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NO. 61752-4-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
2008 NOV -6 AM 11:49

FEDERAL WAY SCHOOL DISTRICT NO. 210,

Appellant,

v.

DAVID VINSON,

Respondent.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to reverse, on statutory certiorari, a hearing officer's conclusion that verbally assaulting a former student, and subsequently telling material falsehoods to a school district investigator, were not sufficient cause for the discharge of a certificated teacher.

2. The trial court erred in awarding the teacher reasonable attorney's fees.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is it sufficient cause for the discharge of a certificated teacher for such teacher to verbally assault a former student in a public place, where such conduct is motivated at least in part by the teacher's grudge against the student for having participated in a prior school district investigation of his conduct?

2. Is it sufficient cause for the discharge of a certificated teacher for such teacher to knowingly and intentionally tell material falsehoods to a school district investigator investigating the teacher's conduct?

3. Where there exists sufficient cause for the discharge of a certificated teacher, is such teacher entitled to an award of reasonable attorney's fees?

III. STATEMENT OF THE CASE[1]

A. Notice of probable cause for discharge.

On July 5, 2007, the Federal Way School District notified David Vinson, a certificated teacher, of probable cause for his discharge. Ex. 15. Pursuant to RCW 28A.405.310, a hearing was held before Hearing Officer John Cooper.

B. The record before Hearing Officer Cooper.

The following facts are established by the record from the hearing before the Hearing Officer and, except where specifically noted, are uncontested.

1. The record establishes with certainty that Vinson verbally assaulted Rebecca Nistrian.

On May 1, 2007, Rebecca Nistrian stopped for something to eat at a Taco Time restaurant in Federal Way, before heading next door for her shift as a waitress at Red Lobster. As she got in line, she recognized the man in front of her as David Vinson. She had known Vinson from her time at Thomas Jefferson High School ("TJHS"), where he had been her junior year English teacher. (She also recalled that in 2005, she had participated in a

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District investigation of Vinson, Trans. 10, but she did not know whether Mr. Vinson knew about her involvement in that investigation, Trans. 26.)

Vinson turned around and saw Nistrian, and Nistrian said something to him. Nistrian testified that she simply said, "hi." Trans. 11. Vinson claims that, rather than simply saying "hi," Nistrian asked, "Why aren't you at TJ?," a reference to his having been transferred to Federal Way High School following the investigation in which Nistrian had participated. Trans. 408. He testified that he "heard what I wanted to hear," which was, "Why aren't you at TJ, *faggot?*" Trans. 412. Vinson is openly gay, and claims that Nistrian had previously called him a "faggot." Trans. 370. Nistrian denies this. Trans. 17. In any event, it is clear that Nistrian did *not* use that offensive term in addressing Vinson at the Taco Time. She said either, "hi," or "why aren't you at TJ?"

In response to Nistrian's comment, Vinson launched into a vicious verbal assault directed at Nistrian. He does not dispute that he said words to the effect of, "stay the fuck away from me," and "you know what you and your brother did." Trans. 408 (admitting saying, "don't talk to me . . . you fucking bitch"). (The investigation that Nistrian (and her brother, Trans. 39) participated in resulted in Vinson's being involuntarily transferred from TJHS to FWHS. Trans. 210.) Nistrian testified, and Mr. Vinson did not

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deny, that Mr. Vinson also called her names including "slut," "tramp," "whore," "bitch" and "hussy." Trans. 12; Trans. 408 (admitting calling her a "bitch" and a "whore").

Vinson also threatened to further harass Ms. Nistrian. Looking down at her Red Lobster name tag, Vinson declared that he was going to go to Red Lobster, insist that she wait on him, and "raise hell." Trans. 13. Vinson attempted to deny this threat during the hearing in this case. Trans. 436. He persisted in his denial even when District counsel pointed out that his friend Sandy Duvall testified that he had recounted that threat to her. Vinson claimed in response that he had told Duvall that he had made that threat, but that he had not actually made the threat to Nistrian. Trans. 437. He could not explain how Nistrian could have heard or known about a threat he claimed to have shared only with Duvall, Trans. 437, and when the Hearing Officer pointed out that Vinson's friend Tommy Decker *also* testified that Vinson had told *him* about the threat, Vinson finally capitulated and admitted that he "might" have made the threat, Trans. 446.

Vinson's verbal assault against Nistrian occurred in front of children. Trans. 409.[2]

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[2] It is also probable that Vinson was accompanied by students. While he denies it, Nistrian testified that he was with students, buying them food. Trans. 12. Moreover, Vinson's friend, Tommy Decker, testified that Vinson had told him, on the afternoon of

In the course of the previous investigation in which Nistrian had participated—and which led to Vinson's involuntary transfer—Vinson was clearly and repeatedly directed not to engage in any form of retaliation against anyone who had participated in that investigation. Trans. 57; Ex. 3 at 3 ("[Y]ou are directed to refrain from retaliation or reprisal against individuals that participated in the investigation process. Any future harassment, retaliation or reprisals on your part may be cause for further discipline, up to and including termination of employment with the District.").

2. The record establishes with certainty that Vinson repeatedly lied during the course of the District's subsequent investigation.

Shortly after the incident at Taco Time, Nistrian reported it to the District. Trans. 40, 210-11. Courtney Wood was assigned to conduct an investigation of Nistrian's complaint. Trans. 211. The evidence establishes that Vinson knew who Wood was. Trans. 386. Vinson was obligated to tell the truth in response to Wood's questions. District Superintendent Tom Murphy testified that, in conducting an investigation, Wood acts under

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the event, that he had taken students who had been working in his classroom after school for food. Trans. 198. (Vinson could not explain why Decker would be confused about this. Trans. 435. No evidence suggests that Decker and Nistrian ever spoke.) While Vinson admitted a number of lies told during the course of the investigation, he never admitted that students accompanied him. The reason seems plain: If he had, the District could have identified them, and they could have told the hearing officer exactly what happened at the Taco Time.

Murphy's authority. Trans. 301. Wood has the authority to demand full and honest answers to his investigative questions. *Id.*

Wood interviewed Vinson regarding the Taco Time incident on May 22, 2007. Trans. 48. Despite having previously been investigated and interviewed by Wood, Vinson disregarded Wood's authority to require honest answers; Vinson admits that he chose to lie. Trans. 435. Among his numerous lies to Wood that day were the following:

- In response to Wood's asking whether he had had any recent contact with Nistrian, Vinson replied that he had not. Trans. 53. By Vinson's own admissions during the hearing, this was a lie. Trans. 408.
- Wood asked if Vinson had had a verbal interaction with Nistrian at the Taco Time. Vinson claimed that he had not. Trans. 53. By Vinson's own admissions during the hearing, this was a lie. Trans. 408.
- Wood asked Vinson if he had told Nistrian that he wanted to find out where she worked so he could go there and raise hell. As he attempted to do during the hearing, Vinson lied, saying he had not. Trans. 54. Only after lying in response to District counsel's questions on cross-examination, Trans. 437, did Vinson admit this threat, when the Hearing Officer reminded him that two of his friends had testified

that he admitted the threat to them shortly after the incident, Trans. 446.

- Wood asked if Vinson had been at the Taco Time in question *at any time*. Incredibly, Vinson claimed that he had not. Trans. 54. By Vinson's own admissions during the hearing, this was a lie. Trans. 407.
- Wood asked Vinson if he had called Nistrian names such as "whore" or "bitch". He said no. Trans. 54. By Vinson's own admissions during the hearing, this was a lie. Trans. 408.
- Wood asked Vinson if there were any witnesses he could provide who could corroborate his answers. His response: "I already told you I wasn't there. How can there be any witnesses if I wasn't there?" Trans. 55-56. Obviously, that was a lie.

Wood gave Vinson every opportunity to respond to Nistrian's allegations about the Taco Time incident. He reviewed Vinson's answers to these and other questions with him at the end of the interview. Trans. 56. Vinson made no corrections other than to say he had seen Nistrian in a park and that that was the last time he had seen her (a demonstrated lie). Trans. 56. Wood even implored the president of Vinson's union, Shannon Rasmussen, to provide any alibi, witnesses or other information; she never did. *Id.*

Vinson told these lies on May 22, 2007. Not until his testimony on November 28, 2007—six months later, and faced with the testimony of friends to whom he had admitted his conduct—did Vinson come clean. Faced with the unassailable testimony of his own friends to paint him as dishonest, Vinson could do nothing but admit it.

Unfortunately, the May 2007 interview was not the first time Vinson had lied to Wood during the course of an investigation. In a 2005 investigation, Wood asked Vinson whether he had written and sent a number of harassing emails to colleague Chris Kraght. Vinson lied, claiming he had had nothing to do with them—even when faced with a "personals" web site in which Vinson included a photograph of himself and used the email address from which the harassing emails had been sent. Trans. 146-47. (Notably, so prolific and accomplished a deceiver is Mr. Vinson that in those harassing emails to Kraght, Vinson misspelled his own name "Vincent" in order to deflect suspicion from himself. Ex. 3 at 10 ("Don't blame Mr. Vincent . . . .").) Again, Vinson admitted his lie only two years later, when he was forced to do so in this hearing. Trans. 440.[3]

[3] Of great irony here is that Vinson points to his having been found "guilty" in this investigation as partial evidence of Wood's being "out to get" him. Trans. 396-97, 421. Of course, during the course of this hearing, more than two years later, Vinson admitted that Wood's conclusions about him in 2005 *were correct.*

Finally, Vinson was forced to admit, during cross-examination, that he had lied to Wood on an even earlier occasion. Vinson had ducked into TJHS principal Mark Marshall's office, hiding from Wood. Vinson admitted telling Marshall he was hiding from Wood because he had told Wood he was out of town. Trans. 440-41.

In summary, the evidence conclusively establishes that Vinson verbally assaulted Nistrian in a public place, in front of children, using vicious, misogynistic language, in response to, at most, Nistrian's having asked why he was no longer teaching at Thomas Jefferson High School. Further, the evidence establishes that, during the District's investigation of that incident, Vinson repeatedly lied to the District's investigator about essentially every material detail of that incident—including the very fact of its occurrence. Finally, the evidence establishes that Vinson has a history of lying to the District's investigator in previous investigations of his conduct.

C. The Hearing Officer's decision.

On January 8, 2008, the Hearing Officer concluded that the District did not possess sufficient cause to discharge Vinson. In essence, that decision was based on his conclusion that, while Vinson's conduct was indeed inappropriate, "troubling and should never have occurred," CP 35, "the conduct complained of on the part of Mr. Vinson has not been shown

to have had, or is likely to have, an impact upon his teaching effectiveness or performance," CP 36.

D. Superior Court review.

The District sought review of the hearing officer's decision in superior court pursuant to RCW 7.16.030, CP 1, and a Writ of Review was issued on February 15, 2008, CP 90. On May 13, 2008, the superior court affirmed the Hearing Officer's decision, finding that the District "failed to meet the requirements for a grant of statutory certiorari." CP 224. The superior court also awarded Vinson reasonable attorney's fees of $38,773.67. *Id.* The District timely appealed. CP 226.

IV. ARGUMENT

A. Standard on writ of review.

Because the District appeals the superior court's decision on a writ of review, a brief summary of the standard applicable to such decisions—and its application to certificated teacher discharge decisions—is warranted.

The "questions involving the merits to be determined" following issuance of a writ of review are set forth in RCW 7.16.120. As relevant to this case, these include:

> (3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

. . .

> (5) Whether the factual determinations were supported by substantial evidence.

RCW 7.16.120.

Writs of review in the context of a certificated employee discharge hearing have been considered in at least two reported decisions. In *Kelso Sch. Dist. v. Howell*, 27 Wn. App. 698, 621 P.2d 162 (1980), the Court of Appeals held that the decision of a hearing officer in such a case may be reversed on writ of review if "the officer is found to have violated constitutional principles, exceeded his statutory jurisdiction, or committed *clear error of law, or* his *decision is found to be arbitrary and capricious*." 27 Wn. App. at 701 (emphasis added).

In *Coupeville Sch. Dist. v. Vivian*, 36 Wn. App. 728, 677 P.2d 192 (1984), the Court of Appeals applied the standards set forth in RCW 7.16.120 and *Howell*—in particular, the "clear error of law" and "arbitrary and capricious" standards—to overturn the decision of a hearing officer who concluded that the employee's demonstrated misconduct (including allowing students to consume alcohol in his home) would not impact his teaching performance and therefore did not constitute sufficient cause for discharge. The *Vivian* hearing officer's strained, narrow interpretation of what impacts a teacher's performance is strikingly similar to the Hearing

Officer's analysis of the impacts of Vinson's demonstrated misconduct on his teaching performance in this case. As in *Vivian*, that narrow analysis constitutes an error of law and arbitrary and capricious action on the part of the hearing officer.

B. The sufficient cause standard.

When a school district superintendent determines that there is "probable cause or causes" for a teacher to be discharged, the superintendent must provide the employee with notice of such cause or causes, and opportunity for hearing. RCW 28A.405.300. The hearing officer must determine whether such cause or causes have been "established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action." RCW 28A.405.310.

1. Misconduct that lacks any positive educational aspect or legitimate professional purpose constitutes a material breach of the employment contract and, consequently, sufficient cause for discharge.

The Washington Supreme Court has stated the general sufficient cause rule: "The thrust of the inquiry of a school board proceeding under RCW 28A.58.450 [recodified as RCW 28A.405.300], although that statute speaks of 'probable cause' and 'sufficient cause' for 'adverse change in contract status', is 'whether the teacher has so materially breached his promise to teach as to excuse the school district in its promise to employ."

Barnes v. Seattle School District, 88 Wn.2d 483, 487, 563 P.2d 199 (1977) (quoting *Francisco v. Board of Directors*, 85 Wn.2d 575, 580, 537 P.2d 789 (1975)). Thus, in a broad sense, if a teacher's conduct amounts to an abandonment of his professional obligations, he is deemed to have "breached his promise to teach" and may be terminated.

In 1986, the Supreme Court reviewed various appellate court decisions interpreting the term "sufficient cause," and articulated the following comprehensive rule:

> Read together, the general rule emanating from Washington case law is this: Sufficient cause for a teacher's discharge exists as a matter of law where the teacher's deficiency is unremediable and (1) materially and substantially affects the teacher's performance, [*Hoagland v. Mount Vernon School District*, 95 Wn.2d 424, 623 P.2d 1156 (1981); *Mott v. Endicott School District*, 105 Wn.2d 199, 713 P.2d 98 (1986)]; *or* (2) lacks any positive educational aspect or legitimate professional purpose. [*Pryse v. Yakima Sch. Dist.*, 30 Wn. App. 16, 632 P.2d 60 (1981); *Potter v. Kalama Public Sch. Dist.*, 31 Wn. App. 838, 644 P.2d 1229 (1982)]. In such cases, the teacher is deemed to have materially breached his promise to teach, *Barnes*, at 487, *Simmons*, at 378, and can be discharged without compliance with the probation procedures of RCW 28A.67.065 [recodified as RCW 28A.405.100].

Clarke v. Shoreline Sch. Dist., 106 Wn.2d 102, 113-14, 720 P.2d 793 (1986).

2. **Where discharge is based on misconduct and not simply a performance deficiency, the remediability of the employee's conduct is irrelevant.**

Under *Clarke*, remediable performance deficiencies may not be sufficient cause for discharge unless the district has complied with the evaluation and probation requirements of RCW 28A.405.100. Where performance issues are not the basis for sufficient cause—as in this case, where the basis for discipline is misconduct in the form of inappropriate conduct with a community member and lying in the course of the resulting investigation, not how well Vinson teaches; that is, the focus is on the employee's *conduct*, not his *performance*—a teacher may be adversely affected in his contract status if the teacher's conduct materially and substantially affects the teacher's performance, or if the conduct lacks any positive educational aspect or legitimate professional purpose.

Every court of appeals decision examining the issue of remediability following *Clarke* has concluded that the "unremediable" requirement stated in *Clarke* applies only to the first prong of the test, related to performance deficiencies. There is *no* authority to the contrary:

> Because of the insertion of the subdivisions by the *Clarke* court, a strict grammatical interpretation of this rule could result in applying the remediable requirement to both subdivisions. However, based upon *Pryse* and *Potter*, we conclude that the *Clarke* court did not intend remediability to apply to both subdivisions (1) and (2).

> Rather, we conclude that remediability only applies to subdivision (1). In light of this interpretation, the test should read that sufficient cause for discharge exists as a matter of law where the teacher's deficiency is unremediable and materially and substantially affects performance *or* where the teacher's conduct lacks any positive educational aspect or legitimate professional purpose. By inserting "or" the court in [*Clarke*] is indicating an alternative test.

Sauter v. Mt. Vernon Sch. Dist., 58 Wn. App. 121, 130-131, 791 P.2d 549 (1990); *Wright v. Mean Sch. Dist.*, 87 Wn. App. 624, 630-31, 944 P.2d 1 (1997) ("*Sauter* is correct. . . . The statute requiring probation is not applicable in situations where the conduct lacks a positive educational aspect or legitimate professional purpose."); *Ruchert v. Freeman Sch. Dist.*, 106 Wn. App. 203, 210-11, 22 P.3d 841 (2001) (following *Sauter*); *Weems v. North Franklin Sch. Dist.*, 109 Wn. App. 767, 776, 37 P.3d 354 (2002) ("Remediability is a consideration only when the discharge follows deficient performance. That is, some professional shortcoming that can be remedied with training, more work, or other instruction . . . . Remediability need not be considered when the teacher's conduct lacks any positive educational aspect or legitimate professional purpose.").

3. The *Hoagland* factors are used to determine impact of non-employment-related conduct or status upon a certificated educator's job performance.

Finally, even as to misconduct lacking a positive educational aspect or legitimate professional purpose, the *Clarke* rule "presumes a nexus

between the conduct in question and the employee's job performance." *Ruchert v. Freeman Sch. Dist.*, 106 Wn. App. 203, 22 P.3d 841 (2001) (holding that, in termination of a bus driver for hosting a party at which minors were served alcohol, trier of fact must consider whether that conduct had a nexus to the employee's job performance). As explained in *Ruchert*, the factors set forth in *Hoagland v. Mt. Vernon Sch. Dist.*, 95 Wn.2d 424, 623 P.2d 1156 (1981), inform that analysis:

> [T]he *Hoagland* factors must be considered when evaluating the job-relatedness of a school employee's alleged misconduct. After adopting the rule for examining job-related "deficiencies," the *Clarke* court listed the *Hoagland* factors and made two observations:
>
> > First, not all eight factors will be applicable in every teacher discharge case. Second, these factors are not necessarily applicable when the cause for dismissal is the teacher's improper performance of his duties. They were designed to ensure that "when a teacher's status or conduct outside his profession is the basis for his dismissal, that cause is related to his performance of his duties as a teacher." Nevertheless, these factors are helpful in determining whether a teacher's effectiveness is impaired by his classroom deficiencies.
>
> *Clarke*, 106 Wn.2d at 114-15 (citations omitted). Similarly, the *Sauter* court reasoned that the *Hoagland* factors were inapplicable because "we are not faced with conduct involving a teacher's private life unrelated to school activities." *Sauter*, 58 Wn. App. at 132. As Division One of this court explained again in a later case:
>
> > Because the eight *Hoagland* factors are designed to assure [sic] that, when a teacher's status or conduct outside his profession is the basis for his dismissal, that cause is related to his performance of his duties as a teacher, *Hoagland*, 95 Wn.2d at 428, those factors are not necessarily applicable when the cause

> for dismissal is the teacher's improper performance of his duties.
>
> *Simmons v. Vancouver Sch. Dist. No. 37*, 41 Wn. App. 365, 378-79, 704 P.2d 648 (1985).
>
> We conclude that different standards apply based on whether the cause for dismissal relates to the employee's job performance or whether the discharge is based on the employee's status or conduct outside these duties. When the cause for dismissal is based on the employee's job performance, either one or both of the *Clarke* tests may apply. But application of these tests may or may not require consideration of some or all of the *Hoagland* factors. In contrast, when a school district employee's status or conduct outside his or her job duties is the basis for discharge, the *Hoagland* factors must be considered along with the second *Clarke* test.

106 Wn. App. 212-13.

Thus, *Hoagland* analysis is critical to determining whether status (*e.g.*, homosexuality as in the now-irrelevant case of *Gaylord v. Tacoma Sch. Dist.*, 88 Wn.2d 286, 559 P.2d 1340 (1977)) or conduct (*e.g.*, possession of a stolen motorcycle as in *Hoagland*) *outside of the employment context* presents such serious implications for job performance as to constitute sufficient cause for discharge. Where the conduct forming the basis for the discharge is itself employment-related (either occurring in the workplace or arising out of the employment), *Hoagland* does not necessarily come into play.

Obviously, when *Hoagland* does apply, it is not "the test for sufficient cause." It is, rather, simply a tool for assisting in the determination of whether conduct impacts job performance. To that end,

Hoagland states eight non-exclusive and unweighted "factors" for consideration:

> (1) the age and maturity of the students;
>
> (2) the likelihood the teacher's conduct will have adversely affected students or other teachers;
>
> (3) the degree of the anticipated adversity;
>
> (4) the proximity or remoteness in time of the conduct;
>
> (5) the extenuating or aggravating circumstances surrounding the conduct;
>
> (6) the likelihood that the conduct may be repeated;
>
> (7) the motives underlying the conduct; and
>
> (8) whether the conduct will have a chilling effect on the rights of the teachers involved or of other teachers. [The meaning of this factor has been clarified by *Coupeville*, 36 Wn. App. 738: "*Hoagland* incorrectly paraphrases this factor. *Morrison v. State Bd. of Educ.*, [1 Cal. 3d 214, 229, 461 P.2d 375 (Cal. 1969),] suggests that it is 'the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.'"]

95 Wn.2d 429-30. As noted in *Clarke*, not all factors will be applicable in every case in which the *Hoagland* factors are applied.

4. Dishonesty in the course of certificated employment is sufficient cause for discharge as a matter of law.

Dishonesty and lying to one's employer—a form of insubordination—is grounds for a teacher's discharge. *See, e.g.*, *Weems*, 109 Wn. App. at 777 (finding that falsification of student records was sufficient

cause for discharge because the conduct served no educational or legitimate professional purpose). In *Weems*, the court plainly stated that "there is no reason for dishonesty in any work place." *Id. Weems* permits *no justification* for lying, for *any reason*, and lying in the course of certificated employment therefore can have no "positive educational aspect or legitimate professional purpose" under *Clarke*, 106 Wn.2d at 114.

Case law from a variety of contexts and jurisdictions makes clear that an employer is entitled to expect that employees will be honest. *See, e.g.*, *Noel v. Andrus*, 810 F.2d 1388, 1393 (5th Cir. 1987) (holding that "[d]ishonesty is a reasonable ground for dismissal" of a teacher). This is particularly so in the context of an investigative interview. Thus, in *Welch v. Bd. of Educ. of Chandler Unified Sch. Dist.*, 667 P.2d 746 (Ariz. App. 1983), where a teacher lied to school officials about his relationship with a student, the court upheld the discharge. The teacher's "conduct of refusing to cooperate with school officials in an investigation, and lying to them, constituted insubordination." *Id.* at 749. Similarly, in *Goldin v. Bd. of Educ. of Central Sch. Dist.*, 359 N.Y.S.2d 384 (N.Y. Spec. Term 1973), a teacher under investigation for a sexual relationship with a former student was discharged for lying to school officials about that relationship. Even though the court didn't find sufficient cause to discharge for his relationship with

the student, it upheld the discharge because "there was a patent attempt by the [teacher] to mislead the school officials who were justified in making preliminary inquiries to ascertain if any charges should be lodged." *Id.* at 386. Thus, as a matter of law, dishonesty in the course of certificated employment constitutes sufficient cause for discharge.

5. The hearing officer's authority is limited to considering whether sufficient cause exists. Once that determination is made, selection of the appropriate sanction is left to the District's Board of Directors.

Having been appointed hearing officer under RCW 28A.405.310, the Hearing Officer's duties were to make findings of fact based on a record created in accordance with the Rules of Evidence, and then to apply the law to those facts. RCW 28A.405.310(7). The law relating to the sufficient cause standard is set forth in the cases discussed above, and is well established.

The limited nature of the hearing officer's role within this statutory scheme should be emphasized. It is limited by statute to determining the "sufficiency" of the cause or causes identified by the District; it is not to determine in the first instance whether discharge versus some other consequence in some sense "should" be imposed. That responsibility and discretion has been assigned, first to the superintendent in determining "probable cause" for discharge, and finally to the school board itself,

following the statutory hearing. The school board is the entity specifically vested by statute with the exclusive authority and responsibility to "employ . . . and for sufficient cause discharge . . . employees" of the District. RCW 28A.400.300(1). Once the legal sufficiency of the cause or causes has been established, *whether* to discharge or to impose some other sanction is a decision explicitly left by statute to the discretion of the District. *Simmons v. Vancouver Sch. Dist.*, 41 Wn. App. 365, 380, 704 P.2d 648 (1985); *Clark v. Central Kitsap Sch. Dist.*, 38 Wn. App. 560, 564-65, 686 P.2d 514 (1984).[4]

C. The Hearing Officer's decision should be reversed.

1. The Hearing Officer disregarded the limited nature of his role.

The foregoing authority clearly establishes that the hearing officer's role is to determine the legal sufficiency of the causes alleged by the district. That entails making findings of fact, based on the Rules of Evidence, and then applying the law of sufficient cause to those facts. If the facts establish sufficient cause, there is nothing left for the hearing officer to decide. In particular, the hearing officer has no discretion to determine that, notwithstanding the establishment of legally sufficient cause, the punishment proposed by the district is too severe. Yet that is precisely what

[4] Although *Clark* involved superior court review of a classified school employee's discharge, the school board's source of statutory authority and the "sufficient cause" standard were the same as those involved here. RCW 28A.400.300 (formerly RCW 28A.58.100).

the Hearing Officer did: "there is a significant concern in any hearing of this nature, particularly in light of the noted professionally heavy consequences, that 'the punishment fit the crime' if you will." CP 39. The Hearing Officer provided no citation to authority for that proposition, as the authority, discussed above, is directly contrary to that proposition.

The Hearing Officer clearly found the essential facts of the District's allegations—that Vinson verbally assaulted Nistrian, and that he subsequently lied about it to the District's investigator—to be proven. CP 33, 35. In his effort to ensure that the "punishment fit the crime"—really, an attempt to nullify the District's authority to decide how to respond to Vinson's misconduct—the Hearing Officer then proceeded to attempt to minimize the impact of Vinson's misconduct on District operations. The *Hoagland* factors were the tool he misused to do so.

2. The *Hoagland* factors should not have been applied.

As discussed above, the *Hoagland* factors are used to measure the impact of a certificated employee's conduct *outside of the context of his employment* on his performance of his duties as a public educator. That analysis was not warranted in this case, because Vinson's misconduct occurred within the context of his employment.

But for his employment as a teacher by the District, Vinson never would have known Nistrian. Vinson knew her—and had a grudge against her—because she had been a student of his; had participated in a prior investigation into his conduct that led to his being transferred to another school within the District; and, allegedly, had called him "faggot" in the past. Mr. Vinson had been clearly and repeatedly directed not to engage in retaliation against any person who participated in that prior investigation, and his verbal assault on Nistrian violated that directive. This conduct was not purely private conduct, such as if Vinson had been involved in an altercation with a stranger with no connection to his employment, in some social setting well apart from his role as a teacher for the District. It was a verbal assault on a former student and a witness against him in an investigation by his employer, and a violation of a clear directive specifically prohibiting such retaliatory conduct.

The inapplicability of the *Hoagland* factors is even more clear in the case of Vinson's lies to the District investigator. That misconduct took place at work, on work time, and in direct violation of directives and expectations of his employer. There is absolutely no question of "job-relatedness" in that context. That conduct amounted to an absolute refusal by Vinson to do his job, which includes honestly answering his employer's questions.

3. Even if *Hoagland* did apply, the Hearing Officer misapplied and simply ignored some of the factors.

In his decision, the Hearing Officer did not clearly differentiate between his application of the *Hoagland* factors to Vinson's verbal assault on Nistrian versus Vinson's lies to the District investigator. Yet those are clearly two distinct causes, which should have been considered separately. Ex. 15 ("I have identified *several separate grounds, each of which* constitutes sufficient cause for your termination.") (emphasis added).

(a) The Hoagland factors show that Vinson's verbal assault on Nistrian does impact his job performance.

The Hearing Officer barely conducted any *Hoagland* analysis at all with regard to this cause, which is ironic in light of the fact that this cause is the one that is arguably better fitted to the *Hoagland* analysis (the conduct having at least occurred away from work). The Hearing Officer's only *Hoagland* analysis specific to this cause is of factor 7, "the motives underlying the conduct." As to this, the Hearing Officer says only that, "Mr. Vinson was apparently motivated by a taunt or attack from someone, no longer a student, who had previously derided him with a homophobic remark and assisted in an investigation resulting in discipline that Mr. Vinson believed to be unfair. His emotional response, while inappropriate, is understandable." CP 42.

This analysis is woefully inadequate, and demonstrably wrong. First, the Hearing Officer's reference to Vinson believing the previous investigation of him—which Nistrian had contributed to—to be "unfair" proves that the conduct *was related to Vinson's District employment*. Second, the suggestion embedded in the Hearing Officer's rationalizing of Vinson's behavior—that the fact that a person contributed to an investigation that led to adverse impacts on one's employment is an acceptable motivation for a verbal assault on that person—is ludicrous. Finally, any perception Vinson had about the "unfairness" of that prior investigation was clearly misplaced: During this very hearing, he *admitted* to the harassment of a colleague that was the focus of that prior investigation, and he *admitted* that his previous denials of that conduct were lies. On what basis, then, can Vinson have reasonably been motivated by that investigation having been "unfair"? The Hearing Officer's blithe acceptance of that suggestion demonstrates the inadequacy of his analysis.[5]

The following is a reasonable application of the *Hoagland* factors to Vinson's verbal assault on Nistrian:

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[5] Moreover, the Hearing Officer's conclusion that Vinson's "response, while inappropriate, is understandable," hardly supports a finding that Vinson's "motives underlying the conduct" were in any way *positive*.

(1) *Age and maturity of the students*: This factor is not directly applicable, as the incident did not directly involve a current student. However, it should be noted that children were present for Vinson's profanity-laced verbal assault on Nistrian, and that fact justifies significant concern regarding Vinson's judgment in modeling appropriate behavior for students.

(2) *Likelihood the teacher's conduct will have adversely affected students or other teachers*: While Vinson's conduct did not directly involve current students (unless he was accompanied by them) or other teachers, it can be predicted to impact them. Most importantly, Vinson has demonstrated a willingness to viciously retaliate against those whom he perceives as having slighted him—including those who participate in legitimate District investigations of his conduct.

(3) *Degree of the anticipated adversity*: This can be predicted to be quite severe. Students and other District staff with information relating to Vinson's conduct would understandably be reluctant to share it and risk the kind of wrathful retaliation Nistrian was subjected to.

(4) *Proximity or remoteness in time of the conduct*: The conduct has just occurred; this is not a case dealing with an old incident but with present misconduct.

(5) *Extenuating or aggravating circumstances surrounding the conduct*: The Hearing Officer's discussion of this factor was blended with his discussion of Vinson's motives. CP 42. Yet the Hearing Officer looked only to extenuating circumstances: the fact that he felt Vinson's motives to have been "understandable." Not only is that analysis wrong for the reasons discussed above, the Hearing Officer totally ignored the *aggravating* circumstances: That Vinson's conduct was indeed—as the Hearing Officer himself notes—related to Nistrian's participation in a prior investigation; and, just as disturbing, that Vinson's attack on Nistrian used offensive and profane language that could have no justification even if Vinson's motives had been pure.

(6) *Likelihood that the conduct may be repeated*: The likelihood is high. By his own admission, this is not the first time Vinson has engaged in harassing conduct towards someone he knows from his District employment. Despite previously and dishonestly denying having harassed colleague Chris Kraght, Vinson admitted during this hearing that he had done so. The evidence demonstrates Vinson's pattern of such behavior.

(7) *Motives underlying the conduct*: Discussed in the context of factor 5 above.

(8) *Whether the conduct will have a chilling effect on the rights of the teachers involved or of other teachers*: Assuming, as suggested in *Coupeville*, this factor

refers to the chilling effect of disciplining an employee for conduct of this type, there would be none. The conduct had no positive or redeeming aspect; it was unacceptable and shocking behavior, and disciplining Vinson for it would not chill the legitimate exercise of employee rights.

Based on the foregoing, each of the *Hoagland* factors that has any bearing on this cause suggests that the conduct *was* job-related, and can be predicted to impact Vinson's performance of the broad duties of a public school teacher.

(b) The Hoagland factors show that Vinson's lies to the District investigator impact his job performance.

As noted above, the job-relatedness and negative impact of an employee's direct lies to his employer in the course of an employer investigation is obvious, and therefore the *Hoagland* factors need not even be applied. Nevertheless, they naturally support a finding of job impact and sufficient cause in this case.

The majority of the Hearing Officer's analysis of the *Hoagland* factors pertains to application of factor 5—"the extenuating or aggravating circumstances surrounding the conduct"—to Vinson's lies to the District investigator. In this context, while the Hearing Officer acknowledges that

"Mr. Vinson candidly admits that he did lie to Mr. Wood when first asked[6] about the events at Taco Time," CP 40, the Hearing Officer proceeds to minimize Vinson's lies:

> He knew that the investigator had the date wrong—asking him about May 2, 2007, instead of May 1, 2007, the actual date of the confrontation with Ms. Nistrian. Consequently, when asked if he had been at the Taco Time on "May 2nd", or had seen Ms. Nistrian on "May 2nd", Mr. Vinson answered "no", which was an honest answer, though obviously not the most responsive. He now admits his denials were somewhat whimsical or flippant in nature and not necessarily cooperative in terms of getting to the bottom of the event in question. . . . Mr. Vinson, regrettably, chose a less than cooperative attitude that did lead to him providing dishonest answers to some of Mr. Wood's questions.

CP 40-41. That discussion mischaracterizes the nature and extent of Vinson's lies during the investigative interview. Vinson was not simply "uncooperative," "whimsical," and "flippant." It is *not* the case that Wood asked Vinson only about events on "May 2." While Wood started his questioning that way, when Vinson flatly denied having been at Taco Time or seeing Nistrian that day, Wood expanded his questioning. Wood asked if Vinson had *ever* been to that Taco Time, and Vinson lied, saying he had not. Trans. 54. Wood asked if Vinson had had *any* recent contact with Nistrian, and Vinson lied, saying he had not. Trans. 53. Vinson did not

[6] The District cannot discern what the Hearing Officer means when he states that Vinson lied when "first asked" about the incident. The uncontested evidence is that he lied over and over and never corrected those lies during the course of the investigation, doing so only during this hearing.

simply choose not to help Wood, or to play a game, answering the questions truthfully but unhelpfully; rather, he chose to lie, over and over, in response to direct questions from his employer.

While minimizing the extent and seriousness of Vinson's lies, the Hearing Officer also sought to justify them, mangling the issue for decision: "The issue thus becomes whether the circumstances pointed out by Mr. Vinson (i.e., a perception of disparate treatment, unfair or biased earlier investigations and/or findings, etc.) ameliorate the gravity of his subsequent conduct in terms of being less than completely responsive, honest and/or dishonest." CP 41. That clearly is not the issue in a legal sufficient cause case. Nothing in any of the foregoing authority suggests that demonstrated misconduct does not constitute sufficient cause if the employee *subjectively thinks he has a good reason for it*. Indeed, *Weems* plainly states that *there can be no justification* for dishonesty by a teacher to his employer. 109 Wn. App. at 777.

Nevertheless, the Hearing Officer elevated *one half* of *one* of the *Hoagland* factors (that shouldn't even be applied to this cause) to the status of determining whether sufficient cause exists. CP 44 ("In light of the *Hoagland* factors, the critical inquiry regarding his falsifications really comes down to whether there are extenuating or mitigating [but not aggravating]

circumstances that might account for, or explain, the conduct, thereby making it more understandable or excusable.") Referring to the "extenuating circumstances" half of factor 5, the Hearing Officer concludes that Vinson's "claimed perceptions were not unreasonable and tend to explain the unfortunate attitude[7] he took toward the investigation of the events of May 1, 2007." CP 41. Vinson's "reactions and conduct, while certainly not appropriate, are understandable or perhaps explicable in light of these extenuating circumstances." CP 44. Notably, the Hearing Officer never finds, as a matter of fact, that Vinson's perceptions were *accurate*—just that Vinson himself *subjectively* thought he was justified in lying.

The excuse the Hearing Officer credits for Vinson's lies is contrary to law. "His excuse or explanation for [lying] is that he did not feel he could get a fair or impartial investigation from Mr. Wood, advised Mr. Wood of this and also advised him that he (Mr. Vinson) was feeling 'bullied' by Mr. Wood in the investigation process. Mr. Wood did not respond, other than to begin the questioning." CP 41. First, this simply is not true: Wood *did* respond to Vinson's expression of concern, Trans. 418, and Vinson admits

[7] A calculated course of material lies is not simply an "unfortunate attitude."

that he lied "because I wanted him to leave me alone," Trans. 420.[8] Further, the Hearing Officer ignores, in regard to this excuse, the uncontested facts that Vinson never brought any concerns regarding Wood's impartiality to any other District official, Trans. 433-34; did not simply *decline to answer the questions* on the basis of this perception but chose instead to lie; and never subsequently sought to correct his dishonest statements, Trans. 437-38. At any rate, *Weems* stands for the principal that there is no justification for a teacher's lying to his employer, so the Hearing Officer's crediting this excuse—indeed, elevating it above all other considerations—was clearly contrary to law.

The following is a reasonable application of the *Hoagland* factors to Vinson's lies to the District investigator:

(1) *Age and maturity of the students*: This factor is not directly applicable.

(2) *Likelihood the teacher's conduct will have adversely affected students or other teachers*, and (3) *Degree of the anticipated adversity*: While Vinson's lies were to

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[8] Indeed, in attempting to explain why he lied to Wood, Vinson lists feeling that Wood was unfair last: "I—well, I had been lying because he asked me if I'd been at Taco Time in the month of May, and I said, No, and—you know. At first it was—I was like, Well, you have the date wrong; and then it was like, No, I'm just lying, *because I wanted him to leave me alone*. And then—

Q Why did you lie to him?

A *Because I was scared, because I was being stupid*, because I thought Courtney was out to get me and no matter what I say it's—I'm doomed." Trans. 420-21 (emphasis added).

an administrator, his penchant for such dishonesty (having lied to the investigator on at least three separate occasions) can be predicted to impact District operations on a broad basis. See subsection 5, *infra*. Vinson clearly cannot be relied upon to be honest in the course of any other investigation, or even the routine supervision of his job performance. Dishonesty by a public educator can lead to the deprivation of student and staff rights and protections, and to District liability.

(4) *Proximity or remoteness in time of the conduct:* Vinson's conduct is not only recent but part of an ongoing, admitted pattern.

(5) *Extenuating or aggravating circumstances surrounding the conduct:* The "extenuating" half of this factor is discussed at length above. As for aggravating circumstances, Vinson's lies were entirely self-serving, clearly intended to actively hinder a legitimate District investigation into his misconduct. They did, in fact hinder that investigation, and but for the investigator finding out about Vinson's statements to his friends, the District would likely never have determined what actually occurred.

(6) *Likelihood that the conduct may be repeated:* As noted, Vinson's lies in this instance were only the latest in a pattern of such conduct. Particularly if such conduct can be excused based on subjective perceptions, as suggested by the Hearing Officer's decision, repetition is essentially assured.

(7) *Motives underlying the conduct*: As noted, Vinson lied for self-serving reasons, to hinder the District's investigation into his conduct.

(8) *Whether the conduct will have a chilling effect on the rights of the teachers involved or of other teachers*: This conduct should be strongly discouraged. Punishing an employee for direct lies to his employer does nothing to chill the legitimate exercise of employee rights. *See Coupeville*, 36 Wn. App. at 738 ("The hearing officer made no finding with reference to either the adverse impact or chilling effect upon other teachers, but if he had, it could only be that such action was rightly calculated to discourage other teachers from engaging in the same or similar conduct."). Vinson himself was free to raise his concerns with District administrators, to tell the truth and explain his side, to pursue grievance and appeal processes in response to any consequences applied. Punishing him for having lied instead does nothing to foreclose those legitimate avenues of recourse.

Again, while the *Hoagland* factors should not even apply to misconduct that occurs in the course of employment, consideration of the factors predictably indicates that such misconduct naturally has a negative impact on the employee's job performance.

(c) *As in Coupeville, the hearing officer's overly narrow interpretation of what affects teaching performance constitutes clear error of law and arbitrary and capricious action.*

As noted above, the Hearing Officer minimizes Vinson's conduct. The fact that Vinson's misconduct did not occur in the classroom or *directly* impact his students seems to have been determinative: "Ms. Nistrian is an adult, no longer a student . . . ." CP 43. "[N]one of the conduct complained of has any direct or significant impact upon his performance, effectiveness or duties as a teacher. No students have been put at risk, nor is there any apparent threat of such a risk . . . ." CP 44-45. "I am unable to find the necessary nexus between [Vinson's] conduct and Mr. Vinson's teaching performance or effectiveness, which is essential to support termination of this teacher's employment." CP 46.

The Hearing Officer's minimizing of the impact of serious misconduct simply because it (arguably) does not *directly* affect his ability to stand in front of a classroom of students is strikingly similar to that of the hearing officer in *Coupeville* who, though finding that the teacher in that case had allowed students to consume alcohol in his home and had consumed alcohol with them, nevertheless rejected the testimony of witnesses who testified that the teacher's misconduct impaired his effectiveness as a teacher, concluding:

> It is my belief that the conduct of the Petitioner in this matter demonstrated a substantial exercise of poor judgment on his part. However, keeping in mind the factors cited by the [*Hoagland*] court and the testimony of various witnesses, I cannot find that the Respondent School District has demonstrated by a preponderance of the evidence that Petitioner's conduct will materially and substantially effect [sic] his teaching performance if he is returned to the classroom.

36 Wn. App. at 734. The Court of Appeals rejected the hearing officer's narrow view of what impacts a teacher's performance:

> If the hearing officer finds as the ultimate fact that Vivian's conduct has not materially and substantially affected his performance and the evidence is not overwhelmingly to the contrary but positively establishes that his performance is affected, then *as a matter of law the decision of the officer is an error of law as well as arbitrary and capricious.*

36 Wn. App. at 738-39 (emphasis added). The court rejected the proposition that the fact that an employee can alter his behavior means the employer lacks sufficient cause to discharge:

> Witnesses for Vivian concluded there was the *possibility of an initial adverse impact on his effectiveness* as a result of his conviction but that this would dissipate if he returned to the classroom and resumed teaching. . . . No doubt Vivian can at some time in the future regain his ability to teach but *the question is whether he could be an effective teacher on . . . the date upon which he was dismissed.* The public schools are not established for retraining unqualified teachers, and *Coupeville was entitled to a teacher who would be an effective role model and teacher on the date of his discharge*, not the following day, or the following month or the following year. . . . We conclude that if all factors are considered, including Vivian's misconduct and its impact on his teaching ability, the School District conclusively established both the misconduct and its material and substantial effect upon his

> future performance. The decision of the hearing officer was arbitrary and capricious and an error of law.

36 Wn. App. 739.

As in *Coupeville*, Vinson's misconduct certainly does not render him incapable of standing in front of a classroom of students and teaching. But the inquiry goes deeper than that. Can he be an effective public educator? Can he, having verbally assaulted a former student using vicious, misogynistic language, and having repeatedly lied to the District about his conduct, be the "effective role model" that *Coupeville* says the District is entitled to? Demonstrably not. Indeed, both of those causes directly conflict with his statutory role as a certificated teacher: "It shall be the duty of all teachers to endeavor to impress on the minds of their pupils the principles of morality, *truth*, justice, temperance, *humanity* and patriotism; to teach them to *avoid* idleness, *profanity and falsehood*; to instruct them in the principles of free government, and to train them up to the true comprehension of the rights, duty and *dignity* of American citizenship." RCW 28A.405.030 (emphasis added). If Vinson rejects these ideals himself, and in the course of his employment as a teacher, he cannot be expected to effectively convey them to his students. As in *Coupeville*, then, the Hearing

Officer's overly narrow interpretation of what impacts teaching effectiveness must be rejected as arbitrary and capricious and an error of law.

4. The Hearing Officer disregarded the legal sufficient cause standard in finding that Vinson's verbal assault on Nistrian did not warrant discharge.

As discussed above, the *Hoagland* factors require a finding that Vinson's verbal assault on Nistrian was job-related and impacts his effectiveness as a certificated educator. He cannot satisfy RCW 28A.405.030's requirement that he "impress on the minds of [his students] the principles of morality [and] humanity [or] teach them to avoid . . . profanity" when he has himself so viciously, inhumanely, and profanely attacked a former student, at least in part because she participated in an investigation into his prior conduct.[9] (His current students were aware of at least some aspects of the incident, as they discussed Nistrian's complaint at school. Trans. 174.)

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[9] Even the Hearing Officer acknowledges that the attack was based in part on Vinson's grudge against Nistrian over her having participated in an investigation that led to his being involuntarily transferred (and the underlying basis of which Vinson now admits to have been founded). The Hearing Officer therefore finds that the conduct was retaliatory, and of course that being the case, it violated a clear directive from the District to Vinson to refrain from retaliation against participants in that investigation. Under Washington law, even if the underlying conduct does not itself warrant termination, disobedience—insubordination—renders a teacher "unreliable and unpredictable . . . and dangerous to students." *Simmons v. Vancouver Sch. Dist.*, 41 Wn. App. 365, 377, 704 P.2d 648, *rev. denied* 104 Wn.2d 1018 (1985).

The Hearing Officer's analysis of sufficient cause relies entirely on his misapplication of the *Hoagland* factors, and totally ignores the *Clarke* standard. Vinson's conduct towards Nistrian, in front of children, demonstrably "lack[ed] any positive educational aspect or legitimate professional purpose," *Clarke*, 106 Wn.2d at 113-14, and therefore constitutes sufficient cause for discharge.

5. The Hearing Officer disregarded the legal sufficient cause standard in finding that Vinson's repeated, material lies to the District investigator did not warrant discharge.

As discussed above, the *Hoagland* factors require a finding that Vinson's lies to the District investigator about all material facts related to the Taco Time incident were job-related conduct, and that his pattern of such lies impacts his effectiveness as a certificated educator. He cannot satisfy RCW 28A.405.030's requirement that he "impress on the minds of [his students] the principle[] of . . . truth [or] teach them to avoid . . . falsehood" when he has himself, in the course of his District employment, repeatedly disregarded the application of those fundamental tenets to his own conduct, and undertaken a course of material and wholly self-serving lies to his employer.

As also discussed above, the Hearing Officer ignores *Clarke*'s holding that sufficient cause exists where employee conduct "lacks any

positive educational aspect or legitimate professional purpose." Worse, the Hearing Officer ignores clear case law holding that there can be no justification for a certificated employee's dishonesty, and that job-related dishonesty, as a matter of law, constitutes sufficient cause for discharge. *Weems*, 109 Wn. App. at 777.

Cases cited above discuss why workplace dishonesty must be grounds for discharge. Any other holding would have destructive implications for the District's ability to make and enforce rules governing the conduct of its employees. In *Pacquing v. Employment Security*, 41 Wn. App. 866 (1985), the court of appeals held:

> [A]n employer has such a serious and substantial interest in maintaining the integrity of its rules forbidding dishonesty by its employees that any intentional violation for the purpose of affecting the violator's work situation is work-connected misconduct per se; no further damage to the employer's interest need be shown. If we held otherwise, we would invite dishonest violations of work rules and justifications based on sympathy.

Id. at 869-70 (upholding denial of unemployment benefits); *see also Franz v. Employment Security*, 43 Wn. App. 753, 760 (1986) (same). Likewise, were the District required to continue to employ a teacher who has lied to it, the message would be clear that some level of deceit and dishonesty (in this case, a consistent pattern of it) is acceptable. This cannot be the case in any employment setting.

In the context of teachers, the importance of honesty and trustworthiness is even more plain: As demonstrated by RCW 28A.405.030 (and as held in *Coupeville*), teachers are role models for our children and play a critical role in instilling values, including honesty and integrity. But even further, they are on the front lines in terms of interaction with students—interactions that, in today's legal environment, can lead to District liability. As District Superintendent Tom Murphy explained, "I have to have trust that my employees are going to be truthful; and that when they're asked questions about their involvement in situations and circumstances, they will answer truthfully." Trans. 299. Vinson's insubordination and lies "have caused me to lose faith in Mr. Vinson's ability to be truthful, to be honest, to follow simple directives and not be insubordinate to directives that he's given from his superiors." Trans. 301.[10]

There is no room, in any of the foregoing authority, for the proposition that lying and insubordination may be excused by an employee's subjective determination that the employer asking the question is "unfair." *Weems* permits *no justification* for lying, for *any reason*, and lying therefore can have no "positive education aspect or legitimate professional

[10] Vinson offered no evidence to the contrary. *See Coupeville*, 36 Wn. App. at 738-39 ("If . . . the evidence . . . positively establishes that his performance is affected, then as a matter of law the decision of the officer is an error of law as well as arbitrary and capricious.").

purpose" under *Clarke*, 106 Wn.2d at 114. Public educators are afforded ample due process. The underlying hearing process in this very case is an example. If Vinson felt that he was being treated unfairly, that did not alter his undeniable obligation to nevertheless answer his employer's questions honestly. His recourse would have been to grieve or appeal any discipline applied—not to hinder the District's ability to get to the truth by engaging in a series of lies. To hold otherwise would be to grant to any employee who subjectively feels himself to be treated unfairly a blank check to lie to his employer about whatever he chooses and to disregard his employer's valid directives, rather than pursuing legitimate means of recourse. If that is the law, then a public school district—an employer charged with both the education and protection of our children[11]—simply cannot function.

6. The Hearing Officer disregarded the Rules of Evidence.

(a) Irrelevant evidence regarding a District administrator should not have been admitted.

Finally, while not necessarily central to decision of the legal issues discussed above, it should be noted that the Hearing Officer disregarded the Rules of Evidence in violation of RCW 28A.405.310(7)(a). In

[11] *See, e.g.*, *State v. Allen*, 90 Wn. App. 957, 962, 955 P.2d 403, 405 (1998) ("[T]he State's public interests and policies recognize the care, protection, and safety of children are of the highest order. *See* RCW 26.09.002; RCW 13.24.020. The State mandates children's education. RCW 28A.225.010. When children are in government care for mandatory education, a *parens patriae* relationship exists. *See* Wash. Const. art. IX, § 1.").

particular, over the District's objections, the Hearing Officer admitted a great deal of testimony and exhibits pertaining to matters other than the causes upon which the District proposed Vinson's termination, offered by Vinson in order to attempt to justify his lies to the District investigator. For example:

- The Hearing Officer allowed extensive testimony pertaining to the conduct of former FWHS Principal George Ilgenfritz, who had left the District prior to the events leading to this case, *towards people other than Vinson*. Trans. 128, 179, 256-57.
- The Hearing Officer likewise allowed testimony regarding that same administrator's comments about Vinson, again, long before the events at issue in this case. Trans. 180-81. (Vinson admitted that he was not even aware of some of the conduct—including the most inflammatory comment admitted by the Hearing Officer—when he lied to Wood. Trans. 445. It therefore cannot have been relevant even to the issue of *why* Vinson lied.)
- The Hearing Officer likewise allowed extensive evidence regarding investigations of Ilgenfritz, totally unrelated to the reasons for Vinson's discharge in this case. Trans 63-71, 225-26.

While the Hearing Officer's decision is short on analysis, this evidence admitted over the District's relevance objections appears to form the basis for the "excuse"—a subjective feeling of unfairness—relied upon by the Hearing Officer in justifying Vinson's demonstrated, uncontested misconduct.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "Evidence which is not relevant is not admissible." ER 402. The foregoing evidence should not have been admitted. If, as *Weems* holds, there is and can be no justification for workplace dishonesty, then the extensive evidence admitted to show Vinson's subjective feelings about his treatment by the District (which the Hearing Officer himself does not actually find to be founded by the facts in evidence) simply was not relevant to the legal determination of whether Vinson's lies constitute sufficient cause.

At any rate, the irrelevant evidence the Hearing Officer admitted does not even reasonably support the alleged justification. In attempting to demonstrate Wood's bias, Vinson first points to the 2005 investigation in which Wood found Vinson to have harassed fellow employee Chris Kraght

by sending a series of anonymous emails. But of course, Vinson admitted during the hearing in this case that he had, in fact, authored and sent the emails to Kraght, and that his previous denials of the same to Wood were lies. Obviously, that investigation—in which Wood found Vinson to have committed the misconduct alleged—cannot support Vinson's claim that Wood was biased: Wood's conclusions proved correct.

Second, Vinson offered evidence regarding Wood's investigation of Vinson's own 2005 complaints against then-principal George Ilgenfritz and Kraght. Yet there is no evidence that Kraght or Ilgenfritz harassed Vinson. (Wood testified that he fully investigated all of Vinson's allegations. Trans. 77. Vinson offered no evidence to the contrary. Indeed, Vinson admitted to Wood, in 2005, that he had "no concrete evidence" that Ilgenfritz had harassed him, only "intuition and gut feeling." *Id.*) However, District Executive Director of Human Resources Chuck Christensen, conducting a separate investigation of Ilgenfritz, in response to the harassment complaint of another employee, found an extensive pattern of offensive comments on Ilgenfritz's part, including language demeaning to women. Included in the many pages of interview notes from Christensen's (*not* Wood's) investigation was assistant principal Eric Priebe's account of Ilgenfritz having, behind closed doors, referred to Vinson as "that fat gay fucker."

Ilgenfritz was suspended without pay for 20 days for his pattern of inappropriate comments, Employee's Ex. 13 (document dated October 13 2004), and shortly thereafter left the District. Any claim that the District did not respond appropriately to Ilgenfritz's conduct is specious. At any rate, Wood simply did not know about Ilgenfritz's comment about Vinson, Trans. 74, 79, as he did not conduct the investigation in which that statement was revealed, Trans. 71. To be clear, *neither did Vinson know about it* at the time of the May 22, 2007 interview. Trans. 445. Therefore, it cannot have been any part of Vinson's thought process in choosing to lie to Wood yet again on that date.

Thus, even considering the extensive irrelevant evidence admitted by the Hearing Officer, Vinson's explanation for why he lied to Wood on May 22, 2007, is not credible. For one thing, it does not explain why Vinson had also chosen to lie to Wood on at least two different occasions in 2005. And at any rate, it is not borne out by Vinson's own conduct. Vinson did not seek out Mr. Christensen, Superintendent Murphy, any District Board member, or anyone else to assert, prior to *or even after* the May 22, 2007 interview, that Wood could not conduct a fair investigation. He didn't even do this through his union president, who sat beside him during the interview. Rather, he simply chose to lie.

(b) Irrelevant evidence regarding Nistrian should not have been admitted, and at any rate cannot support a conclusion that the District investigator was unfair.

The Hearing Officer also admitted evidence, again over District relevance objections, regarding Rebecca Nistrian. For example, he admitted evidence regarding her grades while she was still a student—long before the incidents at issue in this case. Trans. 18-19. The Hearing Officer also accepted testimony, over objection, regarding Nistrian's reputation for honesty, from a witness who never even dealt with Nistrian. Trans. 266. In fact, that witness' testimony appears to have been the basis for the Hearing Officer's statement that she is a "known liar." CP 43, n.8. The Hearing Officer then concludes that Wood's reliance on Nistrian's statements during the investigation was therefore inappropriate and supports Vinson's questioning his fairness. *Id.*

While it is true that Nistrian admitted lying to Wood (regarding having obtained a no-contact order against Vinson; she clarified at hearing that she had tried to, but did not follow through, Trans. 29), the Hearing Officer's reasoning ignores the plain fact that Nistrian's credibility or lack thereof is immaterial, and was immaterial to Wood: Once Vinson's own friends corroborated Nistrian's story (based on Vinson's own admissions to them), Nistrian's credibility became irrelevant to determining what actually

happened at Taco Time. Trans. 119, 121-23. Certainly, given Vinson's admissions during the hearing, Nistrian's credibility was absolutely irrelevant to establishing the fact that Vinson verbally assaulted her, then lied to Wood about the entire incident.

In summary, the evidence does not support the Hearing Officer's finding that Vinson's subjective feeling that Wood was unfair was founded. The evidence demonstrates that Wood conducted a thorough and fair investigation, interviewing numerous witnesses, allowing Vinson full opportunity to explain what occurred at the Taco Time, and inviting Vinson to identify other witnesses who might be able to provide information. The evidence establishes that Wood *correctly* concluded in 2005 that Vinson engaged in harassment of a colleague (even in the face of Vinson's dishonest denials).

While the Hearing Officer claims that "several witnesses frankly questioned the objectivity of the investigation regarding Mr. Vinson," he cites to nothing for that statement, and appears to have pulled it out of thin air. Other than Vinson himself, no witness with direct involvement in the investigation expressed that sentiment. And, at the end of the day, the result speaks for itself: Wood investigated allegations that Vinson verbally assaulted Nistrian at Taco Time; Vinson flatly denied it when questioned by

Wood; Wood interviewed a number of people beyond Nistrian who relayed Vinson's admissions about the incident; Wood concluded that, based on those corroborating statements from people to whom Vinson made admissions (people close to Vinson), the incident did occur; and, only at hearing, Vinson admitted that that conclusion was correct. The only irregularity in that investigation process was Vinson's own self-serving attempts to interfere with it.

D. The award of attorney's fees should be reversed.

"If the final decision is in favor of the employee, the employee . . . shall be awarded reasonable attorneys' fees." RCW 28A.405.310(7)(c). Should the Court reverse the Hearing Officer's decision and conclude that the District possessed sufficient cause to discharge Vinson, the "final decision" will not be in favor of Vinson, and the Court should therefore reverse the superior court's award of attorney's fees to Vinson.

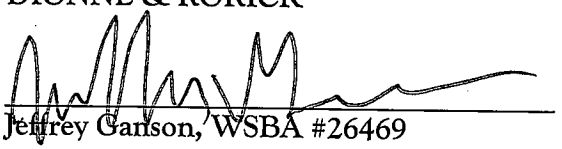
V. CONCLUSION

For the foregoing reasons, the superior court should have found the Hearing Officer's decision that the District did not demonstrate sufficient cause for Vinson's discharge to be clear error of law and/or arbitrary and capricious. This Court should therefore reverse the Hearing Officer's

decision, order that sufficient cause exists for Vinson's discharge, and reverse the superior court's award of reasonable attorney's fees to Vinson.

RESPECTFULLY SUBMITTED this 6th day of November, 2008.

DIONNE & RORICK



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FEDERAL WAY SCHOOL DISTRICT NO. 210, Appellant, v. DAVID VINSON, Respondent.	Court of Appeals Case No. 61752-4-I Certificate of Service

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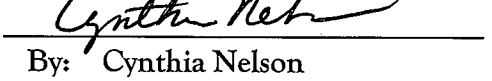

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