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

JONATHAN GREENBERG,

APPELLANT

v.

SEATTLE SCHOOL DISTRICT,

RESPONDENT

APPEAL FROM KING COUNTY SUPERIOR COURT

**OPENING BRIEF OF APPELLANT JONATHAN
GREENBERG**

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I. INTRODUCTION

Court rules are designed to provide for efficient litigation of claims. To effectuate this purpose, court rules should be followed as written. King County Superior Court has a special procedural rule that applies only to writ applications. This rule, LCR 98.40, does not apply to declaratory judgment actions. The superior court here nonetheless insisted that Appellant subject his declaratory judgment claim to the local rule. After Appellant attempted to comply, the court dismissed his entire action without complying with Court Rule 41, and when the defendant had not even filed a motion to dismiss. This Court should reverse and remand for proper application of the state and local court rules.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred by denying Appellant's motion to issue case schedule.
2. The Superior Court erred by dismissing Appellant's case *sua sponte*.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Must a party show good cause to issue a case schedule in a declaratory judgment action?
2. Did the court have any basis to dismiss Appellant's claims *sua sponte*?

3. Is King County Local Rule 98.40 substantive or procedural?
4. Did Appellant show adequate cause to issue a case schedule where he demonstrated that his petition for statutory writ is meritorious?

IV. STATEMENT OF THE CASE

A. Summary of the Underlying Case.

Jonathan Greenberg is a teacher employed at the Seattle School District, and is a member of the Seattle Education Association. In 2010, the Seattle School District (District) and the Seattle Education Association (SEA) entered into a collective bargaining agreement, which contained a clause on the grievance procedures for certain forms of discipline. CP 20. Specifically, this clause states:

SECTION C: REPRESENTATION RIGHTS AND DUE PROCESS

5. No employee shall be disciplined without just and sufficient cause. A process of progressive discipline will be used. Progressive discipline includes, but is not limited to, oral warning, written warning or reprimand, suspension and/or termination as appropriate to the circumstances. The SPS may bypass steps of the progressive discipline process in any situation because of the seriousness of the employee conduct that constituted just cause for discipline. Any disciplinary action, except an oral warning not documented or recorded in the employee's personnel file, shall be subject to the grievance procedure including binding arbitration. The specific grounds forming the basis for disciplinary action will be made available to

the employee in writing. This section shall not apply to matters covered by statutory due process procedures.

CP 49.

In December 2012, the Center School received a complaint from parents of a student that Jonathan Greenberg had created “a hostile and unsafe learning environment” during a unit on race in his AP Humanities class. CP 188. In February 2013, the District canceled the race unit in response to this complaint. CP 188. Upon learning of the cancelation of the race unit, students in Mr. Greenberg’s Humanities class circulated a petition to have the unit reinstated. CP 188-89. This petition was circulated by students during the Humanities class, during which time Mr. Greenberg stepped out of the classroom. CP 188-89, 192.

In May 2013, the District proposed discipline to Jonathan Greenberg for his teaching methods and for allowing the petition to circulate during class time. CP 185-86. The form of discipline selected by the District was a written reprimand, and an involuntary transfer from Center School to Hamilton International Middle School. CP 186. Such discipline is subject to the grievance and arbitration procedures set forth in the collective bargaining agreement between the SEA and the District. CP 48-49, 122-23. The SEA and the District were unable to resolve Mr.

Greenberg's dispute by way of grievance. Pursuant to the collective bargaining agreement, the matter was then set for arbitration. CP 177.

Arbitrator Anthony Vivenzio was mutually selected by the parties and arbitration took place on August 12, 2014, to decide whether there was just cause to impose the written reprimand and involuntary transfer. CP 176. The arbitrator found that just cause did not exist for involuntarily transferring Mr. Greenberg. CP 203. However, the arbitrator also found that "just cause existed to discipline Jonathan Greenberg in the form of a 10 working day suspension." CP 203. Neither party had ever previously discussed suspension as a possibility. The arbitrator opted to retain jurisdiction over the matter until 4:30 p.m. on October 13, 2014. CP 203.

Subsequently, the Seattle School District attempted to impose a 10 day suspension on Mr. Greenberg. On September 18, 2014, the District first notified Mr. Greenberg that it intended to impose a suspension, in accordance with the arbitration decision. CP 205-06. However, no suspension was actually imposed at that time, presumably because the arbitrator still had jurisdiction to reconsider his decision. CP 203, 206. On December 8, 2014, the District notified Mr. Greenberg that his suspension was set to begin in February. CP 208. Pursuant to RCW 28A.405.300, Mr. Greenberg submitted a notice of appeal eight days later.

CP 210. The District refused to entertain Mr. Greenberg's appeal. CP 235-36.

B. The Current Lawsuit.

Appellant filed an application for writ of review and complaint for declaratory relief on December 23, 2014. CP 3. Respondent filed an Answer on January 13, 2015. The superior court took no action.

On June 16, 2015, Appellant filed a motion for summary judgment on his declaratory judgment claim.¹ CP 5. Respondent submitted a response on July 6, 2015. The Chief Civil Judge struck the motion without prejudice, and instead required Appellant to file a motion for an order to establish adequate cause in accordance with LCR 98.40. CP 3.

Appellant filed a motion for an order to establish adequate cause in accordance with LCR 98.40 and to direct the clerk to issue a case schedule on March 4, 2016. CP 4-16. Respondent filed its response on March 11, 2016. CP 211-23. Respondent's response did not address Appellant's declaratory judgment claim, and did not move the court to have the matter dismissed. CP 211-23. Instead of conducting a hearing, the superior court denied Appellant's motion and dismissed the case entirely without explanation on March 16, 2016. CP 256-57.

¹ Appellant's motion did not address his petition for statutory writ of review.

Appellant timely filed his notice of appeal on March 21, 2016. CP 258-62.

V. ARGUMENT

A. King County Local Rule 98.40 does not apply to declaratory judgment actions.

In subsection A, King County Local Court Rule 98.40 states, “This rule shall apply to a writ filed pursuant to ch. 7.16, RCW.” Declaratory judgments are governed by chapter 7.24 RCW. The procedure for initiating an action under the Uniform Declaratory Judgment Act is the same as it is for any other civil action; there are no special procedural rules applying only to declaratory judgment actions. CR 57. King County also does not have any local rules imposing special procedural requirements on actions brought under chapter 7.24 RCW. The King County Local Rules list a number of case types that are not to be issued a case schedule upon filing – declaratory judgment actions are not among them. LCR 4(b). Under King County’s own rules, this matter should have been assigned to a judge and a case schedule issued. The court’s failure to do so was an error, and this matter should be remanded with directions to issue a case schedule.

Just recently, the Supreme Court issued its decision in *New Cingular Wireless PCS, Inc. v. City of Clyde Hill*, No. 91978-0 (May 26,

2016). Therein, the Court held that a request for declaratory judgment is not precluded by the availability of a statutory writ of review. *New Cingular*, at 15. It follows from this holding that it cannot be the case that a request for declaratory relief must adhere to the procedures for writs of review. The superior court erred when it decided otherwise.

B. The superior court had no power to dismiss Appellant's claims *sua sponte*.

Involuntary dismissals are governed by CR 41(b), and are reviewed by this Court for an abuse of discretion. *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 128, 89 P.3d 242 (2004). CR 41(b) permits a court to dismiss a matter for willful noncompliance with a reasonable court order or for failure to prosecute. *Alexander v. Food Servs. of Am., Inc.*, 76 Wn. App. 425, 430, 886 P.2d 231 (1994). The court here did not articulate its basis for dismissing Appellant's claims. Regardless, neither basis for dismissal is present here.

In order to dismiss a case for willful noncompliance with a reasonable court order, the court must explicitly consider whether a lesser sanction would suffice.² *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002). Here, the court did not explicitly consider anything, let alone lesser sanctions. The court's

² Prejudice to the opposing party is also required for dismissal Under CR 41(b). *Rivers*, 145 Wn.2d at 686. Here, no attempt was made to show prejudice.

dismissal order was entered without a hearing and without explanation. Therefore, willful noncompliance could not constitute a basis for dismissal.

The court also had no basis to dismiss Appellant's claims for want of prosecution. Appellant did not fail to prosecute his declaratory judgment claim; he attempted to file for summary judgment a few months after filing the complaint, but the court would not accept his submission. CP 3. Nor did Appellant fail to prosecute his application for writ of review. As the Court of Appeals held in *Foss Maritime Co. v. City of Seattle*, 107 Wn. App. 669, 674-75, 27 P.3d 1228 (2001), moving the court for establishment of a case schedule and assignment of a judge on an application for writ of review effectively notes the case for trial. Under CR 41(b)(1), a court cannot dismiss a case for want of prosecution once it has been noted for trial. *Id.* at 675; CR 41(b)(1). Dismissal for want of prosecution was therefore barred after Appellant filed his motion to establish adequate cause.

The superior court never articulated a basis for dismissing Appellant's claims. It in fact had no basis for dismissal under CR 41(b). Dismissal was an abuse of discretion and this Court should reverse the superior court's order.

C. LCR 98.40 is a procedural rule, and is not a vehicle for adjudication of a petition for a writ on its merits.

Court rules are interpreted in the same manner as statutes. *State v. Hawkins*, 181 Wn.2d 170, 183, 332 P.3d 408 (2014). Interpretation of court rules and statutes are questions of law, subject to de novo review. *Sloan v. Horizon Credit Union*, 167 Wn. App. 514, 518, 274 P.3d 386 (2012).

King County Local Rule 98.40 provides that when a party files an application for a writ of review, the hearing thereon is to be scheduled as follows:

(d) Scheduling of Hearing on Application for Writ: The hearing on a writ from a criminal or infraction case shall be noted before the Chief Criminal Judge for Seattle case assignment area cases. The hearing on a writ in any other case shall be noted before the Chief Civil Judge for Seattle case assignment area cases. All hearings for Kent case assignment area cases shall be noted before the Chief RJC Judge. Where a stay of proceedings has been entered, the dispositive hearing on the writ shall be heard within thirty days of the issuance of the writ.

...

(f) Issuance of Case Schedule. When the court has found adequate cause for issuance of a writ, the filing party shall obtain a trial date and a case schedule from the clerk who will also assign the case to a Judge.

LCR 98.40. There are two possible interpretations of this rule. The first possible interpretation of the rule is that LCR 98.40 seeks to add a

substantive step to the process. The second possible interpretation of the rule is that LCR 98.40 dictates the procedure by which hearing dates on writs are set.

The words “adequate cause” do not appear anywhere in chapter 7.16 RCW. Thus, the first possible interpretation of LCR 98.40 is that it adds an element of adequate cause to RCW 7.16.040. If this is the case, then the rule is unconstitutional. “[T]he drafting of a statute is a legislative, not a judicial, function.” *State v. Enloe*, 47 Wn. App. 165, 170, 734 P.2d 520 (1987). Courts have no power to modify to add to a duly enacted statute. *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 426, 686 P.2d 483 (1984). Judicial modification of statutes is a usurpation of the legislature’s constitutionally delegated powers. The requirements for obtaining a writ of review are governed by RCW 7.16.050-110. The King County Superior Court has no power to add to these statutes. If LCR 98.40 adds a substantive step to the process for obtaining a writ of review, it is unconstitutional.

The rules of statutory construction dictate that statutes must be construed to uphold its constitutionality, whenever possible. *O'Day v. King Cnty.*, 109 Wn.2d 796, 806, 749 P.2d 142 (1988). The second possible interpretation of LCR 98.40, that it is merely procedural, must therefore be the correct one.

D. Mr. Greenberg demonstrated adequate cause for the issuance of a case schedule.

Courts in this state adhere to the principle that “procedural rules should be interpreted to eliminate procedural traps and to allow cases to be decided on their merits.” *Haywood v. Aranda*, 143 Wn.2d 231, 238, 19 P.3d 406 (2001) (citing *In re Detention of Turay*, 139 Wn.2d 379, 390, 986 P.2d 790 (1999)); accord *State v. Fleming*, 41 Wn. App. 33, 36, 701 P.2d 815 (1985). In accordance with this principle, “adequate cause” as used in LCR 98.40 cannot mean that the issues raised in the petition must be adjudicated on the merits. This is so because the petitioner cannot be deprived of the opportunity to have his case resolved on the merits due to an overly burdensome procedural rule. Further, the Rule states that a case schedule will be issued “when the court has found adequate cause for issuance of a writ”, *not* “when the court has issued a writ.”

What, then, is the function of the phrase “adequate cause” in LCR 98.40? Adequate cause likely is a gate keeping function by the Court to ascertain whether there is some merit to the application. An application is meritorious if it raises debatable issues on which reasonable minds might differ and there is a possibility that the writ may be granted. *Cf. Hernandez v. Stender*, 182 Wn. App. 52, 61, 358 P.3d 1169 (2014)

(defining “frivolous”). Mr. Greenberg has more than met this requirement.³

RCW 7.16.040 provides:

A writ of review shall be granted by any court, ... when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

Accordingly, to make a showing of adequate cause under LCR 98.40, the petitioner must demonstrate that he has some possibility of satisfying these factors. Here, as articulated below, Mr. Greenberg has demonstrated that the arbitrator exceeded his jurisdiction, that both the arbitrator and the District acted illegally, and that he lacks an adequate remedy at law.

- 1. The arbitrator exceeded his jurisdiction because the collective bargaining agreement did not authorize the arbitrator to impose disciplinary measures that adversely affect a teacher’s contract.**

Here, the arbitrator exceeded his jurisdiction by imposing a 10-day suspension on Mr. Greenberg, which was outside the realm of his

³ This Court cannot assume that the superior court decided the merits of Mr. Greenberg’s application for writ of review, as it never stated as much in its order. Appellant contends, however, that he meets the requirements of RCW 7.16.040 for a writ to issue.

authority.⁴ When the arbitrator has exceeded his or her designated powers, i.e. jurisdiction, the arbitration award is void. RCW 7.04A.230(1)(d). The error must appear on the face of the award, and “any issue of law evident in the reasoning may also be considered as part of the face of the award.” *Cummings v. Budget Tank Removal & Envtl. Servs., LLC*, 163 Wn. App. 379, 389, 260 P.3d 220 (2011). Here, both the plain language of the collective bargaining agreement and the statutory provisions governing adverse employment actions establish that the arbitrator exceeded his authority and jurisdiction in ordering a suspension.

The collective bargaining agreement signed by the SEA and the District states that the grievance procedures, up to and including arbitration, “shall not apply to matters covered by statutory due process

⁴ Arbitrations are considered judicial functions for purposes of RCW 7.16.040 whenever the parties’ due process rights are implicated. This was articulated by the Supreme Court in *Grays Harbor Cty. v. Williamson*, 96 Wn.2d 147, 152-53, 634 P.2d 296 (1981):

Arbitration has been viewed as both non-judicial or the exercise of a judicial function depending upon the context of the question. For example, when discussing “due process” in the arena of arbitration, we have drawn upon the underlying requirement of English and American jurisprudence to declare that parties have a fundamental right to be heard and to present evidence, after reasonable notice of the time and place of the hearing. *Tombs v. Northwest Airlines*, 83 Wn.2d 157, 516 P.2d 1028 (1973).

Mr. Greenberg has a due process right to have all adverse employment actions adjudicated by a hearing examiner, with a right of appeal to the courts. RCW 28A.405.310; *Giedra v. Mount Adams Sch. Dist. No. 209*, 126 Wn. App. 840, 846, 110 P.3d 232 (2005). The arbitrator, and the District once it adopted the arbitrator’s decision, deprived Mr. Greenberg of that right, subjecting this matter to review through statutory writ.

Furthermore, the District’s decision to impose a suspension was judicial in nature. *Francisco v. Bd. of Directors of Bellevue Pub. Sch., Dist. No. 405*, 85 Wn.2d 575, 580, 537 P.2d 789 (1975).

procedures.” CP 49. RCW 28A.405.300 provides due process rights to all certificated employees to have adverse employment actions adjudicated by a hearing examiner, with a right of appeal to the courts. RCW 28A.405.310; *Giedra v. Mount Adams Sch. Dist. No. 209*, 126 Wn. App. 840, 846, 110 P.3d 232 (2005) This right cannot be waived unless clearly articulated. *Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

Involuntary transfer and a written reprimand are not adverse employment actions. *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 853, 719 P.2d 98 (1986). Pursuant to the terms of the collective bargaining agreement, the initial proposed discipline was properly subject the grievance procedures, including arbitration.

Suspensions, on the other hand, are adverse employment actions that entitle a teacher to statutorily mandated due process procedures. RCW 28A.405.300; *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 674, 266 P.3d 932 (2011); *Myking v. Bethel Sch. Dist. No. 403*, 21 Wn. App. 68, 72, 584 P.2d 413 (1978). They are not subject to arbitration under the plain language of the collective bargaining agreement nor under RCW 28A.405.300. Had the District recommended suspension as discipline for Mr. Greenberg, the matter would have proceeded directly to the Superintendent, as dictated by statute. At the very least, the District

would have been liable for breach of the collective bargaining agreement had it applied the grievance procedure to an adverse employment action.

The arbitrator did not possess the power to do what the District could not. “An arbitrator's powers are defined and limited by the agreement to arbitrate, and the arbitration award must not exceed the powers established by the agreement.” *Boyd v. Davis*, 75 Wn. App. 23, 25, 876 P.2d 478 (1994). Here, the agreement to arbitrate is found in the collective bargaining agreement. This agreement defines the arbitrator’s powers as follows:

SECTION F: POWERS OF THE ARBITRATOR

It shall be the function of the arbitrator, after due investigation and hearing, to make a written decision subject to the following limitations: 1. **The arbitrator shall have no power to alter, add to, subtract from, or modify the terms of this Agreement** between the SPS and the SEA or the rules, regulations, policies or resolutions of the SPS.

CP 123 (emphasis added). Under the plain language of this provision, the arbitrator has no power to expand upon the forms of discipline that are subject to grievance procedures. What the arbitrator did here was to modify the collective bargaining agreement, essentially writing out the provision dictating that grievance procedures “shall not apply to matters covered by statutory due process procedures.”

Although “[c]ourts will not overturn the arbitrator’s remedy when it is drawn from the essence of the collective bargaining agreement,” this is not such a case. *Clark Cnty. Pub. Utility Dist. No. 1 v. Int’l Brotherhood of Elec. Workers*, 150 Wn.2d 237, 249, 76 P.3d 248 (2003). In *Int’l Brotherhood*, the arbitrator ordered the Utility District to offer positions to two union grievants and ordered back pay to union members whose jobs had been terminated in violation of the collective bargaining agreement, although that particular remedy had not been contemplated by the parties. *Id.* at 242. The Supreme Court upheld the award, because “the contract did not specify a means of devising an appropriate remedy, and the parties specifically charged the arbitrator with the challenging task of fashioning one.” *Id.* at 250. Here, however, the grievance provision in the collective bargaining agreement very clearly states “This section shall not apply to matters covered by statutory due process procedures.” CP 49. This clause excludes suspension and termination from the disciplinary remedies that the arbitrator could consider. The arbitrator’s decision was thus not only outside the essence of the collective bargaining agreement, it was directly contrary to the agreement.

Further, allowing the arbitrator to impose a sanction different than the one proposed by the District was an unconstitutional delegation of authority. As recognized by the Court of Appeals, a “gratuitous

recommendation” of any sanction other than that advanced by the district “would be a nullity.” *Clark v. Cent. Kitsap Sch. Dist. No. 401*, 38 Wn. App. 560, 565, 686 P.2d 514 (1984); accord *Van Horn v. Highline Sch. Dist. No. 401*, 17 Wn. App. 170, 176, 562 P.2d 641 (1977). “The choice of sanction is a policy decision requiring consideration of such factors as the employee's work history, safety, effect on other employees, prior decisions and the precedential impact...” *Butler v. Lamont Sch. Dist. No. 246*, 49 Wn. App. 709, 712, 745 P.2d 1308 (1987). Judges and juries, not privy to all of the facts that might influence the District’s decision, are not entitled to impose whatever sanction it deems appropriate. This is no less true for arbitrators, who function as judge and jury to review sufficient cause when the proposed discipline does not implicate due process. By statute, the authority to propose discipline, especially when the discipline constitutes an adverse employment action, rests with the District alone. As the District here did not propose a suspension at any point in the grievance proceedings, the arbitrator had no power to gratuitously recommend a 10-day suspension for Mr. Greenberg.

Mr. Greenberg initiated the grievance proceedings in this matter in order to dispute the imposition of a letter of reprimand and involuntary transfer to another school. The arbitrator was free to consider any form of discipline not considered an adverse employment action. What he was not

free to do was to violate Mr. Greenberg's due process rights. As such the arbitrator exceeded his authority by ordering a form of discipline specifically excluded from grievance by the CBA and by statute, the arbitrator's imposition of a 10-day suspension is void. The arbitrator acted outside his jurisdiction.

2. The District and the Arbitrator acted illegally by imposing a suspension when none had been contemplated.

An inferior tribunal "acts illegally" for purposes of a writ of review when that tribunal

(1) has committed an obvious error that would render further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court.

City of Seattle v. Holifield, 170 Wn.2d 230, 244-45, 240 P.3d 1162 (2010).

The status quo here was substantially altered when the arbitrator and school district suddenly imposed an adverse employment action on Mr. Greenberg. This action constituted probable error because it violates the principle of fundamental fairness.

Due process in employment disputes requires the adherence to principles analogous to the Fifth Amendment's protection against double jeopardy. Tim Bornstein, et al., *Labor and Employment Arbitration*, §

15.07[2][a] (2d ed. 2002). "An agency may not reach a decision as to disciplinary action on one occasion, and then at a later date increase the disciplinary action so that the agency disciplines the employee twice for the same offense." *Dep't of Env'tl. Protection v. Barker*, 654 So.2d 594, 595 (Fla. 1995); *accord State, Dep't of Transp. v. State, Career Serv. Comm'n*, 366 So. 2d 473, 474 (Fla. Dist. Ct. App. 1979). The key to this employment doctrine is not the U.S. Constitution, but fundamental fairness. Bornstein, *Labor and Employment Arbitration*, *supra*, § 15.07[2][a].

When an employee has been disciplined for an offense, it is unfair to suspend him if he has not committed a second offense. *Id.* Courts that have addressed the matter have unanimously concluded that an employee who receives discipline in one instance may not again be disciplined at a later time for the same conduct. *See, e.g., Barker, supra; Ladnier v. City of Biloxi*, 749 So.2d 139, 153 (Miss. App. 1999) (finding that because city policy included "written warnings" among the list of definable discipline, the termination of a police officer who had received a prior written warning for the same offense constituted double discipline) (citing *James v. Sewerage & Water Bd. of New Orleans*, 505 So.2d 119, 122 (La. App. 1987)); *Rochon v. Rodriguez, Superintendent of Police, City of Chicago*, 293 Ill.App.3d 952, 689 N.E.2d 288, 292 (Ill. App. 1 Dist. 1997); *Hamlett*

v. Div. of Mental Health, La. Health & Human Res. Admin., 325 So. 2d 696, 701 (La. Ct. App. 1976). Though this rule has not been explicitly adopted in Washington, it has been looked upon favorably by our courts. See *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 675, 266 P.3d 932 (2011) (declining to apply rule where unwarranted by facts); *In re Disciplinary Proceeding Against VanDerbeek*, 153 Wn.2d 64, 85, 101 P.3d 88 (2004) (same).

Such reasoning finds justifiable application here. Following complaints from a student that Mr. Greenberg had created a hostile environment in his Humanities class through his teaching methods and allowing a petition to circulate during class time, the District imposed a written reprimand and an involuntary transfer as discipline. The decision by the District was issued on May 30, 2013. On September 18, 2014, after the grievance proceeding concluded, the District imposed a second disciplinary measure in the form of a 10-day suspension. The District admitted in the September 18 letter that the 10-day suspension was being imposed for the alleged hostile conduct that occurred in Mr. Greenberg's Humanities class between December 2012 and February 2013. This is the exact same conduct for which the written reprimand and involuntary transfer were imposed. The District was not warranted in imposing a second form of discipline upon Mr. Greenberg.

That the District was ultimately unsuccessful in transferring Mr. Greenberg to another school does not alter the analysis. This is, in fact, precisely what happened in *Barker*. In that case, the Florida Department of Environmental Protection imposed a written reprimand and offered a voluntary demotion on a park officer for his improper performance of law enforcement duties. *Barker*, 654 So.2d at 595. Rather than accepting the proposal, the park officer submitted a grievance contesting the basis for discipline. *Id.* Unsuccessful in procuring a voluntary demotion, the DEP imposed an involuntary demotion with a reduction in pay. *Id.* The Florida District Court of Appeal declared the demotion invalid because it constituted a second punishment for the same conduct. *Id.* As in *Barker*, the District here cannot impose a second form of discipline simply because it was unable to institute the discipline it initially proposed. Such an action is fundamentally unfair to Mr. Greenberg and is not permissible.⁵

The arbitrator's proposal and the District's imposition of a 10-day suspension constitutes double punishment, and violates principles of

⁵ Furthermore, as the Florida court noted, "It is obvious that if improperly used, this method of exercising disciplinary powers could result in unduly coercive pressures being used to the detriment of an employee as to whom insufficient grounds for the threatened disciplinary action actually existed." *Barker*, 654 So.2d at 595. This is precisely the case here, because, as the arbitrator concluded, there was an insufficient basis to impose an involuntary transfer.

fundamental fairness. Because the arbitrator and the District committed a probable error of law that substantially altered Mr. Greenberg's employment record, their disciplinary decision is illegal and subject to review.

3. Mr. Greenberg has no adequate remedy at law.

Mr. Greenberg does not have an adequate remedy at law because the District refuses to consider his challenge to the suspension as separate from his challenge to the proposed involuntary transfer. In other words, the District believes that Mr. Greenberg had an adequate remedy at law via its grievance procedures that culminated in the arbitration.

The District's position makes little sense because it would require an employee to challenge every possible form of discipline, even if not proposed. At the time of the arbitration, the District's only proposed discipline for Mr. Greenberg was an involuntary transfer and a written reprimand. No adverse employment actions had been proposed or even considered at that point. Suspension, or any other form of adverse employment action, was not even discussed during the arbitration itself. Arbitration could not possibly have been an adequate remedy for Mr. Greenberg to address his suspension, when a suspension was not proposed until *after* the arbitration.

The District, through its interim superintendent, imposed an adverse employment action on Mr. Greenberg without a letter of probable cause, without advanced notice, and without proper authority of the arbitrator. All of the avenues Mr. Greenberg could have taken to challenge the suspension under ordinary circumstances were foreclosed by the improper process utilized by the District in this matter. In such circumstances, Mr. Greenberg had no choice but to ask the superior court to review the matter. *See Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 645, 310 P.3d 804 (2013). Mr. Greenberg therefore lacked an adequate remedy at law to address the violation of his rights.

Petitioner's request for a writ of review is meritorious, and the superior court had adequate cause to issue a case schedule pursuant to LCR 98.40.

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VI. CONCLUSION

King County Local Rule 98.40 has no application to declaratory judgment actions. It also cannot add a substantive requirement to the process for obtaining a statutory writ of review. The superior court erred in its application of this procedural rule. The court further erred by dismissing Appellant's claims without explanation. This Court should reverse the decision of the superior court and remand for further proceedings.

DATED this 2ND day of June, 2016.

VAN SICLEN, STOCKS & FIRKINS


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CERTIFICATE OF SERVICE

I certify that on June 2, 2016, I caused a copy of the foregoing document to be served on the following party of record and/or interest party as follows:

Gregory Jackson
John Nicholson
Freimund Jackson & Tardif
701 5th Ave., Ste. 3545
Seattle, WA 98104
By E-mail and Legal Messengers

DATED this 2nd day of June, 2016 at Auburn, Washington.



Diana Butler