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

MICHAEL F. CRONIN,

Respondent,

vs.

CENTRAL VALLEY SCHOOL DISTRICT,

Appellant.

APPELLANT SCHOOL DISTRICT'S REPLY

BREEAN L. BEGGS WSBA No. 20795
Paukert & Troppmann, PLLC
522 W. Riverside Avenue, Suite 560
Spokane, WA 99201
Tel: (509) 232-7760
Fax: (509) 232-7762
E-Mail: bbeggs@pt-law.com

PAUL E. CLAY, WSBA No. 17106
Stevens Clay, P.S.
421 W. Riverside Avenue, Suite 1575
Spokane, WA 99201
Tel: (509) 838-8330
Fax: (509) 623-2131
E-Mail: pclay@stevensclay.org

Attorneys for Appellant Central Valley
School District

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I. ARGUMENT

Sections A, B, and C of this brief assume, for argument's sake only, that Mr. Cronin timely requested a hearing for his nonrenewal (which he did not). Even if he did, though, he is not entitled to pay after his teaching contract expired on August 31, 2012. Section D shows why he did not timely request a nonrenewal hearing, and thus was conclusively nonrenewed without right to a nonrenewal hearing or continued pay. And the remaining sections of the brief (E–H) respond to Mr. Cronin's arguments in support of his cross-appeal.

A. Mr. Cronin Misstates What the Statutes Say, and He Misstates the Holdings of *Schlosser* and *Davis*.

Mr. Cronin continues to misstate the legislative requirements for nonrenewals and the holdings of *Schlosser* and *Davis*. The pertinent statutes, RCW 28A.405.210 and .310, specify the nonrenewal rights possessed by teachers. *Schlosser* and *Davis* help flesh out what rights teachers have regarding continued employment, the purpose of nonrenewal hearings, and whether teachers who have received timely notice of nonrenewal are entitled to continue to receive pay after their contracts have expired while their hearings are pending.

1. The Legislature did not specify a specific date by which nonrenewal hearings must be held.

Because Mr. Cronin has accused the School District of violating his rights by not providing him a hearing prior to August 31, 2018, the gravamen of his case is what statutory procedures are due teachers prior to nonrenewal of their contracts and what statutory rights teachers are due after nonrenewal of their contracts. RCW 28A.405.210 specifies what must occur prior to nonrenewal. A school district superintendent need only provide notice on or before May 15 of the cause or causes for nonrenewal and must ensure the notice is served in the manner specified. Once notice is received, the teacher has the right to request a hearing. And if such a request is made, the teacher “shall be granted opportunity for hearing pursuant to RCW 28A.405.310.”

RCW 28A.405.310 then describes the procedures for holding a sufficient-cause hearing. However, contrary to Mr. Cronin’s assertion, and as explained in more detail below, that statute does not specify any deadlines for the hearing itself. The statute certainly does not require a hearing prior to August 31. Indeed, the Legislature has never imposed a requirement in either RCW 28A.405.210 or RCW 28A.405.310 that a hearing must be held prior to a specific date.

In fact, the Legislature has indicated that a hearing might take place after an employee's contract has expired by including the following language in RCW 28A.405.310: "If the final decision is in favor of the employee, the employee shall be *restored* to his or her employment position and shall be awarded reasonable attorneys' fees." (Emphasis added.) Why else would the Legislature use the word "restored" unless the hearing occurred after the employee was no longer employed?

Because Mr. Cronin had no statutory right to a hearing prior to any specific date, it was error for the trial court to award him pay based on when his hearing occurred (or, more aptly, did not occur).

2. *Schlosser* establishes that teachers do not have a property right in continued employment and that a nonrenewal hearing functions as a post-decision review.

Schlosser establishes four critical points to support that Mr. Cronin was not entitled to receive pay after his 2011–2012 contract expired: (1) teachers have no property interest in continued employment beyond their current one-year contracts; (2) nonrenewal hearings operate as post-decision reviews of nonrenewal decisions; (3) nonrenewal hearings also operate as post-deprivation reviews of nonrenewal decisions; and (4) based on the above, a nonrenewed teacher has no right to pay after his or her contract ends.

After reviewing the statutory scheme for nonrenewal and looking at prior court decisions, the court in *Schlosser* concluded that teachers “neither have tenure rights to continue [their] public employment nor a property interest in continued employment that is analogous to tenure rights.” *Schlosser v. Bethel Sch. Dist.*, 183 Wn. App. 280, 291 (2014). In other words, the continuing contract law for teachers does not create a property interest in employment beyond teachers’ current one-year contracts. See *Kirk v. Miller*, 83 Wn.2d 777, 780 (1974) (“We emphasize that a continuing contract statute such as ours, providing for automatic renewal of teachers’ contract in the absence of notice, does not establish tenure for teachers.”).

Because teachers do not have a property interest in employment beyond their current one-year contracts, they do not have a constitutional right to a hearing before nonrenewal of their contracts. See *Schlosser*, 183 Wn.2d at 291 (“We hold, therefore, that in following the statutory procedures and deciding not to renew Schlosser’s teaching contract, the District did not deprive her of a property interest requiring due process.”). Rather, teachers have a statutory right to seek *post-decision review* of school districts’ decisions to nonrenew their contracts. *Id.* at 288 (“[The Legislature] also promulgated a separate set of statutes governing school district decisions not to renew contracts of certificated employees, such as

teachers; these statutes *provide for post-decision review of decisions not to renew a teacher's contract.*") (emphasis added).

Moreover, *Schlosser* directly addressed whether a post-deprivation hearing (the exact hearing provided to Mr. Cronin here) comports with due process. *Id.* at 291 ("Thus, we next assume, without deciding, that renewal of Schlosser's teaching contract was a property interest and address whether the statutory procedures the District followed here (post-deprivation hearing) comported with due process requirements."). The court held that, indeed, a teacher's "post-deprivation" hearing does comport with the teacher's due process rights. *Id.* at 293 ("[W]e hold that the District's *post-deprivation* review, which followed the statutory requirements, met procedural due process requirements."). By using the term "post-deprivation" the Court recognized that the teacher's hearing occurred after she was deprived of her job and pay. In fact, according to the appellate briefing in *Schlosser*, the statutory hearing occurred in September 2012—after the teacher's contract had expired. 2013 WL 7704766, at *9 (Wash. App. Div. 2) (Brief of Respondent).

Mr. Cronin argues that "nowhere in the *Schlosser* opinion does it state or even imply that a teacher's right to a statutory hearing can take place *after* August 31 of that year." Brief of Respondent at 25. This is incorrect. The Court made clear when using the term "post-deprivation" that a hearing

after August 31 (i.e., a September hearing in *Schlosser*) “comports with due process requirements.” *Schlosser*, 183 Wn. App. at 292.

Based on the statutory interpretation articulated in *Schlosser*, Mr. Cronin did not have a property interest in employment beyond the end of his 2011–2012 contract, meaning he had no property right to pay once his contract expired; he was not entitled to a hearing before the nonrenewal decision was made, meaning he had no pre-decision hearing rights; and he was not entitled to a hearing before his contract ended, meaning that he was wrong in asserting that *Schlosser* does not “even imply that a teacher’s right to a statutory hearing can take place *after* August 31 of that year.” Brief of Respondent at 25. And because Mr. Cronin had no right to a hearing prior to his hearing in 2018, the only way for him to obtain any pay after his contract expired was to prevail at that hearing. *See Petroni v. Deer Park Sch. Dist.*, 127 Wn. App. 722, 727 (2005) (“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.”). Mr. Cronin did not prevail and thus has no right to any pay.

Additionally, the Legislature has clarified in RCW 28A.405.350 that the superior court can only award damages after a determination on the merits of the teacher’s discharge or nonrenewal:

If the court enters judgment for the employee, and if the court finds that the probable cause determination was made in bad faith or upon insufficient legal grounds, the court in its discretion may award to the employee a reasonable attorneys' fee for the preparation and trial of his or her appeal, together with his or her taxable costs in the superior court. If the court *enters judgment for the employee*, in addition to ordering the school board to reinstate or issue a new contract to the employee, the court may award damages for loss of compensation incurred by the employee by reason of the action of the school district.

(Emphasis added.) Here, the trial court jumped the proverbial gun by ordering reinstatement and damages before any hearing and without any determination on the merits. The trial court has essentially turned the legislative framework upside down.

3. *Davis* establishes that teachers are not entitled to be paid between when their contracts expire and when their sufficient-cause hearings conclude.

Although *Davis* is directly on point, Mr. Cronin attempts to minimize its relevance. He says: "All the court in *Davis* determined was that the District's determination to discharge and nonrenew was correct. The case does not provide any details regarding a hearing on nonrenewal." Brief of Respondent at 24. Again, he is wrong. The court in *Davis* never addressed the merits of the school district's decisions to discharge and nonrenew—those weren't at issue. Instead, the primary issue in that case is the primary issue here:

The primary issue is whether the District was required to continue paying Davis wages between the end of the 2012–2013 contract term and the following January when the hearing officer upheld the District’s discharge decision.

Davis v. Tacoma Sch. Dist., 188 Wn. App. 1043, 2015 WL 4093904, at *3 (2015). And in considering that issue, the court focused on the nonrenewal process. *Id.* at *4.

In describing that process, the court detailed how a school district must only provide timely notice of nonrenewal and how a teacher who receives such notice has a right to request a sufficient-cause hearing. The court then said: “[A] school district’s notice to an employee that probable cause exists for nonrenewal *cuts off the employee’s reemployment right*, and thus, the hearing functions as a post-decision review.” *Id.* at *3 (emphasis added) (citing *Schlosser*, 183 Wn. App. at 288).

Because the notice of nonrenewal cuts off a teacher’s reemployment right, the court reasoned that as long as Mr. Davis received timely notice of nonrenewal, he “had no right to wages past the end of [his] contract term.” *Id.* at *4. The court determined that Mr. Davis did indeed receive timely notice of nonrenewal and thus was not owed any wages for “any period after the expiration of his 2012–2013 contract term.” *Id.* at *6 (emphasis added). In *Davis*, the hearing occurred in mid-January 2014. *Id.* at *2. *Davis* is thus directly on point. The School District therefore asks this Court

to look through the same lens in holding that Mr. Cronin was given timely notice of nonrenewal and thus was not owed any wages for any period after the expiration of his 2011–2012 contract term.

In attempt to dissuade this Court that teachers are not entitled to wages between when their contracts expire and when their sufficient-cause hearing conclude, Mr. Cronin paints a portrait of the parade of horrors that will result if teachers aren't entitled to such wages:

If that were the case, then every school district would just act as Central Valley School District did here and deny any teacher their right to a statutory hearing, nonrenew each contract without a hearing, and force the teacher to litigate the matter. This would eviscerate the statutory hearing process and the legislative intent behind it.

Brief of Respondent at 23–24. For a couple of reasons, Mr. Cronin's painting poorly portrays reality.

First, under RCW 28A.405.310(4), either 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's counsel admitted that he could have applied for a hearing officer back in 2012 to force such a hearing. He told Judge Leveque in open court that he “could have just . . . gone and gotten a hearing officer.” RP at 17 (2012).

Second, no school district wants to engage in years of protracted litigation. This case ended up here because Mr. Cronin did not clearly request a statutory hearing (and because the School District prevailed twice in superior court). Normally, though, teachers are able to clearly request a hearing, illustrated by the dearth of cases in which school districts challenge hearing requests. And when clear requests are made, hearing officers are timely appointed, and teachers are given hearings soon thereafter. But sometimes those hearings occur after their contracts have expired, as was the case in *Schlosser* and *Davis*. And in those instances, their pay is cut off when their contracts end. Yet, the statutory hearing process stands, showing that Mr. Cronin's fear is unfounded.

What should give this Court pause, though, is what will likely happen if Mr. Cronin gets his way. If nonrenewed teachers continue to receive pay after their contracts expire, they are incentivized to prolong the hearing process. In the case of widespread financial nonrenewals, the result would be devastating to school districts and taxpayers. As Mr. Cronin pointed out, only teachers can seek to continue the hearing procedures described in RCW 28A.405.310. Brief of Respondent at 26. If they can keep getting paid after their contracts have expired—even though they have no contract under which to get paid—why wouldn't they take advantage of their ability to continue the proceedings?

In sum, when school districts properly notify teachers of their nonrenewal, those teachers are not entitled to wages after the expiration of their contracts unless they prevail at hearing. There is no dispute Mr. Cronin was properly notified. He is not entitled wages because he did not prevail at hearing.

B. The School District Gave Mr. Cronin a Timely Hearing.

Mr. Cronin argues the he was conclusively presumed to be reemployed because the School District did not give him a hearing prior to August 31, 2012. Brief of Respondent at 25–26. His argument is based on the following language from RCW 28A.405.210:

If any such notification *or opportunity for hearing* is not timely given, the employee ... shall be conclusively presumed to have been reemployed by the district for the next ensuing term

(Emphasis added.) He contends that an opportunity for a hearing is not timely given if a school district does not follow supposedly strict timelines in RCW 28A.405.310. Brief of Respondent at 25–26. Based on this interpretation, Mr. Cronin reasons that because the School District did not provide him a hearing “within 40 or so days” of the notice of probable cause being issued, he was conclusively presumed to be reemployed. Brief of Respondent at 26.

Mr. Cronin’s argument fails on two fronts. First, his strict-deadline approach does not accurately capture the timelines in RCW 28A.405.310. Second, the timelines in RCW 28A.405.310 for holding a prehearing conference and for holding a hearing are not triggered until after a hearing officer has been appointed, for which there is not a timeline. Therefore, the timelines for holding the prehearing conference and for holding Mr. Cronin’s hearing were not triggered until a hearing officer was appointed, which happened in May 2018. And once triggered, the School District met those timelines.

1. Mr. Cronin’s strict-deadline approach is not practical.

Mr. Cronin makes it seem as though RCW 28A.405.310 has “strict” deadlines that, if not followed, will doom any school district’s discharge or nonrenewal. Brief of Respondent at 26. However, that’s not how the timelines are described by the Legislature. In fact, most requirements have flexible timelines—and some have no timelines.

For example, there is no time limit on appointing a hearing officer. *See* RCW 28A.405.310(4). A hearing officer could be appointed within weeks, months, or years after a teacher requests a hearing without violating RCW 28A.405.310. And the timeline for holding a prehearing conference is not triggered until a hearing officer is appointed. RCW 28A.405.310(5). So, the prehearing conference could be held within weeks, months, or years

of a teacher requesting a hearing without violating RCW 28A.405.310. The same goes for the hearing itself, since its deadline is not triggered until after a prehearing conference. RCW 28A.405.310(6)(d).

Even when the timelines for a prehearing conference and a hearing are triggered, those timelines are not set in stone. The timeline for holding a prehearing conference is subject to change based on a school district and teacher agreeing otherwise—which is often the case since the school district, the teacher, and the hearing officer must find a date that works for all of them. RCW 28A.405.310(5). The deadline for the hearing can also be continued by the teacher—which happens quite frequently.¹ RCW 28A.405.310(6)(d). It is simply not accurate that hearings must occur within “40 or so days” after issuing a notice of probable cause.

Consequently, when determining whether an opportunity for a hearing was timely given, a court can’t simply tick off “40 or so days” after the notice of probable cause was issued and then say that a hearing was untimely because it took place after that. Such an approach does not reflect reality.

¹ In fact, Mr. Cronin sought a continuance of his statutory hearing in this case. The hearing had been set to begin on September 24, 2018, but Mr. Cronin continued the hearing until November 1, 2018. Declaration of Paul E. Clay (September 11, 2018). And now he is seeking to get paid for that delay.

A much more functional approach utilized by other courts is to assess, regardless of the passage of time, whether the teacher has been effectively deprived of a right to a hearing—because it is only at the point of actual deprivation that the teacher is truly harmed. *See Pappas v. City of Lebanon*, 331 F. Supp.2d 311, 321 (M.D. Penn. 2004) (describing how a person is not deprived of a right to a hearing as long as “adjudicatory procedures remain available”). As long as the teacher can still have a meaningful hearing, he or she is neither prejudiced nor deprived of his right to pursue his claim. Either the teacher will win—in which case, the teacher will be fully compensated—or the teacher will lose—in which case, the teacher is and has never been owed anything beyond the term of the then-existing contract.

Utilizing such an approach in this case, Mr. Cronin was given a timely, meaningful hearing once he nominated a hearing officer for appointment. Indeed, he has never asserted otherwise. Further, this Court, and the trial court below, would not have mandated that Mr. Cronin be given a hearing if either had concluded Mr. Cronin wouldn’t receive a meaningful one. Thus, the delay in holding the hearing did not effectively deprive him of his right to pursue his claim or his right to a hearing at which he could win full compensation. Accordingly, he was not conclusively presumed to

be reemployed. Rather, his nonrenewal was effective, and he was not entitled to any pay after August 31, 2012.

2. The School District gave Mr. Cronin a timely hearing according to the procedures in RCW 28A.405.310.

As mentioned above, the timelines in RCW 28A.405.310 are flexible and many are not triggered until a certain condition is met. For example, the deadline for a prehearing conference is not triggered until a hearing officer has been appointed, and the deadline for a hearing is not triggered until a prehearing conference has been held. RCW 28A.405.310(5), (6)(d). Thus, until a hearing officer is appointed—either by agreement of the parties or by the presiding judge of the superior court—the hearing timelines are put on hold. That’s what happened here.

Mr. Cronin never suggested a hearing officer back in 2012. Moreover, he never applied to the superior court to seek appointment of a hearing officer back in 2012. Again, however, Mr. Cronin’s counsel admitted that he could have done so. RP at 17 (2012) (“I could have just . . . gone and gotten a hearing officer.”).² It was not until May 2018 that Mr. Cronin suggested the name of a hearing officer for the first time. And the

² Mr. Cronin had an obligation to participate in the selection of a hearing officer. See *McLain v. Kent Sch. Dist.*, 178 Wn. App. 366, 378 (2013) (“The plain language of the statute does not support McLain’s argument that by notifying the District of his intent to appeal, he had no responsibility to participate in the selection of a hearing officer and the District had an obligation to unilaterally select a hearing officer and proceed with the hearing.”).

School District promptly agreed to the hearing officer he suggested. CP at 1185–86, 1504. (Recall, RCW 28A.405.310 does not impose time limits on when a hearing officer is appointed.). Therefore, it was not until May 2018, when a hearing officer was finally appointed, that the hearing deadlines were triggered. And once they were triggered, there is no dispute the deadlines were met.

To conclude, Mr. Cronin was given a hearing in accordance with RCW 28A.405.310. Thus, he was not conclusively presumed to be reemployed. Instead, his employment with the School District ended on August 31, 2012, when his contract expired—and he is not entitled to any pay after that point, having lost his nonrenewal hearing.

C. Equity Precludes Mr. Cronin from Recovering Back Wages.

If this Court determines that a hearing was not held in accordance with the deadlines of RCW 28A.405.310, then Mr. Cronin still should not receive wages based on equity. Mr. Cronin argues that the School District should not get the benefit of equity because the School District was the “original wrong-doer.” Brief of Respondent at 28. Mr. Cronin is actually the original wrong-doer. After all, he’s the one who inappropriately touched female students (twice, including once after being reprimanded and then directed not to touch students). He’s the one who was arrested for highly publicized, alcohol-related misconduct (several times). He’s the one who

repeatedly lied to the School District when confronted with the allegations against him. And he's the reason a notice of probable cause was issued in the first place.

Further, during these past seven years, Mr. Cronin has done nothing to warrant getting paid hundreds-of-thousands of dollars. He has provided no service to the School District that would warrant compensation. And there is no evidence before this Court that he made any efforts to obtain gainful employment while awaiting the outcome of this litigation or a statutory hearing, despite having a duty to do so. *Hyde v. Wellpinit Sch. Dist.*, 32 Wn. App. 465, 468 (1982) (“Mr. Hyde had a duty to mitigate his loss of compensation—not merely await the outcome of a somewhat lengthy appellate process.”).

Based on Mr. Cronin's behavior, paying him hundreds-of-thousands of dollars is hardly reasonable compensation. *See Sauter v. Mount Vernon Sch. Dist.*, 58 Wn. App. 121, 134 (1990) (holding that paying a teacher who only taught for 21 days during the school year an entire year's worth of salary would not be reasonable compensation and would amount in the teacher “receiving a windfall”) *abrogated on different grounds by Federal Way Sch. Dist. v. Vinson*, 172 Wn.2d 756, 771–72 (2011).

In fact, even assuming, for argument's sake only, that the School District somehow violated Mr. Cronin's due process rights by delaying his

hearing, he still should be entitled to no more than nominal damages. The dissenting judge in *Schlosser* agrees.

Judge Worswick would have held that the Bethel School District violated the teacher's procedural due process right by not providing a pre-deprivation hearing. *Schlosser*, 183 Wn. App. at 305 fn. 28. Even so, Judge Worswick noted that "[a]n issue exists as to the remedy available to Schlosser for the District's failure to provide her with a pre-deprivation hearing" because even if a pre-deprivation hearing had occurred, "it [is] highly improbable that there would have been any different result." *Id.*; see *Carey v. Phipps*, 435 U.S. 247, 260 (1978) ("[I]n such circumstances, an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation, to respondents. ... We do not understand the parties to disagree with this conclusion. Nor do we."). In resolving that issue, Judge Worswick concluded that "Schlosser would be entitled to nominal damages, plus any damages proven to have resulted directly from the denial of a pre-deprivation hearing." *Schlosser*, 183 Wn. App. at 305 fn. 28.

Here, there is no doubt that the result of a prior hearing would have been the same as the recent hearing: that sufficient cause existed as of January 2012 to discharge and nonrenew Mr. Cronin. Thus, even if the School District were held responsible for a delay in the hearing and even if

such a delay were deemed a due process violation, Mr. Cronin would be entitled to no more than nominal damages, plus any damages as a result of the violation (of which Mr. Cronin has asserted none).

D. Mr. Cronin Never Requested a Hearing for His Nonrenewal.

The foregoing arguments assume that Mr. Cronin made a timely request for a nonrenewal hearing. However, the facts show that Mr. Cronin never requested a hearing for his nonrenewal.

Mr. Cronin contends that the School District is precluded by the law-of-the-case doctrine from arguing that he did not request a hearing for his nonrenewal. Brief of Respondent at 11–14. In the alternative, he argues that he substantially complied with the requirements of RCW 28A.405.210 for requesting a nonrenewal hearing when he requested a hearing to contest his discharge mid-contract under RCW 28A.405.300. Brief of Respondent at 18–20. Neither argument is persuasive.

First, as Mr. Cronin acknowledges, the law-of-the-case doctrine is discretionary. Brief of Respondent at 12. The Rules of Appellate Procedure expressly allow revisiting any past express or implied rulings by an appellate court in the same matter. RAP 2.5(c)(2). This Court should exercise its discretion in allowing the School District to argue that Mr. Cronin did not request a hearing for his nonrenewal because any prior decision by this Court (if one was implicitly rendered) that Mr. Cronin

requested a hearing for his nonrenewal was clearly erroneous and would work a manifest injustice to the School District without harming Mr. Cronin.

Second, the facts show, and this Court and Judge Cooney have acknowledged, that Mr. Cronin did not request a nonrenewal hearing. And Mr. Cronin's request for a discharge hearing pursuant to RCW 28A.405.300 did not substantially comply with the requirement that he request a nonrenewal hearing under RCW 28A.405.210. Therefore, his employment with the School District definitively ended—without any right to a nonrenewal hearing or continued pay—after his contract expired on August 31, 2012.

1. The School District is not precluded from arguing that Mr. Cronin did not request a hearing for his nonrenewal.

Mr. Cronin argues that the law-of-the-case doctrine precludes the School District from asserting that he did not request a hearing for his nonrenewal. However, he fails to distinguish this case from (and fails to even mention) *Sambasivan v. Kadlec Medical Center*, 184 Wn. App. 567 (2014), where, with a similar procedural background to this case, this Court exercised its discretion in allowing a party to raise an issue on appeal it didn't raise in a previous appeal. Brief of Respondent at 11–14. The School District asks this Court to exercise that same discretion here. *See State v.*

Trask, 98 Wn. App. 690, 695 (2000) (noting that the law-of-the-case doctrine is “highly discretionary”). And there is good reason to do so.

As previously argued by the School District, this Court never explicitly decided whether Mr. Cronin timely requested a statutory hearing under RCW 28A.405.210. School District’s Opening Brief at 25.³ But if this Court implicitly decided that issue, then the decision that Mr. Cronin requested a hearing for his nonrenewal was clearly erroneous and would work a manifest injustice to the School District. *Roberson v. Perez*, 156 Wn.2d 33, 42 (2005) (“[A]pplication of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party.”)

This Court itself previously pointed out that “Sally McNair’s January 11 letter referenced Cronin’s termination, but not the nonrenewal of his teaching contract.” CP at 870. Judge Cooney likewise recognized that Mr. Cronin’s request excluded any reference to nonrenewal: “[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 65 (April 27, 2018). Simply put,

³ To say that this Court made a decision that Mr. Cronin requested a nonrenewal hearing is like saying this Court made a decision that Mr. Cronin was entitled to receive back wages. Of course, this Court did not decide the back wage issue because, as it pointed out, the trial court never reached the issue and the parties did not brief it. CP at 637–38. The same applies to whether Mr. Cronin requested a nonrenewal hearing.

Mr. Cronin did not request a hearing for his nonrenewal (which the School District shows below).

Consequently, if this Court impliedly decided otherwise, it was clearly erroneous. And if this Court does not act, the School District could suffer manifest injustice, having to pay Mr. Cronin hundreds-of-thousands of dollars for back wages that he did not earn and had no right to receive. Mr. Cronin, on the other hand, would suffer no harm. He was given a nonrenewal hearing to which he was not entitled. So, he has already obtained more than he deserved. Back wages would thus be a substantial windfall. *See State v. Schwab*, 163 Wn.2d 664, 676 (2008) (affirming the Court of Appeals decision to exercise its discretion under RAP 2.5(c)(2) to reconsider an issue it had already decided because doing otherwise would result in a “windfall”).

2. Mr. Cronin did not substantially comply with the notice requirements of RCW 28A.405.210.

Mr. Cronin argues that the School District was put on notice that he was requesting a hearing for both his discharge and nonrenewal and, thus, he substantially complied with the notice requirements of RCW 28A.405.210. Brief of Respondent at 18–20. However, substantial compliance “requires ‘actual compliance in respect to the substance essential to the statute’s reasonable objectives,’ such that ‘the purpose of

the [statutory] requirement is generally satisfied.” *Humphrey Industries, Ltd. v. Clay Street Assoc., LLC*, 170 Wn.2d 495, 504 (2010) (quoting *In re Det. of A.S.*, 138 Wn.2d 898, 927 (1999)). That did not happen here.

As described in previous briefing, discharge and nonrenewal are two distinct acts that are governed by two different statutes and that have very different results. School District’s Opening Brief at 13–16; *accord* AGO 55-57 No. 1 (“[T]here is a marked difference between the nature and effect of a discharge and the nonrenewal of a contract. A discharge may abruptly break off employment during the term of a contract, when the employee would under ordinary circumstances think his position secure, and thus may operate very harshly. The nonrenewal of a contract, on the other hand, simply terminates employment, on considerable advance notice, at the end of the term of the contract.”).

Despite these differences, Mr. Cronin believes that he could substantially comply with the notice requirements of the nonrenewal statute (RCW 28A.405.210) by requesting a hearing pursuant to the discharge statute (RCW 28A.405.300). However, requesting a hearing under one statute is not actual compliance with the requirements of requesting a hearing under another statute. *See Greene v. Pateros Sch. Dist.*, 59 Wn. App. 522, 532 (1990) (holding that a teacher’s appeal under a collective bargaining agreement did not constitute an appeal under RCW

28A.405.210). The School District relied extensively on *Greene* in its opening brief, and Mr. Cronin did not distinguish *Greene* from this case in his response brief. Presumably, he believes *Greene* is on point and should be applied.

Here, Mr. Cronin only requested a hearing for his discharge. In the January 11 letter that Sally McNair sent on Mr. Cronin’s behalf, she never once mentions nonrenewal or the nonrenewal statute. CP at 780. Yet, Mr. Cronin would have this Court believe that by referring to RCW 28A.405.310—the statute that governs the procedures for sufficient-cause hearings—Ms. McNair was requesting a hearing for both Mr. Cronin’s discharge and nonrenewal. Brief of Respondent at 19. If that were the case, why didn’t she just refer to RCW 28A.405.310? And why would she refer to the discharge statute but not the nonrenewal statute?

As Judge Cooney thought, it looks as though Ms. McNair was intentionally “excluding the nonrenewal hearing” by specifically referencing the discharge statute but not the nonrenewal statute. RP at 69 (April 27, 2018).⁴

⁴ If Judge Cooney had not believed that the law-of-the-case doctrine prevented him from determining whether Mr. Cronin requested a hearing for his nonrenewal, it appears he would have been inclined to rule in the School District’s favor on that issue: “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 (April 27, 2018).

Moreover, if Ms. McNair's January 11 letter seemed at all ambiguous about whether Mr. Cronin requested a hearing for both his discharge and nonrenewal, her February 8 follow-up email (which Mr. Cronin conveniently ignores in his response brief) left no room for doubt that Mr. Cronin was requesting a hearing only for his discharge:

As a follow-up to my letter from January 11th, 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*.

CP at 782 (emphasis added). Why else would Ms. McNair mention only the discharge statute and the notice of probable cause for discharge?

The message Ms. McNair sent to the School District—and to any reasonable person who reads it—was this: Mr. Cronin is requesting a hearing pursuant to the discharge statute to challenge the notice of probable cause for discharge—he is *not* requesting a hearing for his nonrenewal. That's what the School District was put on notice of, and the School District responded accordingly. CP at 784 (informing Mr. McNair that her correspondence did not constitute an appeal of the notice of probable cause for nonrenewal).

Because Mr. Cronin did not request a hearing for his nonrenewal, the School District's decision to nonrenew his contract became final and conclusive, cutting off any right to appeal that decision or to continued

employment beyond the term of his contract. *Robel v. Highline Pub. Schs.*, 65 Wn.2d 477, 485 (1965) (“Appellant had 10 days within which to file a written request for a hearing before the school board following actual or constructive receipt of the notice. She did not do so. Failing in this, the ultimate decision of the school board not to renew the contract became final and conclusive.”).

E. Mr. Cronin is not Entitled to Double Damages.

The trial court properly denied Mr. Cronin’s request for double damages because there was a bona fide dispute as to whether Mr. Cronin was owed any wages. A bona fide dispute over whether an employee is owed wages exists if the employer has a “genuine belief” in the dispute and if the dispute is fairly debatable. *Hill v. Garda CL Northwest, Inc.*, 191 Wn.2d 553, 561–62 (2018). Here, the School District has shown there was a bona fide dispute.

First, the School District genuinely believed that Mr. Cronin was not entitled to any wages because he failed to properly and timely request a statutory hearing. And second, the dispute over whether Mr. Cronin was entitled to any wages was and is, at a minimum, fairly debatable, given that a superior court judge found that Mr. Cronin was conclusively terminated because he did not timely request a statutory hearing and given that existing statutory and case law does not give teachers the right to receive continued

pay after their contracts expire when they have been given timely notice of nonrenewal.

1. The School District lawfully placed Mr. Cronin on unpaid leave status while he was in jail.

Before getting into whether the School District genuinely believed that Mr. Cronin was not entitled to wages because he failed to timely request a statutory hearing, the School District must address Mr. Cronin's argument that it unlawfully cut off his pay on December 31, 2011. Brief of Respondent at 31–35.

Mr. Cronin's pay was cut off on December 31, 2011, because he was on unpaid leave status while he was serving his jail sentence at the Geiger Correctional Center—a sentence he never informed the School District about and, in fact, deliberately tried to hide from the School District by referring to it as “treatment.” CP at 699–700, 738, 740, 743–44, 750, 765. Mr. Cronin has never argued, nor would he be justified in arguing, that the School District *wrongfully placed him on unpaid leave status* while he was sitting in jail. Therefore, his argument that the School District unlawfully cut off his pay on December 31, 2011 while he was still serving his jail sentence should be ignored.

2. The School District genuinely believed that Mr. Cronin was terminated because he failed to timely request a statutory hearing.

Within two weeks of receiving Sally McNair's February 8 email, Superintendent Ben Small expressed the School District's position regarding Mr. Cronin's request for a statutory hearing and his employment status, saying:

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 waived his right to a statutory hearing under RCW 28A.405.210 and RCW 28A.405.300. As such, his employment with the District has been terminated.

CP at 784.

From the beginning, the School District genuinely believed Mr. Cronin was terminated because he had failed to timely request a statutory hearing. And since the School District believed that Mr. Cronin was terminated, it genuinely believed he was not entitled to continued pay. *See, e.g., McAnulty v. Snohomish Sch. Dist.*, 9 Wn. App. 834, 838 (1973) (finding that no double damages were warranted under RCW 49.52.070

because a school district genuinely believed a teacher did not timely request a hearing for his discharge and thus had been legitimately discharged). Had the School District not genuinely and sincerely believed that were the case, it certainly would not have subjected itself to seven years of costly litigation.

Further, during the course of litigation, the School District's consistent position has been that Mr. Cronin did not request a hearing for his discharge or nonrenewal, arguing that he failed to make a timely election between the statutory hearing procedure and the grievance process, that he failed to personally request a hearing, and that he never requested a hearing for his nonrenewal. CP 103–119; 395–406; 664–673. Once again, the School District would not have maintained that position for the past seven years if it did not genuinely believe it.

Mr. Cronin questions the genuineness of the School District's belief because the School District eventually paid him wages he was owed through the end of his 2011–2012 contract, but does so without offering any evidence that the School District did so based on a lack of a genuine belief as to whether the wages should have been owed. Brief of Respondent at 31–32. The School District ended up paying Mr. Cronin wages through the end of his 2011–2012 contract because this Court—despite the School District's vigorous argument and genuine belief to the contrary—determined that Mr. Cronin had timely requested a discharge hearing, meaning that he was

protected from having his wages being cut off during the duration of his 2011–2012 contract. CP at 967–68.

Mr. Cronin also argues that by paying Mr. Cronin four months' pay on June 29, 2012, the School District showed that it did not sincerely believe he was not entitled to pay. Brief of Respondent at 31. Mr. Cronin fails to mention, though, that he was paid four months' of pay as a way to get him to mediation, as he acknowledged in a declaration:

It wasn't until June 29, 2012 . . . that I received a check from the District. This was paid as an incentive for my agreement to participate in mediation.

The District never admitted to me that they had agreed that compensation was owed to me. I had agreed through counsel to offset the payment to me should I later prevail.

CP at 1081–82. Thus, the School District's payment—as Mr. Cronin admits—had nothing to do with whether the School District genuinely believed he was terminated.

Moreover, the School District still genuinely believes that Mr. Cronin did not request a hearing for his nonrenewal and thus is not entitled to any pay beyond August 31, 2012—since it is continuing to stand by that belief.

Therefore, the sincerity of the School District's belief that Mr. Cronin was not entitled to pay for the remainder his 2011–2012 contract and is not entitled to any pay beyond the expiration of that contract cannot

reasonably be questioned, nor has it been questioned with contrary evidence.

3. Whether Mr. Cronin was terminated because he failed to timely request a statutory hearing was fairly debatable at the time wages were not paid.

The law clearly states that if an employee does not request a statutory hearing within ten days of receiving notice of probable cause for discharge or nonrenewal, the employee is conclusively discharged or nonrenewed. RCW 28A.405.300; *Robel*, 65 Wn.2d at 485. Accordingly, if Mr. Cronin failed to timely request a hearing, then he would have been discharged and nonrenewed and not entitled to any pay. Whether Mr. Cronin made such a request was—and still is—a fairly debatable issue.

As the School District has argued from the very beginning, Mr. Cronin did not request a hearing for his nonrenewal. Although no court has squarely addressed whether Mr. Cronin has in fact made such a request. Both this Court and Judge Cooney more than hinted that Mr. Cronin did not make such a request. CP at 870; RP at 65 (April 27, 2018). And the evidence heavily supports that position. CP at 780, 782. Therefore, to say that the issue of whether Mr. Cronin requested a hearing for his nonrenewal is not a fairly debatable one would be disingenuous.

As to whether Mr. Cronin timely requested a hearing for his discharge, two superior court judges found the issue to be fairly debatable,

and one of the two ruled in favor of the School District. After looking at Sally McNair’s January 11 letter and her February 8 email, Judge O’Connor granted summary judgment in favor of the School District, concluding that Mr. Cronin did not make the required election between a statutory hearing and arbitration until Ms. McNair’s February 8 email and, thus, Mr. Cronin’s request was untimely. CP at 591; RP at 6–7 (2014).

The second judge, Judge Cooney, did not rule on the issue, but he had this to say about Mr. Cronin’s request for a hearing: “[T]he notice for the statutory hearing was terribly drafted. Mr. Cronin requested a grievance process as well as . . . a termination hearing” RP at 44:16–18 (August 3, 2018). He then said: “Obviously there was a valid dispute as to whether or not the notice was proper and whether or not the third party providing notice was adequate.” RP at 45:1–4 (August 3, 2018). There is no better evidence to prove that the issue was fairly debatable.

Further, despite what Mr. Cronin may argue, this Court’s subsequent opinion that Judge O’Connor was wrong did not transform the issue into one that was not fairly debatable.⁵ *See Moore v. Blue Frog Mobile, Inc.*, 153

⁵ Mr. Cronin has a skewed understanding of what a bona fide dispute is. According to him, there is never a bona fide dispute if the dispute is eventually resolved in favor of the employee by an adjudicator—which, if true, would mean that there never would be a bona fide dispute exception to the double damages remedy. Brief of Respondent at 32–33. Fortunately, Mr. Cronin is wrong, and the Legislature’s statutory language in limiting a double damages remedy in situations where there is bona fide dispute must be given full effect.

Wn. App. 1, 8 (2009) ([The issue] is whether Siegel’s asserted belief—that Moore breached the severance agreement and was no longer entitled to severance payments—was reasonable enough to create a bona fide dispute. It does not matter if Siegel’s interpretation of the nondisparagement clause is erroneous. The question is whether Moore’s entitlement to the payments was ‘fairly debatable.’”). The key to triggering any liability for double damages is whether the issue was fairly debatable at the time the decision was made not to pay wages, not after the terminal court has conclusively decided the issue.

F. There is no Basis for Mr. Cronin to be Awarded an Offset for Tax Consequences.

The trial court properly denied Mr. Cronin additional damages for tax consequences because there was no statutory basis for such an award. Mr. Cronin asks this Court to invoke its powers of equity to overrule the trial court and use appellate equity to award him an offset for tax consequences he may suffer by receiving a lump sum back pay award if he prevails in this appeal. Brief of Respondent at 36. However, the cases Mr. Cronin relies on to show that courts may exercise their inherent powers of equity to award an offset for tax consequences support the trial court’s denial. Brief of Respondent at 37–38. Both *Sears* and *Blaney* establish that the power to award an offset for tax consequences is grounded in statute.

And Mr. Cronin cannot point to any statutory authority that would allow for such an award in this case

Mr. Cronin says this about the award of an offset for tax consequences in *Sears*: “The award was made pursuant to the Court’s equitable powers, not any statutory authority.” Brief of Respondent at 37–38. Mr. Cronin is wrong.

In reviewing the trial court’s award of an offset, the court in *Sears* mentions how it had previously stated that “the trial court has wide discretion in fashioning remedies to make victims of discrimination whole.” *Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984). Specifically, the court had previously said: “*Under Title VII* the trial court has wide discretion in fashioning remedies to make victims of discrimination whole.” *Sears v. Bennett*, 645 F.2d 1365, 1378 (10th Cir. 1981) (emphasis added); *see* 42 U.S.C. § 2000e-5(g)(1) (giving courts authority to award “any other equitable relief as the court deems appropriate”). Based on that discretion, the trial court fashioned an appropriate remedy that included an offset for tax consequences. *Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, 1982 WL 500, at *7 (D. Kan. Dec. 1, 1982) (basing its award of an offset on the “general principles underlying the Title VII remedy”). Thus, the award in *Sears* was grounded in the

discretion that Title VII gives courts to make victims of discrimination whole, not in the court's inherent equitable powers.

The Washington State Supreme Court, in *Blaney*, recognized as much when it cited to *Sears* to support this statement: "A number of federal courts have used the *equitable powers bestowed on them by Title VII* to allow offsets for the federal tax consequences of damage awards." *Blaney v. Int'l Assoc. of Machinists and Aerospace Workers*, 151 Wn.2d 203, 215 (2004) (emphasis added).

In *Blaney*, the Supreme Court had to decide whether the Washington Law Against Discrimination (the "WLAD) allowed plaintiffs to recover an offset for tax consequences that result from a lump sum damages award. *Id.* In particular, the Court had to decide whether the following italicized language of RCW 49.60.030(2) allowed for such an award:

Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or *any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 [Title VII] as amended*, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

Id. (Emphasis added.) Given the italicized language, the Court looked to see whether federal courts had awarded an offset under the equitable powers

granted by Title VII, the statute upon which RCW 49.60.030 is modeled.

Id.

Upon finding that several federal courts had awarded such an offset under Title VII's statutory language, including the *Sears* court, the Court then concluded as follows:

Because WLAD incorporates remedies authorized by the federal civil rights act and that statute has been interpreted to provide the equitable remedy of offsetting additional federal income tax consequences of damage awards, we hold that WLAD allows offsets for additional federal income tax consequences.

Id. at 215–16. Thus, as in *Sears*, the award of an offset for tax consequences in *Blaney* was grounded in statute, showing that such an award is only appropriate when authorized by statute.

This Court's recent decision in *Peiffer v. Pro-Cut Concrete Cutting and Breaking Inc.*, 6 Wn. App.2d 803 (2018), supports that proposition. In *Peiffer*, this Court had to determine whether a plaintiff could recover an offset of tax consequences after he had been awarded back wages under chapter 49.48 RCW. *Id.* at 825–27. Looking at the *Blaney* decision for guidance, this Court pointed out that the Supreme Court had decided that an offset for tax consequences was “not allowable as actual damages or costs” but rather “was permitted by WLAD's ‘any other appropriate remedy’ clause.” *Id.* at 826; *Blaney*, 151 Wn.2d at 216 (“[W]e refuse to characterize

Ms. Blaney’s requested offset for additional tax consequences as actual damages because the proximate cause of the additional tax consequences is not the unlawful discrimination, but rather the additional tax liability is a direct result of the tax laws. Thus, the additional tax liability is too attenuated from the unlawful discrimination to be deemed actual damages.”).

Relying on *Blaney*, this Court found that the term “wages” as used in Title 49 RCW—which would be considered actual damages—did not capture the “increased tax liability that Mr. Peiffer incurred as a result of recovering his unpaid wages as a lump sum,” and thus Mr. Peiffer could not recover an offset. *Peiffer*, 6 Wn. App.2d at 827. In other words, this Court denied Mr. Peiffer’s request for an offset because the statute that allowed him to recover wages did not contemplate an award for an offset of tax consequences.

Thus, *Sears*, *Blaney*, and *Peiffer* show that the only way Mr. Cronin can recover an offset for tax consequences is if he can point to a statute that allows him to do so. He cannot point to the WLAD or Title VII since this is not a discrimination case. And he cannot point to chapter 49.48 RCW because this Court has already held, in *Peiffer*, that an offset for tax consequences is not authorized under that chapter. The only statute Mr. Cronin points to as authority for him recovering an offset is RCW

28A.405.350. Brief of Respondent at 38. However, a teacher is only entitled to “loss of compensation” under RCW 28A.405.350 if a superior court determines that sufficient cause for discharge or nonrenewal does not exist. That has not happened here.

Indeed, before RCW 28A.405.350 ever comes into play, one of the following two scenarios must have played out. First scenario. A sufficient-cause hearing was held, and a hearing officer found that sufficient cause existed. The teacher appealed the hearing officer’s decision under RCW 28A.405.320 to the superior court. Then the superior court entered judgment in favor of the teacher. At that point, the superior court “may award damages for loss of compensation” under RCW 28A.405.350. That scenario hasn’t happened.

Second scenario. A teacher appealed a school district’s notice of probable cause directly to superior court under RCW 28A.405.380. After holding a hearing, the superior court determines that sufficient cause does not exist for discharge or nonrenewal. At that point, the superior court “may award damages for loss of compensation” under RCW 28A.405.350. That scenario hasn’t happened.

Because RCW 28A.405.350 has not come into play in this case and because Mr. Cronin cannot point to another statute that would allow him to recover an offset for additional tax consequences, he cannot recover such

an offset. And even if Judge Cooney had the discretion to award Mr. Cronin such an offset based on the court's inherent equitable powers, Mr. Cronin has not shown that Judge Cooney abused his discretion in not awarding Mr. Cronin an offset.

G. Judge Cooney did not Abuse His Discretion in Calculating Mr. Cronin's Attorney's Fees.

Mr. Cronin claims that Judge Cooney erred in his award of attorney's fees by finding that \$250 an hour was a reasonable rate and by denying Mr. Cronin's request for a multiplier. Brief of Respondent at 40–42. Mr. Cronin, though, has not shown that Judge Cooney's award was an abuse of discretion. *Washington State Physicians Ins. Exchange Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 335 (1993) (“A trial court's fee award will not be overturned absent an abuse of discretion. Whether attorneys' fees are reasonable is a factual inquiry depending on the circumstances of a given case and the trial court is accorded broad discretion in fixing the amount of attorneys' fees.”).

In arguing that Judge Cooney erred in setting the reasonable hourly rate, Mr. Cronin says: “[T]he Trial Court found the attorneys' hourly rate reasonable, but then reduced the award by reducing the hourly rate based on several factors, including unsuccessful claims from the declaratory judgment complaint.” Brief of Respondent at 40. However, Mr. Cronin

inaccurately describes what Judge Cooney found. Judge Cooney never found that the hourly rate Mr. Cronin proposed was reasonable—and Mr. Cronin never cites to the record to prove that Judge Cooney made such a finding. Instead, Judge Cooney considered a number of things in concluding that \$250 an hour was reasonable.

During the hearing held on August 3, 2018, Judge Cooney considered the following in determining that \$250 an hour was a reasonable rate: the hourly rate that Mr. Kuznetz actually charged for his services throughout the course of the litigation (well below \$250 per hour), RP at 11 (August 3, 2018); Mr. Clay’s hourly rate of \$195 per hour, RP at 43:15 (August 3, 2018); the length of time Mr. Kuznetz had been practicing and his reputation, RP at 44:12, 45:5–6 (August 3, 2018); the undesirability of the case, RP at 44:13–45:5 (August 3, 2018); that Mr. Kuznetz had not been to trial, RP at 45:17–46:1 (August 3, 2018); and that Mr. Cronin failed to segregate the hours Mr. Kuznetz spent on unsuccessful claims, RP at 46:11–13 (August 3, 2018). All of those factors were incorporated into the judgment Judge Cooney entered on August 22, 2018. CP at 1629–30.

By taking all of those factors into consideration in deciding that \$250 an hour was a reasonable rate, Judge Cooney did not “manifestly abuse[] [his] discretion” by “exercising [his] discretion on untenable grounds or for untenable reasons.” *Chuong Van Pham v. City of Seattle*, 159

Wn.2d 527, 538 (2007); see *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 83 (2012) (noting that a court may consider several factors in setting a reasonable hourly rate, including “the attorney’s usual billing rate, the level of skill required by the litigation, . . . the attorney’s reputation, and the undesirability of the case”).

Nor did Judge Cooney abuse his discretion by denying Mr. Cronin’s request for a multiplier. A court may adjust a fee award based on two factors: (1) “whether the fee was contingent on the outcome,” and (2) “the quality of the work.” *Clausen*, 174 Wn.2d at 83. Mr. Cronin does not argue, nor could he argue, that a multiplier is warranted here because Mr. Kuznetz was providing services on a contingency fee basis. Brief of Respondent at 42; CP at 1216. Instead, he believes a multiplier is justified based on the quality of Mr. Kuznetz’s work.

But a multiplier for quality of work “is an *extremely limited* basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 599 (1983) (emphasis added). Accordingly, a multiplier for quality is only warranted where the representation is unusually good or exceptional. See *Travis v. Washington Horse Breeders Ass’n, Inc.*, 111 Wn.2d 396, 411 (1988) (“As to quality of the work performed, although the trial court found the work done by ‘both plaintiff’s

counsel of extremely high quality,’ there was no finding the representation was ‘unusually good’ or exceptional. Thus, the Court of Appeals was correct in denying a multiplier for quality.”).

There is nothing in the record that shows Mr. Kuznetz’s work was unusually good or exceptional. CP at 1520–23. And there is nothing in the record that shows Judge Cooney abused his discretion in determining that the hourly rate he set is a reflection of the quality of Mr. Kuznetz’s work. CP at 1631; *see Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (“A quality adjustment is appropriate only when the representation is unusually good or bad, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the ‘lodestar.’”). Therefore, there is no basis to disturb Judge Cooney’s discretion as to the attorney’s fee award.

H. Mr. Cronin is not Entitled to Attorney’s Fees for Time Spent Litigating the School District’s Motion to Stay and Motion to Modify.

Mr. Cronin seeks attorney’s fees for the time Mr. Kuznetz had to spend arguing against the School District’s Motion to Stay and Motion to Modify. Brief of Respondent at 43. Attorney’s fees, though, are not available “as costs or damages absent a contract, statute, or recognized ground in equity.” *City of Seattle v. McCready*, 131 Wn.2d 266, 275 (1997). And Mr. Cronin has not identified a contract, statute, or recognized ground

in equity to support his request for attorney's fees. Therefore, his request should be denied.

Moreover, Mr. Cronin's is incorrect in arguing that the School District abandoned and waived the argument that Judge Cooney lacked the authority to reinstate Mr. Cronin before a statutory hearing had been held. Brief of Respondent at 43. The School District still believes that Judge Cooney did not have the authority to reinstate Mr. Cronin while his statutory hearing was pending. However, because a hearing officer has determined that sufficient cause existed for Mr. Cronin's discharge and nonrenewal, the issue of whether Judge Cooney could reinstate Mr. Cronin pending his statutory appeal is now moot.⁶

In fact, the School District argued to both this Court and Judge Cooney that Judge Cooney's order reinstating Mr. Cronin to his employment pending the outcome of his statutory hearing was rendered moot by the hearing officer's decision. Motion to Modify at 6, 7 (December 28, 2018); Reply to Motion to Modify at 1–3 (January 10, 2019); Appendix to Brief of Respondent at A29. And Judge Cooney agreed. Appendix to Brief of Respondent at A67 (“The Memorandum decision by the Hearing

⁶ The School District also argued in the alternative, for purposes of its Motion to Modify, that a debatable issue existed as to Judge Cooney's authority to reinstate Mr. Cronin pending his appeal. Motion to Modify at 14–15.

Officer now makes it impossible for Plaintiff to be reinstated so the Court is unable to enforce its Order because time has run out.”).

Thus, the primary issue on appeal is whether Mr. Cronin is entitled to back pay between when his 2011–2012 contract expired and when his hearing concluded—an issue that the School District raised in its briefing regarding its Motion to Stay and its Motion to Modify. Reply to Motion to Stay at 5–6 (September 25, 2018); Motion to Modify at 8–14 (December 28, 2018).

II. CONCLUSION

Whether Mr. Cronin requested a hearing for his nonrenewal or not, he was not entitled to receive wages after his contract expired on August 31, 2012. If he did request a hearing, his contract still expired on August 31, 2012, and he had no right to receive pay after that point unless he prevailed at a sufficient-cause hearing. He did not prevail. If he did not request a hearing, then the School District’s decision to nonrenew him became final and conclusive in 2012. Thus, under no circumstance should Mr. Cronin receive back wages.

Accordingly, the School District respectfully requests that the order entered June 29, 2018, and the subsequent judgment entered on August 22, 2018, be vacated and the matter returned to the trial court with instructions to dismiss Mr. Cronin’s remaining claims. If this Court does not vacate the

June 29 order and the August 22 judgment, the School District asks that this Court deny Mr. Cronin's requests for double damages, for an offset for tax consequences, for an adjustment to his award of attorney's fees, and for additional attorney's fees.

Respectfully submitted April 23, 2019,

PAUKERT & TROPPMANN, PLLC

By: 
BREEAN L. BEGGS, WSBA #20795
Attorney for Central Valley School District

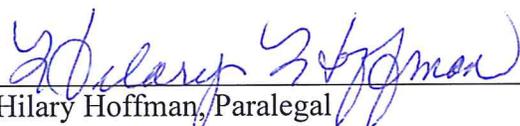
STEVENS CLAY, P.S.

By: 
PAUL E. CLAY, WSBA #17106
Attorney for Central Valley School District

CERTIFICATE OF SERVICE

I certify that on April 23, 2019, I served true and correct copies of the foregoing document on the following, in the method indicated:

Larry Kuznetz Sarah Harmon Powell, Kuznetz & Parker 316 W. Boone Ave. Rock Pointe Tower, Suite 380 Spokane, WA 99201-2346	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> By Legal Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email: larry@pkp-law.com sarah@pkp-law.com
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Hilary Hoffman, Paralegal

PAUKERT & TROPPMANN, PLLC

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