90031-1

NO. 68373-0

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JAMES McLAIN,

Respondent,

vs.

KENT SCHOOL DISTRICT, NO. 415,

Appellant.

PETITION FOR DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

COGDILL NICHOLS REIN
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I. IDENTITY OF PETITIONER

This *Petition For Discretionary Review To The Washington State Supreme Court* is filed by the Respondent, James McLain, (hereinafter "McLain"), pursuant to RAP 13.4.

II. CITATION TO COURT OF APPEALS DECISION

McLain seeks review, and reversal, of the decision of the Court of Appeals filed December 16, 2013, No. 68373-0, Division One. *See, Appendix A.* Reference is also made to the Order denying McLain's Motion For Reconsideration, filed January 27, 2014, and McLain similarly seeks review and reversal of that decision. *See, Appendix B.*

III. ISSUE PRESENTED FOR REVIEW

Should this Court accept review of the decision of the Court of Appeals denying McLain a hearing under Washington's continuing contract law applicable to certificated public school instructional staff on the basis that said decision raises a significant issue of law under

the Constitution of Washington, or on the basis that the petition involves an issue of substantial public interest?

IV. STATEMENT OF THE CASE

McLain was a certificated instructional employee (teacher) with the Kent School District. The District sought to nonrenew McLain's continuing contract due to alleged performance deficiencies and issued to McLain a *Notice of Probable Cause* under RCW 28A.405.300. McLain timely availed himself of his right to file an appeal of said *Notice of Probable Cause*, and did so, again, as provided in RCW 28A.405.300. McLain and the District did not agree upon a hearing officer to serve under RCW 28A.405.310, and McLain made application to the Presiding Judge for King County Superior Court for the appointment of a hearing officer, all in accordance with RCW 28A.405.310. The Superior Court appointed a hearing officer qualified to serve in that capacity. The District appealed

the appointment of the hearing officer on the grounds that McLain waited too long to apply to the Superior Court for the same, notwithstanding the fact that the District similarly delayed, and further that the District shoulders the burden of prosecuting to conclusion its effort to discharge McLain.

V. ARGUMENT ON MOTION FOR RECONSIDERATION

The Washington State Supreme Court should accept review of this matter on the grounds that the case involves an issue of substantial public interest that should be determined by the Supreme Court, and the case raises a significant question of law under the Constitution of the State of Washington.

1. The Court Of Appeals' Decision Is Contrary To Washington Law And Denies McLain His Right To Hearing Prior To Discharge.

The authority of a Superior Court Judge to appoint a Hearing Officer under RCW 28A.405 et. seq. arises from RCW 28A.405.300 and RCW

28A.405.310. Those statutory provisions provide that when parties to a statutory appeal under RCW 28A.405.300 do not agree on a Hearing Officer, the Presiding Judge in the County in which the dispute is situated is to appoint a Hearing Officer. That is what occurred here.

The Court of Appeals' decision is contrary to Washington law, and effectively denies McLain his substantive and procedural due process rights under Washington's continuing contract law. *See*, Giedra v. Mount Adams School Dist. No. 209, (2005) 126 Wn.App. 840, 110 P.3d 232, *reconsideration denied, review denied*, 156 Wn.2d 1016, 132 P.3d 147; Daly v. Shelton School Dist. 309, (1970) 3. Wn.App. 348, 475 P.2d 897; Foster v. Carson School Dist. No. 301, (1963) Wn.2d 29, 385 P.2d 367; Hoagland v. Mount Vernon School Dist. No. 320, 1981 95 Wn.2d 424, 623 P.2d 1156; Lines v. Yakima Public School, Yakima School Dist. No. 7, (1975) 12 Wn.App. 939, 533 P.2d 140.

Some background as to the continuing contract law in Washington is necessary. The general purpose of RCW 28A.405.300, and the hearing procedures that follow under RCW 28A.405. et. seq., can be expressed as follows:

> "(1) To implement "the sound public policy of retaining in the public school system competent and capable teachers and supervisory personnel who have become increasingly valued by reason of their experience. This works not only to the advantage of the employees but of the public and those concerned with the administration of the school system. AGO 55-57, No. 51, at p.2.
>
> (2) To protect employees of school districts from arbitrary dismissal. Hill v. Dayton School District, 10 Wn.App. 251, 517 P.2d 223 (1973), reversed on other grounds, 85 Wn.2d 204 (1975), citing Foster v. Carson School District, 63 Wn.2d 29, 385, P.2d 367 (1963).
>
> (3) To eliminate uncertainty in the employment plans of both the teacher and the school district for the ensuing term . . . Robel v. Highline School District, 65 Wn.2d 477, at 483, 398 P.2d 1 (1965).
>
> (4) To create a form of civil service or merit system employment . . . (a) teacher has achieved a legal

> equivalent of appointment by examination, for he or she cannot even be appointed to a teaching position without possessing the professional qualifications prescribed by law, and evidenced by "an effective teacher's certificate or other certificate required by law of the State Board of Education." RCW 28A.67.070. Rightful possession or entitlement to such a certificate makes one a "certificated employee." These provisions alone should constitute at least the legal equivalent of a civil or merit system certificate of standing in the examinations. Secondly the school board, in employing teachers, must take only those who possess the requisite professional qualifications evidenced by a state certificate. RCW 28A.67.070. The board is not a freely negotiating employer; its contract with the teachers must conform to the laws of the state."
>
> Justice Hale dissenting in Pierce v. Lake Washington School District, 84 Wn.2d 772 at 790 (1974).

The provisions of RCW 28A.405 define the minimum rights applicable to certificated employees in the State of Washington. RCW 28A.405.300 is known as the discharge statute; and RCW 28A.405.310 gives the statutorily appointed hearing officer certain rights and

authority. These statutes, as to discharge matters (adverse action), constitute the "continuing law contract." Under the discharge statutes, and under common law prior to their enactment, the burden is/was on the school district to "establish by a preponderance of the evidence" that there is "sufficient cause or causes" for discharge.

Prior to 1943, a school district had no obligation to a certificate employee at the end of the one-year period; the contract was simply terminated according to its terms. Seattle High School Chapter 200 v. Sharples, 159 Wn. 424, 293 P. 994 (1930). In 1943, the Washington State Legislature passed the predecessor to RCW 28A.405.210. The law then provided as follows:

> "Every teacher, principal, supervisor or superintendent holding a position s such with a school district, whose employment contract is not to be renewed by the district for the next ensuing term, shall be notified in writing on or before April 15 preceding the commencement of such term of the decision of the board of directors not to renew his or her employment and the

> reason or reasons therefore, and if such notification is not timely given by the district, the teacher, principal, supervisor or superintendent entitled thereto shall be conclusively presumed to have been reemployed by the district for the next ensuing term upon contractual terms identical to those which would have prevailed if his or her employment had actually been renewed by the board of directors for such ensuing term . . . ." Chapter 52, Sec. 1, pp. 95-96, Laws of 1943.

In short, the employee's one year contract was "renewed" or "continued" for the next year, unless the district: (1) Gave written notice by April 15, and (2) Stated the reason or reasons in the notice. In 1955, the Legislature amended the continuing contract law by adding to these requirements that a school district could "nonrenew" an employee's contract only if the district: (1) Had "sufficient cause or causes" for nonrenewal; (2) Gave the employee an opportunity for a hearing before the school board; and (3) "Proved and established at the hearing" the cause or causes to be sufficient. If the district failed to meet these

requirements, the employee's contract was continued. Chapter 68, Sec. 415, Laws of 1955.

In 1969, the Legislature again amended the law providing for an optional direct appeal to superior court for all nonrenewals, i.e. for cause or economic reasons. That was subsequently changed by Laws of the 2nd Ex. Sess., 1975-76, Chapter 114, Sec.2, whereby the hearing officer procedure was first instituted, but preserving the sufficient cause requirement, hearing opportunity and preponderance of evidence tests and standard. This change was codified in RCW 28A.405.310, and was subsequently amended again in Laws of 1st Ex. Sess., 1977, Chapter 7, Sec. 2, whereby the decision of the hearing officer was final subject to subsequent appeal to the superior court.

In summary, the continuing contract law in Washington has a history spanning in excess of 50 years, with the discharge statute, RCW

28A.405.300, having first been enacted in 1961, Chapter 241, Sec. 2. The right of continuing contract employees to a hearing prior suffering adverse action is matter substantial public interest.

A school district's "cause or causes for nonrenewal or discharge" are those factors which "cause" the district to seek to terminate the employment of a person. RCW 28A.405.300 requires a district to specify in writing its causes or reasons for adverse action (ie, discharge). With respect to the hearing procedure, RCW 28A.405.300 provides through RCW 28A.405.310 for a full fact-finding hearing culminating in a written decision. The hearing officer sits as the tribunal of first resort and substitutes his judgment for that of the officer making the determination of probable cause, the District. The hearing, since it is the first hearing, must be de novo because the District has made only a "probable" decision and not a

final decision as to the sufficiency of the cause or causes.

The hearing officer must follow the rules of evidence, make appropriate rulings of law, make rulings as to the admissibility of evidence, make his or her decision within 10 days following the conclusion of the hearing, and award attorney's fees if the hearing officer restores the employee to his or her position. *See* RCW 28A.405.310(7) and (8).

Pursuant to RCWs 28A.405.300 and 28A.405.310, where the employee appeals from a probable cause determination to a hearing officer, there is no full due process hearing until a hearing is conducted by the hearing officer and hence there could be no final decision until the hearing officer decides whether probable cause and sufficient cause exist.

Under RCW Title 28A it has been held that where a district, instead of making a probable

cause determine, makes a final determination to terminate a teacher's employment prior to affording him notice and an opportunity for hearing, such action renders the district's decision void, and entitled the employee to reinstatement of his employment. Foster v. Carson School District, 63 Wn.2d 29 (1963). The reason for this is that the employee has a statutory and due process right under the continuing contract law to a hearing prior to a decision terminating his employment.

The discharge statutes have consistently been interpreted to mean that if it is found that the statutory procedures have not been followed, or if the District cannot prove by a preponderance of evidence that sufficient cause for discharge of the certificated employee exists, the hearing officer must then order reinstatement.

McLain must be provided with a hearing prior to his contract with the District being adversely affected. RCW 28A.405.300 provides:

> In the event it is determined that there is probable cause or causes for a teacher, principal, supervisor, superintendent, or other certificated employee, holding a position with the school district, hereinafter referred to as "employee", to be discharged or otherwise adversely affected in his or her contract status, such employee shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action. Such determinations of probable cause for certificated employees, other than the superintendent, shall be made by the superintendent. Such notices shall be served upon that employee personally, or by notice at the house of his or her usual abode with some persons of suitable age and discretion then resident therein. **Every such employee so notified, at his or her request made in writing and filed with the president, chair of the board or secretary of the board of directors of the district within ten days after receiving such notice, shall be granted opportunity for a hearing pursuant to RCW 28A.405.310 to determine whether or not there is sufficient cause or causes for his or her discharge or other adverse action against his or her contract status.**
>
> **In the event any such notice or opportunity for hearing is not timely given, or in the event cause for discharge or other adverse action is not established by a**

> **preponderance of the evidence at the hearing, such employee shall not be discharged or otherwise adversely affected in his or her contract status for the causes stated in the original notice for the duration of his or her contract.**
>
> 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.
>
> Transfer to a subordinate certificated position as that procedure is set forth in RCW 28A.405.230 shall not be construed as a discharge or other adverse action against contract status for the purposes of this section.
>
> Wash.Rev.Code, 28A.405.300 [emphasis added].

The plain language of RCW 28A.405.300 makes clear that McLain may not be adversely affected in his contract status before there is a hearing and decision to determine whether such action is justified. Washington cases addressing this issue, and interpreting RCW 28A.405.300, yield the same conclusion. *See*, Benson v. Bellevue School District, No. 405, 41 Wn.App. 730 (1985); Foster v. Carson School District, No. 301, 63

Wn.2d 29 (1963); Noe v. Edmonds School District, No. 15, 85 Wn.2d 97 (1973).

2. The Court Of Appeals Decision Being Contrary To RCW 28A.405.310(7)(b) Raises An Issue Of Substantial Public Interest.

The decision of the Court of Appeals is contrary to RCW 28A.405.310(7)(b) which provides that the Hearing Officer is to make rulings of law and procedure. Wash.Rev.Code 28A.405.310(7)(b). The Superior Court, as noted above, had the limited authority to appoint a Hearing Officer, and did so. The Court of Appeals, exceeded its authority under Washington law, as decisions of law and procedure are specifically reserved for the Hearing Officer. The lengthy history of the continuing contract law in Washington, coupled with the Court of Appeals decision contrary to the same, raises an issue of substantial public importance such that the Supreme Court should accept review.

3. The Court Of Appeals Decision Being Contrary To RCW 28A.405.300 Raises An Issue Of Substantial Public Interest

The Court of Appeals decision is contrary to RCW 28A.405.300 which provides that once an employee situated as is McLain files a "notice of appeal" under RCW 28A.405.300, the employee is entitled to a hearing to determine if there is sufficient cause for the adverse action sought the by the school district (here, the Kent School District). The Court of Appeals, by ruling as it has, has denied McLain his right to a hearing before the Hearing Officer appointed by the Superior Court. This raises, again, an issue of substantial public interest as the effect of the decision, significantly impacts the entire continuing contract law in Washington.

4. The Decision Of The Court Of Appeals Improperly Interprets RCW 28A.405.310

RCW 28A.405.310 is clear that if the parties cannot agree upon a Hearing Officer *either party may apply to the Superior Court for the appointment of the same.* The statute does not place upon either McLain or the District a requirement to "cooperate" as which seems to be the notion of the District, and does not require either McLain or the District to provide any explanation as to why the parties cannot agree upon a Hearing Officer in application for the appointment of the same. Here, the District could have sought the appointment of a Hearing Officer under RCW 28A.405.310 - it did not do so, and RCW 28A.405.310 does not place the burden of seeking the appointment of Hearing Officer *solely* upon McLain, nor does the statute require such a petition to be filed by McLain within any specified period of time. The decision of the Court of Appeals is contrary to

RCW 28A.405.310(4), imposes obligations upon McLain (and those availing themselves of their statutory appeal rights under RCW 28A) which cannot be found in the statute, and further such matters should be determined by the Supreme Court.

5. The Court Of Appeals Incorrectly Ruled Upon Appellant's "Waiver" Argument

A waiver of a right must be predicated on conduct which the person *knows* has effect of relinquishing his or her right. McDaniels v. Carlson, 108 Wn.2d 299, 308, 738 P.2d 254 (1987). The record here does not establish that McLain knew he was relinquishing his statutory right to a hearing under RCW 28A.405.300 et. seq. There is nothing in the statutory appeal procedures from which McLain could have discerned that any lack of communication alone would serve to relinquish his statutory appeal rights.

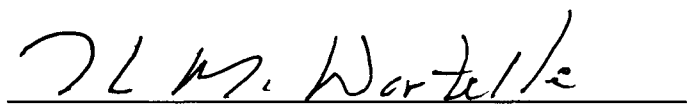
McLain cannot be said to have waived his right to a statutory hearing under RCW 28A.405.300 et. seq. when, in fact, he asserted his right to such a hearing by filing his notice of appeal. The Court of Appeals decision to the contrary strips McLain of his rights under Washington law to a hearing, as a school district employee covered by the continuing contract law, and there is a substantial public interest in review by the Supreme Court.

VI. CONCLUSION

McLain's *Petition For Discretionary Review To The Washington State Supreme Court*, for the reasons set forth herein, should be granted.

RESPECTFULLY SUBMITTED this 25TH day of February, 2014.

Cogdill Nichols Rein Wartelle Andrews Vail



Douglas M. Wartelle, WSBA #25267
Attorney For Respondent

CERTIFICATE OF MAILING

I hereby certify under penalty of perjury under the laws of the State of Washington that on February 25, 2014, I delivered via email, as well as delivering via legal messenger, a copy of the Petition for Discretionary Review to the Washington State Supreme Court in this matter No. 68373-0, to the Court of Appeals Division One, and to appellant's counsel, Charles Lind, at the following address:

Sent via Email/Hand-Delivery
Charles Lind
Patterson Buchanan Fobes & Leitch
2112 – 3rd Avenue, Suite 500
Seattle, WA 98121-2326
Email: cwl@pattersonbuchanan.com

Dated this 25th day of February, 2014 in Everett, Washington.

Heidi Allen

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES MCLAIN, Respondent, v. KENT SCHOOL DISTRICT, NO. 415, Appellant.	)	No. 68373-0-I DIVISION ONE PUBLISHED OPINION FILED: December 16, 2013

SCHINDLER, J. — Where a teacher appeals the decision of a school district to not renew a teaching contract under RCW 28A.405.210 and timely requests an administrative hearing, RCW 28A.405.310 sets forth the procedure and deadlines that must be followed to select a hearing officer. The statute authorizes the presiding judge of the superior court to appoint a hearing officer only if the school district and the teacher "fail to agree as to who should be appointed."[1] James McLain timely appealed the decision of the Kent School District (District) to not renew his teaching contract for the 2010-2011 school year but did not comply with the statutory procedure or deadlines to select a hearing officer and schedule a hearing. Fifteen months later, McLain sought to pursue the appeal and filed a motion to appoint a hearing officer. The presiding judge of King County Superior Court granted the motion and directed the parties to contact the hearing officer within 10 days. Because the undisputed facts establish

[1] RCW 28A.405.310(4).

McLain waived his right to an administrative hearing under chapter 28A.405 RCW, we reverse and vacate the order.

FACTS

The facts are undisputed. On February 23, 2010, the superintendent of the Kent School District notified James McLain of the decision to not renew his teaching contract. The District informed McLain that lack of improvement during the probationary period established probable cause to not renew the teaching contract for the 2010-2011 school year. The notice states McLain must contact the District within 10 days to contest the decision through an administrative hearing under RCW 28A.405.310.

On March 1, Washington Education Association attorney Michael Gawley sent a letter to the District appealing the decision to not renew McLain's teaching contract. Gawley and the attorney for the District discussed the selection of "possible hearing officers and possible resolutions to this matter." But first Gawley wanted to review the documents supporting the decision. The District provided Gawley with approximately 340 pages of documentation concerning the decision to not renew the teaching contract.

In June, Gawley notified the District that "he may no longer represent [McLain]" in the appeal. On July 12, Gawley sent a letter confirming his withdrawal and instructed the District to contact McLain "directly to make arrangements with respect to the further prosecution of his appeal."

In a letter to McLain dated July 13, the District informed McLain that his contractual relationship with the District would end on August 31 and "[i]f you choose to continue your appeal of the nonrenewal of your teaching contract, you or your legal

counsel must contact [the lawyer representing the District] within ten (10) days of receiving this letter" to select a hearing officer and agree on the time line for the appeal under RCW 28A.405.310. The letter states, in pertinent part:

> Today, July 13, we received written confirmation that Mr. Gawley no longer represents you and that we are to contact you directly to make arrangements regarding any further appeal.
>
> Your contractual relationship with the Kent School District will end August 31. If you choose to continue your appeal of the nonrenewal of your teaching contract, you or your legal counsel must contact [the lawyer representing the District] within ten (10) days of receiving this letter. At that time, we will confer to agree upon a hearing officer and, once a hearing officer has been selected, confer again on the timeline for your appeal pursuant to RCW 28A.405.310. If you choose not to contest the nonrenewal any further, you may contact Legal Services to notify us of such or simply disregard this notice, in which case the right to a hearing will be deemed waived.

In a letter to the District dated July 27, McLain states, "I am continuing with the appeal of the termination of employment . . . . I have secured my own attorney . . . . I intend to file suit against [the District] for wrongful termination and discrimination." McLain also requested the District provide "all emails that were in my folder" and stated that his "attorney will also be demanding all papers, letters, evaluations, emails and files." But the letter did not identify the attorney.

In a letter dated August 3, the District acknowledged receipt of the July 27 letter and asked McLain to have his attorney contact the attorney for the District. The letter states, in pertinent part:

> I have received your letter dated July 27 notifying us that you are continuing the appeal of your nonrenewal. You stated that you have secured your own attorney, but you did not mention the name or contact information for your counsel. Since you are represented on this matter, it is inappropriate for me to have further direct contact with you. The rules of professional conduct require that our interactions be channeled through

> your legal representative. This includes requests for discovery or other documents associated with this appeal.
>
> Please have your attorney contact me as soon as possible.

On August 17, the District received a public records[2] request from an attorney representing McLain. The letter from attorney Mary Ruth Mann states, in pertinent part:

> Our office represents James McLain with respect to the matters discussed below.
>
> **PUBLIC RECORDS REQUEST**
>
> In order that we be able to evaluate Mr. McClain's [sic] situation, please provide a copy of his complete personnel file, supervisory and administrative notes and communications about him, and all electronic correspondence about him during the past 4 years including emails to and from and between any administrator, school board member, principal, assistant principal, parent, student, political figure, agent of the district, lawyer, consultant or any other person.[3]

The attorney for the District left a voice mail for Mann and sent a letter seeking to obtain McLain's consent to release his employment records. The letter to Mann also asks whether McLain was pursuing the administrative appeal. If so, the letter requests McLain designate and authorize his nominee to contact the nominee for the District to "jointly identify potential hearing officers." The letter states, in pertinent part:

> As I mentioned in my voice mail message, the district received your request for records associated with your client, James McLain. . . .
>
> To expedite your request and reduce the exemptions and/or redactions that we might otherwise make to a Public Records Act request, it would be helpful if Mr. McLain put something in writing acknowledging your representation and consenting to accessing all of his employment records. You could scan that and simply send it to us electronically by email, if it would be easier. In the meantime, we will begin collecting the records that you have requested.
>
> . . . .
>
> In my voice mail message I also mentioned that your client earlier requested to appeal the determination of just cause for his nonrenewal pursuant to the statutory process of RCW 28A.405.310. I am the Board of Directors' nominee for selecting a hearing officer for this process. If Mr. McClain [sic] chooses to continue through this statutory process and you

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[2] Public records act, chapter 42.56 RCW.

[3] (Emphasis in original.)

> have your client's authority to act as his nominee, please let me know and we will jointly identify potential hearing officers.

In a letter dated August 19, Mann states legal representation of McLain is limited to the public records request. The District then sent a letter to McLain instructing him to contact the District within three business days if he wanted to pursue the administrative appeal. The August 19 letter to McLain states:

> Today I received an electronic copy of a letter from the law firm of your attorney, Mary Ruth Mann. The letter indicates that you were sent a copy as well. Ms. Mann's office states that although she has initiated a records request on your behalf, neither she nor her firm is representing you with regards to a hearing under RCW 28A.405.310 at this time.
>
> If you choose to go forward with this statutory hearing on your own, it is your responsibility to contact me at the district's Legal Services office within three business days of receiving this letter to initiate the process. I am the Board of Directors' nominee for selecting a hearing officer and the process is initiated by jointly identify[ing] potential hearing officers.
>
> To make arrangements for choosing a hearing officer, you should telephone my office.[4]

McLain did not respond to the August 19 letter. His teaching contract for the 2009-2010 school year expired on August 31, 2010. McLain did not contact the District at any point during the 2010-2011 school year or before the beginning of the following school year. For the first time in November 2011, an attorney representing McLain contacted the District in an effort to pursue the administrative appeal of the decision to not renew McLain's teaching contract for the 2010-2011 school year. The District took the position that by failing to timely "follow through or appoint a designee to follow through with his hearing request," McLain abandoned his right to a hearing under chapter 28A.405 RCW.

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[4] (Emphasis omitted.)

On January 12, 2012, McLain filed a "Petition for Appointment of Hearing Officer Pursuant to RCW 28A.405.310(4)" to be heard on February 6 without oral argument. In support of the petition, McLain submitted the declaration of his attorney and a copy of the March 1, 2010 letter from McLain's former attorney appealing the probable cause determination "pursuant to Chapter 28A.405 RCW." The attorney concedes the statute only allows the presiding judge to appoint a hearing officer after the District and the employee appoint a nominee within 15 days of the request for a hearing and the nominees are unable to agree on the appointment of a hearing officer.[5] Nonetheless, the attorney asserts that "Gawley, Petitioner's previous legal counsel, was initially appointed as Petitioner's nominee for purposes of appointment of a hearing officer," and as "current legal counsel, [I] am appointed by Mr. McLain for purposes of selection of a hearing officer." The attorney then asserts that the nominees "have been unable to agree on a hearing officer to conduct the hearing as required by statute." The declaration states, in pertinent part:

> [The District nominee] and I have been unable to agree on a hearing officer to conduct the hearing as required by statute. Because Petitioner's and Respondent's nominee are unable to agree on a hearing officer, Petitioner now petitions this Court for appointment of a hearing officer to hear and decide the case.

---

[5] The declaration states, in pertinent part:

The procedure for appointment of a hearing officer specified by RCW 28A.405.310(4) is as follows: Within 15 days of the date of the employee's request for hearing, the district and the employee each are to appoint one nominee. The nominees are to jointly appoint a hearing officer who must 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. If the two parties' nominees are unable to agree on the appointment of a hearing officer, either party may, upon appropriate notice to the other party, apply to the presiding judge of the superior court for the county in which the district is located for the appointment of the hearing officer. The statue specifies that the presiding judge thereupon "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." [RCW 28A.405.310(4).] The statute further provides that the school district shall pay all fees and expenses of the hearing officer selected.

The District filed a motion to deny the petition to appoint a hearing officer and requested oral argument. The District argued McLain waived his right to an administrative hearing by failing to respond for over 15 months to the repeated requests to jointly appoint a hearing officer and schedule the hearing. The attorney for the District submitted a declaration describing the procedural history. The attorney asserts, "The parties did not 'fail to agree' on a hearing officer appointment—Petitioner's legal representative withdrew and Petitioner took no action for two more school years to either complete this process himself or find another lawyer to contact the district until November 201[1]." The attorney also pointed out that if McLain "believes that he was wrongly nonrenewed, Petitioner can litigate this matter."

The presiding judge considered the motion without oral argument and entered an order appointing a hearing officer and directing the parties to contact the hearing officer within 10 days.

The District filed a notice of discretionary review of the order. The District argued the court committed probable error substantially altering the status quo or substantially limiting a party's freedom to act under RAP 2.3(b)(2). We granted the motion for discretionary review.

ANALYSIS

The District contends the presiding judge did not have the authority to appoint a hearing officer under RCW 28A.405.310(4) and McLain waived his right to an administrative hearing under chapter 28A.405 RCW. McLain argues that after timely filing a notice of his intent to appeal the decision to not renew his teaching contract, he

had no obligation to participate in the selection of a hearing officer under RCW 28A.405.310.

Where the facts are not in dispute, review is de novo. Wash. Equip. Mfg. Co. v. Concrete Placing Co., 85 Wn. App. 240, 244, 931 P.2d 170 (1997). The interpretation and meaning of a statute is a question of law that we also review de novo. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Our fundamental objective is to ascertain and carry out the intent of the legislature. Campbell & Gwinn, 146 Wn.2d at 9-10. We first look to the language of the statute to determine legislative intent. Campbell & Gwinn, 146 Wn.2d at 9-10. If the statute is unambiguous, we interpret the plain language of the statute as written. Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). A statutory provision must be read in its entirety and within the context of the statutory scheme as a whole. ITT Rayonier, Inc. v. Dalman, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). We give meaning to every word and must avoid an interpretation that would produce an unlikely, absurd, or strained result. In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000); Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002); State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).

The undisputed record establishes that because McLain did not comply with the mandatory procedure to select a hearing officer, the presiding judge did not have the authority to enter an order appointing a hearing officer under RCW 28A.405.310(4). The plain language of the statute does not support McLain's argument that by notifying the District of his intent to appeal, he had no responsibility to participate in the selection

of a hearing officer and the District had an obligation to unilaterally select a hearing officer and proceed with the hearing.[6]

Under RCW 28A.405.210, a school district has the right to not renew the contract for a certified teacher for probable cause. A teacher filing a request to appeal within 10 days of receiving the notice of nonrenewal "shall be granted [the] opportunity for hearing pursuant to RCW 28A.405.310 to determine whether there is sufficient cause or causes for nonrenewal of contract." RCW 28A.405.210. RCW 28A.405.210 states, in pertinent part:

> In the event it is determined that there is probable cause or causes that the employment contract of an employee should not be renewed by the district for the next ensuing term such employee shall be notified in writing on or before May 15th preceding the commencement of such term of that determination, . . . which notification shall specify the cause or causes for nonrenewal of contract. Such determination of probable cause for certificated employees, other than the superintendent, shall be made by the superintendent. Such notice shall be served upon the employee personally, or by certified or registered mail, or by leaving a copy of the notice at the house of his or her usual abode with some person of suitable age and discretion then resident therein. Every such employee so notified, at his or her request made in writing and filed with the president, chair or secretary of the board of directors of the district within ten days after receiving such notice, shall be granted opportunity for hearing pursuant to RCW 28A.405.310 to determine whether there is sufficient cause or causes for nonrenewal of contract.

RCW 28A.405.310 states that within 15 days of receiving the request for an administrative hearing, the teacher and the District must designate a nominee to jointly agree to a hearing officer: "Within fifteen days following the receipt of any such request

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[6] The cases McLain cites also do not support his argument. See Benson v. Bellevue Sch. Dist. No. 405, 41 Wn. App. 730, 735-37, 707 P.2d 137 (1985) (under former RCW 28A.58.450 (1976) governing discharge for cause, principal's demotion was ineffective because "employee cannot be notified of the discharge as a fait accompli but must first be afforded an opportunity to be heard"); Noe v. Edmonds Sch. Dist. No. 15, 83 Wn.2d 97, 104, 515 P.2d 977 (1973) (under former RCW 28A.58.450 (1969), district could not summarily place teacher on probation and reduce her salary without notice and opportunity for hearing); Foster v. Carson Sch. Dist. No. 301, 63 Wn.2d 29, 32-33, 385 P.2d 367 (1963) (under former RCW 28.58.450 (1961) governing discharge for cause, teacher discharged without timely notice entitled to appeal directly to superior court).

. . . the district . . . and the employee . . . shall each appoint one nominee," who must in turn "jointly appoint a hearing officer." RCW 28A.405.310(4).[7] RCW 28A.405.310(4) sets forth mandatory procedures to select a hearing officer and pursue the appeal. RCW 28A.405.310(4) states, in pertinent part:

> In the event that an employee requests a hearing pursuant to RCW 28A.405.300[8] or 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.

If the nominees "fail to agree" on the selection of a hearing officer, either party may file a petition with the presiding judge of the superior court to appoint a hearing officer. RCW 28A.405.310(4). But the plain and unambiguous language of RCW 28A.405.310(4) authorizes the presiding judge to appoint a hearing officer only if the nominees "fail to agree as to who should be appointed as the hearing officer." RCW 28A.405.310(4) states, in pertinent part:

> 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.

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[7] (Emphasis added.)

[8] RCW 28A.405.300 applies to a teacher "discharged or otherwise adversely affected in his or her contract status" and is not applicable here.

The statute does not define "fail to agree." Because "fail to agree" is undefined, we look to the ordinary meaning of the term. Am. Legion Post No. 149 v. Dep't of Health, 164 Wn.2d 570, 592, 192 P.3d 306 (2008). Webster's Third New International Dictionary 814 (2002) defines "fail" to mean "miss attainment : fall short of achievement or realization." Webster's Third New International Dictionary at 43 defines "agree" to mean "to concur in [:] to give assent : express approval : ACCEDE . . . to a plan."[9]

Here, the nominees for the District and McLain did not "fail to agree" on the selection of a hearing officer under RCW 28A.405.310(4). The undisputed record establishes McLain waived his right to pursue the administrative appeal of the decision to not renew his contract for the 2010-2011 school year.

Waiver is an equitable doctrine that can defeat a legal right where the facts show that the party relinquished a known right, or conduct shows the party relinquished known rights. Schroeder v. Excelsior Mgmt. Grp., LLC, 177 Wn.2d 94, 106, 297 P.3d 677 (2013).

> Most rights can be waived by contract or conduct. Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). "The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled. 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." [Bowman, 44 Wn.2d at 669].

Schroeder, 177 Wn.2d at 106; see also Jones v. Best, 134 Wn.2d 232, 241, 950 P.2d 1 (1998) (waiver may be inferred from circumstances indicating intent to waive). To establish implied waiver, unequivocal acts or conduct must show an intent to waive; waiver is not to be inferred "from doubtful or ambiguous factors." Jones, 134 Wn.2d at

[9] (Emphasis in original.)

241. The party claiming waiver has the burden to prove intent to relinquish a known right. Jones, 134 Wn.2d at 241-42.

The record shows McLain knew he had a right to an administrative hearing under RCW 28A.405.210. On February 23, 2010, the District notified McLain there was probable cause to not renew his contract because he did not demonstrate sufficient improvement during his probationary period. McLain timely appealed the decision under chapter 28A.405 RCW. After reviewing the documentation provided in support of the decision, on July 12, McLain's attorney withdrew and instructed the District to contact McLain directly. Despite repeated requests from the District in July and August, McLain did not designate a nominee or jointly select a hearing officer. For instance, in the letter to McLain dated July 13, 2010, the District told McLain his contract would expire on August 31, 2010 and he was responsible for contacting the District to jointly select a hearing officer. And in the letter to McLain dated August 19, 2010, the District reiterated that McLain had to contact the District to jointly identify a hearing officer. McLain did not respond or contact the District either before the start of the 2010-2011 school year or at the beginning of the following 2011-2012 school year. For the first time in November 2011, an attorney contacted the District in an effort to pursue the administrative hearing challenging the decision to not renew his teaching contract for the 2010-2011 school year. We conclude McLain waived his right to an administrative appeal under chapter 28A.405 RCW by failing to comply with the mandatory statutory requirements and deadlines.

We reverse and vacate the order granting the petition to appoint a hearing officer.

WE CONCUR:

APPENDIX B

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

JAMES MCLAIN, Respondent, v. KENT SCHOOL DISTRICT, NO. 415, Appellant.	)	No. 68373-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, James McLain, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 27th day of January, 2014.

FOR THE COURT:

Judge

APPENDIX C

superintendent that the best interests of the school district would be served by the transfer.

(3) Commencing with the fourth consecutive school year of employment as a principal, or the second consecutive school year of such employment in the case of a principal who has been previously employed as a principal by another school district in the state for three or more consecutive school years, the transfer of the principal to a subordinate certificated position shall be based on the superintendent's determination that the results of the evaluation of the principal's performance using the evaluative criteria and rating system established under RCW 28A.405.100 provide a valid reason for the transfer without regard to whether there is probable cause for the transfer. If a valid reason is shown, it shall be deemed that the transfer is reasonably related to the principal's performance. No probationary period is required. However, provision of support and an attempt at remediation of the performance of the principal, as defined by the superintendent, are required for a determination by the superintendent under this subsection that the principal should be transferred to a subordinate certificated position.

(4) Any superintendent transferring a principal under this section to a subordinate certificated position shall notify that principal in writing on or before May 15th before the beginning of the school year of that determination, or if the omnibus appropriations act has not passed the legislature by May 15th, then notification shall be no later than June 15th. The notification shall state the reason or reasons for the transfer and shall identify the subordinate certificated position to which the principal will be transferred. The notification shall be served upon the principal personally, or by certified or registered mail, or by leaving a copy of the notice at the place of his or her usual abode with some person of suitable age and discretion then resident therein.

(5) Any principal so notified may request to the president or chair of the board of directors of the district, in writing and within ten days after receiving notice, an opportunity to meet informally with the board of directors in an executive session for the purpose of requesting the board to reconsider the decision of the superintendent, and shall be given such opportunity. The board, upon receipt of such request, shall schedule the meeting for no later than the next regularly scheduled meeting of the board, and shall give the principal written notice at least three days before the meeting of the date, time, and place of the meeting. At the meeting the principal shall be given the opportunity to refute any evidence upon which the determination was based and to make any argument in support of his or her request for reconsideration. The principal and the board may invite their respective legal counsel to be present and to participate at the meeting. The board shall notify the principal in writing of its final decision within ten days following its meeting with the principal. No appeal to the courts shall lie from the final decision of the board of directors to transfer a principal to a subordinate certificated position.

(6) This section provides the exclusive means for transferring a certificated employee first employed by a school district under this section as a principal after June 10, 2010, to a subordinate certificated position at the expiration of the term of his or her employment contract. [2010 c 235 § 302.]

Finding—2010 c 235: "The legislature finds that the presence of highly effective principals in schools has never been more important than it is today. To enable students to meet high academic standards, principals must lead and encourage teams of teachers and support staff to work together, align curriculum and instruction, use student data to target instruction and intervention strategies, and serve as the chief school officer with parents and the community. Greater responsibility should come with greater authority over personnel, budgets, resource allocation, and programs. But greater responsibility also comes with greater accountability for outcomes. Washington is putting into place an updated and rigorous system of evaluating principal performance, one that will measure what matters. This system will never be truly effective unless the results are meaningfully used." [2010 c 235 § 301.]

28A.405.250 Certificated employees, applicants for certificated position, not to be discriminated against—Right to inspect personnel file. The board of directors of any school district, its employees or agents shall not discriminate in any way against any applicant for a certificated position or any certificated employee

(1) On account of his or her membership in any lawful organization, or

(2) For the orderly exercise during off-school hours of any rights guaranteed under the law to citizens generally, or

(3) For family relationship, except where covered by chapter 42.23 RCW.

The school district personnel file on any certificated employee in the possession of the district, its employees, or agents shall not be withheld at any time from the inspection of that employee. [1990 c 33 § 394; 1969 ex.s. c 34 § 21. Formerly RCW 28A.58.445.]

Code of ethics for municipal officers—Contract interests: Chapter 42.23 RCW.

28A.405.260 Use of false academic credentials—Penalties. A person who issues or uses a false academic credential is subject to RCW 28B.85.220 and 9A.60.070. [2006 c 234 § 5.]

HIRING AND DISCHARGE

28A.405.300 Adverse change in contract status of certificated employee—Determination of probable cause—Notice—Opportunity for hearing. In the event it is determined that there is probable cause or causes for a teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with the school district, hereinafter referred to as "employee", to be discharged or otherwise adversely affected in his or her contract status, such employee shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action. Such determinations of probable cause for certificated employees, other than the superintendent, shall be made by the superintendent. Such notices shall be served upon that employee personally, or by certified or registered mail, or by leaving a copy of the notice at the house of his or her usual abode with some person of suitable age and discretion then resident therein. Every such employee so notified, at his or her request made in writing and filed with the president, chair of the board or secretary of the board of directors of the district within ten days after receiving such notice, shall be granted opportunity for a hearing pursuant to RCW 28A.405.310 to determine whether or not there is suf-

ficient cause or causes for his or her discharge or other adverse action against his or her contract status.

In the event any such notice or opportunity for hearing is not timely given, or in the event cause for discharge or other adverse action is not established by a preponderance of the evidence at the hearing, such employee shall not be discharged or otherwise adversely affected in his or her contract status for the causes stated in the original notice for the duration of his or her contract.

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.

Transfer to a subordinate certificated position as that procedure is set forth in RCW 28A.405.230 or 28A.405.245 shall not be construed as a discharge or other adverse action against contract status for the purposes of this section. [2010 c 235 § 305; 1990 c 33 § 395; 1975-'76 2nd ex.s. c 114 § 2; 1973 c 49 § 1; 1969 ex.s. c 34 § 13; 1969 ex.s. c 223 § 28A.58.450. Prior: 1961 c 241 § 2. Formerly RCW 28A.58.450, 28.58.450.]

Finding—2010 c 235: See note following RCW 28A.405.245.

Savings—Severability-1975-'76 2nd ex.s. c 114: See notes following RCW 28A.400.010.

Minimum criteria for the evaluation of certificated employees, including administrators—Procedure—Scope—Models—Penalty: RCW 28A.405.100.

Transfer of administrator to subordinate certificated position—Procedure: RCW 28A.405.230.

28A.405.310 Adverse change in contract status of certificated employee, including nonrenewal of contract—Hearings—Procedure. (1) Any employee receiving a notice of probable cause for discharge or adverse effect in contract status pursuant to RCW 28A.405.300, or any employee, with the exception of provisional employees as defined in RCW 28A.405.220, receiving a notice of probable cause for nonrenewal of contract pursuant to RCW 28A.405.210, shall be granted the opportunity for a hearing pursuant to this section.

(2) In any request for a hearing pursuant to RCW 28A.405.300 or 28A.405.210, the employee may request either an open or closed hearing. The hearing shall be open or closed as requested by the employee, but if the employee fails to make such a request, the hearing officer may determine whether the hearing shall be open or closed.

(3) The employee may engage counsel who shall be entitled to represent the employee at the prehearing conference held pursuant to subsection (5) of this section and at all subsequent proceedings pursuant to this section. At the hearing provided for by this section, the employee may produce such witnesses as he or she may desire.

(4) In the event that an employee requests a hearing pursuant to RCW 28A.405.300 or 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. Nothing herein shall preclude the board of directors and the employee from stipulating as to the identity of the hearing officer in which event the foregoing procedures for the selection of the hearing officer shall be inapplicable. The district shall pay all fees and expenses of any hearing officer selected pursuant to this subsection.

(5) Within five days following the selection of a hearing officer pursuant to subsection (4) of this section, the hearing officer shall schedule a prehearing conference to be held within such five day period, unless the board of directors and employee agree on another date convenient with the hearing officer. The employee shall be given written notice of the date, time, and place of such prehearing conference at least three days prior to the date established for such conference.

(6) The hearing officer shall preside at any prehearing conference scheduled pursuant to subsection (5) of this section and in connection therewith shall:

(a) Issue such subpoenas or subpoenas duces tecum as either party may request at that time or thereafter; and

(b) Authorize the taking of prehearing depositions at the request of either party at that time or thereafter; and

(c) Provide for such additional methods of discovery as may be authorized by the civil rules applicable in the superior courts of the state of Washington; and

(d) Establish the date for the commencement of the hearing, to be within ten days following the date of the prehearing conference, unless the employee requests a continuance, in which event the hearing officer shall give due consideration to such request.

(7) The hearing officer shall preside at any hearing and in connection therewith shall:

(a) Make rulings as to the admissibility of evidence pursuant to the rules of evidence applicable in the superior court of the state of Washington.

(b) Make other appropriate rulings of law and procedure.

(c) Within ten days following the conclusion of the hearing transmit in writing to the board and to the employee, findings of fact and conclusions of law and final decision. If the final decision is in favor of the employee, the employee shall be restored to his or her employment position and shall be awarded reasonable attorneys' fees.

(8) Any final decision by the hearing officer to nonrenew the employment contract of the employee, or to discharge the employee, or to take other action adverse to the employee's contract status, as the case may be, shall be based solely upon the cause or causes specified in the notice of probable cause to the employee and shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action.

APPENDIX D

ficient cause or causes for his or her discharge or other adverse action against his or her contract status.

In the event any such notice or opportunity for hearing is not timely given, or in the event cause for discharge or other adverse action is not established by a preponderance of the evidence at the hearing, such employee shall not be discharged or otherwise adversely affected in his or her contract status for the causes stated in the original notice for the duration of his or her contract.

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.

Transfer to a subordinate certificated position as that procedure is set forth in RCW 28A.405.230 or 28A.405.245 shall not be construed as a discharge or other adverse action against contract status for the purposes of this section. [2010 c 235 § 305; 1990 c 33 § 395; 1975-'76 2nd ex.s. c 114 § 2; 1973 c 49 § 1; 1969 ex.s. c 34 § 13; 1969 ex.s. c 223 § 28A.58.450. Prior: 1961 c 241 § 2. Formerly RCW 28A.58.450, 28.58.450.]

Finding—2010 c 235: See note following RCW 28A.405.245.

Savings—Severability-1975-'76 2nd ex.s. c 114: See notes following RCW 28A.400.010.

Minimum criteria for the evaluation of certificated employees, including administrators—Procedure—Scope—Models—Penalty: RCW 28A.405.100.

Transfer of administrator to subordinate certificated position—Procedure: RCW 28A.405.230.

28A.405.310 Adverse change in contract status of certificated employee, including nonrenewal of contract—Hearings—Procedure. (1) Any employee receiving a notice of probable cause for discharge or adverse effect in contract status pursuant to RCW 28A.405.300, or any employee, with the exception of provisional employees as defined in RCW 28A.405.220, receiving a notice of probable cause for nonrenewal of contract pursuant to RCW 28A.405.210, shall be granted the opportunity for a hearing pursuant to this section.

(2) In any request for a hearing pursuant to RCW 28A.405.300 or 28A.405.210, the employee may request either an open or closed hearing. The hearing shall be open or closed as requested by the employee, but if the employee fails to make such a request, the hearing officer may determine whether the hearing shall be open or closed.

(3) The employee may engage counsel who shall be entitled to represent the employee at the prehearing conference held pursuant to subsection (5) of this section and at all subsequent proceedings pursuant to this section. At the hearing provided for by this section, the employee may produce such witnesses as he or she may desire.

(4) In the event that an employee requests a hearing pursuant to RCW 28A.405.300 or 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. Nothing herein shall preclude the board of directors and the employee from stipulating as to the identity of the hearing officer in which event the foregoing procedures for the selection of the hearing officer shall be inapplicable. The district shall pay all fees and expenses of any hearing officer selected pursuant to this subsection.

(5) Within five days following the selection of a hearing officer pursuant to subsection (4) of this section, the hearing officer shall schedule a prehearing conference to be held within such five day period, unless the board of directors and employee agree on another date convenient with the hearing officer. The employee shall be given written notice of the date, time, and place of such prehearing conference at least three days prior to the date established for such conference.

(6) The hearing officer shall preside at any prehearing conference scheduled pursuant to subsection (5) of this section and in connection therewith shall:

(a) Issue such subpoenas or subpoenas duces tecum as either party may request at that time or thereafter; and

(b) Authorize the taking of prehearing depositions at the request of either party at that time or thereafter; and

(c) Provide for such additional methods of discovery as may be authorized by the civil rules applicable in the superior courts of the state of Washington; and

(d) Establish the date for the commencement of the hearing, to be within ten days following the date of the prehearing conference, unless the employee requests a continuance, in which event the hearing officer shall give due consideration to such request.

(7) The hearing officer shall preside at any hearing and in connection therewith shall:

(a) Make rulings as to the admissibility of evidence pursuant to the rules of evidence applicable in the superior court of the state of Washington.

(b) Make other appropriate rulings of law and procedure.

(c) Within ten days following the conclusion of the hearing transmit in writing to the board and to the employee, findings of fact and conclusions of law and final decision. If the final decision is in favor of the employee, the employee shall be restored to his or her employment position and shall be awarded reasonable attorneys' fees.

(8) Any final decision by the hearing officer to nonrenew the employment contract of the employee, or to discharge the employee, or to take other action adverse to the employee's contract status, as the case may be, shall be based solely upon the cause or causes specified in the notice of probable cause to the employee and shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action.

(9) All subpoenas and prehearing discovery orders shall be enforceable by and subject to the contempt and other equity powers of the superior court of the county in which the school district is located upon petition of any aggrieved party.

(10) A complete record shall be made of the hearing and all orders and rulings of the hearing officer and school board. [1990 c 33 § 396; 1987 c 375 § 1; 1977 ex.s. c 7 § 1; 1975-'76 2nd ex.s. c 114 § 5. Formerly RCW 28A.58.455.]

Additional notes found at www.leg.wa.gov

28A.405.320 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Notice—Service—Filing—Contents. Any teacher, principal, supervisor, superintendent, or other certificated employee, desiring to appeal from any action or failure to act upon the part of a school board relating to the discharge or other action adversely affecting his or her contract status, or failure to renew that employee's contract for the next ensuing term, within thirty days after his or her receipt of such decision or order, may serve upon the chair of the school board and file with the clerk of the superior court in the county in which the school district is located a notice of appeal which shall set forth also in a clear and concise manner the errors complained of. [1990 c 33 § 397; 1969 ex.s. c 34 § 14; 1969 ex.s. c 223 § 28A.58.460. Prior: 1961 c 241 § 3. Formerly RCW 28A.58.460, 28.58.460.]

28A.405.330 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Certification and filing with court of transcript. The clerk of the superior court, within ten days of receipt of the notice of appeal shall notify in writing the chair of the school board of the taking of the appeal, and within twenty days thereafter the school board shall at its expense file the complete transcript of the evidence and the papers and exhibits relating to the decision complained of, all properly certified to be correct. [1990 c 33 § 398; 1969 ex.s. c 223 § 28A.58.470. Prior: 1961 c 241 § 4. Formerly RCW 28A.58.470, 28.58.470.]

28A.405.340 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Scope. Any appeal to the superior court by an employee shall be heard by the superior court without a jury. Such appeal shall be heard expeditiously. The superior court's review shall be confined to the verbatim transcript of the hearing and the papers and exhibits admitted into evidence at the hearing, except that in cases of alleged irregularities in procedure not shown in the transcript or exhibits and in cases of alleged abridgment of the employee's constitutional free speech rights, the court may take additional testimony on the alleged procedural irregularities or abridgment of free speech rights. The court shall hear oral argument and receive written briefs offered by the parties.

The court may affirm the decision of the board or hearing officer or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the employee may have been prejudiced because the decision was:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the board or hearing officer; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or

(6) Arbitrary or capricious. [1975-'76 2nd ex.s. c 114 § 6; 1969 ex.s. c 34 § 15; 1969 ex.s. c 223 § 28A.58.480. Prior: 1961 c 241 § 5. Formerly RCW 28A.58.480, 28.58.480.]

Additional notes found at www.leg.wa.gov

28A.405.350 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Costs, attorney's fee and damages. If the court enters judgment for the employee, and if the court finds that the probable cause determination was made in bad faith or upon insufficient legal grounds, the court in its discretion may award to the employee a reasonable attorneys' fee for the preparation and trial of his or her appeal, together with his or her taxable costs in the superior court. If the court enters judgment for the employee, in addition to ordering the school board to reinstate or issue a new contract to the employee, the court may award damages for loss of compensation incurred by the employee by reason of the action of the school district. [1990 c 33 § 399; 1975-'76 2nd ex.s. c 114 § 7; 1969 ex.s. c 34 § 16; 1969 ex.s. c 223 § 28A.58.490. Prior: 1961 c 241 § 6. Formerly RCW 28A.58.490, 28.58.490.]

Additional notes found at www.leg.wa.gov

28A.405.360 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appellate review. Either party to the proceedings in the superior court may seek appellate review of the decision as any other civil action. [1988 c 202 § 26; 1971 c 81 § 71; 1969 ex.s. c 223 § 28A.58.500. Prior: 1961 c 241 § 7. Formerly RCW 28A.58.500, 28.58.500.]

Additional notes found at www.leg.wa.gov

28A.405.370 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Other statutes not applicable. The provisions of chapter 28A.645 RCW shall not be applicable to RCW 28A.405.300 through 28A.405.360. [1990 c 33 § 400; 1969 ex.s. c 223 § 28A.58.510. Prior: 1961 c 241 § 8. Formerly RCW 28A.58.510, 28.58.510.]

28A.405.380 Adverse change in contract status of certificated employee, including nonrenewal of contract—Appeal from—Direct judicial appeal, when. In the event that an employee, with the exception of a provisional employee as defined in RCW 28A.405.220, receives a notice of probable cause pursuant to RCW 28A.405.300 or 28A.405.210 stating that by reason of a lack of sufficient funds or loss of levy election the employment contract of such employee should not be renewed for the next ensuing school term or that the same should be adversely affected, the employee may appeal any said probable cause determination directly to the superior court of the county in which the school district is located. Such appeal shall be perfected by serving upon the secretary of the school board and filing with