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

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MICHAEL F. CRONIN,

Respondent,

vs.

CENTRAL VALLEY SCHOOL DISTRICT,

Appellant.

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**APPELLANT SCHOOL DISTRICT'S OPENING BRIEF**

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## I. ASSIGNMENT OF ERROR

The Superior Court erred when it restored Mr. Cronin to his employment as a teacher for the Central Valley School District and when it determined that he was entitled to receive wages after his existing contract expired on August 31, 2012, pursuant to timely notice of nonrenewal and discharge, for which sufficient cause existed as determined by a statutory hearing officer.

Based on the above errors, there are several issues for this Court to address:

1. Is a teacher who has received timely notice of nonrenewal required to expressly request a nonrenewal sufficient cause hearing within ten days in order to preserve the right to such a hearing?
2. Did Mr. Cronin or his agent request a statutory sufficient cause hearing for his notice of nonrenewal prior to the ten-day deadline?
3. Is a teacher, who has received timely notice of nonrenewal, entitled to collect pay and benefits after the end of his current signed teaching contract if he does not prevail at a statutory hearing where it was determined that the school district had sufficient cause to discharge him mid-contract and nonrenew any potential future contracts?
4. Did the delay, caused by the legal proceedings filed by Mr. Cronin, between receiving a notice of discharge and nonrenewal and the eventual statutory hearing upholding that notice entitle him to be restored to his employment or to receive pay after the expiration of his existing contract on August 31, 2012?

## II. STATEMENT OF THE CASE

On December 21, 2018, a hearing officer decided that sufficient cause existed as of January 5, 2012, to discharge Mr. Cronin and to nonrenew his teaching contract with the School District.<sup>1</sup> However, the road that led to that decision has been a long and winding one—spanning nearly seven years and including a lawsuit and two trips to this Court initiated by Mr. Cronin. And now the parties are here for a third time, asking this Court to decide whether Mr. Cronin was entitled to receive pay after his contract with the School District expired on August 31, 2012.

In December 2012, after investigating Mr. Cronin's misconduct—which included inappropriately touching female students, harassing adult women, assaulting others, and alcohol-related arrests—Mr. Jay Rowell, the Deputy Superintendent for the School District, recommended to Superintendent Ben Small that probable cause existed for Mr. Cronin's discharge and for the nonrenewal of his teaching contract that was set to expire on August 31, 2012. CP at 702. Mr. Small accepted that recommendation and issued a written notice of probable cause for discharge

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<sup>1</sup> This took place after the Superior Court's ruling but is in the Court of Appeals record related to the District's Motion for Stay. *See* Second Declaration of Paul E. Clay, Ex. A. Also in the record, on January 9, 2019, the hearing officer entered findings of fact and conclusions, deciding that sufficient cause existed to discharge Mr. Cronin and to nonrenew his teaching contract. Third Declaration of Paul E. Clay, Ex. A.

and nonrenewal (the “Notice of Probable Cause”) to Mr. Cronin on January 5, 2012. CP at 702.

The Notice of Probable Cause listed the causes that formed the basis of Mr. Small’s determination that probable cause existed for Mr. Cronin’s discharge and nonrenewal and informed Mr. Cronin that he had the right to request a hearing pursuant to RCW 28A.405.210 (the nonrenewal statute), RCW 28A.405.300 (the discharge statute), and RCW 28A.405.310 (the hearing process for discharge and nonrenewal)—copies of which were attached. CP at 707–08. The Notice of Probable Cause also advised Mr. Cronin that if he did not timely request a hearing—within ten days of receiving the notice—Mr. Small’s decisions would “become final, binding and non-appealable.” CP at 708. Lastly, the Notice of Probable Cause invited Mr. Cronin to contact Mr. Small if he did not understand the notice or if he had any questions. CP at 708.

Because Mr. Cronin was in jail at the time the Notice of Probable Cause was issued—serving time for alcohol-related misconduct—he had his union representative, Sally McNair, act on his behalf. Ms. McNair requested a hearing to address termination of Mr. Cronin’s existing contract, but she did not address the nonrenewal of Mr. Cronin’s contract. CP at 811–12.

Specifically, on January 11, Ms. McNair delivered a letter to the School District that said:

I have received the Notice of Probable Cause for Termination of Mike Cronin's employment dated January 5<sup>th</sup>, 2012. Pursuant to RCW 28A.405.300 and .310, I am requesting a closed hearing on Mr. Cronin's behalf to determine whether there is sufficient cause for such adverse action. Until counsel has been appointed, I will serve as Mr. Cronin's nominee for a hearing officer.

Due to the lack of access to Mr. Cronin, I will also be filing a grievance in order to preserve timeliness to both procedures. It is clear the contract requires an election of remedies and it is not our intent to pursue both options, only to allow time to consult with Mr. Cronin so he can determine his desired path. We anticipate notifying the District on or before February 10<sup>th</sup>, 2012 as to Mr. Cronin's decision to pursue either the statutory hearing or the grievance. At that time, either this request or the grievance will be withdrawn.

CP at 780.<sup>2</sup>

Because it appeared from Ms. McNair's letter that Mr. Cronin had not decided at that time whether he was going to pursue a statutory hearing or to file a grievance, the School District determined that the letter did not constitute a request for a statutory hearing for either Mr. Cronin's discharge or the nonrenewal of his contract. CP at 136. Accordingly, the School District waited to hear from Ms. McNair, as she had directed in her letter,

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<sup>2</sup> As will be discussed *infra*, Ms. McNair's citation to RCW 28A.405.300 is a reference to the discharge statute, which pertains only to termination of Mr. Cronin's existing contract and not to nonrenewal of that contract. She also used the phrase "adverse action," which is likewise only used in the discharge statute.

about whether Mr. Cronin was going to choose a statutory hearing or whether he was going to file a grievance. CP at 702–03.

Then on February 8, more than ten days after Mr. Cronin received the Notice of Probable Cause, Ms. McNair sent an email to Mr. Rowell informing him of Mr. Cronin’s decision:

As a follow-up to my letter from January 11<sup>th</sup>, 2012, this email is to provide you written notice that Mr. Cronin has decided to pursue the statutory hearing as described in RCW 28A.405.300 as his election of remedy for the notice of probable cause for discharge. He will not be utilizing the grievance procedure.

CP at 782. Again, she did not request a hearing for the nonrenewal of future contracts or mention the nonrenewal statute. Id.

A couple of weeks after Ms. McNair sent her email, Mr. Small sent her a letter, informing her that the School District did not think Mr. Cronin had timely appealed the Notice of Probable Cause:

Thank you for your correspondence dated January 11, 2012. Any appeal of a Notice of Probable Cause under RCW 28A.405.300 and RCW 28A.405.210 must be undertaken by the employee who receives the Notice. Since you are not the employee who received the Notice, your correspondence does not constitute a valid appeal. Further, your correspondence does not mention and thus does not constitute an appeal of the Notice of Probable Cause for Mr. Cronin’s Nonrenewal.

The employee here, Mr. Cronin, did not timely appeal the Notice of Probable Cause for Discharge or Nonrenewal and thus he has waived his right to a statutory hearing under

RCW 28A.405.210 and 28A.405.300. As such, his employment with the District has been terminated.

CP at 784.

After waiting about a month, on March 23, Mr. Cronin filed suit against the School District, seeking an order determining that he had made a timely request for a statutory hearing and requiring the School District to pay him wages and benefits until a hearing officer decided there was sufficient cause for his discharge and nonrenewal. CP at 3–10. Then Mr. Cronin filed a motion for summary judgment against the School District on March 28. CP at 73–74. At that time, Mr. Cronin did not seek appointment of a statutory hearing officer pursuant to RCW 28A.405.310, though he admits he could have. RP at 17 (November 15, 2012).

In response to Mr. Cronin's motion, the School District filed a cross-motion for summary judgment, arguing, among other things, that Mr. Cronin's suit was untimely under RCW 28A.645.010, that Mr. Cronin had failed to timely request a hearing for his discharge, and that he had failed to request a hearing for his nonrenewal altogether. CP at 92–119.

After responses and replies and motions to strike, a hearing was held on November 15 before Judge Jerome J. Leveque. RP at 1 (2012). Judge Leveque granted the School District's cross-motion for summary judgment on the ground that Mr. Cronin's suit was untimely filed and, therefore, the

court did not have jurisdiction to hear his claims. CP at 276–97. Mr. Cronin appealed Judge Leveque’s order, and on March 13, 2014, this Court reversed Judge Leveque’s decision and remanded the case for further proceedings. CP at 860–61.

The further proceedings resulted in both Mr. Cronin and the School District filing motions for summary judgment on November 14, 2014 per Judge Kathleen M. O’Connor’s scheduling order. CP at 309–10, 389–90. The School District argued that Mr. Cronin had failed to timely request a hearing for his discharge from his existing contract because he did not personally request a hearing, because Ms. McNair was not authorized to request a hearing for him, and because he did not timely choose between pursuing a statutory hearing and filing a grievance. CP 395–404. The School District also argued that Mr. Cronin did not request a hearing for his nonrenewal. CP 404–06.

After more responses and replies and motions to strike were filed, Judge O’Connor held a hearing on December 12, 2014. RP at 1 (December 12, 2014). At that hearing, Judge O’Connor granted the School District’s motion for summary judgment on the basis that Mr. Cronin failed to timely elect between having a statutory hearing and filing a grievance. RP at 8 (2014). Then she indicated that she did “not need to make rulings on everything else because they all are contingent upon a different sort of

ruling.” RP at 8–9 (2014). Her oral ruling was memorialized in a written order dated December 19. CP at 589–92.

Judge O’Connor’s ruling thus resulted in the second time that Mr. Cronin’s case was dismissed at the trial court level. On January 5, 2015, Mr. Cronin appealed Judge O’Connor’s grant of summary judgment in favor of the School District but did not appeal the denial of his motion. CP at 593–98, 875.

On appeal, this Court had to decide whether Mr. Cronin timely chose between pursuing a statutory hearing for his discharge under his existing contract and filing a grievance. CP at 875. Whether Mr. Cronin had adequately requested a hearing for his nonrenewal was not raised on appeal since Judge O’Connor had not ruled on that issue and since Mr. Cronin did not appeal the denial of his motion. CP at 870, 875. On April 14, 2016, this Court decided that Mr. Cronin had timely requested a statutory hearing for his mid-contract discharge and reversed Judge O’Connor’s decision. CP at 889–90.

In reversing the decision, this Court also directed the superior court to enter an order compelling the School District to hold a statutory hearing for Mr. Cronin and allowed him to pursue his claims for pay and benefits on remand. CP at 889–90.

Back at superior court, both parties filed motions for summary judgment on June 26, 2017, again pursuant to the trial court's scheduling order. CP at 642–43, 785–805. To defend against Mr. Cronin's claim that he was entitled to pay and benefits until a hearing officer made a sufficient-cause determination, the School District argued, once again, that regardless of whether Mr. Cronin requested a hearing for his discharge from his existing contract, he did not request a hearing for his nonrenewal of future contracts. The School District also argued that because Mr. Cronin had received timely notice of nonrenewal, he had no right to be paid after his contract for the 2011–12 school year expired, regardless of whether he requested a hearing for his nonrenewal. CP at 664–75.

After more briefing and after several judges were either reassigned or disqualified from hearing this case, a hearing was eventually held before Judge John O. Cooney on April 27, 2018.<sup>3</sup> CP at 1087, 1089, 1090 1092, 1093, 1094, 1096, 1099; RP at 1 (April 27, 2018). At that hearing, Judge Cooney determined that this Court had already decided that Mr. Cronin requested a hearing for his nonrenewal.<sup>4</sup> RP at 64–66 (2018). Judge Cooney

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<sup>3</sup> Indeed, at no fault to the parties, numerous delays occurred between when this Court remanded the case in April 2016 and when summary judgment motions were filed in June 2017 and then between when the motions were filed in 2017 and when they were heard in April 2018.

<sup>4</sup> See argument *infra* regarding the lack of any such determination by this Court.

then went on to award Mr. Cronin pay and benefits pending his statutory hearing. RP at 67–68 (2018).

Not long after Judge Cooney’s oral ruling, the School District suggested the name of a hearing officer to Mr. Cronin’s counsel, Larry Kuznetz. CP at 1185–86. At no time before that suggestion by the School District had Mr. Cronin ever, in seven years, suggested the name of a hearing officer to the School District. CP at 1185–86. Mr. Cronin rejected the School District’s proposal and then proposed the name of another possible hearing officer, Mr. David Kulisch. The School agreed to Mr. Kulisch as the hearing officer. CP at 1185–86, 1500.

On May 8, the School District filed a motion for reconsideration of Judge Cooney’s decision. CP at 1104. After reviewing the briefing of the parties and without hearing oral argument, Judge Cooney issued a written decision denying the School District’s motion. CP at 1202–203. In his decision, Judge Cooney recognized that Mr. Cronin had no property interest in having his contract renewed (as opposed to the property interest in his contract for the school year in which he was discharged) but nevertheless determined that he was entitled to be restored to his employment pending his hearing. Judge Cooney based that determination on the premise that the School District had somehow failed to comply with certain timelines in RCW 28A.405.310. CP at 1203. Prior to Judge Cooney’s determination,

Mr. Cronin had never made any such assertion, and, as a result, neither party had addressed Judge Cooney's position in their briefing.

On June 29, 2018, Judge Cooney entered a written order granting Mr. Cronin his request for back pay and benefits, restoring him to employment pending the outcome of his statutory hearing, and compelling the School District to hold a statutory hearing.<sup>5</sup> CP at 1497–1500. And after receiving briefing on the issues of the amount of damages, attorney's fees, tax consequences, and prejudgment interest, Judge Cooney entered a final judgment on August 23. A few days later, the School District filed its notice of appeal with this Court. CP at 593–98.

In the interim, Mr. Cronin received a two-week long hearing, where he was given a chance to defend against the charges levied by the School District. Third Clay Decl., Ex. A. And as mentioned earlier, the hearing officer presiding at the hearing determined that sufficient cause existed as of January 5, 2012—the date Mr. Cronin received the Notice of Probable Cause—for Mr. Cronin's discharge and for the nonrenewal of his teaching contract. Second Clay Decl., Ex. A; Third Clay Decl., Ex. A.

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<sup>5</sup> Because the School District had already paid Mr. Cronin his wages and benefits through the end of his 2011–2012 contract, Judge Cooney's order only applied to wages owed after Mr. Cronin's contract expired. RP at 66 (2018); CP at 1499.

### III. ARGUMENT

#### **A. Mr. Cronin was not Entitled to Receive Pay After His Contract Expired Even Though His Statutory Hearing was still Pending.**

Mr. Cronin believes that he should have continued to be paid until his statutory hearing even when the hearing was held after he received timely notice of nonrenewal and after he no longer had a current contract with the School District. Mr. Cronin's position is based on a mistaken understanding of the protections teachers are provided under the statutory framework for terminating teachers in Washington. That is, Mr. Cronin misunderstands the statutory and conceptual differences between termination of an existing contract and notice of nonrenewal of future contracts. He also misunderstands the differences between Washington's continuing contract statutes and tenure.

Specifically, Mr. Cronin's position rests on his belief—without any appellate authority—that the protections provided to teachers under RCW 28A.405.300, the discharge statute, apply after a teacher's current contract term has ended. However, the protections of the discharge statute only apply during the term of a teacher's current contract. Thus, once a teacher receives timely notice of nonrenewal and his contract term ends, the protections of the discharge statute no longer apply. That means, Mr. Cronin was not

entitled to receive pay after his contract for the 2011–2012 school year ended.

By statute, a school district can only enter into a one-year employment contract with a teacher. RCW 28A.405.210. However, a teacher's contract is presumed to be renewed for another one-year term unless the teacher is given timely notice that his contract will not be renewed. *Id.* Additionally, a teacher's current one-year contract can be cut short if the school district discharges the teacher with sufficient cause. RCW 28A.405.300. Thus, there are two ways to end the employment relationship between a teacher and school district: discharge and nonrenewal.

Discharge adversely affects a teacher's current contract status. *Myking v. Bethel Sch. Dist. No. 403*, 21 Wn. App. 68, 72 (1978) (“When RCW 28A.[405.300] is read in the light of RCW 28A.[405.210], it is obvious that it pertains only to an adverse action taken with respect to the Current contract status of an employee.”). Whereas, nonrenewal cuts off a teacher's right to employment beyond the teacher's existing contract term. *See Schlosser v. Bethel Sch. Dist.*, 183 Wn. App. 280, 290–91 (2014). Because discharge and nonrenewal have different effects, the legislature has provided different procedural protections under different statutes for discharging a teacher mid-contract and nonrenewing a teacher's future contracts.

Because discharge affects a teacher's existing contract status, the legislature has "created a statutory scheme with heightened procedural due process for discharging" a teacher. *Schlosser*, 183 Wn. App. at 288. That scheme gives teachers the right to request a hearing before a school district discharges him or otherwise adversely affects his contract. RCW 28A.405.300. And if the teacher does request such a hearing, then the school district cannot adversely affect his current contract status until a hearing is held. *Bellevue Pub. Sch. Dist. No. 405*, 41 Wn. App. 730, 734–35 (1985) ("RCW 28A.[405.300] requires a pretermination hearing before a principal is adversely affected in his contract status.").

Practically, that means a teacher continues to receive pay until a hearing, assuming that the hearing is held before the teacher's contract ends. *See Petroni v. Bd. of Directors of Deer Park Sch. Dist. No. 414*, 127 Wn. App. 722, 728 (2005) ("When a decision to discharge is made, the district . . . need only pay the teacher until the hearing."); *see also Davis v. Tacoma Sch. Dist.*, 188 Wn. App. 1043, 2015 WL 4093904, at \*3 fn. 5 (2015) ("The *Petroni* court's reference to the district having to pay a teacher *only* until the hearing reflects the assumption that hearings on probable cause for discharge usually occur before the end of the teacher's current contract.

Therefore, the district has to pay the teacher only until the hearing rather than until the end of the contract term.”).<sup>6</sup>

Because the protections of the discharge statute at RCW 28A.405.300 only apply to a teacher’s existing contract, those protections no longer apply once the contract expires. *Davis*, 188 Wn. App. 1043, 2015 WL 4093904, at \*4 (“[T]he discharge statute, RCW 28A.405.300, protects an employee from discharge or adverse action only for the duration of his or her *current contract*.”); see *Foster v. Carson Sch. Dist. No. 301*, 63 Wn.2d 29, 31 (1963) (“[I]f notice of probable cause and an opportunity for hearing is not timely given a teacher shall not be discharged for the *duration* of his or her contract.” (emphasis added)).

Unlike a mid-contract discharge, a teacher is not entitled to a hearing before a teacher’s contract is nonrenewed. *Schlosser*, 183 Wn. App. at 288. That is because teachers have “neither tenure rights to continue [their] public school employment nor a property interest in continued employment that is analogous to tenure rights.” *Id.* at 291. In other words, teachers, unlike tenured employees, have no expectation of continued employment beyond their existing contracts. *Id.* Thus, once a teacher receives timely notice of nonrenewal, his contract is nonrenewed unless his nonrenewal is

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<sup>6</sup> Pursuant to GR 14.1, *Davis* is not considered binding authority; however, it may be “accorded such persuasive value as the court deems appropriate.”

overturned at a statutory hearing. *See Petroni*, 127 Wn. App. at 727 (“A teacher also has a continuing contract if notice of nonrenewal is received, and the teacher is successful in challenging the basis for the nonrenewal decision.”).

This distinction between discharge and nonrenewal is significant for many reasons, including nonrenewal of teachers based on financial exigency. As described in *Schlosser*, there are times when school districts are forced to nonrenew numerous employees in a single year due to financial exigencies. *Schlosser*, 183 Wn. App. at 291, fn. 14 (“[T]he District (1) notes that ‘[i]n the spring of 2009, . . . 137 of Washington’s 295 school districts issued [reduction in force] notices to more than 1800 classroom teachers—representing 3 [percent] of all teachers in Washington’; and (2) concludes that in 2009, Schlosser’s interpretation would have required 1800 nonrenewal teacher contract hearings throughout the state”).

In *Schlosser*, the court noted the undue burden on school districts if they were required to provide nonrenewed teachers with pretermination hearings, which was what Schlosser sought. *Id.* The same burden applies here, in that Mr. Cronin essentially seeks (and Judge Cooney so ordered) a pretermination hearing on his nonrenewal (that is, a hearing prior to having his contract and pay terminated).

Based on Judge Cooney’s determination, school districts that reduce their work force because of financial exigency (and provide multiple notices of nonrenewal on that basis) would be required to either hold hearings on all appealed nonrenewals prior to the end of the employee’s contract term or else continue to pay the employees into the next school year despite the existence of the financial exigency.

The burden on school districts to do either cannot be understated. Indeed, requiring hearings prior to the end of the contract would potentially force needless hearings prior to when school district budgets might be finalized and thus prior to when school districts might have the ability to “recall” certain nonrenewed employees. Judge Cooney’s ruling, were it allowed to stand, would thus have widespread negative impact on school districts across the state.

Like the teacher’s claim in *Schlosser*, the differences between discharge and nonrenewal prove fatal for Mr. Cronin’s claim that he was entitled to receive pay after he no longer had a contract with the School District. *See Schlosser*, 183 Wn. App. at 288–89 (“When applying chapter 28A.405 RCW and when determining due process protections, Washington courts distinguish between nonrenewal of teachers’ contracts and teachers’ mid-contract discharge from employment. This distinction is fatal to *Schlosser*’s claims.”). And *Davis* illustrates why.

In *Davis*, the Court of Appeals had to determine the exact same issue raised here: whether a school district was required to continue to pay a teacher until his sufficient-cause hearing when the hearing was held after his existing contract term ended. 188 Wn. App. 1043, 2015 WL 4093904, at \*2. In that case, Mr. Davis was given notice of probable cause for both discharge and nonrenewal. *Id.* at \*1. Mr. Davis requested a statutory hearing for the discharge but not for the nonrenewal. *Id.* When his contract expired, the school district stopped paying him, even though his statutory hearing was still pending. *Id.* A few months later, Mr. Davis filed suit against the school district, claiming that the district should have continued to pay him through the hearing. *Id.* at \*2. The superior court ruled against Mr. Davis, and he appealed. *Id.*

On appeal, the court focused on the “nonrenewal process because the discharge statute, RCW 28A.405.300, protects an employee from discharge or adverse action only for the duration of his or her *current contract.*” *Id.* (emphasis in original). Thus, the crux of the dispute was “whether the District complied with the notice provisions of RCW 28A.405.210 when it nonrenewed Davis’s contract.” *Id.* at \*4. The court reasoned that if the school district had properly given Mr. Davis notice of nonrenewal, then he “had no right to wages past the end of [his] contract term.” *Id.*

Applying the notice requirements of RCW 28A.405.210, the court determined that the school district had given Mr. Davis timely and proper notice of nonrenewal. *Id.* at \*6. Accordingly, the court held that “[b]ecause the District followed the proper procedures for nonrenewing Davis’s contract, the District d[id] not owe him wages for any period after the expiration of his 2012–2013 contract term.” *Id.*

As in *Davis*, the focus here is on the nonrenewal process—not the discharge process which has been fully resolved. That is, the crux of the dispute here is whether the School District gave Mr. Cronin timely statutory notice of nonrenewal. Mr. Cronin has never argued that the School District did not provide him with timely notice of nonrenewal—because he, in fact, received timely notice.<sup>7</sup> Thus, Mr. Cronin’s contract was properly nonrenewed, and he was not entitled to receive any pay once his existing contract expired on August 31, 2012, unless *and until* he prevailed at the

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<sup>7</sup> Mr. Cronin is likely to argue, as he has before, that the School District could not nonrenew his contract for misconduct. However, over the nearly seven years of litigation, he has never provided authority to support his position and no court has ever ruled in his favor on that position. This Court, however, has previously rejected his position, saying: “It defies common sense to conclude that a school board cannot base a nonrenewal decision on legitimate concerns about a provisional teacher’s conduct.” *Petroni*, 127 Wn. App. at 732. (Mr. Cronin will also attempt to distinguish *Petroni* from this case by pointing out that the teacher in *Petroni* was a provisional teacher, not a nonprovisional teacher as Mr. Cronin was. However, that distinction is irrelevant to the common sense approach articulated by this Court. In addition, the Hearing Officer has already decided that the School District had sufficient cause to nonrenew Mr. Cronin.)

statutory hearing.<sup>8</sup> But he did not prevail, so he is not entitled to pay and was never entitled to pay after his contract expired.

**B. Mr. Cronin was not Entitled to be Restored to His Employment Because of the Length of the Legal Process in Determining the Adequacy of his Appeal of the Notice of Probable Cause.**

Although Judge Cooney acknowledged the above reasoning and determined that Mr. Cronin did not have a property interest in having his contract renewed, he nevertheless determined that Mr. Cronin was entitled to be restored to his employment pending his sufficient-cause hearing because of the length of time between when his representative responded to the Notice of Probable Cause and when a hearing was held. CP at 1203. Specifically, Judge Cooney determined that because this Court had ruled that Mr. Cronin had “complied with the requirements of RCW 28A.405.210 in requesting a hearing,” the School District “was required to comply with the timeliness provisions of RCW 28A.405.310(4), (5), and (7).” CP at 1203. And because the School District did not do that, Mr. Cronin was entitled to have his employment restored. CP at 1203.

There are two reasons why Judge Cooney erred in deciding that Mr. Cronin was entitled to reemployment. First, this Court has never ruled that Mr. Cronin complied with the requirements of RCW 28A.405.210 in

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<sup>8</sup> The School District previously paid Mr. Cronin for the balance of his contract through August 31, 2012. RP at 68 (2018); CP at 1001.

requesting a hearing to contest his notice of nonrenewal. And, in fact, Mr. Cronin failed to request a hearing in accordance with RCW 28A.405.210—or even mention nonrenewal or the statute in his requests for a hearing. Thus, his contract was conclusively nonrenewed as a matter of law on August 31, 2012. Accordingly, even if his hearing to determine sufficient cause for discharge was delayed, such delay could not invalidate the proper nonrenewal of Mr. Cronin’s contract. In other words, he had no right to be reemployed by the School District regardless of when his discharge hearing was held.

Second, even if this Court determines that Mr. Cronin’s representative did adequately request a hearing for his nonrenewal despite not explicitly doing so or referencing the statute, Judge Cooney erred by determining that the School District failed to comply with the timeliness provisions of RCW 28A.405.310 (an argument, incidentally, that Mr. Cronin has never made).

**1. Mr. Cronin did not request a hearing for his nonrenewal.**

Despite his concern about whether Mr. Cronin had adequately requested a hearing for his nonrenewal under RCW 28A.405.210, Judge Cooney nonetheless erroneously determined that this Court had already decided that Mr. Cronin had requested a nonrenewal hearing, and, thus was the law of the case. RP at 65 (2018).

However, for the law-of-the-case doctrine to apply, this Court must have actually decided whether Mr. Cronin had requested a hearing for his nonrenewal. It did not. But even if this Court had expressly considered and decided the issue, it does not preclude either party from arguing for a different result on this appeal. RAP 2.5(c)(2). Because the parties have never briefed or argued this issue at the Court of Appeals and Judge Cooney seemed to rely solely on an interpretation of this Court's ruling that was never argued by the parties, this appellate rule allowing argument over a portion of a previous appellate opinion in the same case is particularly appropriate.

Further, applying the law-of-the-case doctrine in this case would be unfair: the issue of whether Mr. Cronin requested a hearing for his nonrenewal was not raised in the prior appeal, neither party briefed that issue for this Court, and Mr. Cronin, in fact, never requested a hearing for his nonrenewal.

*a. The law-of-the-case doctrine does not prevent the School District from arguing that Mr. Cronin did not request a hearing for his nonrenewal.*

“The law of the case doctrine provides that an appellate holding enunciating a principle of law must be followed in subsequent stages of the same litigation.” *Cook v. Brateng*, 180 Wn. App. 368, 375 (2014). Generally, “the doctrine applies only to issues actually decided.” *Fluke*

*Capital & Management Services Co. v. Richmond*, 106 Wn.2d 614, 620 (1986) (citing *Riley v. Sturdevant*, 12 Wn. App. 808, 812 (1975) (“[I]t is clear that since this court’s opinion did not discuss or decide the propriety of the trial court holding that Tele-View had converted plaintiff’s property, it is not now barred by the law of the case doctrine from so doing.”)).

However, courts “may also refuse under the doctrine to address issues that could have been raised in a prior appeal.” *Sambasivan v. Kadlec Medical Center*, 184 Wn. App. 567, 576 (2014). Ultimately, though, “the law of the case is a discretionary doctrine.” *Id.* at 577. That is why courts will allow parties to argue issues that could have been barred by a rigid application of the law-of-the-case doctrine “when application of the doctrine would result in unfairness to the litigants and the perpetuation of judicial error.” *Greene v. Rothschild*, 68 Wn.2d 1, 10 (1996).

Moreover, under RAP 2.5(c)(2), “[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.” See *Roberson v. Perez*, 156 Wn.2d 33, 41–42 (2005) (The Washington State Supreme Court noted that RAP 2.5(c)(2) “codified certain restrictions on the law of the case doctrine” and that one of those restrictions included avoiding application of the doctrine “where the prior decision is

clearly erroneous, and the decision would work manifest injustice to one party.”).

Here the law-of-the-case doctrine does not apply for two reasons. First, this Court did not previously consider on the record or decide whether Mr. Cronin requested a hearing for his nonrenewal. Second, although the School District could have argued on the last appeal before this Court that Mr. Cronin did not request a hearing for his nonrenewal but did not do so, a rigid application of the law-of-the-case doctrine would result in unfairness and the perpetuation of judicial error. Thus, the School District asks this Court to exercise its discretion under RAP 2.5(c)(2) and consider the School District’s argument that Mr. Cronin did not request a hearing for his nonrenewal and thus any claim for employment beyond the expiration of his contract on August 31, 2012, must be dismissed as a matter of law.

A review of this Court’s most recent decision in this case and the briefing leading up to that decision, demonstrates that the issue being addressed on appeal was whether Mr. Cronin had made a proper request for a discharge hearing. Several times this Court mentioned Mr. Cronin seeking a hearing for his discharge:

- “Michael Cronin’s union representative, Sally McNair, demanded a hearing to challenge Cronin’s discharge from employment.” CP at 862.

- “On January 11, 2012, union representative Sally McNair hand delivered, to Central Valley School District Superintendent Ben Small, a request for a statutory hearing on Michael Cronin’s discharge.” CP at 869.
- “Michael Cronin sought an appeal of his discharge pursuant to RCW 28A.405.300.” CP at 882.

And this Court ultimately concluded that Mr. Cronin “timely exercised his right to a statutory appeal under RCW 28A.405.300,” the discharge statute. CP at 889.

However, this Court never concluded that Mr. Cronin timely exercised his right to a statutory appeal under RCW 28A.405.210, the nonrenewal statute. In fact, the only time this Court mentioned Mr. Cronin requesting a hearing for his nonrenewal, it said: “Sally McNair’s January 11 letter referenced Cronin’s termination from employment, *but not the nonrenewal of his teaching contract.*” CP at 870 (emphasis added). Thus, it is clear that this Court never decided that Mr. Cronin requested a hearing for his nonrenewal.

This Court, however, did acknowledge that the School District had argued before Judge O’Connor that Mr. Cronin had failed to request a hearing for his nonrenewal but that the issue was not raised on that appeal. CP at 870. So if the law-of-the-case doctrine does apply, it is because either party could have argued whether or not Mr. Cronin failed to request a hearing for his nonrenewal on appeal but neither did. The decision by both

parties not to argue that issue on the last appeal does not prevent this Court from now resolving it as a matter of law.

The last time this case came up on appeal, Judge O'Connor had granted the School District's motion for summary judgment. CP at 589–92. The School District had made several arguments to support its motion, including that Mr. Cronin had failed to timely request a hearing for his discharge and that he failed to ever request a hearing for his nonrenewal. CP at 395–406. Judge O'Connor never reached the issue of whether Mr. Cronin had requested a hearing for his nonrenewal, instead granting summary judgment on the ground that Mr. Cronin had not timely requested a statutory hearing. RP at 8–9 (2014).

Mr. Cronin appealed Judge O'Connor's summary judgment ruling in favor of the School District, but he did not appeal her denial of his motion for summary judgment. CP at 875. Thus, the primary issue presented to this Court on appeal was whether Mr. Cronin had timely requested a hearing for his discharge—not whether he ever requested a hearing for his nonrenewal. CP at 875. This Court determined that Mr. Cronin had requested a hearing for his discharge and remanded the case back to the superior court to enter an order compelling the School District to hold a statutory hearing. CP at 889.

The procedural background of this case is similar to that in *Sambasivan*, where this Court exercised its discretion and allowed Kadlec Medical Center to argue an issue that it could have raised before this Court on a prior appeal.

In *Sambasivan*, Kadlec Medical Center had been granted partial summary judgment against Sambasivan, and he appealed. 184 Wn. App. at 573–74. On appeal, this Court reversed the superior court’s ruling and remanded the case for trial. *Id.* at 574. On remand, Kadlec Medical Center moved for summary judgment on an issue that it could have raised on appeal to support the partial summary judgment ruling, and the trial court granted the motion. *Id.*

Sambasivan appealed, arguing that the law-of-the-case doctrine precluded the trial court from entertaining a summary judgment motion on that issue since this Court had remanded the case for trial. *Id.* at 576. This Court, however, chose not to apply the doctrine, acknowledging that “the first appeal was from a summary judgment motion that was addressed to limited issues” and that the “trial court resolved the motion on even more narrow grounds.” *Id.* at 577.

As in *Sambasivan*, Judge O’Connor ruled in favor of the School District on narrower grounds than those raised in the School District’s motion for summary judgment. RP at 8–9 (2014). Thus, when Mr. Cronin

only appealed Judge O'Connor's grant of summary judgment in favor of the School District on the issue of timeliness, the School District, as Kadlec Medical Center did, only addressed the narrow grounds upon which the Superior Court's judgment rested.

Likewise, just as Sambasivan argued that the trial court could not entertain Kadlec Medical Center's motion for summary judgment on remand because this Court had remanded the case for trial, Mr. Cronin has argued that the School District cannot argue that he did not request a hearing for his nonrenewal because this Court directed the superior court to compel the School District to hold a statutory hearing. Accordingly, the School District asks this Court to exercise the same discretion that it did in *Sambasivan* and allow the School District to argue that Mr. Cronin did not request a hearing for his nonrenewal.

This Court afforded Mr. Cronin the same leeway that the School District seeks here. In the prior appeals of this matter, Mr. Cronin never raised the issue of whether he was entitled to pay and benefits pending his statutory hearing—although he could have. With regard to that issue, this Court said: “The trial court did not address this contention because it ruled the request for the hearing void. The parties did not brief the issue on appeal. On remand, Michael Cronin may renew his request before the superior court

for pay and benefits pending the hearing on the merits of his discharge and nonrenewal.” CP at 889.

If Mr. Cronin was given a chance to argue that he was entitled to pay and benefits on remand, the School District ought to be able to defend against that argument by showing that Mr. Cronin’s contract was conclusively nonrenewed; thus, he was not entitled to pay and benefits beyond the term of his contract for the 2011–2012 school year as a matter of law.

Moreover, if this Court chooses to rigidly apply a discretionary doctrine like the law-of-the-case doctrine, it would perpetuate an error. As shown below—and as previously acknowledged by this Court—Mr. Cronin only requested a hearing for his discharge—he never requested a hearing for his nonrenewal. Allowing the fiction of a requested nonrenewal hearing to stand in this appellate process without prior appellate review (never addressed by the parties) or superior court review (never addressed because Judge Cooney applied the law-of-the-case doctrine) would not serve the cause of justice and would unduly interfere with this Court’s final resolution of all the issues in the case.

*b. Mr. Cronin only requested a hearing for his discharge.*

As explained above, discharge and nonrenewal are two distinct actions: the former cutting off a teacher’s employment mid-contract; the

latter giving a teacher advance notice that his employment will end when his contract expires. Further, discharge is addressed in RCW 28A.405.300, and nonrenewal is addressed in RCW 28A.405.210. Likewise, one is referred to by the legislature as “adverse action” (i.e., discharge) while the other (i.e., nonrenewal) is not. The distinction between discharge and nonrenewal once again proves fatal to Mr. Cronin’s case.

The subject line to the Notice of Probable Cause that the School District issued to Mr. Cronin specifically said: “Notice of Probable Cause for Discharge and Nonrenewal Pursuant to RCW 28A.405.210 and RCW 28A.405.300.” CP at 707. Superintendent Small told Mr. Cronin “that probable cause exists for your nonrenewal and discharge from employment with Central Valley School District.” CP at 707. And Superintendent Small informed Mr. Cronin of his right to request a hearing under RCW 28A.405.210, RCW 28A.405.300, and RCW 28A.405.310 and attached those separate statutes to the Notice of Probable Cause. CP at 707.

In response to the Notice of Probable Cause, Mr. Cronin had Ms. McNair deliver the following letter to the School District on his behalf:

I have received the Notice of Probable Cause for Termination of Mike Cronin’s employment dates January 5<sup>th</sup>, 2012. Pursuant to *RCW 28A.405.300 and .310*, I am requesting a closed hearing on Mr. Cronin’s behalf to determine whether there is sufficient cause for such adverse action. Until counsel has been appointed, I will serve as Mr. Cronin’s nominee for a hearing officer.

Due to the lack of access to Mr. Cronin, I will also be filling a grievance in order to preserve timeliness to both procedures. It is clear the contract requires an election of remedies and it is not our intent to pursue both options, only to allow time to consult with Mr. Cronin so he can determine his desired path. We anticipate notifying the District on or before February 10<sup>th</sup>, 2012 as to Mr. Cronin's decision to pursue either the statutory hearing or the grievance. At that time, either this request or the grievance will be withdrawn.

CP at 780 (emphasis added). Despite the explicit reference to nonrenewal several times in the Notice of Probable Cause, Ms. McNair's letter never mentions nonrenewal nor refers to the nonrenewal statute—it only references the discharge statute.

Then Ms. McNair said this in her follow-up email:

As a follow-up to my letter from January 11<sup>th</sup>, 2012, this email is to provide you written notice that Mr. Cronin has decided to pursue a statutory hearing described in RCW 28A.405.300 as his election of remedy for the *notice of probable cause for discharge*. He will not be utilizing the grievance procedure.

CP at 782 (emphasis added). Ms. McNair, again, specifically references the discharge statute and she says that Mr. Cronin will be pursuing a hearing for the *notice of probable cause for discharge*. She never mentions nonrenewal or the nonrenewal statute.

And this Court has already acknowledged that: “Sally McNair's January 11 letter referenced Cronin's termination from employment, but not the nonrenewal of his teaching contract.” CP at 870. Judge Cooney has

acknowledged that too: “If the issue before the court today was whether or not Mr. Cronin made a proper request for a nonrenewal statutory hearing, I may have some issues with that being that the notice was fairly specific as to a discharge hearing.” RP at 65 (2018). He also stated: “[T]here was a lack of specific request for a nonrenewal. It almost seems that by making a request for a discharge hearing Ms. McNair was purposefully excluding the nonrenewal hearing.” RP at 69 (2018).

Mr. Cronin, however, is likely to argue that he substantially complied with the requirements of RCW 28A.405.210 by requesting a hearing for his discharge. This Court’s decision in *Greene v. Pateros School District*, 59 Wn. App. 522 (1990) rejects such a contention. In *Greene*, a teacher, Mr. Greene, was given notice of probable cause for nonrenewal because the school district had to reduce its workforce and he was at the bottom of the seniority list. *Id.* at 525–26. After receiving the notice, Mr. Greene sent a letter to the superintendent, challenging his placement on the seniority list. *Id.* at 526. But he did not request a hearing for his nonrenewal. *Id.*

Just a couple of days after Mr. Greene had written his letter, he met with the superintendent to discuss his placement on the seniority list—it was unclear whether Mr. Greene indicated at the meeting whether he would be appealing the notice of probable cause for nonrenewal. *Id.* at 527. After the

meeting, the superintendent wrote Mr. Greene a letter, explaining why Mr. Greene was placed at the bottom of the seniority list and informing him that he could appeal his placement to the school board. *Id.* at 528. Mr. Greene did appeal. *Id.* at 528–29. And the school board denied his appeal. *Id.* at 529.

Mr. Greene filed a notice of appeal in superior court pursuant to what is now codified as RCW 28A.405.320. *Id.* The superior court ruled that Mr. Greene did not give timely notice of appeal in accordance with what is now codified as RCW 28A.405.210. *Id.* Mr. Greene appealed to this Court, arguing that his letter and the meeting with the superintendent substantially complied with the notice requirements of RCW 28A.405.210. *Id.* at 531. This Court disagreed with Mr. Greene’s argument, saying:

The record reflects that Mr. Greene believed by challenging his seniority listing he was also challenging the notice of nonrenewal. Unfortunately, he confused the appeal rights in the master agreement, which governed the seniority list, with the appeal rights in RCW 28A.[405.210] which governs nonrenewals. Although his confusion is understandable, his notice did not comply with the law.

*Id.* at 532. And because Mr. Greene did not timely request a hearing for his nonrenewal, his nonrenewal became final and conclusive. *Id.* at 531 (*citing Robel v. Highline Pub. Schs.*, 65 Wn.2d 477 (1965)).

Just as Mr. Greene’s appeal of his placement on the seniority list did not constitute an appeal of his nonrenewal, Mr. Cronin’s request for a

hearing for his discharge did not constitute a request for a hearing for his nonrenewal. He never communicated that he was seeking a hearing for the nonrenewal nor did he mention the nonrenewal statute.

Just as it did not matter whether Mr. Greene thought by challenging his placement on the seniority list he was challenging the notice of nonrenewal, it does not matter here that Mr. Cronin or his representative may have thought that his request for a discharge hearing was sufficient to also operate as a request for a nonrenewal hearing. And just as Mr. Greene's nonrenewal became final and conclusive, Mr. Cronin's nonrenewal became final and conclusive when he did not request a nonrenewal hearing within ten days of receiving the Notice of Probable Cause. *See* RCW 28A.405.210.

Because Mr. Cronin's nonrenewal became final and conclusive, he had no right to reemployment with the School District once his contract term ended—regardless of whether his discharge hearing was still pending. Thus, whether his hearing took place six months or six years after his contract expired simply does not matter. His employment with the School District had already conclusively ended, and a delay in holding his discharge hearing does not affect that.

**2. Judge Cooney erred by determining that the School District failed to meet the timeliness provisions of RCW 28A.405.310.**

Even if this Court determines that Mr. Cronin timely requested a hearing for his nonrenewal, he still should not be awarded back wages. As explained earlier, a teacher who receives timely notice of nonrenewal has no right to continued employment beyond his existing contract even when the teacher has requested a hearing and the hearing is not held until after his contract expires. Even Judge Cooney recognized that. CP at 1203. And unless he prevails at the hearing, his contract is nonrenewed—meaning he is not entitled to any pay beyond his expired contract unless he prevails on the merits at the statutory hearing.

Despite the statutory framework for nonrenewing a teacher's contract, Judge Cooney nevertheless determined that Mr. Cronin was entitled to receive pay beyond his expired contract because the School District did not comply, back in 2012, with certain timelines in RCW 28A.405.310.<sup>9</sup> There are two reasons why Judge Cooney erred in

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<sup>9</sup> The basis for Judge Cooney's decision was not entirely clear to the School District, in that Judge Cooney also seemed to rely on the premise that it had simply been too long between the probable cause notice and the hearing. He thus seemed to conclude that Mr. Cronin was "deprived" of an unspecified right. However, Mr. Cronin has not been deprived of any right to which he is entitled. In *Pappas v. City of Lebanon*, 331 F. Supp.2d 311 (2004), the court properly framed the issue in a similar case as whether the individual was actually "deprived" of a hearing. After all, the hearing itself (as opposed to the payments sought via the hearing) was the property right to which the individual was entitled. The *Pappas* court noted the importance of distinguishing between entitlement to a benefit and mere eligibility. The *Pappas*, court then went on to hold that a multi-year delay did not "deprive" the individual of his hearing right. Here Mr. Cronin's right to which

determining that the School District had an obligation to comply with the timeliness provisions of RCW 28A.405.310 back in 2012 when the School District received Ms. McNair's letter.

First the timelines of RCW 28A.405.310 are only triggered if a teacher requests a hearing for his discharge or nonrenewal. Here, however, it was unclear back in 2012 whether Mr. Cronin did request a hearing. In fact, it was not determined until several years later that he did request a hearing. It would lead to inequitable results if this Court required the School District to have followed the timelines in RCW 28A.405.310 when, at that time, it (and a superior court judge) had no reason to believe that Mr. Cronin had properly requested a hearing.

Second, for the timelines in RCW 28A.405.310 to be triggered, a hearing officer must be appointed. Mr. Cronin, however, never suggested the name of a hearing officer until May 2018, and he never followed the procedure under RCW 28A.405.310(4) to have the presiding judge of the Spokane County Superior Court appoint a hearing officer. Thus, because Mr. Cronin failed to exhaust his remedies under RCW 28A.405.310 to

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he was entitled was also a right to hearing (assuming he had properly appealed his nonrenewal) but not a right to payments unless he prevailed at the hearing. There is no evidence (and has been no argument by Mr. Cronin), that the delay in this case actually deprived Mr. Cronin of a robust right to present his case at a hearing. He has thus been deprived of no property right.

appoint (or even suggest) a hearing officer, the timelines of that statute were not triggered.

- a. The School District should not have been required to follow the timelines of RCW 28A.405.310 back in 2012 when it was unclear at that time whether Mr. Cronin had requested a statutory hearing.*

Judge Cooney essentially determined that the School District should have followed the procedures set out in RCW 28A.405.310 back in 2012 even though it was not determined that Mr. Cronin requested a hearing for both his discharge and nonrenewal until Judge Cooney's April 27, 2018 decision, in which he concluded that this Court determined that Mr. Cronin requested a hearing for his discharge *and* nonrenewal. CP at 1203; RP at 64–65 (2018).

Judge Cooney's retroactive application of the timeliness provisions of RCW 28A.405.310 lacks common sense. Those provisions only apply if a teacher has made a proper request for a hearing. But at the time Ms. McNair responded to the Notice of Probable Cause, it was not clear whether Mr. Cronin had made a proper request for any hearing, and certainly not one for nonrenewal. In fact, at one point, Judge O'Connor determined that Mr. Cronin had not made a proper request. RP at 6 (2014). And both this Court and Judge Cooney recognized that Mr. Cronin did not clearly request a hearing for his nonrenewal. CP at 870; RP at 65 (2018).

So why would the School District have had to comply with the procedures of RCW 28A.405.310 in 2012 when at that point there was good reason to challenge whether Mr. Cronin had properly requested a hearing? Stated otherwise, why would the School District have had an obligation back in 2012 to begin the hearing process when the School District had a legitimate basis for defending against Mr. Cronin's underlying lawsuit? Imposing such an obligation on the School District would lead to inequitable results.

As Judge Cooney found, the School District did not willfully fail to give Mr. Cronin a hearing. RP at 70 (2018). Rather, as pointed out by Judge O'Connor, Ms. McNair sent a confusing letter to the School District that—to a reasonable person—at the very least raised a legitimate question about whether the required choice was made between pursuing a statutory discharge hearing or filing a grievance. RP at 6 (2014). And because of that letter—and Ms. McNair's subsequent email—the School District took a reasonable position that it appeared Mr. Cronin did not timely request a hearing for his discharge and did not request a hearing for his nonrenewal at all.

The School District should not now be punished because Ms. McNair's confusing letter was determined to constitute a timely request for a statutory hearing several years after the School District actually

received it—especially since it is not the School District’s fault that Mr. Cronin filed two appeals or that litigation over issues of first impression take time.

Moreover, now that a hearing officer has determined that sufficient cause existed as of January 5, 2012, to discharge Mr. Cronin and to nonrenew his teaching contract, awarding him back wages for six-and-half years would essentially be rewarding him for making a poor request for a hearing and failing to suggest a hearing officer or seek appointment of one, which he was required to do under RCW 28A.405.310 (discussed in greater detail below).

Had Mr. Cronin clearly and timely requested a hearing for his discharge and nonrenewal back in January 2012, he would have had a hearing shortly thereafter. At that time, a hearing officer would have found sufficient cause for his discharge and nonrenewal—just as the hearing officer recently found. Thus, had Mr. Cronin clearly requested a hearing for his discharge and nonrenewal back in 2012, he would not have been entitled to pay past August 31, 2012.

However, Mr. Cronin did not make a clear request for a hearing. And because he did a poor job requesting a hearing—leading to several years of litigation—he should not now get back wages and benefits for the six-and-a-half years from when his last contract with the School District

expired. Otherwise, he would benefit from his poor request. Awarding such a windfall would be unfair and contrary to the statutory scheme of teacher nonrenewal and the appellate cases interpreting that scheme.

b. *The timelines of RCW 28A.405.310 are not triggered until the employee seeks the appointment of a hearing officer.*

Further, Mr. Cronin is the party who needed to trigger the timelines and other procedures of RCW 28A.405.310 by first suggesting a hearing officer and then having the presiding judge of the Spokane County Superior Court appoint a hearing officer, thus forcing the School District to either abandon its position or to participate in the statutory hearing process. RCW 28A.405.310(4). He did neither of those things, so the timelines in RCW 28A.405.310 were not triggered.

Revised Code of Washington 28A.405.310(4) describes the procedures that must be followed when a teacher makes a request for a statutory hearing. This is the first step that must be followed:

In the event that an employee requests a hearing pursuant to RCW 28A.405.300 or 28A.405.210, a hearing officer shall be appointed in the following manner: Within fifteen days following the receipt of any such request the board of directors of district or its designee and the employee or employee's designee shall each appoint one nominee. The two nominees shall jointly appoint a hearing officer . . . . Should said nominees fail to agree as to who should be appointed as the hearing officer, either the board of directors or the employee, upon appropriate notice to the other party, may apply to the presiding judge of the superior court for the county in which the district is located for the appointment of

such hearing officer, whereupon such presiding judge shall have the duty to appoint a hearing officer . . . .

Mr. Cronin neither had his nominee suggest a hearing officer nor did he go to superior court to seek the appointment of a hearing officer—despite his counsel admitting that he could have done so back in 2012. RP at 17 (2012) (“I probably could have just requested, gone and gotten a hearing officer.”). Instead, Mr. Cronin chose a different litigation strategy: he sued the School District.<sup>10</sup>

Because Mr. Cronin failed to suggest a hearing officer or seek appointment of a hearing officer under RCW 28A.405.310 back in 2012, the timelines of that statute did not start running at that time. In fact, the timelines did not start running until May 2018 when Mr. Cronin suggested a hearing officer *for the very first time*. CP at 1185–86. Thus, Judge Cooney’s rationale for requiring the School District to restore Mr. Cronin to his employment and pay him back wages and benefits was fundamentally flawed: the School District had no obligation to follow the timelines of

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<sup>10</sup> Nothing would have prevented Mr. Cronin from doing both—filing this lawsuit and seeking appointment of hearing officer pursuant to RCW 28A.405.310(4). But he will likely argue that it would have been futile for him to seek the appointment of a hearing officer because the School District would have likely sought injunctive relief at that point. However, such an assertion would amount to speculation. Indeed, had the School District been faced with the choice of defending its position (that Mr. Cronin did not properly perfect a hearing request) versus facing the appointment of a hearing officer by superior court, the School District could very well have chosen at that point to abandon its position and move forward with the hearing. The School District, however, was never faced with that choice because of Mr. Cronin’s litigation strategy.

RCW 28A.405.310 back in 2012. Therefore, his ruling should be reversed by this Court.

#### IV. CONCLUSION

The School District respectfully ask this Court to do the following: (1) reverse the portions of Judge Cooney's June 29, 2018 order that granted relief to Mr. Cronin and reverse the subsequent judgment of August 23, 2018 in its entirety; (2) grant the School District's motion for summary judgment as a matter of law dismissing all of Mr. Cronin's claims; and (3) remand to the trial court for an order dismissing all of Mr. Cronin's claims with prejudice.

Respectfully submitted January 14, 2019,

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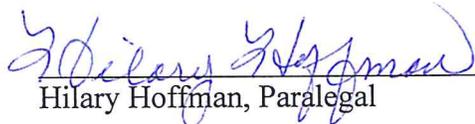
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**CERTIFICATE OF SERVICE**

I certify that on January 14, 2019, I served true and correct copies of the foregoing document on the following, in the method indicated:

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