68373-0

68373-0

NO. 68373-0

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

JAMES McLAIN,

Respondent,

v.

KENT SCHOOL DISTRICT NO. 415,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD McDERMOTT

BRIEF OF APPELLANT

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I. INTRODUCTION

In February 2010, the Kent School District notified teacher James McLain that his teaching contract would not be renewed for the following school year. McLain's original attorney filed a letter to appeal the district's determination, but in June 2010 withdrew from representation before a hearing officer was selected. A second attorney later filed a public records request on McLain's behalf, but confirmed that she did not represent McLain on his employment appeal. Despite repeated letters to McLain from the district that either he or his representative needed to contact the district to select a hearing officer, no such contact occurred within the fifteen months following his attorney's withdrawal. In November 2011—nearly two years after he was notified that his teaching contract would not be renewed—a third attorney on McLain's behalf contacted the district and insisted that McLain still had a right to appeal his 2010 nonrenewal pursuant to the statutory process of chapter 28A.405 RCW. The district disagreed, arguing that McLain waived the opportunity to appeal his nonrenewal by failing to pursue the appeal in a timely manner. McLain petitioned the King

County Superior Court for the appointment of a hearing office and the petition was granted without oral argument or legal conclusions regarding the district's objections. The district petitioned this court for review of the superior court's appointment of a hearing officer. Review was granted to decide whether the district may assert waiver or estoppel when a teacher fails to take necessary steps to pursue a hearing for more than a year, and whether a hearing officer—whose adverse decision cannot be appealed by a school district—should be the forum for deciding whether waiver has occurred.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The superior court erred in appointing an administrative hearing officer and ordering a teacher and school district to participate in an appeal hearing pursuant to chapter 28A.405 when the teacher clearly waived, and should have been estopped from asserting, his right to such a hearing by failing to pursue the appeal of his contract nonrenewal for more than a year.

2. The superior court erred by misapplying the procedure of RCW 28A.405.310 (4) and thereby compelling an administrative hearing, despite the fact that the Respondent had clearly waived the opportunity for such a hearing by failing to pursue this statutory opportunity for more than a year.

3. The superior court erred by deferring the issue of waiver and estoppel to an administrative hearing officer, from whose adverse ruling the school district has no legal recourse.

B. Issues Pertaining To Assignments Of Error

1. Under the provisions for public school teachers in chapter 28A.405 RCW, did the Respondent impliedly waive, or should he be estopped from asserting, his opportunity for a hearing to appeal the nonrenewal of his teaching contract when he abandoned the appeal process and failed to take necessary steps to pursue his appeal for more than a year?

2. Did the superior court err in granting the teacher's petition for the appointment of a hearing officer under RCW 28A.405.310 (4), when the teacher had abandoned the appeal process for more than a year following the 2010 nonrenewal of his teaching contract and the district objected that such a hearing was not available?

3. Should the superior court—and not a hearing officer, from whom a school district is powerless to appeal an adverse ruling—be the proper forum for deciding issues of waiver and/or estoppel when a teacher has failed to pursue his statutory nonrenewal appeal for an unreasonable period of time?

III. STATEMENT OF THE CASE

In a letter dated February 23, 2010, former teacher James McLain was notified by the superintendent of the Kent School District that probable cause existed to nonrenew his teaching contract for the ensuing school year. McLain's failure to demonstrate necessary growth during a plan of improvement constituted the grounds for a finding of probable cause, per RCW 28A.405.100 (4) (a). CP 27.

Attorney Michael Gawley of the Washington Education Association sent a letter as McLain's representative notifying the district that McLain was appealing the superintendent's determination pursuant to the statutory process in chapter 28A.405 RCW. CP 28. On April 6, 2010, the district sent Mr. Gawley 340 documents regarding McLain's plan of improvement and probationary period. CP 24.

In June 2010, Mr. Gawley notified the district that he would no longer be representing McLain. CP 24. Mr. Gawley sent written confirmation of his withdrawal on July 13, 2010. CP 29. In a letter written July 13, the District reminded McLain that his teaching contract with the district would end on August 31 and, following the withdrawal of Mr. Gawley, either another designee or McLain

himself would need to contact the district to continue the appeal process. The District provided McLain another ten days to reply. CP 30.

In a letter dated July 27, 2010, McLain replied that he intended to continue his appeal and he claimed that he had retained an attorney. However, McLain failed to identify his attorney. CP 31. The district wrote McLain again on August 3, asking for his attorney's name and informing McLain that communications from district's counsel should go through his attorney. CP 32.

On August 14, 2010, the District received a Public Records Act request from attorney Mary Ruth Mann on McLain's behalf, requesting many of the same records that had previously been given to Mr. Gawley. CP 33-34. In response to her request, the district wrote Ms. Mann August 17 to clarify whether she was representing McLain in the nonrenewal hearing or simply making a records request on his behalf. CP 35. On August 19, 2010, Ms. Mann's associate (attorney Mark Rose) sent a letter via email confirming that although the firm initiated a records request on Mr. McLain's behalf, the attorneys were not representing him regarding his employment appeal. CP 36.

On August 19, 2010, the district wrote yet another letter to McLain regarding Ms. Mann's assertion that she was not representing him for the hearing process. The letter notified McLain that if he chose to go forward with the statutory hearing, it was his responsibility to contact the district's Legal Services office within *three* business days of receipt to initiate the process (i.e., by mutually selecting a hearing officer). CP 37. McLain's teaching contract with the district expired on August 31, 2010.

The district heard nothing further from McLain for *fifteen months*. He made no attempt to contact or work for the district in September 2010. He did not contact the district at any point during the 2010-2011 school year regarding either his contract or his teaching obligation. Likewise, McLain made no attempt to contact or work for the Kent School District in August or September 2011 at the beginning of the 2011-2012 school year.

In November 2011 attorney Douglas Wartelle contacted the district on behalf of McLain. Mr. Wartelle sought to reinitiate the appeal process for McLain by selecting a hearing officer with the district. By this time, however, McLain had not signed a contract with the district for two consecutive school years following the nonrenewal of his contract. CP 25. Counsel for the district spoke

with Mr. Wartelle and also explained in a follow-up letter that since McLain neglected to follow through with his employment appeal request in 2010, the district determined that he had abandoned this process during the intervening fifteen months. The district determined that in doing so, McLain waived the opportunity for such an appeal. CP 25-26.

On January 12, 2012, McLain filed a petition and supporting declaration for the appointment of a hearing officer pursuant to RCW 28A.405.310 (4) with the presiding judge of the King County Superior Court. CP 1-13. This petition and supporting declaration, however, made no mention of the exchange of correspondence between the district and McLain throughout the summer of 2010, nor did the petition notify the presiding judge that fifteen months had elapsed between the district's last contact with McLain in 2010 and Mr. Wartelle's contact in November 2011. The petition was scheduled for a ruling without the opportunity for oral argument on February 6, 2012. CP 14.

On January 30, 2012, the District filed a notice to dismiss the petition or, in the alternative, that the matter be assigned to a judge for oral argument and briefing regarding whether McLain had waived his right to a hearing. CP 17-38.

On February 2, 2012, McLain filed a reply in which he claimed, in part, that the district had a statutory obligation to complete the hearing process unilaterally regardless of whether he himself participated. Failing to do so, argued McLain, meant that the superintendent's determination of probable cause was never "final" and his demand for an employment hearing pursuant to RCW 28A.405.310 could be renewed at any time. CP 39-47.

On February 16, 2012, the Honorable Richard McDermott, presiding judge of the King County Superior Court, issued a one-page order appointing a hearing officer and directing both parties to contact the hearing officer. CP 51.

The district filed a notice for discretionary review on February 28, 2012. CP 48-50. Following briefing and argument, Commissioner Mary Neel of this court granted discretionary review of this matter with the following observation:

> The District's motion for discretionary review raises an important procedural issue that appears to be one of first impression, that is, whether a District may assert waiver or estoppel when a teacher initially notifies the District of his intent to appeal, and then fails to take steps to pursue a hearing for more than a year. The issue has significant ramifications beyond this case. Also lurking in the briefing is the issue of whether it is for the hearing officer to decide any issues of waiver/estoppel. Most important, it is undisputed that under Federal Way School District v. Vinson, 172 Wn.2d 756, 765-67, 261 P.2d 145 (2011), while

> McLain may seek judicial review of an adverse decision by the hearing officer, the District may not do so. Thus, without review now, it is unlikely that the issues raised by the District will ever be subject to judicial review.

Court of Appeals, No. 68373-0-I (Commissioner's Ruling June 4, 2012).

IV. ARGUMENT

A. Respondent McLain clearly waived—and should be equitably estopped from asserting—his statutory opportunity to appeal a nonrenewal of his teaching contract pursuant to RCW 28A.405.310 when he abandoned the process prior to selecting a hearing officer and failed to contact the district to pursue his appeal for more than a year.

As a public school teacher in the State of Washington, James McLain had the opportunity to appeal pursuant to chapter 28A.405 RCW his school district superintendent's determination that his teaching contract should not be renewed. Under the plain language of this statutory provision, McLain had not only an obligation to request an appeal hearing in the first place, but the obligation to actively and persistently participate in the process as well. In fact, the provisions of RCW 28A.405.310 (4) require that the parties begin the hearing officer selection process within *fifteen days* following the receipt of the request for a hearing. When he

abandoned the process before a hearing officer was selected by the parties and did not contact the school district for *fifteen months*, McLain waived this opportunity for a hearing. The superior court erred when it appointed a hearing officer and compelled the parties to engage in an appeal hearing nearly two years after McLain was first notified that his teaching contract would not be renewed. The court's order should be vacated and this matter should be dismissed under the doctrines of waiver and estoppel.

Public school teachers in the state of Washington are annually employed by a one-year, written contract. RCW 28A.405.210. While a teaching contract is limited to a single year, each teacher has a statutory right to the annual renewal of this employment relationship[1] (sometimes referred to as a "continuing contract" right). See Peters v. South Kitsap School District No. 402, 8 Wn. App. 809, 813, 509 P.2d 67 (1973) ("[T]he district may refuse to renew a contract for an ensuing year only for sufficient probable cause.").

RCW 28A.405.210 codifies the requirement that probable cause must exist in order for a district to "nonrenew" the

[1] Teachers in the first few years of teaching are called "provisional employees." See RCW 28A.405.220. The relaxed rules for nonrenewal of provisional employees are not applicable to McLain's case because of his years of teaching experience and will not be discussed here.

employment contract of a teacher. This provision also requires that if a district determines that such probable cause for nonrenewal exists, the district is required to provide the employee timely notice by May 15.[2] The notice must specify the cause or causes for nonrenewal of the employee's contract as determined by the district's superintendent. Id. Lack of necessary improvement during a probationary period for a teacher placed on a program for improvement[3] constitutes grounds for a finding of probable cause for nonrenewal under 28A.405.210. RCW 28A.405.100 (4) (a).

Any teacher who is notified of the superintendent's determination that his contract will not be renewed for the ensuing school year is granted the *opportunity* for a hearing if the employee files a request for such a hearing within ten days of receiving the superintendent's notice. RCW 28A.405.210. An appeal hearing for a nonrenewed teacher—like a hearing for a teacher who is discharged[4]—is conducted according to the provisions of RCW 28A.405.310 to determine whether the cause identified by the superintendent was, in fact, sufficient.

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[2] If the legislature has not passed an omnibus appropriations act by May 15, notice is not required until June 15. Id.

[3] Pursuant to the teacher evaluation procedures of RCW 28A.405.100.

[4] RCW 28A.405.300 is the provision that regulates the discharge of a teacher for cause. RCW 28A.405.210 regulates the nonrenewal of a teacher's employment contract for the ensuing school year.

RCW 28A.405.310 (4) explains how the hearing process is initiated and that the district bears responsibility for associated costs and fees:

> In the event that an employee requests a hearing pursuant to RCW 28A.405.300 or RCW 28A.405.210, a hearing officer shall be appointed in the following manner: Within fifteen days following the receipt of any such request the board of directors of the district or its designee and the employee or employee's designee shall each appoint one nominee. The two nominees shall jointly appoint a hearing officer who shall be a member in good standing of the Washington state bar association or a person adhering to the arbitration standards established by the public employment relations commission and listed on its current roster of arbitrators. Should said nominees fail to agree as to who should be appointed as the hearing officer, either the board of directors or the employee, upon appropriate notice to the other party, may apply to the presiding judge of the superior court for the county in which the district is located for the appointment of such hearing officer, whereupon such presiding judge shall have the duty to appoint a hearing officer who shall, in the judgment of such presiding judge, be qualified to fairly and impartially discharge his or her duties. . . . The district shall pay all fees and expenses of any hearing officer selected pursuant to this subsection.

A teacher, however, can be deemed to have waived his or her statutory opportunity to challenge a nonrenewal determination. See Lande v. South Kitsap School District No. 402, 2 Wn. App. 468, 469 P.2d 982 (1970) (right to challenge a variation in her new teaching contract waived by teacher's decision to negotiate with the school district and sign a new contract for the ensuing school year).

Under Washington law, the question of whether or not there has been a 'waiver" is usually for a trier of facts. Lande, supra, 2 Wn. App. at 473.

1. Respondent McLain waived his opportunity for an appeal to challenge the nonrenewal of his teaching contract.

The rule on waiver was announced in Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954):

> A waiver is the intentional and voluntary relinquishment of a known right, *or such conduct as warrants an inference of the relinquishment of such right*. It may result from an express agreement *or be inferred from the circumstances indicating an intent to waive*. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waiver them.

(emphasis added). Bowman also goes on to explain when an implied waiver may be recognized:

> An implied waiver may arise where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. An estoppel is a preclusion by act or conduct from asserting a right which might otherwise have existed, to the detriment and prejudice of another who, in reliance on such act or conduct, has acted upon it. A waiver is unilateral and arises by the intentional relinquishment of a right, *or by a neglect to insist upon it*,

> while an estoppel presupposed some conduct or dealing with another by which the other is induced to act, or to forbear to act.

Bowman, 44 Wn.2d at 670 (quoting Kessinger v. Anderson, 31 Wn.2d 157, 168, 196 P.2d 289 (1948)) (emphasis added). Waiver is also an equitable principle that defeats someone's legal rights where the facts support an argument that a party relinquished its rights by delaying in asserting or failing to assert an otherwise available adequate remedy. Albice v. Premier Mortgage Services of Washington, Inc., 174 Wn.2d 560, 569, 276 P.3d 1277 (2012). There is no requirement of showing prejudice to another before a party may be found to have waived a known right. Lake Washington School District No. 414 v. Mobile Modules Northwest, Inc., 28 Wn. App. 59, 61-62, 621 P.2d 791 (1980).

In the present case, McLain's conduct clearly evidenced a waiver of the opportunity for an appeal hearing through his delay and failure to assert his remedy. McLain stopped communicating with the district prior to selecting a hearing officer and abandoned the process for more than a year. The statutory timeline for selecting a hearing officer is fifteen days. See RCW 28A.405.310 (4).

There is no question that McLain was aware of his statutory right to challenge his nonrenewal. McLain knew that he was to be nonrenewed for the ensuing school year and he knew that his teaching contract would expire August 31, 2010. Yet despite the district's repeated letters to McLain reminding him of the need to initiate the process that he had requested, McLain failed to do so.

McLain did not contact the school district at the beginning of the 2010-2011 school year and other staff were hired to fill his position. Similarly, McLain did not contact the district prior to the start of the 2011-2012 school year. From June 2010 (withdrawal of Mr. Gawley's representation) to November 2011, neither McLain nor any representative on his behalf participated in the initial step of selecting a hearing officer. From August 2010 to November 2011, the district heard nothing from McLain. Under these circumstances, McLain clearly waived the opportunity for an appeal hearing by neglecting the appeal process for more than a year.

2. Respondent McLain should be estopped from asserting his right to an appeal hearing after failing to take required steps to pursue his appeal for more than a year.

In addition to his obvious waiver of this opportunity, McLain should be estopped from now attempting to assert his right to a hearing for his 2010 nonrenewal. The doctrine of equitable estoppel

rests on the principle that "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." Emrich v. Connell, 105 Wn.2d 551, 559, 716 P.2d 863 (1986) (quoting Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975)). Estoppel requires three elements: (1) a statement or act inconsistent with the claim afterward asserted; (2) action by the other party based on the act or statement; and (3) injury to such other party if the first party is allowed to contract or repudiate its act. Emrich, 105 Wn.2d at 559; Ferndale v. Friberg, 107 wn.2d 602, 607, 732 P2.d 143 (1987). The specific equitable doctrine giving rise to estoppel in this case is the doctrine of laches. "Laches consists of two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay." Clark County Pub. Util. Distr. No. 1 v. Wilkinson, 139 Wn.2d 840, 848, 991 P.2d 1161 (2000).

McLain's conduct—failing for more than a year to follow through or otherwise pursue his opportunity for a statutory hearing—is plainly inconsistent with his sudden and insistent demand for a hearing following his reappearance in November

2011. The Kent School District reasonably believed that McLain had abandoned his appeal when he simply stopped communicating with the district. To allow a teacher to disappear for nearly two years, only to resurface later and assert his right to a hearing makes little sense and would prejudice a school district. Memories fade over time, and there is a danger that records or files can become scattered or lost. Over an extended length of time, witnesses may no longer be available. The administrator who was responsible for supervising a teacher's plan of improvement may not be able to recall important details or may confuse the teacher with others who have been supervised during the intervening time. These concerns are, in part, why the law contains timelines and statutes of limitation for claims, and no doubt also underlies the very short timelines contemplated by RCW 28A.405.310. Moreover, were McLain to be successful in his appeal hearing, the remedy would be for the district to restore McLain to his employment position. See RCW 28A.405.310 (7) (c). However, a high school staff position cannot be left unfilled for two school years. The district moved forward and hired a teacher to fill McLain's former position, and that staff member has no less right to a continuing employment contract that did McLain. After a

reasonable period of time, a school district should be able to rely on a teacher's failure to pursue an appeal and hire staff to replace that teacher. Allowing the teacher to then return and resurrect this appeal places the district in the untenable potential position of being forced to retain multiple staff on payroll without available positions in which to place them.

3. The district had no obligation to unilaterally petition for a hearing officer and conduct a hearing *ex parte* in McLain's absence.

Throughout this process, McLain has argued that once he asked for an appeal hearing, his responsibilities were completed and he had no statutory obligation to participate or pursue the appeal of his nonrenewal. In fact, McLain has claimed that the district was required to proceed alone, even if that meant that the district and the hearing officer worked together without McLain's presence. CP 39-47.

This position frustrates the plain purpose and clear language of RCW 28A.405.310. As the statutory language clearly set forth, this process is, first and foremost an *opportunity* for hearing. See RCW 28A.405.300. An appeal hearing is not automatic—it is merely the option required by due process for a teacher who chooses to present his or her side of a story. Moreover, the plain language of

the statutes clearly supposes the teacher is at all times *participating* in the process. The employee initiates the appeal by his or her request. Id. The employee has the right to determine whether the hearing be open or closed. RCW 28A.405.310 (2). The employee is permitted to produce witnesses at the hearing. RCW 28A.405.310 (3). The employee must participate in the hearing officer selection process. RCW 28A.405.310 (4). The employee participates in a prehearing conference with the district and the hearing officer. RCW 28A.405.310 (5). In short, the statutes clearly contemplate the employee's involvement throughout the process. An appeal without the appealing employee's participation is patently meaningless, an absurd waste of public funds, and inconsistent with the statutory language. [5]

Simply put, the provisions of chapter 28A.405 RCW should not be given an illogical or absurd interpretation requiring appeal hearings in which an appealing employee takes no interest or part for more than a year. The more logical interpretation of this statute

[5] RCW 28A.405.380 also permits an employee who is discharged, nonrenewed or otherwise adversely affected due to a lack of funding to appeal the determination of probable cause directly to the superior court. If an employee filed such a direct appeal then disappeared and failed to do anything for two years, a consistent application of McLain's argument would seem to require the school district and the superior court follow through with the civil action *ex parte* to complete the discharge or nonrenewal, even with no participation or interest shown on behalf of the employee. It is difficult to imagine the superior court actually proceeding in this manner where an employee abandons his appeal after the initial filing.

is that an employee who has the opportunity for a hearing is required to initiate that process and reasonably participate (or have a designee participate) throughout that process. The employee cannot simply decline to do anything and then expect the district and hearing officer to proceed with his appeal in his absence. An employee who neglects to participate for an unreasonable period of time—absent extraordinary or extenuating circumstances—cannot be said to have truly invoked the opportunity for a hearing. After an opportunity to participate in the process over a reasonable period of time, the results should be no different than if the employee had neglected to appeal in the first place. See RCW 28A.405.310 ("If such employee does not request a hearing as provided herein, such employee may be discharged or otherwise adversely affected as provided in the notice served upon the employee.").

B. The superior court presiding judge erred in appointing a hearing officer pursuant to RCW 28A.405.310 (4), a procedure that does not apply to the facts presented.

When Respondent McLain reappeared after more than a year from the last time he spoke with the district in 2010, he immediately sought to reinitiate the appeal of his contract

nonrenewal through his latest attorney. The district set out the reasons that it believed McLain had waived his statutory opportunity to such an appeal and refused to grant McLain an appeal hearing. McLain then petitioned the superior court to appoint a hearing officer pursuant to RCW 28A.405.310 (4). The superior court presiding judge seemingly relied on this provision to grant the petition and appoint a hearing officer of its own selection. However, the superior court's decision wrongly validated McLain's misuse of the statutory process contained in RCW 28A.405.310 (4). The court's order was error that should be overturned.

For a school district and a teacher in a nonrenewal appeal hearing, RCW 28A.405.310 (4) sets out the procedure for selecting a hearing officer to preside over the appeal. The parties are required to either (1) each appoint a nominee who work together to jointly select a hearing officer; or (2) stipulate to the identity of a hearing officer. Only if the nominees working jointly cannot agree does the following provision become applicable:

> Should said nominees fail to agree as to who should be appointed as the hearing officer, either the board of directors or the employee, upon appropriate notice to the other party, may apply to the presiding judge of the superior court for the county in which the district is located for the appointment of such hearing officer, whereupon such presiding judge shall have the duty to appoint a hearing officer who shall, in the

> judgment of such presiding judge, be qualified to fairly and impartially discharge his or her duties. . . . The district shall pay all fees and expenses of any hearing officer selected pursuant to this subsection.

The language of this statute is clear: before the superior court presiding judge can be petitioned to appoint a hearing officer, the employee and the school district must be engaged in a hearing process. The nominee of each party must work be working together to jointly appoint a hearing officer, and only when the parties "fail to agree as to who should be appointed as the hearing officer" may a petition to the superior court for appointment then be filed. This statutory process is simply intended to resolve a dispute between the parties when they are at an impasse regarding who the hearing officer should be. Nothing in this provision authorizes a teacher to petition the superior court for an order compelling a nonrenewal appeal hearing when the district maintains that a teacher is not entitled to one. The practical effect of the superior court's order was to compel a hearing without affording the district an opportunity to be heard regarding whether such a hearing was appropriate.[6] The granting of the McLain's petition by the superior

[6] In fairness to the presiding judge, he may have been misled by Respondent's representation that the parties had been "unable to agree on a hearing officer to the conduct the hearing as required by statute." CP 4.

court presiding judge was a misuse of the procedure in RCW 28A.405.310 (4) and thus was error.

Instead of using 28A.405310 (4) in a manner for which it was not intended, McLain could have sought a writ of mandamus in the superior court compelling the district to hold a hearing. See, e.g., Walker v. Munro, 124 Wn.2d 402, 407-08, 879 P.2d 920 (1994) ("Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance."). McLain could have filed his case with the King County Superior Court under the provisions of RCW 28A.645.010, which allow any person aggrieved by any decision or order of a school official or school board to file such an action.[7] This process would have permitted the parties to be heard on whether a statutory hearing was available or whether such a right had been waived. Such a proceeding would have permitted the parties to brief and argue their legal positions and the court would have likely issued findings and conclusions regarding the

[7] RCW 28A.645.101 states that "[a]ppeals by teachers, principals, supervisors, superintendents, or other certificated employees from the actions of school boards with respect to discharge or other action adversely affecting their contract status, or failure to renew their contracts for the next ensuing terms shall be governed by chapters 28A.400 and 28A.405 RCW and therefor in all other cases shall be governed by chapter 28A.645 RCW." In other words, while chapter 28A.405 RCW governs the appeal process, "all other cases" would include whether a teacher was entitled to an appeal hearing in the first place.

appropriateness of a hearing. That matter could then have been reviewed by appellate courts if either party chose to seek such review.

The petition procedure of RCW 28A.405.310 (4) provides no such due process protections. In fact, by transferring this matter to a hearing officer and forcing the district to argue waiver and/or estoppel in that forum, the superior court eliminated any possibility that the school district would have been able to have such issues heard by a court. See Federal Way School District v. Vinson, 172 Wn.2d 756, 765-67, 261 P.3d 145 (2011) (a school district may not seek judicial review of an adverse decision by a hearing officer).

In short, RCW 28A.405.310 (4) presumes that the parties are engaged in a nonrenewal or discharge hearing, but simply cannot agree who should preside over the hearing. The use of this statutory petition to compel the district to grant McLain an appeal hearing over the district's objection was error. If a school district refuses to participate in an employment appeal hearing because it believes that the opportunity for such a hearing has been waived by the passage of time, the employee demanding such a hearing should seek a writ of mandamus in the superior court ordering the

district to fulfill this duty under the provisions of chapter 28A.645 RCW.

C. The superior court, not an administrative hearing officer in a nonrenewal hearing, should decide whether the teacher has waived the right—or should be estopped from asserting such a right—to an appeal hearing in the first place.

When the presiding judge appointed a hearing officer despite the district's objection that Respondent McLain had waived the opportunity for such a hearing, he did not explicitly order the hearing officer to decide the issue of waiver and/or estoppel. However, it is reasonable to assume that the presiding judge's order was intended to defer this decision to the hearing officer, where the issue of timeliness and opportunity for a hearing could be briefed, argued, and decided. Unfortunately, such a decision would put a school district at a significant disadvantage and substantially limits the district's ability to correct any errors that the hearing officer might make. As noted above, the Washington Supreme Court recently held that the legislature did not intend for school districts to have the right to seek review in the superior from adverse decisions by a hearing officer. Federal Way School District v. Vinson, supra. If the hearing officer errors in his or her application of chapter 28A.405 RCW to McLain's failure in pursuing

his appeal, the district is significantly limited in its ability to correct such error.

In addition, submitting a case to a hearing officer to determine whether an employee is entitled to hearing before a hearing officer renders meaningless one of the district's objections to such a hearing in the first place. A school district has an obligation to be a wise steward of the public funds that it administers. One of the reasons that the school district objects to engaging in an appeal hearing an employee is not entitled to such process is that doing so is a waste of public funds. See RCW 28A.405.310 (4) ("The district shall pay all fees and expenses of any hearing officer selected pursuant to this subsection.") Being forced to appear in front of a hearing officer—even if the hearing officer rules that no such hearing is warranted—burdens the district with fees and expenses that it should not be required to pay if, in fact, the employee has waived a right to such a hearing.

Finally, it must be acknowledged that while employment hearing officers are typically experts in the field of labor principles and familiar with relevant statutes or regulations governing employers, a hearing officer may not be a lawyer or otherwise adequately trained in general legal principles. The doctrine of waiver, estoppel, and

laches may be beyond a hearing officer's area of expertise. The superior court is a better forum for addressing such concerns.

V. CONCLUSION

For the reasons state above, the Appellant Kent School District respectfully requests this court to vacate the superior court order appointing an administrative hearing officer and requiring the district to engage in an administrative hearing with Respondent McLain. McLain waived his opportunity to such a hearing provided under chapter 28A.405 RCW by abandoning the process and failing to take necessary steps for more than a year to pursue the appeal he requested. He has not demonstrated any extraordinary or exceptional circumstances that would justify this lengthy failure to act.

Moreover, RCW 28A.405.310 (4) is not a procedure intended to compel an appeal hearing over objections that the right to such a hearing is subject to waiver or estoppel. A certificated public school employee who believes that he or she is entitled to a hearing to challenge his or her contract nonrenewal should seek to have the superior court compel the district to fulfill this duty.

Similarly, Appellant asks this court to conclude that an administrative hearing under RCW 28A.405.310 is not the proper forum for deciding whether a public school teacher's failure to pursue an appeal, as a matter of law, constitutes a waiver or estoppel that excuses a school district from its statutory obligation to engage in such a hearing. If a school district believes that a teacher has waived his right to a statutory appeal and refuses in good faith to grant the teacher a hearing, the proper forum for challenge is the superior court. This mechanism provides the school district an opportunity to be heard and—unlike an adverse ruling by a hearing officer under chapter 28A.405 RCW—permits *all* parties an opportunity to appeal an adverse and potentially erroneous decision.

Respectfully submitted the 27th 8th day of ~~September~~ October, 2012.

By: _____
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Attorney for Kent School District

CERTIFICATE OF MAILING

I hereby certify under penalty of perjury under the laws of the State of Washington that on October 8, 2012, I delivered via email, as well as placing in the U.S. Mail, a copy of the Opening Brief of Appellant in this matter No. 68373-0, to the Court of Appeals Division One, and to plaintiff's counsel, Douglas M. Wartelle, at dmw@cnrlaw.com and at the following postal address: 32 Square, 3232 Rockefeller Avenue, Everett, WA 98201.

Signed and dated this 8th day of October, 2012 in Kent, Washington.

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