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NO. 61752-4I

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

FEDERAL WAY SCHOOL DISTRICT NO. 210,

Appellant,

v.

DAVID VINSON,

Respondent.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN STRICT REPLY TO BRIEF OF RESPONDENT

- A. Whether the facts constitute sufficient cause for discharge is a question of law and therefore subject to the writ of review's "clear error of law" standard.

"[W]hether the alleged conduct constitutes sufficient cause for termination is a question of law. And we review that conclusion de novo." *Weems v. North Franklin Sch. Dist.*, 109 Wn. App. 767, 776, 37 P.3d 354 (2002). Vinson's assertions to the contrary notwithstanding, it is clear that whether the Hearing Officer erroneously applied the law to the facts is an issue properly considered on writ of review. That extends to application of the factors set forth in *Hoagland v. Mount Vernon Sch. Dist.*, 95 Wn.2d 424, 623 P.2d 1156 (1981).

Vinson claims that application of the *Hoagland* factors is a mixed issue of law and fact, and therefore can only be considered under the "arbitrary and capricious" standard. Brief of Respondent at 40. That proposition is plainly disposed of by *Coupeville Sch. Dist. v. Vivian*, 36 Wn. App. 728, 677 P.2d 192 (1984)¹. After discussing the *Hoagland* factors in detail, the *Coupeville* court rejected the notion that review is precluded by a hearing officer's refusal to find that the employee's conduct materially and

¹ Vinson's suggestion that the Court ignore *Coupeville* on an argument that it was wrongly decided should be rejected. *Coupeville* has not been overturned and, indeed, the Supreme Court denied review of that decision. 101 Wn.2d 1018 (1984).

substantially affects teaching performance. *Id.* at 738. “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 only 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.” *Id.* at 738-39 (emphasis added). The application of the law—including the *Hoagland* factors—to the facts is therefore a question of law reviewable under the “error of law” standard. That the Hearing Officer’s application of the law to the facts in this case was erroneous—including misapplication of or just plain failure to apply the *Hoagland* factors—is discussed at length in the District’s opening brief and will not be repeated here.

B. *Weems* and RCW 28A.405.030 establish workplace dishonesty as sufficient cause for discharge.

Vinson attempts to minimize *Weems*’s holding that “there is no reason for dishonesty in any work place” by characterizing that statement as *dicta*. Brief of Respondent at 38. It is not; that notion was at the heart of the *Weems* court’s decision, firmly providing that, in Washington, an educator’s lying on the job simply is not excusable. While the exact kind of dishonesty exhibited by *Weems* may differ from the kind exhibited by

Vinson, that is a distinction without a difference. A lie, in the course of a public educator's job, is intolerable and sufficient cause for discharge.

Vinson also attempts to distinguish *Weems* by characterizing Weems's misconduct as in violation of WACs. Brief of Respondent at 39. According to Vinson, Weems's discharge was more supportable because his dishonesty violated legal standards applicable to his position. Yet the same is true of Vinson. If discharge for teacher dishonesty must be based on some explicit statutory statement of the employee's job duties, that is found in RCW 28A.405.030, which establishes Vinson's statutory duty to instill in his students principles such as honesty. Honesty is no less at the heart of Vinson's statutory duties as a public educator than it was Weems's.

Of course, Vinson attempts to dismiss RCW 28A.405.030 because it is old and has not been discussed in any case. Brief of Respondent at 37. Vinson cites no authority for this proposition that clear and valid statutory authority may be ignored simply because it is long-standing and its meaning sufficiently understood such that it has not been interpreted by a court. While it is true that this statute's origins date to the 1880s, it is not a forgotten anachronism. It was revised in 1969, and has been carried forward through at least two recodifications of the common school provisions, moving from RCW 28.67.110, to RCW 28A.67.110, to its

current, prominent position at the very beginning of the chapter stating the qualifications and duties of certificated educators.

Further, while it is obviously true, as pointed out by Vinson, that teachers possess ordinary personal rights outside of their profession, Brief of Respondent at 37 (citing *Browne v. Gear*, 21 Wash. 147 (1899)), that proposition certainly does not mean that a teacher may disregard clearly stated statutory obligations and job responsibilities *while on the job*. At work, sitting in front of a District investigator with the authority to require honest and complete responses to legitimate investigative questions, Vinson was not free to lie.

Finally, Vinson's assertion that RCW 28A.405.030 cannot be considered because it was not explicitly mentioned in the letter commencing his termination is without merit. RCW 28A.405.310(8), upon which Vinson relies for this proposition, Brief of Respondent at 36, states only that a decision upholding discharge "shall be based solely upon the cause or causes specified in the notice of probable cause to the employee." The "causes" in this case are the verbal assault on Nistran, and the subsequent lies about that event to the District's investigators—both of which were described in detail in the probable cause letter. Nothing in that statute requires the letter of probable cause to detail all of the ways in which

the alleged conduct impacts the employee's job performance (i.e., that this conduct indicates that Vinson disregards the statutory duties of his position with respect to honesty, humanity, and the like). And any assertion by Vinson that he was not aware of the statutory duties of his position—which he has held for many years—must be considered specious.

- C. Vinson grossly and inappropriately overstates the Hearing Officer's findings regarding the District's investigator, and Vinson's subjective beliefs about the investigator, even if true, do not excuse his misconduct.**

In his transparent effort to justify his own abhorrent behavior, Vinson attempts to smear the District's investigator, characterizing him as "a biased and bigoted investigator." Brief of Respondent at 10. Putting aside for the moment the red herring issue of bias in the conduct of the investigation, nothing at all in the record, or in the Hearing Officer's findings, supports the false accusation that the investigator is a "bigot." No witness used the word or any word like it to describe the investigator, nor did the Hearing Officer. The District asserts that this false and defamatory accusation warrants sanctions.

What Vinson attempts to do is to paint the investigator with the clearly bigoted statements of *another employee* (George Ilgenfritz), whose inappropriate conduct/statements the investigator *didn't have occasion to*

investigate, Trans. 71², whose bigoted statements the investigator *was not aware of*, Trans. 74, 79, and who was very sternly disciplined (a 20-day suspension, leading shortly to his departure from the District) in response to his pattern of such conduct, Employee's Ex. 13 (document dated October 13, 2004). Calling the investigator "bigoted" because he did not know about and did not learn of another employee's bigoted statements is outrageous and illustrates the speciousness of Vinson's explanation for his lies.

That this is the heart of Vinson's defense for lying to the investigator is telling. The evidence is clear that *not even Vinson* was aware of George Ilgenfritz's comments about him when he chose to lie to the District's investigator. Trans. 445. Those comments—and the investigator's lack of knowledge about them—obviously cannot have formed the basis for Vinson's decision to lie to the investigator.

Aside from the Ilgenfritz comments, which Vinson would have the court falsely ascribe to the District's investigator, Vinson suggests other reasons to believe that the investigator was biased. For instance, he points

² Citations to the transcript ("Trans.") are citations to the transcript of the hearing before Hearing Officer Cooper, included within the Clerk's Papers before this Court but not separately paginated. Unless otherwise noted, citations to exhibits ("Ex.") are to the District's hearing exhibits before Hearing Officer Cooper, included within the Clerk's Papers before this Court, Tab D.

out that the investigator “reassured Nistran that Vinson’s alleged conduct was an ‘intolerable action’ which the District would take seriously.” Brief of Respondent at 5. Would Vinson have the District take an allegation of harassment in retaliation for participation in a prior investigation any way other than “seriously”? To be clear, the investigator’s comment was prefaced by the proviso, “if . . . factually substantiated.” Employee’s Ex. 16 at 1. The investigator assumed nothing but merely acknowledged the seriousness of the allegations.

Next, Vinson ascribes great meaning to the fact that, “before even beginning his investigation of Vinson, Wood was accusing Vinson of lying” in regard to scheduling the interview. Brief of Respondent at 6. Aside from the fact that neither the record nor the findings support this assertion, one could hardly fault the investigator for questioning the reliability of Vinson’s claims about being unavailable for an interview. After all, Vinson admitted, during the hearing in this case, to previous dishonesty in that regard—including *physically hiding from the investigator* at a time when he had told the investigator he was out of town. Trans. 440-41.

Vinson also suggests that the investigator’s 2005 conclusion that Vinson harassed a colleague indicates bias: “Wood upheld Kraght’s harassment complaint against Vinson, finding that Vinson had sent Kraght

anonymous emails critical of his job performance.” Brief of Respondent at 8. Vinson apparently faults the investigator for having “snooped around in the online gay personals” during that investigation. *Id.* What Vinson fails to mention is that he had falsely denied, to the investigator, that he had sent a series of harassing emails from an email account that he falsely denied owning. The truth was only revealed because the investigator found a publicly-available online “personals” ad posted by Vinson, including his photograph, and using the email account he claimed not to own. Trans. 146-47. Vinson admitted that his 2005 denials were lies during his testimony in this case. Trans. 440. These facts cannot support a finding of bias on the part of the investigator—particularly in light of his having found the truth even in the face of Vinson’s efforts to thwart the investigation by lying. These events might reasonably lead Vinson to dislike Wood, and provide another, more reasonable explanation for his lies in this case, but they do not demonstrate bias.

As for any suggestion that the investigator’s having believed Nistran’s version of events was evidence of his bias against Vinson, the investigator explained that, quite understandably, once Vinson’s own friends corroborated Nistran’s story (based on Vinson’s own admissions to

them), Nistran's credibility became less important to determining what actually happened at Taco Time. Trans. 119, 121-23.

To be clear, the Hearing Officer did not find, as a matter of fact, that the investigator was biased: "I wish to make it clear that it is not my function to determine whether any of the matters complained of by Mr. Vinson were true or not. Rather, my only consideration is whether his view or perception was understandable or of a legitimate concern so as to amount to an extenuating circumstance." CP 41. As to this, the District offers two observations.

First, to the extent the Hearing Officer concluded, as a matter of law, that subjective perceptions excuse what is otherwise demonstrated misconduct serving no positive purpose, that conclusion is clear error of law, for reasons discussed in detail in the District's prior brief and elsewhere in this Reply.

But second, in light of the full evidence, and even given the Hearing Officer's judgments as to the credibility of individual witnesses, a factual finding that Vinson chose to lie to Wood because he perceived Wood to be biased—and that this subjective belief was "not unreasonable"—was arbitrary and capricious. As discussed in the District's opening brief, Vinson admitted that he lied in an effort to stop the investigation: "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." Trans. 420.³ As for the reasonableness of Vinson's claimed perception that the investigator was unfair, the foregoing demonstrates that the evidence simply does not support that finding.

Vinson's lies to the District's investigator had nothing to do with legitimate concerns regarding fairness. Had that been the case he could and would have taken up those concerns with a District administrator. Rather, Vinson's reasons were entirely self-serving: to avoid scrutiny of his conduct by thwarting the District's investigation.

D. Vinson did not merely "dissemble;" he intentionally and repeatedly lied in an effort to thwart the District's investigation. The Hearing Officer's reliance upon Vinson's testimony was therefore arbitrary and capricious.

Vinson repeatedly characterizes his conduct during the investigative interview as "dissembling." E.g., Brief of Respondent at 10, 18. That term—meaning to *conceal one's true motives, feelings or beliefs*—does not do Vinson's conduct justice. Nearly everything Vinson told the District's investigator on May 22, 2007, was a bald-faced lie. Vinson did not merely play a game

³ Vinson failed to take up his alleged fairness concerns with any other District administrator, and he failed to request that someone else conduct the investigation. At hearing, he claimed, "I didn't know there was anybody. I would have jumped on it." Trans.

around the date of the incident with Nistran. He denied having seen her at all; denied *ever* having been to the restaurant in question at all; denied there was *ever* a confrontation with her. His lies were substantive, going to the heart of the allegations the District reasonably undertook to investigate.

Moreover, Vinson's suggestion that he was unaware of the subject of the investigation is demonstrably false. He declared to his friend, Tommy Decker, prior to the investigative interview, that he intended to mislead the District's investigator, telling Decker that there was a way to answer without telling the full truth (apparently referring to the fact that the investigator's understanding of the date of the Taco Time incident was off by one day). Trans. 200.

Vinson's suggestion that Nistran's testimony was properly disregarded in its entirety by the Hearing Officer simply because of a disciplinary incident while she was still in high school, and because she lied to the investigator about having obtained a protection order against Vinson, is floridly ironic in light of his own long series of *substantive* lies about the incident in question. Without question, the record and findings of the Hearing Officer establish that Nistran was *far more truthful* about the events

444. However, Vinson then admitted that he knew District attorney Rachel Miller, and that she had previously conducted an investigation in which he was interviewed. *Id.*

at Taco Time than was Vinson. Further, Vinson now admits to lying *during his testimony in this case*: “Vinson called Nistran a bitch and a whore and said something to the effect that he would later go to the Red Lobster and be a difficult customer for her.” Brief of Respondent at 17. Vinson previously denied this very thing during his testimony. Trans. 436. He persisted in his denial even when counsel for the District pointed out that his friend Sandy Duvall testified that he had recounted that threat to her. Vinson testified, quite incredibly, that he had *told Duvall* that he had made that threat to Nistran, but that he had not actually done so. Trans. 437. The Hearing Officer’s decision to credit Vinson’s testimony, while disregarding Nistran’s, was arbitrary and capricious in light of Vinson’s uncontested series of substantive lies about his conduct and his admitted false testimony in this case. The Hearing Officer’s findings, based on this willful and unreasoning acceptance of the testimony of a demonstrated and repeat liar, were arbitrary and capricious.

E. Vinson misconstrues *Commanda*.

Vinson cites to *Commanda v. Cary*, 143 Wn.2d 651, 23 P.2d 1086 (2001), for the proposition that the Hearing Officer’s evidentiary rulings may not be reviewed on writ of review. Brief of Respondent at 39. But *Commanda* dealt with an attempted interlocutory appeal of a district court

ruling, prior to trial. In that narrow and specific context, *Commanda* holds that a writ of review is only available if the district court exceeds its subject matter jurisdiction, but not for review for errors of law. That is because the Rules for Appeal of Decisions of the Courts of Limited Jurisdiction allow review for errors of law via appeal to superior court following trial, and therefore RCW 7.16.040's requirement that there be no appeal or adequate remedy at law is not satisfied. *Commanda* does not alter the law regarding writs of review, which allows for reversal of factual findings if they are arbitrary and capricious, and for reversal of legal conclusions if they are clearly erroneous. While a finder of fact's evidentiary rulings are afforded deference, they are not unassailable. If the Court finds that the Hearing Officer abused his discretion in rendering decisions regarding the admissibility of evidence, and that this contributes to his findings being arbitrary and capricious, or that such rulings constitute clear error of law, then such rulings may and should be reversed.

F. The Hearing Officer's conclusion that Vinson's verbal assault on Nistran did not constitute retaliation does not shield from review his legal conclusion regarding whether the conduct constitutes sufficient cause.

Vinson asserts that the Hearing Officer found, as a matter of fact, that Vinson's conduct towards Nistran was not retaliatory. Brief of Respondent at 47. The decision is not so clear. In fact, the Hearing Officer

does suggest that Vinson's conduct was related, at least in part, to Nistran's having participated in a previous investigation of Vinson:

As to the claim of retaliation, Ms. Nistran was no longer a student, *had participated in an investigation about two years earlier leading to a transfer from Thomas Jefferson to Federal Way that Mr. Vinson felt was unjustified* (though she does not appear to have been a critical witness in that proceeding), had disparaged him personally by calling him a "faggot" on at least one if not two occasions, and initiated the incident with a statement, perhaps a taunt, to the effect of "Hey Mr. V, why aren't you at TJ anymore?"

CP 42 (emphasis added). The "taunt" the Hearing Officer refers to is obviously related to the outcome of the investigation that "Vinson felt was unjustified"—even though Vinson now admits the conduct that led to his disciplinary transfer: the harassment of Kraght via email, which he previously, falsely, denied.

Regardless of the Hearing Officer's characterization, if Vinson's conduct towards Nistran was even partially motivated by a grudge against her owing to her involvement in the prior investigation, that is, very plainly, retaliation, and as such, a violation of the 2005 written directive to Vinson that he not engage in retaliation against anyone who participated in the District's investigation. Ex. 3 at 3. Because the Hearing Officer finds that this did motivate Vinson's conduct, the question then becomes a legal one: Did this conduct, which was at least partly retaliatory, constitute sufficient

cause? As to this, the Hearing Officer's decision may be reversed if it is clear error of law. For the reasons set forth in the District's opening brief, including application of the *Hoagland* factors, it is.

G. As in *Coupeville*, the only evidence is that Vinson's performance is affected by his misconduct.

In attempting to differentiate *Coupeville Sch. Dist. v. Vivian*, 36 Wn. App. 728, 677 P.2d 192 (1984), Vinson claims that, "by all evidence, [Vinson's conduct] did not affect Vinson's effectiveness as a teacher." Brief of Respondent at 24. In actuality, the opposite is true: The only person to testify on the question of whether and how Vinson's misconduct affects his effectiveness as a public school teacher testified that it does, significantly.

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. Vinson offered no evidence to the contrary. Thus, the only evidence is that Vinson's performance is affected. "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.” *Coupeville*, 36 Wn. App. at 738-39.

H. Other misstatements of the record and findings.

The District wishes to briefly correct two further misstatements of the record contained in Vinson’s brief to this Court. First, Vinson attacks Nistran’s claim that Vinson was accompanying students at Taco Time: “She claimed Vinson was with students, or maybe Junior High kids, although he was not.” Brief of Respondent at 4. In actuality, the Hearing Officer made no finding regarding whether Vinson was with students at Taco Time. Naturally, even the Hearing Officer must have been skeptical of Vinson’s denial of this one element of Nistran’s version of events. After all, when the District asked Vinson about those events, he lied across the board. The result of Vinson’s lies is that he accomplished what he hoped to do—to thwart the District’s investigation. We don’t know, and the record does not affirmatively establish, whether Vinson was with students or not.

Second, Vinson’s statement that “Ilgenfritz had failed to support Vinson when a teacher called Vinson a ‘flaming faggot’ during a school sporting event,” Brief of Respondent at 6, is incorrect. The incident involved a parent, not another staff member. Trans. 369. The man soon apologized and, according to Vinson, “that was that.” *Id.* Despite the

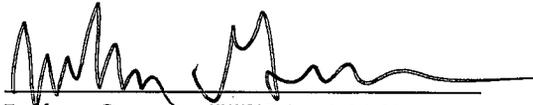
District having corrected this precise misstatement before the superior court, CP 219, Vinson inexplicably and irresponsibly repeats it to this Court.

II. CONCLUSION

For the reasons set forth above, and in the District's opening brief, the Court should find that the Hearing Officer's conclusion that the District did not possess sufficient cause for Vinson's discharge was based on arbitrary and capricious factual findings and/or clearly erroneous application of the law to the facts; reverse the superior court's affirmation of the Hearing Officer's decision; and reverse the superior court's order of attorney's fees in favor of Vinson.

RESPECTFULLY SUBMITTED this 4th day of February, 2009.

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