at 749.) Supt. Quick testified that he reviewed Mr. Frazier’s evaluation (Exhibit 84). (*Id.*) Supt. Quick testified:

The first thing that jumped out at me was the defiant, flippant and attitude basically, as she put in her words, a smart aleck attitude with her regarding the first evaluation. And to me, that was something that jumped right out at me because I talked to her in September about him not doing lesson plans and so it’s almost like I felt he wasn’t really taking – I mean this is – his first observation was October 15th, so a month after the fact he didn’t seem like he was taking his job very seriously. You know, then when I flipped through it further there were several unsatisfactory marks on his evaluation that were directly tied to his failure to plan and his failure to participate in staff activities.

(*Id.* at 750-51.) Supt. Quick noted that Mr. Frazier made a self-assessment that “was delusional.” (*Id.* at 754.) Supt. Quick testified that Mr. Frazier’s planning “wasn’t even basic. It was unsatisfactory.” (*Id.*) Supt. Quick testified because there was “a large gap” in what Mr. Frazier thought he was doing and what he was actually doing “it’s a red flag that maybe this person isn’t teachable.” (*Id.* at 754-55.) Supt. Quick testified that Mr. Frazier at no time acknowledged his weakness or deficiency in lesson planning. (*Id.* at 755.) Supt. Quick testified that Mr. Frazier was also rated unsatisfactory in exhibiting collaborative and collegial practices focused on improving instruction practice and student learning. (*Id.*) Supt. Quick testified that Mr. Frazier’s evaluation was by Ms. Sarmiento. (*Id.* at 760.) Supt. Quick testified that Mr. Frazier’s principal commented that “while Mr. Frazier knows about the need to plan outside of his own mind, I have yet to see in advance.” (*Id.* at 762.) Supt. Quick testified that Ms. Sarmiento’s “main concerns were the same as my main concerns, lesson planning, planning for success, as well as participating in school . . . district and school initiatives.” (*Id.* at 766.) Supt. Quick testified that Mr. Frazier self-assessed his performance as “distinguished.” (*Id.* at 767.) Supt. Quick testified that he had a meeting with Mr. Frazier on May 28. (*Id.* at 816.) Supt. Quick testified:

So, after he showed me his . . . purported lesson plans, I did let him know that I didn't believe that they were lesson plans and at that point he proceeded to get very angry and upset . . . Because he really was claiming that they were lesson plans and so we spent quite a bit of time discussing . . . what lesson plans would look like. He says he told me, show me a lesson plan, I don't have a lesson plan in my office, but I could certainly explain to him the key components of a lesson plan that I was looking for and I . . . told him point blank that these lessons . . . were not lesson plans. These were two student portfolios of a high school student and a low student and they didn't qualify as lesson plans.

(*Id.* at 817.) Supt. Quick further testified:

And so after quite a lengthy discussion, we did get to the point where I asked him, I said so, are you willing to do lesson plans in the future. I mean I don't see these as being lesson plans, but in the future, are you willing to and he said, hey look, I could probably commit to a monthly lesson plan and he says maybe a weekly lesson plan, but there is no way I could do a daily lesson plan. He says, I'm already here until five o'clock every day. There is no way I have time to do a daily lesson plan.

(*Id.* at 817-18.) Supt. Quick further testified:

[S]o for him to thumb his nose at me, kinda surprised me, kinda took me back because . . . I was hoping that he came into the meeting with the idea that maybe I could make a few changes, perhaps I could do things a little bit differently and . . . the things that are expected of all teachers, but I didn't find his willingness to do just a basic thing like a lesson plan, there.

(*Id.* at 818.) Supt. Quick testified that they discussed “about lesson plans and what those looked like” together with “his lack of attendance at staff meetings and the Monday morning professional meetings” (*Id.*)

Supt. Quick testified that “he told me that earlier in the year that he attended the meetings, but he said to be quite frank, they were boring and a waste of his time” (*Id.* at 818-19.) Supt. Quick testified:

I found his attitude as being defiant, as like you’re telling me that what the principal has to say, what your colleagues have to say aren’t important to you? He said instead I would spend my time planning in the morning, calling guest speakers, talking to people outside of the school, but he felt that meetings themselves were generally a waste of time.

(*Id.* at 819.) Supt. Quick testified that after the meeting his decision to non-renew Mr. Frazier’s contract “was very easy to make” because “[n]ot only was he not willing to do daily lessons that I had asked him to do, but he was unwilling to participate as a regular staff member” (*Id.* at 820.) Supt. Quick testified that “when he yelled and screamed at me telling me how wrong I was, I was kinda shocked. I was like man, you need to sit down.” (*Id.*) Supt. Quick testified:

I think this meeting is for you to convince me to change my mind and you standing up yelling at me, pointing your finger, that’s not helping me change my mind a bit. So, by the end of the meeting, when I have an employee yelling at me, telling me how wrong I am, it was a little shocking.

(*Id.*) Supt. Quick testified at the end of the meeting, “I saw no sense whatsoever that he was willing to do any kind of change for the school district.” (*Id.* at 821.) Supt. Quick testified he then wrote a letter to the school board recommending that Mr. Frazier’s contract not be renewed.

(*Id.*) Supt. Quick testified that he advised Mr. Frazier before the school board meeting that he was to submit written evidence to the school board.

(*Id.* at 821.) Supt. Quick testified: “Very, very clear procedures were given to him, what he expectation would be for him if he would like the board to receive any kind of evidence from him.” (*Id.*) Supt. Quick testified that he gave Mr. Frazier a copy of an RCW “that clearly explained the exact steps he needed to take for his evidence to be heard to the board.” (*Id.*) Supt. Quick testified:

The only thing he brought was a letter, a two-sided letter, one page, front and back. The first page was his letter of protest clearly stating he had no intention of submitting any kind of evidence. It was a letter of protest and on the back he put the lyrics to a Bob Dylan song. I think how times are changing or something to that effect.

(*Id.* at 821-22.) Supt. Quick testified that after the school board went into a 20-30 minute executive session, the members of the board returned to open session and reported announced they voted to not renew Mr. Frazier’s contract. (*Id.* at 822-25.) Supt. Quick testified that he only attended a portion of the executive session, during which time he answered questions posed by the school board members. (*Id.*)

Testimony of Principal Sarmiento

Principal Sarmiento’s testimony is set forth at VRP 333-416. Ms. Sarmiento testified that Mr. Frazier had areas he needed to work on.

(VRP 381.) She rated Mr. Frazier “unsatisfactory” in three or four categories. (*Id.* at 381-82.) She rated him unsatisfactory in participating in district and school initiatives based on “lesson planning in the online planner.” (*Id.* at 384.) She rated him unsatisfactory in monitoring progress relative to professional growth and development. (*Id.* at 385-86.) She discussed the unsatisfactory scores with Mr. Frazier and with Supt. Quick. (*Id.* at 386.) She pointed out to Supt. Quick that she gave Mr. Frazier an unsatisfactory rating due to his failure to use the online planner. (*Id.*) She gave Mr. Frazier an unsatisfactory rating in using multiple student data elements to modify instruction and improve student learning. (*Id.* at 386-87.) She testified that she does not “willy nilly rate somebody unsatisfactory.” (*Id.* at 387.) She had to have evidence of unsatisfactory performance before she wrote that down. (*Id.* at 387-88.) She had to have evidence whether or not a student was actually learning what was being taught. (*Id.* at 388.) She testified that she marked Mr. Frazier unsatisfactory in three areas. (*Id.* at 389.) She testified that a teacher has a continuing right to submit data in any areas the teacher is being evaluated on up until her “final closing.” (*Id.* at 390-91.) A teacher is allowed to present “artifacts or evidence.” (*Id.* at 391.) She testified that she was very careful in her evaluations because she knew it would impact a teacher’s future. (*Id.* at 391-92.) She was asked to show a single lesson

plan that had in it a category regarding an assessment of student learning and she responded: “Not assessment overall.” (*Id.* at 393.) She testified that because she left part of the form blank it means that Mr. Frazier did not provide an artifact that establishes he was using multiple data elements “or that I did not observe it.” (*Id.* at 394.) She testified that multiple data elements is an area that impacts whether or not it can be determined if a student is getting the information that is being taught. (*Id.* at 395.) Ms. Sarmiento was directed to Mr. Frazier’s answer on how a teacher would celebrate a student’s success and Mr. Frazier wrote:

I have brains in my head, I have feet in my shoes, I can steer children any direction I choose, they’re not on their own and they know what they know and they are the ones who will decide where they go.

(*Id.* at 396.) She was asked whether Mr. Frazier’s answer provided a single piece of educational validity in answering how to monitor the levels of student improvement and she responded: “It was not what – an answer I was expecting, no.” (*Id.*) Ms. Sarmiento testified that she considered Mr. Frazier’s answer to be a “smart aleck response.” (*Id.*) She testified she concluded that Mr. Frazier was wasting her time and that his answers were full of sarcasm and were inappropriate responses. (*Id.* at 397.) She testified that Mr. Frazier’s responses gave her “a red flag” as to whether she might have problems with Mr. Frazier. (*Id.*) She testified

that she had a concern with Mr. Frazier's lesson plans in the fall of 2013. (*Id.* at 398.) She was shown "the black notebook" (Exhibit 65) that Mr. Frazier testified was a list of lesson plans that he submitted that he was able to locate. (*Id.* at 399.) She was unable to find a single "scoring rubric" in the notebook. (*Id.*) She was asked about "the important things in a lesson plan." (*Id.* at 400.) She testified that it would include "learning targets" and a link to the standards. (*Id.* at 400-01.) She testified that EALRs and GLEs are standards. (*Id.* at 401.) She testified that "daily lesson plans should be directly in regards to the GLE standards or essential learning." (*Id.*) She testified that GLE stands for "grade level expectancy" EALR stands for "essential academic learning requirements," (*Id.*) which are Office of the Superintendent of Public Instruction (OSPI) developed standards. (*Id.*) She testified she educators want teachers to teach to the EALR and GLE standards. (*Id.* at 402.) She testified that the best way to evaluate whether the standards are being met "can be" to have a teacher set forth in the daily lesson plan to identify the EARLs and GLEs they are targeting. (*Id.*) She testified that "possibly" a lesson plan should have a strategy for assessment to determine whether the students are actually getting the information being taught. (*Id.*) "[I]t depends on what point of the lesson they are in. If they are at the beginning there is probably not going to be an assessment." (*Id.*) She testified that it is

“important” for a first year teacher to prepare daily lesson plans so that she can find out the teacher’s teaching objectives. (*Id.*) She testified that the importance of daily lesson plans is to identify objective, EALRS, GLEs so that it can be seen whether the plan meets them. (*Id.* at 403.) She testified that when she went through Mr. Frazier’s black notebook she did not find a single reference to an EALR or a GLE. (*Id.*) She testified that she did not see any lesson plans by Mr. Frazier in a certain format but “in content, yes.” (*Id.* at 404.) She testified that she wanted to take Mr. Frazier’s side and give him more time to overcome his deficiencies. (*Id.*) She testified that when she finished her evaluation on May 5, 2014 of Mr. Frazier that she had no further input into what happened to Mr. Frazier. (*Id.* at 405.) She testified that the decision whether Mr. Frazier’s contract would be renewed was not a decision for her to make. (*Id.*) She did not know the information that Mr. Frazier submitted to the school board. (*Id.*) She testified that Supt. Quick sent her an email on April 25 stating that he had concerns with Mr. Frazier and another teacher. (*Id.* at 406.) She testified that she knew Supt. Quick had some issues about the performance of the two first year teachers and that before he could recommend them for renewal or non-renewal he needed to see her evaluations of the teachers. (*Id.*) She testified that Supt. Quick wrote: “I believe you have spoken to Ryan several times this year regarding classroom conduct, his behavior

and perhaps other things. Are all these things reflected in the evaluation?”

(*Id.*) She testified that it is true that over the school year she talked to Supt. Quick on several occasions about his teaching contract and his behavior. (*Id.* at 406-07.) Supt. Quick stated that he saw that Mr. Frazier did not have any online lesson plans. (*Id.* at 407.) Ms. Sarmiento testified there is an online lesson plan program that could be used to create a lesson plan. (*Id.*) She testified regardless of whether a teacher elects to use the online lesson program, she expected every teacher to prepare daily lesson plans. (*Id.*) She testified that it was “no defense to not having daily lesson plans to say I’m struggling with the online planner” because “[t]hose are separate matters.” (*Id.*) She testified that a teacher could prepare “physical copies” of daily lesson plans instead of using the online system. (*Id.* at 407-08.) She testified that a teacher was no allowed to neglect preparing daily lesson plans because they were struggling with dealing with the online planner program. (*Id.* at 408.) She testified when she responded to Supt. Quick’s email she intended to meet with Supt. Quick to discuss Mr. Frazier’s evaluation. (*Id.*) She testified that it “could have” been that she had some issues with Mr. Frazier that she identified when she wrote unsatisfactory “in the terms of his planning and scoring rubrics.” (*Id.*) She promised Supt. Quick that she would submit the evaluations of both teachers during the following week. (*Id.* at 410.) She testified that she

completed Mr. Frazier's evaluation, Exhibit 84, which was submitted on May 6. (*Id.*) She rated Mr. Frazier "unsatisfactory" on the item dealing with using the online lesson planner. (*Id.* at 410-11.) She testified that she wrote: "[W]hile Mr. Frazier knows the need to plan outside of his own mind, I have yet to see that in advance and as I understand what you told me the other day was, you thought he did a lot of planning in his own mind, but that you hadn't seen in advance the class documentation of that planning." (*Id.* at 411.) Ms. Sarmiento testified that she had a yearlong plan from Mr. Frazier but such a plan is not a daily lesson plan. (*Id.*) She testified that she "could have" spoken to Supt. Quick about her concerns about Mr. Frazier's lack of daily lesson plans. (*Id.* at 413.) She testified that her evaluation of a teacher would demonstrate to administrators the areas she concluded in which a teacher was unsatisfactory. (*Id.*) She "could have" spoken to Supt. Quick about the areas in which Mr. Frazier was deemed to be unsatisfactory. (*Id.* at 414.) She was shown a map which she admitted was not a daily lesson plan. (*Id.*) When asked whether she recalled Mr. Frazier telling her that he didn't have time to type out his daily lesson plans she responded: "I remember him having a conversation." (*Id.*)

E. THE TRIAL COURT'S CONCLUSIONS OF LAW ARE SUPPORTED BY THE EVIDENCE.

Mr. Frazier contends that the trial court erred in entering its Conclusions of Law ## 3, 6, 8, 9, 12, 14, 16, 17 and 18. (Brief of Appellant at 27-28.) Mr. Frazier did not challenge the trial court's Conclusions of Law ## 1, 2, 4, 7, 10, 13 and 15. No. 1 concluded the trial court had subject matter and personal jurisdiction. No. 2 concluded Mr. Frazier did not have a claim for tortious interference as a matter of law. No. 4 concluded Mr. Frazier did not have a claim for negligent infliction of emotional distress as a matter of law. No. 7 concluded Mr. Frazier was a provisional employment pursuant to RCW 28A.405.220(1). No. 10 concluded Supt. Quick complied with the procedures set for in RCW 28A.405.220(4). No. 13 concluded that the decision made by the school board was not subject to appeal pursuant to RCW 28A.405.220(5). No. 15 concluded that the decision to non-renew Mr. Frazier's teaching contract was within the school board's jurisdiction and authority.

This Court should apply the substantial evidence rule to affirm the trial court's Findings of Fact. The trial court's Conclusions of Law are consistent with the trial court's Findings of Fact.

F. THE TRIAL COURT DID NOT ERR IN DISMISSING SUPT. QUICK.

Mr. Frazier contends that Supt. Quick should not have been dismissed. (Brief of Appellant at 28-30.) It is not clear why Mr. Frazier

contends that Supt. Quick should not have been dismissed other than (a) Supt. Quick's "statement of facts [is] too incredible to be believed" and (b) because Supt. Quick was acting within the scope of his employment. (*Id.*) The trial court concluded there was no legal basis to support claims against Supt. Quick for tortious interference of contract, *ultra vires* conduct, negligent infliction of emotional distress or defamation. (Trial Court's Conclusions of Law ## 2-5.) Mr. Frazier's claim for tortious interference is discussed in Section G and his claim for negligent infliction of emotional distress is discussed in Section I. Mr. Frazier's claim for defamation and *ultra vires* conduct were dismissed pursuant to the District's motion for the trial court to reconsider its ruling on the District's motion for summary judgment (Reconsid. Order at 3; CP 445.) and once again at the end of trial. All of Supt. Quick's communications about Mr. Frazier were made in connection with whether to non-renew Mr. Frazier's provisional teaching contract. Supt. Quick was privileged to speak and was immune from liability under the "common interest privilege," which applies when the declarant and the recipient have a common interest in the "subject matter of the communication." *Moe v. Wise*, 97 Wn.App. 950, 957-58, 989 P.2d 1148 (1999), *rev. denied* 140 Wn.2d 1025, 10 P.3d 406 (2000). All of Supt. Quick's acts were performed in the scope of his employment in conformity with the non-renewal statute so there was no

ultra vires conduct on the part of Supt. Quick. Only acts “done without legal authority or in direct violation of existing statute are *ultra vires*.” *Miller v. City of Bainbridge Island*, 111 Wn.App. 152, 165, 43 P.3d 1250 (2002).

G. SUPT. QUICK IS NOT LIABLE FOR TORTIOUS INTERFERENCE WITH CONTRACT.

Mr. Frazier alleged that Supt. Quick tortuously interfered with *his* teaching contract. Mr. Frazier was not entitled to bring a common law tort action based upon his non-renewal pursuant to RCW 28A.405.220. Mr. Frazier’s rights under the non-renewal of provision teacher statute were limited to whether the decision to non-renew his teaching contract was arbitrary, capricious or contrary to law. This was Mr. Frazier’s exclusive remedy. The District has not been able to find a single case where a plaintiff brought (or was allowed to bring) common law claims based upon an employment decision based on a school employment statute – or any other employment statute – where the statute provided that a decision was not subject to appeal. Mr. Frazier did not cite any cases suggesting that a provisional employee who brings a lawsuit for arbitrary and capricious non-renewal also has common law claims based upon the facts and circumstances of his or her non-renewal. Mr. Frazier’s objections to the way he was treated were subsumed by his only way to challenge his

non-renewal: a claim that he was the victim of an arbitrary and capricious decision or that the decision was contrary to law. RCW 28A.405.220(5) provides: “The decision of the board of directors to nonrenew the contract of a provisional employee shall be final and not subject to appeal.” RCW 405.220.220(6) provides: “This section provides the exclusive means for nonrenewing the employment contract of a provisional employee and **no other provision of law shall be applicable thereto . . .**” (Emphasis added.) A common law claim qualifies as a “provision of law.” Thus, by the terms of the statute, Mr. Frazier was not entitled to bring common law claims.

Assuming, arguendo, that Mr. Frazier was allowed to bring a cause of action for a common law tort, which is denied, Mr. Frazier did not have a tortious interference claim. “An action for tortious interference with a contractual relationship lies only against a third party.” *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 598, 611 P.2d 737 (1980). “A party to a contract cannot be liable in tort for inducing his own breach.” *Id.* Here, Supt. Quick was a party to Mr. Frazier’s provisional teaching contract. The trial court’s Conclusion of Law No. 2 stated:

Because Superintendent Quick was a party to Ryan Frazier’s provisional teaching contract there is no legal basis to support a claim against Superintendent Quick for intentional interference of Ryan Frazier’s contract

H. THE NON-RENEWAL OF PLAINTIFF’S CONTRACT WAS NOT ARBITRARY AND CAPRICIOUS.

Mr. Frazier asserted that the nonrenewal of Mr. Frazier’s provisional teaching contract was arbitrary and capricious. (Brief of Appellant at 32.) After hearing all the evidence, the trial court entered Conclusion of Law No. 16, which stated: “The decision of the Oroville School Board and its members **was not arbitrary, capricious or illegal.**” (Emphasis in original.)

“A court’s review for a writ of certiorari is not full appellate review, but instead **based on the administrative record.**” *Hood Canal Sand and Gravel v. Goldmark*, 195 Wn.2d 284, 308, 381 P.3d 95 (2016). (Emphasis added.) “**Judicial review** [under RCW 28A.405.220] is not entirely appellate review, but **involves the consideration of whether the administrative record reveals that the lower tribunal’s decision was illegal, arbitrary, or capricious.**” *Petroni*, 127 Wn.App. at 726. (Emphasis added.) The trial court is not permitted to receive new evidence. Here, the administrative record that was before the District’s school board when it voted to non-renew Mr. Frazier’s provisional teaching contract consisted of Supt. Quick’s letter to the school board, Mr. Frazier’s letter to the school board and letters submitted by third parties. Mr. Frazier did not provide *any evidence* to the school board; he simply

submitted a “letter of protest.” **On the record that was before the school board the trial court could not have found that the decision by the school board was “illegal, arbitrary, or capricious.”**

On Jan. 9, 2017, in regards to a motion for consideration brought by Supt. Quick and the District, the trial court ruled that there was a question of material fact whether the school board’s decision was arbitrary and capricious. (Court’s ruling at 2; CP 445.) The trial court made this conclusion “based upon the facts as ‘subjectively’ submitted to them [the school board members] by Superintendent Quick” including (a) the “adequacy or methodology of evaluation, and with disregard for other important evaluations, observations, recommendations, or comments of others along with the possible withholding of information as alleged or stated in declarations” and (b) because it “appear[s] that a proper review and consideration of information by individual members was not made or they failed to perform their duty as board members.” (*Id.*) The trial court also stated: “While the Oroville School Board acted ‘arbitrary and capricious’, it did not do so maliciously or intentionally” (Court’s ruling at 2.) This contradicted the trial court’s statement that there was a question of material fact whether the decision of the school board was arbitrary and capricious. The inconsistent statements made by the trial court are fully discussed at above.

Here, the trial court's decisions were clearly based upon evidence that was not before the District's school board. The trial court was required to decide solely upon the record that was before the school board when it voted not to renew Mr. Frazier's provisional teaching contract. However, the trial court's err in this regard was harmless because the trial court ultimately reached the correct result.

Here, once this Court affirms the trial court's Findings of Fact under the substantial evidence rule, it must be concluded that the trial court's Conclusions of Law were not erroneous.

I. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S CLAIM FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS.

Mr. Frazier asserted that the trial court erred in dismissing his claim for negligent infliction of emotional distress (NIED). (Brief of Appellant at 42-48.)

Mr. Frazier's challenge to the non-renewal of his provisional teaching contract could only be based upon the *Petroni* standard: that the decision of the District's school board was illegal, arbitrary, or capricious. The District maintains that Mr. Frazier was not permitted to bring common law causes of action in this lawsuit.

Even if Mr. Frazier was allowed to bring claims for NIED and outrage, which is denied, this claim was properly dismissed on the merits.

A claim for NIED cannot be based upon a workplace dispute. “[A]bsent a statutory or public policy mandate, employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes.” *Bishop v. State*, 77 Wn.App. 228, 234-35, 889 P.2d 959 (1995). There is no duty, in the context of a claim for NIED, for an employer to provide employees with a stress-free workplace. *Snyder v. Med. Serv. Corp. of Eastern Wash.*, 145 Wn.2d 233, 243-44, 35 P.3d 1158 (2001). *See also Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wn.App. 212, 230, 907 P.2d 1223 (1996) (holding employers have no duty to avoid infliction of emotional distress on employees when responding to employment disputes).

Moreover, a claim for NIED “must be susceptible to medical diagnosis and proved through medical evidence.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 196-97, 66 P.2d 630 (2003). Mr. Frazier did not provide proof that he had a medical diagnosis and did not provide medical evidence to prove a medical diagnosis. At most, “Plaintiff merely accuses Defendants of inflicting emotional harm when they terminated him. Such allegations in the employment context do not support a cause of action for [NIED].” *Carlson v. City of Spokane*, 2014 WL 1593350, *13 (E.D.Wash. 2014) (applying Washington law). Moreover, a negligence claim cannot be based upon intentional conduct, which is what Mr. Frazier alleged in

this action. *Willard v. City of Everett*, 2013 WL 4759064, *2 (W.D.Wash. 2013) (applying Washington law).

Mr. Frazier cited *Chea v. Men's Warehouse*, 85 Wn.App. 405, 932 P.2d 1261 (1997), *rev. denied* 134 Wn.2d 1002, 953 P.2d 96 (1998), for the proposition: "Adverse employment actions can provide the basis for a claim of negligent infliction of emotional distress when the Defendant is shown to have acted wrongfully." (Brief of Appellant at 45.) In *Chea*, an employee of a clothes store sued his employer for NIED. Co-employees made negative comments about Asians and about plaintiff's short stature. 85 Wn.App. at 408. A manager grabbed plaintiff by his lapels and cursed at him for not taking care of a customer. *Id.* The Court of Appeals held that a claim for NIED is a cognizable claim in the workplace when it does not arise solely from racial remarks and does not result from an employer's disciplinary acts or personality dispute. 85 Wn.App. at 412. The court also stated: "**We agree with the Bishop Court's holding that an employer's disciplinary decision in response to a workplace personality dispute cannot be the basis for such a claim.**" *Id.* at 413. (Emphasis added.) Division I's opinion in *Chea* was distinguished by our Supreme Court in *Snyder v. Med. Serv. Corp of Eastern Wash.*, 145 Wn.2d 233, 35 P.3d 1158 (2001), where it was stated at 245:

Snyder claims dismissal of her negligent infliction claim creates a conflict with *Chea* In *Chea* Division One upheld a negligent infliction verdict where a supervisor inflicted emotional damage on an employee. ***Chea* is however limited to its facts.** . . . [T]he *Chea* court permitted the employee to recover because the employer did not argue at trial the incident at issue was a disciplinary act or in response to a personality dispute. . . . In contrast, **the trial court in the instant matter did find MSC defending on the basis that Snyder’s claim encompassed a workplace dispute** or personality difference. Consequently, Snyder’s reliance on *Chea* is misplaced.

(Emphasis added.) Our Supreme Court in *Snyder* held that the court in *Chea* was correct in affirming the verdict only because plaintiff did not argue the issue of duty. 145 Wn.2d at 245-46. *See also Bishop v. State*, 77 Wn.App. 228, 234, 889 P.2d 959 (1995):

The utility of permitting employers to handle workplace disputes outweighs the risk of harm to employees who may exhibit symptoms as a result. The employers, not the courts, are in the best position to determine whether such disputes should be resolved by employee counseling, discipline, transfers, terminations or no action at all. While such actions undoubtedly are stressful to impacted employees, the courts cannot guarantee a stress-free work place. Therefore, we hold that absent a statutory or public policy mandate, employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes.

See also Doty v. PPG Industries, Inc., 2016 WL 5253205, *7 (W.D.Wash. 2016) (quoting *Bishop* with approval); *Bailey v. Alpha Technologies, Inc.*, 2016 WL 4211527, *7 (W.D.Wash. 2016) (quoting *Bishop* with approval); *Richards v. Healthcare Resources Group, Inc.*, 131

F.Supp.3d 1063, 1075 (E.D.Wash. 2015) (quoting *Bishop* with approval); *Banks v. Yoke's Foods, Inc.*, 2014 WL 7177856, *10 (E.D.Wash. 2014) (quoting *Bishop* with approval); *Carlson v. City of Spokane*, 2014 WL 5334264, *15 (E.D.Wash. 2014) (quoting *Snyder* and citing *Bishop* with approval).

J. PLAINTIFF WAS NOT ENTITLED TO VERBALLY ADDRESS THE DISTRICT'S SCHOOL BOARD.

Plaintiff contends that he was wrongfully not allowed to verbally address the District's school board on June 23, 2014. (Brief of Appellant at 48-49.) RCW 28A.405.220(4) provides:

In taking action upon the recommendations of the superintendent, the board of directors **shall consider any written communication** which the provisional employee may file with the secretary of the board at any time prior to that meeting.

(Emphasis added.) There is no requirement under RCW 28A.405.220(4) that a teacher whose contract is not renewed shall be given the right to make an oral argument to a school district's board of directors. The fact that other teachers were allowed to verbally address the school board in the past is of no consequence. The school board was absolutely entitled to conduct its meetings any way it deemed fit so long as it did not violate any statute. The non-renewal statute was not violated in this case.

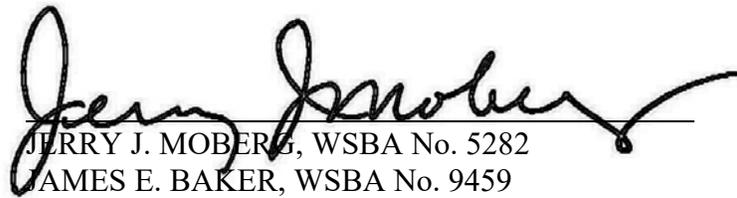
Mr. Frazier contends that he did, in fact, prepare lesson plans. (*Id.* at 49.) In the trial court's Finding of Fact No. 33, the trial court accepted the testimony of Dr. Howard who "concluded that, in fact, none of the documents were daily lesson plans." Thus, Mr. Frazier lacked evidence at the time of the school board meeting that he prepared daily lesson plans.

IV. CONCLUSION

For the reasons stated above, this court should affirm the judgment of the trial court dismissing all claims of Mr. Frazier.

RESPECTFULLY SUBMITTED this 26th day of July, 2018.

JERRY MOBERG & ASSOCIATES, P.S.

A handwritten signature in black ink, appearing to read "Jerry J. Moberg", is written over a horizontal line. The signature is fluid and cursive.

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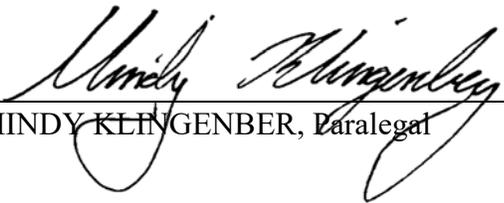
CERTIFICATE OF SERVICE

I certify that on this date I filed this document using the Washington State Appellate Court's Portal which will send notification of the filing to:

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DATED this 27th day of June, 2018 at Ephrata, WA.

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