

61752-4

61752-4

84243-4

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 JAN -6 AM 8:31

NO. 61752-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FEDERAL WAY SCHOOL DISTRICT

Appellant,

vs.

DAVID VINSON,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
NO. 08-2-05374-1 KNT

BRIEF OF RESPONDENT

VAN SICLEN, STOCKS, & FIRKINS
Tyler K. Firkins
Attorneys for Appellants
Address:
721 45th St NE
Auburn, WA 98002-1381
(253) 859-8899
e-mail: tfirkins@vansiclen.com

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE 3

III. ARGUMENT..... 11

A. Standard of Review 11

B. The District fails to assign error to the hearing officer’s findings of fact, and cannot demonstrate that they were not supported by substantial evidence in the record 13

1. The District fails to assign error to the hearing officer’s findings of fact..... 14

2. The hearing officer’s findings of fact are supported by substantial evidence in the record 14

3. For purposes of this review, the facts are the facts the hearing officer found, and the District cannot supplement these facts with a set of contradictory facts cherry-picked from the records..... 20

C. The District cannot demonstrate that the Hearing Officer exceeded his statutory jurisdiction 22

D. The District cannot demonstrate that the Hearing Officer Committed clear error of law 23

1. The Hearing officer was correct to apply the *Clarke* standard in conjunction with the *Hoagland* factors..... 24

a. The hearing officer was correct to apply *Clarke* and *Hoagland* to the Taco Time incident 28

b.	The hearing officer was correct to apply <i>Clarke and Hoagland</i> to Vinson’s conduct during the 2007 investigation.....	31
2.	The hearing officer did not misapply or inappropriately Disregard the Hoagland factors	33
3.	The present case is distinguishable from <i>Coupeville</i>	35
4.	The hearing officer correctly concluded that on-the-job Dishonesty in not <i>per se</i> sufficient grounds for dismissal, but should be evaluated in context using the Hoagland factors.....	37
5.	The District cannot contest the hearing officer’s evidentiary Decisions in this proceeding.....	39
E.	The District cannot demonstrate that the hearing officer’s decisions on mixed questions were arbitrary and capricious.....	40
1.	The hearing officer’s application of the Hoagland factors is not arbitrary and capricious	40
a.	The hearing officer’s application of the Hoagland factors to the Taco Time incident is not arbitrary and capricious.....	41
b.	The hearing officer’s application of the <i>Hoagland</i> factors to the investigation is not arbitrary and capricious.....	44
2.	The hearing officer did not act arbitrary and capriciously in Concluding that neither the Taco Time incident nor Vinson’s conduct during the investigation impaired his teaching performance enough to justify discharge.....	46

3. The hearing officer did not act arbitrarily and capriciously in concluding that Vinson's conduct at Tacoma Time was not retaliation	47
F. Coupeville was improperly decided.....	48
V. CONCLUSION.....	50

Washington Cases

<i>Barnes v. Seattle Sch. Dist.</i> , 88 Wn.2d 483, 563 P.2d 199 (1977)	48
<i>Browne v. Gear</i> , 21 Wn. 147, 57 P. 359 (1899)	38
<i>Clarke v. Shoreline Sch. Dist. No. 412</i> , 106 Wn.2d 102, 720 P.2d 793 (1986).....	14, 24, 25, 28, 32, 35, 41, 47, 50
<i>Commanda v. Cary</i> , 143 Wn.2d 651, 23 P.2d 1086 (2001).....	25, 40
<i>Concerned Land Owners of Union Hill v. King County, Union Hill</i> , 64 Wn. App. 768, 774-75, 827 P.2d 1017 (1992).....	14, 35
<i>Coupeville School Dist. No. 204 v. Vivian</i> , 36 Wn.App. 728, 677 P.2d 192 (1984).....	14, 32, 36, 37, 41, 47, 48, 49, 50
<i>Development Services of America, Inc. v. City of Seattle</i> , 138 Wn.2d 107, 979 P.2d 387 (1999).....	13
<i>Estevez v. Faculty Club of the Univ. of Wash.</i> , 129 Wn.App. 774, 797, 120 P.3d 579 (2005).....	49
<i>Franklin Cy. Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982)).....	13
<i>Hoagland v. Mount Vernon School District No. 320</i> , 95 Wn.2d 424, 623 P.2d 1156 (1981).....	23, 25, 34, 42
<i>Kelso School Dist. No. 453 v. Howell</i> , 27 Wn.App. 698, 621 P.2d 162 (1980).....	13, 49, 50
<i>Lang v. Hougan</i> 136 Wn. App. 708, 150 P.3d 622, 627 (2007)	15
<i>Moreman v. Butcher</i> , 126 Wn.2d 36, 40, 891 P.2d 725 (1995).....	40
<i>Mott v. Endicott Sch. Dist. 308</i> , 105 Wn.2d 199, 713 P.2d 98 (1986)	25, 26, 32, 33
<i>Potter v. Kalama Pub. Sch. Dist. 402</i> , 31 Wn. App. 838, 644 P.2d 1229 (1982).....	27
<i>Pryse v. Yakima Sch. Dist. 7</i> , 30 Wn. App. 16, 632 P.2d 60 (1981).....	26
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 42, 59 P.3d 611 (2002).....	15
<i>Ruchert v. Freeman Sch. Dist.</i> , 106 Wn. App. 203, 222 P.3d 841 (2001).	25, 27, 29, 30, 50
<i>Sauter v. Mt. Vernon Sch. Dist. No. 320</i> , 58 Wn. App. 121, 791 P.2d 549 (1990).....	13, 32
<i>Simmons v. Vancouver Sch. Dist. 41</i> Wn. App. 365, 377, 704 P.2d 648 (1985).....	29, 31, 32, 33
<i>State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce</i> , 65 Wn.App. 614, 829 P.2d 217 (1992).....	16
<i>State v. Epler</i> , 93 Wn. App. 520, 969 P.2d 498 (1999).	40
<i>State v. Johnson</i> , 109 Wn. 214, 186 P. 671 (1919).....	13
<i>Sunderland Family Treatment Services v. City of Pasco</i> , 127 Wn.2d 782, 788, 903 P.2d 986 (1995).....	15
<i>Union Hill</i> , 64 Wn. App. 768, 827 P.2d 1017 (1992).....	14, 41, 47, 50

<i>Washington Waste Sys., Inc. v. Clark Cy.</i> , 115 Wn.2d 74, 81, 794 P.2d 508 (1990).....	14, 41
<i>Weems v. N. Franklin Sch. Dist.</i> , 109 Wn.App. 767, 37 P.3d 354 (2002) 33, 39	
<i>Wenatchee v. Boundary Review Bd.</i> , 39 Wn. App. 249, 256, 693 P.2d 135 (1984).....	14
<i>Wright v. Mead Sch. Dist. No. 354</i> , 87 Wn. App. 624, 944 P.2d 1 (1997)	33, 39

Washington Statutes and Regulations

RCW 28A.405.030.....	37
RCW 28A.405.300.....	49
RCW 28A.405.320.....	49
RCW 7.16.120	12, 13
WAC 180-87-005.....	40

Federal Cases

<i>Noel v. Andrus</i> , 810 F.2d 1388, 1392-93 (5th Cir. 1987)	39
<i>Reeves v. Sanderson Plumbing Prods., Inc.</i> , 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).....	49

Other Jurisdictions

<i>Goldin v. Board of Ed. of Cent. Sch. Dist. No. 1</i> , 78 Misc.2d 972, 359 N.Y.S.2d 384 (1973).....	38
<i>Ohio State Bar Assn. v. Stern</i> , 103 Ohio St. 3d 491, 817 N.E.2d 14 (2004)	39
<i>Welch v. Board of Ed. of Chandler Unified Sch. Dist. No. 80</i> , 136 Ariz. 552, 667 P.2d 746 (1983).....	38

I. INTRODUCTION

I love teaching. It's my passion. It's – I think every person has something in their life they're really good at, and this is mine.
David Vinson. Trans. 447.

In May 2007, teacher David Vinson had a brief verbal exchange with Rebecca Nistran at a Taco Time restaurant after school hours. Mr. Vinson is gay, and Rebecca Nistran, was a former student who had previously called him a “faggot” at school events. Nistran initiated the exchange, which was mutual, verbal, and lasted about 20 seconds.

After Nistran complained to the Federal Way School District, Courtney Wood was assigned to investigate. Wood had previously investigated Vinson's sexual orientation harassment complaint against principal George Ilgenfritz and teacher Christopher Kraght, finding no bias despite the fact that Ilgenfritz's District personnel file indicated that he had referred to Vinson as “that fat gay fucker” in at least one staff meeting, and refused to hire a female teacher because he felt the school “had enough dykes” already. (This evidence had been discovered by a different investigator during investigation of an earlier sexual harassment complaint against Ilgenfritz.) After Vinson's complaint was dismissed, he subjected to retaliatory bias complaints by Ilgenfritz and Kraght, both of which Wood investigated and found meritorious. Vinson was also subjected to a series of other disciplinary measures, and involuntarily

transferred to a different school. It was Vinson's first significant discipline in 20 years as a teacher.

Understandably, Vinson felt Wood was a biased investigator. When he expressed this concern to Wood, Wood ignored it, and when Wood got the date of the Taco Time incident wrong, Vinson played along and stonewalled him. Following Wood's investigation, the District discharged Vinson, both for the Taco Time exchange and for "lying" to Wood. Vinson appealed, and the hearing officer, after a full hearing on the facts, determined that Wood's investigation was biased, Vinson's lack of candor was excusable under the circumstances, and neither the Taco Time exchange nor Vinson's conduct during the investigation were grounds for dismissal under the relevant law.

The District appealed pursuant to a statutory writ of certiorari. A hearing officer's decision may be set aside on writ of certiorari only if the officer exceeded his statutory jurisdiction, committed clear error of law, violated constitutional principles, or made findings of fact that were not supported in the record. The District lost at the Superior Court level, and now appeals. The District should lose again, because the hearing officer's findings of fact were supported by competent evidence in the record, and because the hearing officer correctly applied Washington teacher discharge law, under which a teacher may not be discharged unless his

conduct substantially undermines his effectiveness.

II. STATEMENT OF THE CASE

He has the ability to make every kid accountable and to raise the bar amazingly high for these kids; and when homework was due, he knew which kids were late with homework, when things needed to be done, how they needed to get it done, when it was going to get done. The support was given to every single kid he had contact with. Gina Craig, Federal Way School District Cambridge Program Parent, Trans. 359-60.

In May 2007, David Vinson, a teacher in the Federal Way School District since 1988, ran into former student, Rebecca Nistran, at a Taco Time restaurant. Nistran, a troubled student who had failed to graduate, had previously called Vinson a “faggot” on two occasions. CP 34. In Spring of 2005, Vinson had been transferred from Thomas Jefferson High School (“TJ”) to Federal Way High School as discipline for sending critical emails to another teacher. Emp. Ex. 11.¹ This transfer followed a troubling school year at TJ, during which Vinson had filed a sexual and malicious harassment complaint against Principal George Ilgenfritz and teacher Christopher Kraght, only to find himself suddenly subject to multiple disciplinary actions within a week of appealing his harassment complaint, and subject to transfer three months later. Two of the three actions were taken pursuant to complaints by Ilgenfritz and Kraght. Trans. 393, 396.

¹ Employee Exhibits are behind Tab E in the Clerk’s Papers.

Seeing Vinson ahead of her in line, and recognizing him by his “little girly half-man voice” (as she would later tell school district investigators), Nistran decided to taunt Vinson, smirking, “Hey, Mr. V, why aren’t you at TJ anymore?” Dist. Ex. 14 at 3, CP 33. Vinson, who had ducked into Taco Time for a quick dinner in the middle of a long school day that would extend into the evening, lost his temper, turning around and telling Nistran something to the effect of “Don’t talk to me ever again, you fucking bitch. Don’t talk to me.” Trans. 406-08. Nistran called Vinson an asshole and told him to fuck off, repeatedly. Trans. 408, 27. Vinson continued to tell Nistran not to talk to him, calling her a bitch and a whore. *Id.* By all accounts, the verbal exchange between Vinson and Nistran was mutual and brief, lasting less than 20 seconds. *Id.*

The next day, Nistran called the school district to lodge a complaint with Chuck Christensen, Executive Director of Human Resources. CP 34. Christensen assigned the investigation to Courtney Wood. *Id.* In interviews with Wood, Nistran lied repeatedly about the content, context, and aftermath of the exchange at Taco Time, so much so that the hearing officer in this case entered a finding of fact that Nistran is “lacking in credibility.” *Id.* She claimed Vinson was with students, or maybe with Junior High kids, although he was not. Dist. Ex. 14 at 3. She claimed that Vinson bought the supposed students food with his credit

card, although he did not. *Id.* at 4. She claimed that Vinson initiated the exchange, although he did not. *Id.* Later, on the stand, she claimed that she did initiate the exchange, but merely by saying “hi.” Trans. 11. She claimed that Vinson towered over her and shook his finger in her face, although he did not. Dist. Ex. 14 at 4. Later, she claimed to have gotten a protection order against Vinson, and to have dropped a copy of the order off at the Federal Way School District offices for Wood. Trans. 29. In fact, she never applied for any order. *Id.*

Wood was remarkably credulous about Nistran’s claims, especially given that when she was a student in the District, Nistran had a reputation as a liar and had been suspended for lying and forgery. Trans. 23, 266. As he began his investigation of Vinson, Wood reassured Nistran that Vinson’s alleged conduct was an “intolerable action” which the District would take seriously. Emp. Ex. 16. Wood first contacted Vinson on May 14, 2007, notifying Vinson that the District was investigating a Citizen’s Complaint and demanding that Vinson “confirm [his] attendance for our meeting that has been scheduled to occur on Thursday, May 17th, at 3:30.” Dist. Ex. 4. After several more scheduling emails, Vinson’s schedule became an object of considerable scrutiny and concern for Wood, who accused Vinson of lying about his schedule because Vinson’s original email said he had a student-led conference at 4:00, but a later

phone call from Vinson's principal Lisa Griebel led Wood to believe that Vinson actually needed to leave for the airport at 4:00. Dist. Ex. 9. In other words, before even beginning his investigation of Vinson, Wood was accusing Vinson of lying—over a 30-minute schedule miscommunication. Vinson replied that he needed to “put in writing that I feel like I’m being bullied by you, Courtney.” Dist. Ex. 10. Wood replied, indicating that he would try to work out the schedule issues, but then went on to say, “Please also know however, that the District has the right to direct your employment related activities during the normal course of the business day.” *Id.* Eventually, a meeting was scheduled for May 22. Dist. Ex. 12.

Wood's level of animus and suspicion toward Vinson was nothing new. When Vinson filed his sexual and malicious harassment complaint against Ilgenfritz and Kraght in January 2005, Wood was the investigator. Vinson alleged that Kraght had, when talking to students, repeatedly made anti-gay remarks targeting Vinson. See Emp. Ex. 2 at 2. Vinson alleged that Ilgenfritz had failed to support Vinson when a teacher called Vinson a “flaming faggot” during a school sporting event in 2002, and also that, following the 2002 incident, Ilgenfritz refused to speak to Vinson when he ran into him around the school and targeted Vinson, giving him undesirable teaching schedules and imposing unnecessary classroom moves. *Id.* at 3. In conducting his investigation of Vinson's bias

complaint, Wood failed to interview student witnesses Vinson identified, failed to discover an investigation the District had already done in which an administrator reported that Ilgenfritz had referred to Vinson as “that fat gay fucker” and said that he wouldn’t hire a teacher because she was a “dyke” and he “already had enough of those at TJ” (Wood claims he cannot recall whether he checked any of Ilgenfritz’s files in Human Resources, although according to Executive Director of Human Resources Chuck Christensen, Wood had access to those files)², failed to discover that it was common knowledge among teachers that Ilgenfritz disparaged people’s sexuality at staff meetings, disregarded student complaints about Kraght’s derogatory remarks, and seemed, from the very beginning of the investigation, as if he was “personally invested in the matter” and didn’t take Vinson’s allegations of homophobia seriously. Trans. 74-75, 163-65, 181, 228-32, 255, 261, 280, 393; Emp. Ex. 13, 14.

As a result, Wood’s investigation of Vinson’s bias complaint reads more like an investigation of Vinson. See generally Emp. Ex. 2. The report spends considerable time summarizing interviews with witnesses who knew nothing either way about any harassment by Ilgenfritz or Kraght, but

² When Vinson appealed his harassment complaint, Christensen served on the hearing panel. Emp. Ex. 6. Despite the fact that Christensen clearly knew that Ilgenfritz had referred to Vinson as a “fat gay fucker” in at least one staff meeting, and despite the fact that Christensen just as clearly knew this was not addressed in Wood’s report, the appeals panel upheld Wood’s conclusion that Ilgenfritz had not harassed Vinson. *Id.*

had plenty of irrelevant theories about what was wrong with Vinson. Matt Oberst's interview is a case in point. See Emp. Ex. 2 at 12-15. The interview says little about Ilgenfritz or Kraght, but asserts that Oberst's wife, who used to work at TJ, "believed Mr. Vinson would give students keys to [her] room, and that they would go and rummage through it." *Id.* at 14. Wood also relays Oberst's opinion that "kids love [Vinson]," but "Mr. Vinson's relationship with students is too personal." *Id.* Oberst's interview also mentions the practice of "cheeking" in which Vinson would put his hands on either side of a student's face and squeeze his or her cheeks. *Id.* at 15. On May 12, two days after appealing Wood's conclusions, Vinson received a letter of reprimand about "cheeking." Emp. Ex. 8. In fact, Vinson was the only person to suffer disciplinary charges after his complaint.

Later, in summer 2005, employing a considerably more thorough procedure in which he interviewed multiple student witnesses and apparently even snooped around in the online gay personals, Wood upheld Kraght's harassment complaint against Vinson, finding that Vinson had sent Kraght anonymous emails critical of his job performance. Trans. 96-97, 146-47. As a result, Vinson was transferred from TJ to Federal Way High School. Emp. Ex. 11, 12.

Following his transfer to Federal Way, Vinson continued to excel

as a teacher. When he started at Federal Way, Vinson was assigned to teach a class of “level-one WASL students” who were at risk for failing the test. Trans. 401. It was Vinson’s responsibility to help them pass the reading and writing portion of the test. *Id.* In typical fashion, Vinson threw himself into the difficult assignment, making clear to the students that “No matter what, I’m going to stand by you...and you can fight me, buck me, but whatever you want, and I’m still going to be standing here, and we’re going to get through the WASL.” *Id.* Of 75 at-risk students assigned to Vinson that year, 68 passed. *Id.* As part of his extraordinary effort, Vinson promised the students that if they were having trouble with the novels they were studying, he would read to them—aloud, after school, walking through the difficult books line by line. See Emp. Ex. 23. A Seattle Times reporter doing a story on the WASL stumbled on Vinson’s program and gave it an inspirational write up. *Id.* The following year, Vinson was asked to help create and coordinate the Cambridge Preparatory Academy program at Federal Way. Trans. 404. The Cambridge program is an international, pre-college curriculum and examination system that builds advanced academic skills and offers students the opportunity to earn significant college credit while still in high school. By all accounts, Vinson did a “great job” with the program, and parents of students in the program speak of Vinson in glowing terms. Trans. 184, 358-61. This is

not surprising. Vinson had taught successfully for 20 years, without incident until Ilgenfritz became his principal.

Despite his success at Federal Way, Vinson was still stung by the way his harassment complaint and Kraght's counter-complaint had been handled, and, given the evidence, reasonably believed that Wood was a biased and bigoted investigator. CP 35. When Wood and Vinson met about Nistran's 2007 "Citizen Complaint," Vinson expressed this concern to Wood at the start of their interview, but Wood ignored it. CP 46; Trans. 418-19. As a result, Vinson stonewalled and dissembled, at first because Wood was asking about the wrong date, but partly because he just "wanted him [Wood] to leave me alone." Trans. 420. Without first explaining what the complaint was about, Wood also mentioned that the police might be involved, causing Vinson to panic and dig in. *Id.* By the time Vinson had an opportunity to reflect on his decision and regret his lies, both sides had lawyered up and no one was talking to anyone. Trans. 422, 439.

During the summer of 2007, as the District's investigation proceeded, Vinson continued to work on the Cambridge program—he was never placed on administrative leave, as would be typical in most cases, evidently because the District had no concern about the quality of his teaching. Trans. 184-85, 424-25. On July 5, 2007, the District issued a

letter of discharge stating that Vinson was being fired for the exchange with Nistran at Taco Time, for lying to Wood, and for failing to maintain confidentiality about the investigation. Emp. Ex. 18. Vinson appealed pursuant to RCW 28A.405.300, and on November 27 and 28, 2007 Hearing Officer John G. Cooper presided over the appeal. In his decision, Cooper found that Federal Way had failed to establish sufficient cause to justify termination of Vinson's employment. CP 32. Of the District's grounds for dismissal, Cooper found Vinson's lies to Wood "most troubling," but felt that the evidence on Wood's bias was such that Vinson's behavior was, if not ideal, understandable. CP 44.

Because the District has no appeal right under RCW 28A.405.340, the District petitioned the Superior Court for a statutory writ of certiorari pursuant to RCW 7.16, claiming that the hearing officer exceeded his jurisdiction and acted contrary to law. The District lost at the Superior Court level, and now appeals.

III. ARGUMENT

A. Standard of Review

This case is before the Court on a writ of certiorari filed by the Federal Way School District. Appeals on writ of review are subject to RCW 7.16.120, which provides that review may be had as to:

(2) Whether the authority, conferred upon the body or officer in

relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.

(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.

(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

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

RCW 7.16.120.

Under this standard, “[i]ssues of fact are reviewed to determine whether they are supported by competent and substantial evidence. This review is deferential and requires the court to view the evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed” below. *Development Services of America, Inc. v. City of Seattle*, 138 Wn.2d 107, 979 P.2d 387 (1999). The reviewing court cannot re-weigh the evidence on certiorari. *State v. Johnson*, 109 Wash. 214, 186 P. 671 (1919). In particular, the hearing officer's findings as to witness credibility are entitled to "great deference." *Sauter v. Mt. Vernon Sch. Dist. No. 320*, 58 Wn. App. 121, 129, 791 P.2d 549 (1990) (citing *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113 (1982)).

A hearing officer's decisions of law may be overturned on writ only if they amount to *clear* error of law. *Kelso*, 27 Wn.App. at 701.

In teacher discharge cases, "[t]he question of whether specific conduct...constitute[s] sufficient cause for discharge is one of mixed law and fact." *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 110,720 P.2d 793 (1986). When mixed questions are reviewed pursuant to a statutory writ of certiorari, the appropriate standard of review is "arbitrary and capricious." *Concerned Land Owners of Union Hill v. King County, Union Hill*, 64 Wn. App. 768, 774-75, 827 P.2d 1017 (1992); *Coupeville*, 36 Wn. App. at 738-39.

"Arbitrary and capricious" is a very deferential standard of review. Under the arbitrary and capricious standard, it is necessary only that the hearing officer's decision not be "willful and unreasoning action in disregard of facts and circumstances." *Union Hill*, 64 Wn. App. 768, 772, 827 P.2d 1017 (1992) (citing *Washington Waste Sys., Inc. v. Clark Cy.*, 115 Wn.2d 74, 81, 794 P.2d 508 (1990)). Under the arbitrary and capricious standard, "if there is room for two opinions, discretion exercised upon due consideration will not be overturned," and a "mere error in judgment or unwise decision" likewise fails to merit reversal. *Id.* (citing *Wenatchee v. Boundary Review Bd.*, 39 Wn. App. 249, 256, 693 P.2d 135 (1984); *Washington Waste*, 115 Wn.2d at 81; *State v. Ford*, 110 Wn.2d 827, 832, 755 P.2d 806 (1988)).

B. The District fails to assign error to the hearing officer's

findings of fact, and cannot demonstrate that they were not supported by substantial evidence in the record.

- 1. The District fails to assign error to the hearing officer's findings of fact.**

The District's brief does not assign error to the hearing officer's findings of fact. As a consequence, the findings are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002); *but see Lang v. Hougan* 136 Wn. App. 708, 719, 150 P.3d 622, 627 (2007) (a court may excuse a party's failure to assign error only where the briefing makes the nature of the challenge clear and the challenged finding is argued in the text of the brief, which the District fails to do in this case).

- 2. The hearing officer's findings of fact are supported by substantial evidence in the record.**

Even if the District's brief is taken to implicitly contest the hearing officer's findings of fact, which would be improper, the District still cannot overcome those findings under the deferential standard of review applied on a statutory writ. In this review upon writ of certiorari, the court must first view the evidence and reasonable inferences therefrom in the light most favorable to Vinson, and then ask whether the hearing officer's findings are supported by some competent and substantial evidence in the record. *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995) (citing RCW 7.16.120(4)-(5); *State*

ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wash.App. 614, 618, 829 P.2d 217, *review denied*, 120 Wn.2d 1008, 841 P.2d 47 (1992)). In addition, the hearing officer, who had the opportunity to view and evaluate demeanor, is granted great deference on determinations of witness credibility. *Sauter v. Mt. Vernon Sch. Dist. No. 320*, 58 Wn. App. 121, 129, 791 P.2d 549 (1990) (citing *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113 (1982)).

Viewing the evidence and reasonable inferences therefrom in the light most favorable to Vinson, and granting deference to the hearing officer's credibility determinations, the hearing officer's findings of fact are supported by the record. For purposes of this appeal, the key findings of fact and the corresponding support in the record are:

Finding 11: Nistran is not credible. CP 33-34.

Nistran is lacking in credibility because she is a "known liar," lied during the investigation, and was previously suspended from school for lying and forgery.

Support in the Record: This finding of fact is supported by Nistran's own testimony that she lied about getting a protection order against Vinson, and lied about whether she had dropped that order off at the Federal Way School District for Wood. Trans. 29. It is also supported by Nistran's own testimony that she was suspended for lying and forgery.

Trans. 23. It also appears that Nistran lied on the stand about the Taco Time exchange, testifying that Vinson was with students and paid for their meal using his credit card, when his only credit card shows no charges for Taco Time. Trans. 12, 409-11. The hearing officer's conclusion that Nistran was not credible is further bolstered by Wood's own telephone log, kept during the investigation, in which he records his repeated attempts to get her to come forward with the protection order she said she had, and which she said she had left at the District although in fact she never sought the order. Emp. Ex. 16. Tara Bacher also testified that Nistran's reputation for lying was known among teachers at Thomas Jefferson High School. Trans. 266.

Finding 12: Nistran had previously called Vinson a "faggot" at least once, if not twice. CP 34.

Support in the Record: Vinson testified that Nistran had called him a "faggot" twice in the spring and summer of 2005—once at a soccer game and once at a public park. Trans. 370-71. Wood's own investigative report on the Taco Time incident states that during her interview, Nistran stated that she recognized Vinson at the Taco Time because of his "little girly half-man voice." Dist. Ex. 14 at 3. Nistran's characterization of Vinson's voice draws on anti-gay stereotypes and lends credibility to the idea that the word "faggot" was probably in her vocabulary.

Finding 9: The exchange at Taco Time. CP 33.

Discounting Nistran's unsupported version of events as non-credible, and taking as true the version testified to by Vinson and by others to whom he recounted the event, what happened at Taco Time was: Nistran approached Vinson and said "Hey Mr. V, why aren't you at TJ anymore?" Vinson, perceiving this as a taunt, responded "Don't talk to me ever again, you fucking bitch." Nistran said "Fuck off." The confrontation continued, with Nistran calling Vinson an "asshole" and telling him to "fuck off." 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. Vinson was not accompanied by students.

Support in the Record: This version of events is supported by Vinson's testimony (Trans. 408-09), Nistran's testimony (Trans. 27 ("Q. And you told him to f _ _ _ off how many times? A.I know I said it quite a few times.")), and the testimony of Tara Bacher (Trans. 267), Sandra Duvall (Trans. 189-90), and Thomas Decker (Trans. 196-98).

Finding 16: Vinson is bullied by Wood. CP 34.

Despite the fact that Vinson told Wood he felt bullied and didn't think Wood could be fair, Wood proceeded with the investigation of Nistran's accusations.

Support in the Record: Vinson testifies to this, saying that he

expressed concern that Wood was not an unbiased investigator, and that Wood noted this, offered no reassurance that he was unbiased, and proceeded to ask Vinson about the exchange at Taco Time in an intimidating and adversarial manner. Trans. 418-19. Wood's testimony supports Vinson's version of events. *Id.*

Finding 17: Vinson admits he lied during the course of the investigation. CP 34.

Support in the Record: Vinson testified extensively on this issue. When asked by Wood about the exchange at Taco Time, Vinson dissembled, telling Wood that he had not been at Taco Time on May 2nd because Wood was asking about the wrong date. Trans. 419. In his testimony, Vinson was quite frank about having "dug in" and "made a poor decision" to lie to Wood. Trans. 420.

Finding 21: Vinson had plausible reasons for failing to cooperate in the District's investigation, and it appears that the investigation was not fair and impartial. CP 35.

Vinson's reasons for failing to cooperate in the investigation were "plausible" based on his feeling that Wood could not and would not conduct a fair and impartial investigation. "Based on the evidence before me, [Vinson's] perceptions in this regard were not unreasonable and it also appears that the investigation of the May 1, 2007 incident was not conducted in a fair and impartial manner." *Id.*

Support in the Record: Vinson reasonably viewed Wood as biased for a number of reasons. First, there were significant differences between how Wood investigated Vinson's bias and harassment complaint against Ilgenfritz and Kraght, and how Wood investigated Kraght's subsequent bias complaint against Vinson, and Vinson was aware of these differences. For example, Wood declined to interview key student witnesses in Vinson's complaint, but interviewed multiple students (including Nistran) when investigating Kraght's charges. Trans. 96-7, 393, 261. Second, in investigating Principal Ilgenfritz's alleged anti-gay bias against Vinson, Wood failed to actually investigate the incident in which Ilgenfritz failed to assist Vinson in dealing with a parent who had called Vinson a "faggot" in front of the cheer squad—the very incident that sparked Vinson's complaint. Wood admits being aware of this incident at the time he wrote the report. Trans. 161-65. Third, to a reasonably careful reader, Wood's 2005 report reads more like an investigation of Vinson than of Ilgenfritz and Kraght. Fourth, both Vinson and Tara Bacher, who accompanied Vinson to Wood's interviews in 2005, felt that Wood seemed incredulous about Vinson's allegations of anti-gay harassment and wasn't open-minded during the investigation. Trans. 260-61, 280, 393.

Finally, although this fact was not known to Vinson during Wood's 2007 investigation, in late 2004 a District investigation of Lisa

Griebe's sexual harassment complaints against Ilgenfritz had discovered that he had, on more than one occasion, referred to Vinson as "that fat gay fucker" in front of other staff, and had remarked that he didn't want to hire a particular teacher because "she was a dyke" and he "already had enough of those at TJ." Emp. Ex. 13, App. 2 and 3. Eric Priebe was the person who reported hearing the homophobic remarks, and Wood interviewed neither him nor Lisa Griebe when he investigated Vinson's complaint. Emp. Ex. 2. Although Wood would have had access to these reports and was aware that Ilgenfritz had previously been investigated, he claims he simply didn't check these records or include them in his investigation. Trans. 24-26, 230-32.

As the foregoing discussion makes clear, the hearing officer's findings of fact were supported by substantial evidence in the record, and cannot be overturned on a statutory writ.

3. For purposes of this review, the facts are the facts the hearing officer found, and the District cannot supplement these facts with a set of contradictory facts cherry-picked from the record.

Many of the "facts" the District sets forth contradict the hearing officer's findings of fact and evidence in the record. As discussed above, the hearing officer explicitly found that Rebecca Nistran was not credible, that she had previously called Vinson a "faggot" on at least one occasion, that she initiated the exchange at Taco Time by saying something to the

effect of “Hey Mr. V, why aren’t you at TJ anymore?” and that she responded in kind to Vinson’s outburst. CP at 33-34. Despite being unable to overcome these findings, the District repeatedly credits Nistran’s account of the Taco Time incident. The District:

- Narrates the Taco Time incident from Nistran’s point of view. Dist. Brf. at 3-5.
- Repeats her contention that she merely said “hi.” *Id.* (citing Trans. 11).
- Characterizes the Taco Time incident as an unprovoked “assault” on Nistran. *Id.*
- Repeats Nistran’s denial that she had ever called Vinson a “faggot,” despite this also being directly contradicted by the hearing officer’s findings of fact. Dist. Brf. at 3 (citing Trans. 17); Decision at 4.
- Repeats Nistran’s uncorroborated contentions that Vinson called her a “slut,” “tramp,” and “hussy.” *Id.* (citing Trans. 12-13).
- Repeats Nistran’s uncorroborated assertion that Vinson said “You know what you and your brother did.” *Id.* (citing Trans. 408, a portion of Vinson’s testimony where he does not admit to saying this).
- Repeats Nistran’s uncorroborated and flatly contradicted assertion, that Vinson was accompanied by students. Dist. Brf. at 4, fn. 2.
- Omits any indication that Nistran responded in kind, repeatedly telling Vinson to “fuck off.” CP 33.
- Repeatedly states that there were children present at the restaurant.
- Repeatedly states that Vinson was “retaliating” against Nistran.

The facts for purposes of this review are the facts as found by the hearing officer, plus any genuinely uncontested facts in the record. They, and not some set of facts preferred by the District, must serve as the facts

to which the law is applied in this appeal.

C. The District cannot demonstrate that the Hearing Officer exceeded his statutory jurisdiction.

The District argues that the hearing officer exceeded his statutory jurisdiction by attempting to dictate the District's discipline of Vinson rather than merely determining whether there was sufficient cause for discharge. Dist. Brief at 21-22. In support, the District cites the hearing officer's opinion as follows: "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. It is clear in the opinion that the hearing officer is not setting forth some new legal standard by which he can make disciplinary determinations for the District. Rather, he is summarizing *Hoagland* and *Wojt*, which he had just quoted at length. In context, the passage in question reads as follows:

[Hearing officer's decision, quoting *Hoagland*, at 430]

We, too, believe that a teacher should not be dismissed without a showing of the presence of these factors. They are obviously relevant to any determination of teaching effectiveness, the touchstone for all dismissals. Moreover, a consideration of them may avert an improvident dismissal and its consequences. As observed in *Wojt v. Chimacum School Dist.* 49, 9 Wn. App. 857, 862, 516 P.2d 1099 (1973):

Where a teacher is discharged...the consequences are severe. Chances of other employment in the profession are diminished, if not eliminated. Much time, effort, and money has been expended by the teacher in obtaining the requisite credentials. It would be manifestly unfair to allow a discharge for a teaching or classroom deficiency which is

reasonably correctable.

Likewise, it would be manifestly unfair, besides illegal, to allow a discharge for insufficient cause.

[Hearing officer's decision now says:] Thus, 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.

The offending phrase does not represent some attempt by the hearing officer to seize authority beyond his statutory role: it is an accurate summary of *Hoagland* and *Wojt*'s concern that teachers not be dismissed without sufficient cause. Furthermore the hearing officer's decision repeatedly states that "I would agree that it is certainly not my role to suggest what discipline should be administered," CP 38, and "I have no leeway in this regard." *Id.* at FN 4. The hearing officer operated within his authority to determine whether the District had, by a preponderance of the evidence, demonstrated sufficient cause for terminating Vinson.

D. The District cannot demonstrate that the Hearing Officer committed clear error of law.

The hearing officer correctly applied the *Clarke* standard in conjunction with the *Hoagland* factors, as required by multiple Washington decisions, including *Clarke* itself. *Clarke*, 106 Wn.2d at 114-15. The District is incorrect to assert that the *Hoagland* factors may be applied only when there is absolutely no nexus between the alleged conduct and the teacher's role—in fact, *Clarke* itself uses the *Hoagland*

factors to analyze classroom performance. *Id.*

The officer also correctly applied the *Hoagland* factors: there is no requirement that the factors be balanced any particular way or that all factors be applied. *Ruchert v. Freeman Sch. Dist.*, 106 Wn. App. 203, 213, 222 P.3d 841 (2001). The current case is easily distinguishable from *Coupeville* because the conduct here is not criminal, does not involve current students, did not result in harm to students, and, by all evidence, did not affect Vinson's effectiveness as a teacher. Trans. 184-186. No valid source of Washington law holds that teacher dishonesty merits discharge as a matter of law. Finally, evidentiary rulings are not reviewable on appeal by writ. *Commanda v. Cary*, 143 Wn.2d 651, 656, 23 P.2d 1086 (2001).

1. The hearing officer was correct to apply the *Clarke* standard in conjunction with the *Hoagland* factors.

Clarke v. Shoreline Sch. Dist. No. 412, *Hoagland v. Mount Vernon School District No. 320*, and *Mott v. Endicott School District No. 308* are the only three Washington Supreme Court cases addressing sufficient cause for teacher discharge. In *Hoagland*, decided in 1981, a teacher was dismissed after being convicted of grand larceny for possessing a stolen motorcycle. *Hoagland*, 95 Wn.2d at 425-26. After noting that Washington courts have repeatedly held that sufficient cause requires a "showing of

conduct which materially and substantially affects the teacher's performance," the *Hoagland* court, drawing on attorney discipline cases and on a line of cases from California and Colorado, set forth eight factors "relevant to any determination of teaching effectiveness, the touchstone of all dismissals." *Hoagland*, 95 Wn.2d at 428-30 (*citations omitted*). Thus, while the *Hoagland* factors were initially developed and set forth in a case in which the teacher's misconduct was not even tangentially school-related, the *Hoagland* court never stated that the factors were to be used only to evaluate dismissals in that context. To the contrary, the *Hoagland* court itself viewed the factors as a means of determining teaching effectiveness and averting "improvident dismissal and its consequences." *Hoagland*, 95 Wn.2d at 430.

In *Mott*, decided in 1986, the court held that repeatedly striking boys of junior high and high school age in their genitals was not a remediable teaching deficiency because the conduct was "so patently unacceptable that the school district was entitled to discharge the teacher...regardless of prior warnings." *Mott*, 105 Wn.2d at 204. The *Mott* court did not apply the *Hoagland* factors because the conduct "lack[ed] any positive educational aspect or legitimate professional purpose." *Id.* at 203 (citing *Pryse v. Yakima Sch. Dist.* 7, 30 Wn. App. 16, 24, 632 P.2d 60 (1981) (sexually suggestive comments and actions directed toward female

students are sufficient cause for dismissal as a matter of law); *Potter v. Kalama Pub. Sch. Dist.* 402, 31 Wn. App. 838, 842, 644 P.2d 1229 (1982) (improper physical contact with female students is sufficient cause for dismissal as a matter of law)). Thus, *Mott* stands for the proposition that sexual or physical abuse of students lacks any positive educational aspect or legitimate professional purpose, and is sufficient cause for discharge as a matter of law. The *Hoagland* factors need not be applied in such situations.

In *Clarke*, decided in 1986, a visually handicapped and hearing-impaired teacher was dismissed for deficiencies in classroom performance. *Clarke*, 106 Wn.2d at 109. Synthesizing several Washington cases, *Clarke* held that “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 unremediable³ and (1) materially and substantially affects the teacher’s performance, or (2) lacks any positive educational aspect or legitimate professional purpose.” *Clarke*, 106 Wn.2d at 113-14 (citing *Hoagland*, 95 Wn.2d at 428; *Mott*, 105 Wn.2d at 203; *Pryse*, 30 Wn.App at 24; *Potter*, 31

³ Although the *Clarke* rule would upon first reading seem to impose a consideration of potential remediation under both (1990); *Wright v. Mead Sch. Dist. No. 354*, 87 Wn. App. 624, 944 P.2d 1 (1997); *Ruchert v. Freeman Sch. Dist.*, 106 Wn. App. 203, 22 P.3d 841 (2001). prongs of the rule, Washington’s appeals courts have since determined that remediation is only required for performance deficiencies. See *Sauter v. Mt. Vernon Sch. Dist.*, 58 Wn. App. 121, 191 P.2d 549

Wn.App at 842). The *Clarke* court goes on to state that the *Hoagland* factors are the proper test for “determining whether a teacher’s conduct substantially undermines his effectiveness,” that “not all eight factors will be applicable in every teacher discharge case,” that “these factors are not necessarily applicable when the cause for dismissal is the teacher’s improper performance of his duties,” but that “[n]evertheless, these factors are helpful in determining whether a teacher’s effectiveness is impaired by his classroom deficiencies.” *Clarke*, 106 Wn.2d at 114-15. The *Clarke* court then proceeds to discuss all eight *Hoagland* factors, applying the first, second, third, fifth, and sixth factors as “pertinent” to an analysis of whether Clarke’s classroom deficiency “materially and substantially affects his performance as a teacher.” *See Clarke*, 106 Wn.2d at 115-18. Thus, in addition to the two-prong rule articulated, *Clarke* stands for the proposition that the *Hoagland* factors may be applied to a teacher’s conduct at school, and that not all of the *Hoagland* factors need be applied in every case.

Taken together, *Hoagland*, *Mott*, and *Clarke* stand for a set of propositions that have continued to prevail in Washington’s teacher discharge cases. The *Hoagland* factors are used to determine whether misconduct materially and substantially affects a teacher’s performance so as to constitute sufficient cause for discharge. They are necessary to any

determination that non-school conduct constitutes sufficient cause, but may be applied (and generally are applied) to evaluate school-related conduct as well. However, in cases of sexual or physical abuse of students, the factors need not be applied because abuse is so obviously harmful, and so obviously lacks any positive educational aspect or legitimate professional purpose, that it is grounds for dismissal as a matter of law.

a. The hearing officer was correct to apply *Clarke* and *Hoagland* to the Taco Time incident.

The District contends that the hearing officer was in error to apply the *Hoagland* factors to the exchange at Taco Time because but for his employment as a teacher by the District, Vinson never would have known Nistran, therefore rendering the Taco Time incident so “job-related” as to prohibit application of the *Hoagland* factors.⁴ Dist. Brief at 13, 19. Instead, the District argues, the hearing officer should have applied the second prong of the *Clarke* rule without consideration of the *Hoagland* factors, essentially returning Washington law to the pre-*Hoagland*, pre-Brown era of 1899, when even teachers’ private conduct could be a basis for discipline or discharge. Dist. Brief at 33. In support of this contention, the District cites *Ruchert v. Freeman School District* and *Simmons v. Vancouver School District*. Dist. Brief at 13, 33.

⁴ The District also asserts that Vinson’s conduct at Taco Time was job-related because he was retaliating against Nistran. This assertion is contrary to the hearing officer’s uncontested findings of fact and should not be considered in this appeal.

The *Ruchert* court rejected precisely the argument that the District makes here, holding instead that it is necessary to apply the *Hoagland* factors even where employee conduct has some nexus with the school, and that it is error to apply the *Clarke* test alone in such situations. *Ruchert v. Freeman Sch. Dist.*, 106 Wn. App. 203, 216, 22 P.2d 841 (2001). In *Ruchert*, a school bus driver appealed a school board's decision terminating her for supplying alcohol to minors, including district students, at a New Year's Eve party hosted by Ruchert's son. *Id.* at 205. *Ruchert* was dismissed by the school board and appealed to the Superior Court, where she received a jury trial. *Id.* at 208. At trial, the jury was instructed that sufficient cause for discharge existed where the conduct complained of lacked any positive or legitimate professional purpose (prong 2 of the *Clarke* rule), without being given additional instruction on the *Hoagland* factors. *Id.* at 216. Although the school district contended that "job-relatedness is established whenever the employee's conduct involves student participation," and that "any misconduct involving students meets the second test of the *Clarke* rule without any additional showing," the court rejected that argument, holding that the *Hoagland* factors must be applied to determine the touchstone issue of whether the conduct affected job performance. *Id.* at 215-16. Here, the District argues that job-relatedness is established whenever conduct involves former

students, a contention that should likewise be rejected.

The District also cites *Simmons v. Vancouver School District* for the proposition that “even if the underlying conduct does not itself warrant termination, disobedience—insubordination—renders a teacher ‘unreliable and unpredictable...and dangerous to students.’” Dist. Brief at 33 (citing *Simmons v. Vancouver Sch. Dist.* 41 Wn. App. 365, 377, 704 P.2d 648 (1985)). *Simmons*’s insubordination analysis is only relevant to the exchange at Taco Time if Vinson’s behavior at Taco Time is taken to be an act of retaliation in defiance of the District’s directive not to retaliate against those who participated in the 2005 investigation. *Id.* As discussed above, the hearing officer specifically found that Vinson was not acting out of a retaliatory motive, but was reacting to someone who “previously belittled [Vinson] with her pernicious, homophobic epithets and baited Mr. Vinson into an exchange.” CP 33. The hearing officer’s findings are verities for purposes of this appeal. Therefore, the District’s discussion of *Simmons* is inapposite because Vinson’s conduct at the Taco Time was not insubordination.

Furthermore, *Simmons* is factually distinguishable, involving a teacher who, in the classroom while performing his duties, repeatedly struck students after being specifically directed not to—striking one on the jaw with his hand, pinching another hard enough to cause a red mark on

his neck, pinching another in a similar manner, and slapping two others on the chest, one hard enough to make him lose his breath. *Simmons*, 41 Wn. App. at 368-69. As a classroom conduct case, *Simmons* is one in which the *Hoagland* factors will not necessarily be applicable. See *Clarke*, 106 Wn.2d at 114-15. As a case involving physical assault on current students, *Simmons* was properly decided under the *Mott* rule, whereby physical assaults on students are sufficient cause for discharge as a matter of law. *Mott*, 105 Wn.2d at 204.

b. The hearing officer was correct to apply *Clarke* and *Hoagland* to Vinson's conduct during the 2007 investigation.

The District also contends that the hearing officer erred by applying the *Hoagland* factors to evaluate Vinson's conduct in lying to Wood during Wood's investigation of the Taco Time incident. Again, the District contends that if teacher conduct is "job-related" in any way, it is error to apply the *Hoagland* factors. *Id.* This is clearly not the law in Washington. In *Clarke*, the Washington Supreme Court applied the *Hoagland* factors to classroom performance. *Clarke*, 106 Wn.2d at 114-15. In *Coupeville*, the Court of Appeals applied the *Hoagland* factors to off-site misconduct with current students. *Coupeville*, at 738-739.

The only post-*Hoagland* cases in which the *Hoagland* factors were not applied are *Sauter v. Mount Vernon School District*, *Wright v. Mead*

School District, Simmons v. Vancouver School District, and Weems v. North Franklin School District. Sauter and Wright both involved sexual misconduct with students, and are therefore controlled by the *Mott* rule holding that such conduct is cause for discharge as a matter of law. *Mott*, 105 Wn.2d at 204. As discussed above, *Simmons* also involved physical assaults on students and therefore was decided according to the *Mott* rule.

In *Weems*, an administrator whose primary job duty was to administer the school's special education programs instead failed to comply with state and federal law, then falsified records to feign compliance. *Weems*, 109 Wn. App. at 770. Because the misconduct went to the core of *Weems*'s job duties, amounted to a complete failure to do his job, and constituted *per se* unprofessional conduct under the relevant WAC sections governing falsification of student records, the court found sufficient cause for termination without applying the *Hoagland* factors. *Id.* at 777.

By contrast, *Vinson*'s failure to be truthful during *Wood*'s investigation of the Taco Time incident does not involve sexual misconduct with or physical assault on a student, and does not involve his core job duties of classroom teaching. As a result, it was appropriate for the hearing officer to apply the *Hoagland* factors to determine whether the alleged misconduct affected *Vinson*'s teaching effectiveness, "the

touchstone of all dismissals.” *Hoagland*, 95 Wn.2d at 430. Moreover, as in *Clarke*, nothing prevented the hearing officer from applying *Hoagland* even if such conduct had involved classroom activities.

2. The hearing officer did not misapply or inappropriately disregard the Hoagland factors.

The District contends that the hearing officer did not conduct enough *Hoagland* analysis with regard to the Taco Time incident. This contention is untrue and seems to stem from a careless reading of the hearing officer’s decision. The eight *Hoagland* factors are as follows:

(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.

Hoagland, 95 Wn.2d at 429-30.

The hearing officer’s decision makes clear that for both causes, “[f]actors (1), (2), and (3) strike me as having little relevancy since the conduct complained of here has virtually nothing to do with students,” and “[f]actor (8) does not appear to have any particular significance in this proceeding.” CP 41-42. The hearing officer further states that “[t]he proximity of time of the conduct (factor (4) also seems to have little

bearing, although it clearly is recent.” *Id.* With respect to the incident at Taco Time, the hearing officer concludes that the “motive underlying the conduct (factor (7))...seems to blend in with the extenuating circumstances [factor (5)]” before concluding that Vinson’s response to Nistran was motivated by being taunted by someone who had “previously derided him with a homophobic remark,” and concluding that Vinson’s “emotional response, while inappropriate, is understandable.” CP 42. While the hearing officer’s discussion of the irrelevant *Hoagland* factors is brief, it is no briefer than that found in *Clarke*, and therefore does not constitute error of law. *See e.g. Clarke*, 106 Wn.2d at 116 (“The fourth factor...does not appear to apply to this factual situation.” “The seventh factor...and the eighth factor...do not appear to be applicable to this case.”)

The District also takes issue with how the hearing officer applied the *Hoagland* factors to the facts in this case. Dist. Brief at 20-30. As a mixed issue of law and fact reviewed pursuant to a writ of certiorari, the hearing officer’s application of the *Hoagland* factors is not evaluated as an error of law, but as an arbitrary and capricious application of law. *Concerned Land Owners of Union Hill v. King County, Union Hill*, 64 Wn. App. 768, 774-75, 827 P.2d 1017 (1992); *Coupeville*, 36 Wn. App. at

738-39.⁵

3. The present case is distinguishable from *Coupeville*.

The District argues that the hearing officer committed an error of law by “minimizing” Vinson’s alleged misconduct at Taco Time and concluding that it had no nexus with Vinson’s teaching performance or effectiveness. Dist. Brief at 30. The District contends that this is analogous to the faulty analysis of the hearing officer in *Coupeville*, who concluded that the teacher’s conduct did not affect his teaching performance or effectiveness despite the hearing officer’s own factual conclusions that the teacher had accepted a gift of whiskey from two sixteen-year-old female students; allowed them to drink at his house for four and one half hours; allowed them to drink both the whiskey they had given him and beer he had in his refrigerator; allowed the students to become so drunk that one of them passed out on his bed, then vomited, wet the bed, undressed herself, and later feared that she had been raped. *Coupeville*, 36 Wn.App. at 733. Because the student’s mother called the police, the teacher was charged with furnishing liquor to a minor, to which he pled guilty. *Id.* With respect to the current case, there was no need for the hearing officer to “minimize” Vinson’s misconduct at the Taco Time: compared to the misconduct at issue in *Coupeville*, the brief, mutual exchange of angry

⁵ This analysis is conducted in Section E below.

words with Nistran is genuinely minimal.

Coupeville also differs from the present case with respect to direct evidence of impaired teaching performance. In *Coupeville*, even witnesses for the teacher concluded there could be an adverse impact on his effectiveness because the incident and his criminal conviction were so widely known in the community. *Coupeville*, 36 Wn.App. at 739. By contrast, the evidence introduced at Vinson's hearing tended to show that a few students knew of the Taco Time incident because Nistran had told them, and that Vinson's teaching effectiveness was unimpaired until his discharge.

In its discussion of *Coupeville*, the District also argues for the first time that RCW 28A.405.030, which imposes upon teachers a duty "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," requires that Vinson be discharged for violating those ideals. Dist. Brief at 37-40, citing RCW 28A.405.030. Because this alleged basis for discharge was not included in the letter of probable cause, nor argued before the hearing officer, it cannot be considered here. *See* RCW 28A.405.310(8). In addition, RCW

28A.405.030, which has been law since the 1800s, has never been applied or cited in a published case, including cases like *Coupeville* or *Hoagland*, where it might logically apply. Furthermore, mere profanity outside the classroom (which is all that is alleged here) has never been held a ground for dismissal in Washington. To the contrary, it has been a principle in Washington since 1899 that “[t]he teacher, outside of her professional obligations, possesses the ordinary personal rights and freedom that other persons do, the same social privileges...” *Browne v. Gear*, 21 Wash. 147, 153, 57 P. 359 (1899) (holding that teaching certificate could not be revoked for impropriety or inconsiderate language).

4. The hearing officer correctly concluded that on-the-job dishonesty is not *per se* sufficient grounds for dismissal, but should be evaluated in context using the Hoagland factors.

The hearing officer correctly rejected the District’s argument that “[d]ishonesty in the course of certificated employment is sufficient cause for discharge as a matter of law.” Dist. Brief at 15. The District can cite no Washington authority actually holding such a thing. For the most part, this proposition also finds no support in other states. Of the three out-of-state cases cited by the District, two involve lying about a sexual relationship with a student. *Welch v. Board of Ed. of Chandler Unified Sch. Dist. No. 80*, 136 Ariz. 552, 667 P.2d 746 (1983); *Goldin v. Board of Ed. of Cent. Sch. Dist. No. 1*, 78 Misc.2d 972; 359 N.Y.S.2d 384 (1973). In other

states as in Washington, sexual relationships with students are for good reason subject to uniquely harsh discipline. See e.g. *Wright v. Mead Sch. Dist. No. 354*, 87 Wn. App. 624, 629-31, 944 P.2d 1 (1997) (noting that sexual misconduct is viewed in a special light). The other case the District cites involves the dismissal of a probationary teacher who was not even entitled to a hearing under Louisiana law. See *Noel v. Andrus*, 810 F.2d 1388, 1392-93 (5th Cir. 1987). Finally, courts elsewhere considering the issue of whether it is misconduct to lie to a biased investigator have found that, while not ideal, such behavior is often excusable. See *Ohio State Bar Assn. v. Stern*, 103 Ohio St. 3d 491, 817 N.E.2d 14 (2004).

The District can cite to no Washington authority actually holding that dishonesty in the course of certificated employment is *per se* grounds for dismissal. The District refers repeatedly to *Weems v. North Franklin School District* as the source for this supposed rule, but *Weems*'s language to the effect that "there is no reason for dishonesty in any work place" is dicta that the hearing officer was correct to ignore. *Weems*, 109 Wn. App. at 777. The misconduct at issue in *Weems* was falsification of student records by someone whose job it was to accurately keep such records, not general dishonesty. *Id.* at 770-72. Although *Weems* did lie to investigators, he was not dismissed for that, but for falsifying student records in response to a state audit. *Id.* In concluding that *Weems*'s conduct served

no legitimate professional purpose, the court relied largely on the fact that the WAC sections on teacher certification specifically define misrepresentation or falsification of student records and of federal and state compliance reports as “unprofessional conduct.” *Id.* at 776-77 (citing WAC 180-87-005). As such, the sweeping suplusage about dishonesty in the workplace is dicta.

Elsewhere in the brief, the District also cites employment security cases for the proposition that any lie can be sufficient cause for dismissal. These cases do not apply because they operate under an entirely different legal standard. Private-sector employees do not enjoy the protection of a statutory regime requiring “sufficient cause” for dismissal. Teachers do.

5. The District cannot contest the hearing officer’s evidentiary decisions in this proceeding.

Evidentiary rulings are reviewed for abuse of discretion. Only when the trial court’s decision is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons may the appellate court reverse. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). The court’s exercise of discretion is not reviewable by extraordinary writ. *Commanda v. Cary*, 143 Wn.2d 651, 656, 23 P.2d 1086 (2001) (citing *State v. Epler*, 93 Wn. App. 520, 524, 969 P.2d 498 (1999)). Therefore, evidentiary decisions are not reviewable here.

E. The District cannot demonstrate that the hearing officer's decisions on mixed questions were arbitrary and capricious.

On a statutory writ of certiorari, mixed questions of fact and law are reviewed under an “arbitrary and capricious” standard of review. *Coupeville*, 36 Wn. App. at 738-39. This is a very high standard under which the hearing officer’s conclusions will stand unless they are “willful and unreasoning action in disregard of facts and circumstances.” *Union Hill*, 64 Wn. App. at 772 (citing *Washington Waste*, 115 Wn.2d at 81). Under the arbitrary and capricious standard, “if there is room for two opinions, discretion exercised upon due consideration will not be overturned,” and a “mere error in judgment or unwise decision” likewise fails to merit reversal. *Id.* (citing *Boundary Review*, 39 Wn. App. at 256; *Washington Waste*, 115 Wn.2d at 81; *Ford*, 110 Wn.2d at 832).

1. The hearing officer's application of the Hoagland factors is not arbitrary and capricious.

The hearing officer correctly applied the *Hoagland* factors to Vinson’s conduct at Taco Time and during the subsequent investigation. Although the hearing officer did not extensively balance all of the *Hoagland* factors on the record, no Washington case imposes such a requirement. To the contrary, *Clarke* notes that “not all eight factors will be applicable” in every case. *Clarke*, 106 Wn.2d at 114. *Hoagland* set forth eight factors “relevant to any determination of teaching

effectiveness, the touchstone of all dismissals”:

(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. *Hoagland*, 95 Wn.2d at 429-30

a. The hearing officer’s application of the Hoagland factors to the Taco Time incident is not arbitrary and capricious.

As discussed above, the hearing officer concluded that *Hoagland* factors (1), (2), (3), (4), and (8) were irrelevant to the Taco Time incident. Because the hearing officer’s findings of fact concluded that there were no students present for Vinson and Nistran’s exchange at Taco Time, and because no evidence was offered that teachers were present, the hearing officer reasonably concluded that factors (1), (2) and (3) were not highly relevant to his determination. Likewise, factor (4), proximity or remoteness in time, applies primarily to cases where past misconduct may be used as a basis for dismissal, and does not apply here. Factor (8) is arguably relevant because dismissing a teacher for getting into a heated exchange with a former student is likely to stifle free speech rights for all teachers, but if this is an error, it is not to the prejudice of the District, and therefore it is irrelevant for purposes of this review. See RCW 7.16.120.

While the District contests the hearing officer's application of these factors to the Taco Time incident and argues that they should weigh for dismissal, the District's application of the *Hoagland* factors is riddled with departures from the hearing officer's findings of fact. In discussing factor (1), the District once again asserts, contrary to the evidence, that "children were present" for the incident. Dist. Brief at 21. The District goes on to characterize the exchange as a "disgusting, profanity-laced verbal assault on Nistran." Dist. Brief at 21-22. This is contrary to the hearing officer's findings of fact, which concluded that what happened at the Taco Time was a mutual exchange of hostilities. CP 33-34, 42. On factor (2), the District, again contrary to the findings of fact, suggests that Vinson was accompanied by current students. Dist. Brief at 26. The District also characterized Vinson's conduct as demonstrating "a willingness to viciously retaliate," once again in contradiction of the hearing officer's undisturbed findings of fact. *Id.*; CP 42. The District's discussion of factor (3) likewise assumes that Vinson was retaliating. *Id.*

The hearing officer concluded that for the Taco Time incident, the "motive underlying the conduct (factor (7))...seems to blend in with the extenuating circumstances [factor (5)]," and that Vinson's response to Nistran was motivated by being taunted by someone who had "previously derided him with a homophobic remark," which the hearing officer felt

was an extenuating circumstance making Vinson's "emotional response...understandable." CP 42. As to factor (6), the hearing officer found that, "[b]ased upon the evidence presented, it is not likely the conduct may be repeated." *Id.* While the hearing officer does not cite the record for this conclusion, no witness asserted that this kind of outburst was typical for Vinson, and in his testimony Vinson was extremely apologetic and regretful, stating that immediately following the incident he was "upset at myself for my poor management of my own behavior," and detailing how he has sought therapy since the event and wants nothing more than to return to teaching. Trans. 412, 426.

In contesting the hearing officer's application of factors (5), (6), and (7), the District again asserts, contrary to the undisturbed facts, that Vinson's conduct was retaliatory. Dist. Brief at 27. The District also argues that the balance should shift for evaluation of factor (6) because Vinson's prior harassing emails to Kraght indicate that he is likely to engage in this kind of conduct again. *Id.*⁶ This argument is totally improper as there is no evidence in the record to support such a conclusion. Regardless, under the arbitrary and capricious standard, the most the District can demonstrate here is that reasonable minds could

⁶ Of course this evidence was not offered by the District as substantive evidence, but instead to show that Wood did conduct an investigation. Because it was admitted for a limited purpose, it may not be later expanded for every other purpose.

disagree as to factor (6). Under the arbitrary and capricious standard, that is not sufficient to prevail on factor (6), let alone on the entire analysis.

b. The hearing officer's application of the *Hoagland* factors to the investigation is not arbitrary and capricious.

The hearing officer concluded that factors (1), (2), (3), (4), and (8) were not relevant to an analysis of Vinson's conduct during the investigation. CP 41-42. The District agrees that factor (1) is not applicable. Dist. Brief at 32. In addressing factor (2), the District characterizes Vinson as having a "penchant for dishonesty"—again, contrary to the facts as found by the hearing officer. Dist. Brief at 33. The District also argues that factor (8) should weigh against Vinson because "[p]unishing an employee for direct lies to his employer does nothing to chill the legitimate exercise of employee rights." Dist. Brief at 34. However, in concluding that the factor was irrelevant, hearing officer already in effect concluded that any chilling effect was insignificant.

The hearing officer's analysis of factors (5) and (7) is extensive with respect to the issue of Vinson's lies during the investigation. The hearing officer concludes that Vinson reasonably perceived that Wood was biased in conducting his earlier investigation of Vinson's harassment complaint against Principal Ilgenfritz and Chris Kraght, and in the conduct of Kraght's later harassment complaint against Vinson. CP 35. In

discussing Vinson's motive for lying to Wood, the hearing officer concludes that "[t]he 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." CP 41. The hearing officer concludes that "[i]n my opinion, his claimed perceptions were not unreasonable and tend to explain the unfortunate attitude he took toward the investigation." *Id.* Such an analysis is amply supported by the record.

The District's analysis of factors (5) and (7) relies heavily on the District's invalid argument that lying is always sufficient cause for discharge as a matter of law. From this basis, the District argues that it was improper for the hearing officer to consider any mitigating factors or motives for Vinson's conduct. Because the District is incorrect about its underlying legal point, the District's argument lacks merit here. The District then goes on to argue that Vinson's lies were "self-serving" and impeded the District's investigation. Dist. Brief at 33-34. The District's approach to these factors amounts to an impermissible re-weighing of the evidence on appeal. Where the hearing officer believed Vinson's claims that he lied because he was scared and felt Wood was biased, the District thinks he lied self-servingly. In this appeal pursuant to a writ of certiorari, the hearing officer's balancing of the evidence must prevail.

2. **The hearing officer did not act arbitrarily and capriciously in concluding that neither the Taco Time incident nor Vinson's conduct during the investigation impaired his teaching performance enough to justify discharge.**

The hearing officer ultimately concluded that the District failed to demonstrate that probable cause existed for termination of Vinson's employment. CP 36. Like the application of the *Hoagland* factors, the question of whether specific conduct...constitute[s] sufficient cause for discharge is one of mixed law and fact." *Clarke*, 106 Wn.2d at 110. Therefore, when reviewed upon writ of certiorari, the hearing officer's decision will be overturned only if it is arbitrary and capricious, made in "willful and unreasoning action in disregard of facts and circumstances." *Union Hill*, 64 Wn. App. at 772; *Coupeville*, 36 Wn. App. at 738-39.

As should be clear from the foregoing discussion, the hearing officer did not disregard the facts and circumstances when concluding that the District failed to demonstrate sufficient cause for Vinson's discharge. His application of the *Hoagland* factors took account of the circumstances surrounding both the incident at Taco Time and Vinson's conduct during the ensuing investigation. In addition, the hearing officer correctly evaluated the ultimate question of whether Vinson's teaching performance was materially and substantially affected—whether Vinson had "so materially breached his promise to teach as to excuse the school district in

its promise to employ.” *Barnes v. Seattle Sch. Dist.*, 88 Wn.2d 483, 487, 563 P.2d 199 (1977).

In opposing the hearing officer’s finding, the District argues primarily from *Coupeville*, contending that this hearing officer’s conclusion is arbitrary and capricious just as the hearing officer’s finding in *Coupeville* was. Dist. Brief at 30. The District argues that because the hearing officer “minimized” Vinson’s misconduct, the officer acted arbitrarily and capriciously. *Id.* This amounts to an argument that the hearing officer should have weighed the evidence differently. However, *Coupeville*’s hearing officer was found arbitrary and capricious not because he weighed the evidence differently than the school district did, but because his conclusions of law were directly opposed to the weight of his own findings of fact. *Coupeville*, 36 Wn. App. at 738-39. That is the relevant inquiry, and under that inquiry, the District cannot prevail.

3. The hearing officer did not act arbitrarily and capriciously in concluding that Vinson’s conduct at Taco Time was not retaliation.

The hearing officer’s conclusion that Vinson’s conduct at Taco Time was not retaliation is also a mixed question of fact and law, as it involves determining whether Vinson’s conduct, a matter of fact, was or was not retaliation, a quasi-legal concept. In other areas of law, conduct is normally not considered to be retaliation for one thing if it is actually

motivated by something else. *See e.g. Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn.App. 774, 797, 120 P.3d 579 (2005) (employee must specifically show a causal link between protected conduct and later retaliation); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (retaliation may not be found where the record conclusively reveals another reason for the action).

The hearing officer applied similar principles in this case. He concluded that that Vinson's conduct at Taco Time was not motivated by Nistran's years-old participation as a minor witness in the District's investigation, but by her prior epithets and her taunts moments before Vinson's outburst. CP 42. Given that the District was able to introduce no evidence other than its own speculation in support of its "retaliation" theory, the hearing officer's decision does not represent willful disregard of the facts, but a reasonable conclusion from the evidence presented.

F. Coupeville was improperly decided.

The *Coupeville* decision was wrongly decided for two main reasons. First, *Coupeville* allows a school district to use the statutory writ procedure to "appeal" as a matter of right an adverse determination of sufficient cause under RCW 28A.405.300. RCW 28A.405.320 specifically does not provide for an appeal by the school districts of an adverse

decision. *Coupeville* relies on the holding in *Kelso*⁷ to determine that a writ of certiorari is available to school districts in any instance in which the District desires to appeal. This construction is simply contrary to a plain reading of the statute. If the legislature intended that a District could file an appeal as a matter of right, then the language of the statute would be dramatically different.⁸

The second reason the decision was wrongly decided is because the Court applies a wavering and changing standard of review. The Court asserts that whether sufficient cause exists is a question of fact.

In most cases, because the statutes do not stipulate certain grounds as per se grounds for dismissal, it will be a question of fact whether the complained of acts constitute sufficient cause.

Coupeville, at 738. The Court then goes on to apply two different standards to in reviewing this question of fact as follows:

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.

Coupeville, at 738-39. Thus, it should be obvious, that the standard of review is not both an error of law and arbitrary and capricious. Rather, the proper standard is arbitrary and capricious because the existence of

⁷. *Kelso Sch. Dist. 453 v. Howell*, 27 Wash.App. 698, 700-01, 621 P.2d 162 (1980).

⁸ This argument is included as a good faith effort to overturn existing law and is primarily included to preserve the issue for later determination in the event of further appeals.

sufficient cause is a mixed question of fact and law. *Concerned Land Owners of Union Hill*, 64 Wn. App. at 774-75; *Clarke*, 106 Wn.2d at 110.

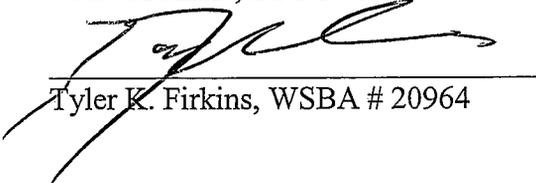
Using the proper standard in this case, where the findings of fact are verities on appeal, and are supported by substantial evidence in any event, this Court cannot conclude that the hearing officer's decision was "willful and unreasoning action for which there is no support in the record." *Kelso*, at 701. As evidenced previously in this brief there is ample evidence from which the hearing officer could reach the decision that he did. This Court may not substitute its decision for that of the hearing officer. Sufficient cause requires a "showing of conduct which materially and substantially affects the teacher's performance." *Ruchert*, 106 Wn. App. 203, 216. There is no evidence whatsoever in this record that demonstrates that David Vinson's teaching effectiveness was materially affected by the purported misconduct. The opposite is true. Therefore, the District cannot meet its heavy burden on this record.

V. CONCLUSION

For the above reasons, the District's appeal should be denied.

RESPECTFULLY SUBMITTED this 5th day of January, 2009.

VAN SICLEN, STOCKS & FIRKINS


Tyler K. Firkins, WSBA # 20964

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I am employed by the law offices of Van Siclen, Stocks & Firkins.

2. On January 5, 2009, I caused to be served a true and correct copy of the Respondent's Brief on the following via hand delivery:

Jeffrey Ganson
Dionne & Rorick
601 Union St., Ste. 900
Seattle, WA 98101

DATED this 5th day of January, 2009 at Auburn, Washington.



Le'a Kent