No. 313603

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

MICHAEL F. CRONIN,

Plaintiff,

vs.

CENTRAL VALLEY SCHOOL DISTRICT,

Respondent.

RESPONDENT SCHOOL DISTRICT'S RESPONSE BRIEF

PAUL E. CLAY, WSBA No. 17106
STEVENS · CLAY · MANIX, P.S.
421 W. Riverside, Suite 1575
Spokane, WA 99201
Tel: (509) 838-8330
Fax: (509) 623-2131
E-Mail: pclay@stevensclay.org

Attorneys for Respondent Central Valley School District

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Attorneys for Respondent Central Valley School District

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I. INTRODUCTION

RCW 28A.645.010 is a plain, unambiguous statute with broad yet fair application. It applies here to impose a jurisdictional requirement on Plaintiff's underlying declaratory judgment action. Plaintiff's four causes of action in his Complaint for Declaratory Relief challenge the School District's failure to act on his hearing request and failure to act on his request to be paid. RCW 28A.645.010, however, mandates that Plaintiff file his Complaint within 30 days of each failure to act.

Plaintiff failed to file his Complaint within 30 days of the failure to act. Specifically, he filed his Complaint on March 23, 2012, which was more than 30 days after: (1) the Superintendent's January 26th failure to act upon a hearing request (and, in particular, a request to appoint a nominee); and (2) The School Board's January 31st failure to pay Plaintiff (and even after his lawyer's February 21st request to be paid). Because Plaintiff did not file his action within 30 days as required, the trial court lacked subject matter jurisdiction.

II. NO ASSIGNMENTS OF ERROR

The School District is not seeking review of any trial court order.

III. STATEMENT OF THE CASE

On January 5, 2012, Superintendent Small caused a Notice of Probable Cause for Discharge and a Notice of Probable Cause for

Nonrenewal to be "personally served" on Plaintiff. CP 6, 20, 135. The Superintendent ensured personal service on Plaintiff expressly as provided in RCW 28A.405.210 (for the nonrenewal notice) and as expressly provided in RCW 28A.405.300 (for the discharge notice). CP 14, 135. The Notice of Probable Cause for Nonrenewal and Discharge expressly notified Plaintiff of his appeal rights; it even enclosed both statutes, which expressly and separately, provide for a 10-day timeline in which the employee must request a hearing as to the separate discharge and nonrenewal. CP 20-21.

Plaintiff is a member of the Central Valley Education Association ("CVEA"), the teachers' union at that School District. CP 14. The CVEA collective bargaining agreement ("CBA") contains several Election of Remedies provisions that require an employee who is discharged and or nonrenewed to either pursue a grievance procedure (ending in AAA arbitration) or a statutory hearing under RCW 28A.405, but never both. CP 139 & 152. The CBA does not provide any right for a union representative to elect remedies on behalf of an employee – even though the CBA could easily have been negotiated to do so. *Id.*

Plaintiff did not file a request for a statutory hearing under RCW 28A.405.210 or RCW 28A.405.300 within 10 days of receiving the Notice of Probable Cause for Nonrenewal and Discharge. CP 7, 14-15, 136. A

union representative for the CVEA, Ms. Sally McNair, presented a letter to Superintendent Small on January 11, 2012 with the following messages: "I received the Notice of Probable Cause for Termination" and, "[p]ursuant to RCW 28A.405.300 [the discharge statute, as distinct from the nonrenewal statute] I am requesting a closed hearing...." CP 48.

Ms. McNair stated in the letter that she had a "lack of access to Mr. Cronin" and that, as such, she (not plaintiff) would also be "filing a grievance" at some unstated date in the future to "preserve timelines." *Id.* Ms. McNair's letter also made clear that the whole point of her letter was to attempt to circumvent the Election of Remedies requirement in the CBA, in order to ostensibly "preserve timelines." *Id.* Ms. McNair explained that, instead of Plaintiff providing an election of remedies within the 10 days required by statute and required by the CBA, Ms. McNair was somehow unilaterally extending the timeline from the required 10 days, to over 30 days. *Id.* Thus, according to Ms. McNair, the District would have to wait more than 30 days (not the 10 days specified by statute) for "Mr. Cronin's decision to pursue either the statutory hearing or the grievance." *Id.*

Plaintiff himself **never** elected any remedy and **never** presented any request for hearing within 10 days as expressly required by both RCW 28A.405.210 (the nonrenewal appeal statute) and RCW 28A.405.300 (the

discharge appeal statute). CP 7, 15, 136. Ms. McNair sent an email to the District's Assistant Superintendent on February 8, 2012 (more than 30 days after issuance of the Notices of Probable Cause), "to provide notice that Mr. Cronin has decided to pursue the statutory hearing as described in RCW 28A.405.300 [the discharge statute] as his election of remedy for the notice of probable cause for discharge." CP 49. Even then, Ms. McNair made no mention of appealing the nonrenewal and Plaintiff has never expressed any election of remedy for the nonrenewal. *Id.*

RCW 28A.405.310 requires action by a district within fifteen days of receiving a request for hearing. More specifically, RCW 28A.405.310(4) expressly mandates that "[w]ithin fifteen days following the receipt of any such request [for statutory appeal] the board of directors of the district or its designee ... **shall** ... appoint one nominee." (Emphasis added). Under this provision, within fifteen days of receiving Ms. McNair's letter (assuming such letter should suffice as a request for a hearing), the District was required to appoint a nominee (the purpose of which is to select a hearing officer).

Because Ms. McNair's request was not properly filed and because the District did not want to subject itself to an argument that, by responding to Ms. McNair's letter, the District waived the ability to contest the validity of the letter, the District chose to **fail to act** on the

request. Specifically, the District failed to act by not appointing a nominee within fifteen days of Ms. McNair's letter. CP 7 & 136. Fifteen days after January 11, 2012 was January 26, 2012. This action was not filed until March 23, 2012 – more than 30 days after the Superintendent "failed to act" upon Ms. McNair's purported request for hearing. CP 1.

Moreover, Plaintiff's legal counsel, Mr. Larry Kuznetz, inquired on February 21, 2012 about the School Board's failure to pay Plaintiff on January 31, 2012—the day he would normally have been paid. CP 24. More than 30 days also elapsed between the January 31st failure to pay and the March 23rd filing. Further and finally, more than 30 days elapsed between the failure to act on Mr. Kuznetz's February 21st request for payment and the March 23rd filing.

IV. ARGUMENT

A. Standard of Review.

The parties agree that this Court applies a de novo standard of review to the superior court's decision granting summary judgment in favor of the School District. The School District presented the superior court with two overall reasons why the court should rule in the School District's favor.[1] First, Plaintiff did not timely file the action, thus depriving the Court of subject matter jurisdiction. Second, Plaintiff's

[1] *See* Defendant's Memorandum of Authorities in Opposition to Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment. CP 87-134.

underlying basis for his action was substantively invalid because he did not properly request a hearing to challenge his nonrenewal and discharge. Because the trial court ruled that it lacked subject matter jurisdiction, it never addressed the second issue. CP 276-79. That second issue is significant here because it provides context for the School District's failure to act and because it is a standalone basis for dismissing Plaintiff's action.

B. Underlying Basis for Plaintiff's Action.

Plaintiff's Complaint lists four causes of action, all of which are premised on the School District's failure to act on Ms. McNair's purported hearing request. CP 7-9. Plaintiff's Complaint essentially argues that he was not required to "personally" request a hearing in under RCW 28A.405.210 and .300. Plaintiff, instead, argues that some other person can somehow request a hearing for him (even without having any contact with him) and that such a purported request can be both vague and equivocal. *Id.* Plaintiff's position is not contrary to RCW 28A.405.210 and .300.

To back up a bit, when a school district superintendent decides to terminate a teacher's employment, RCW 28A.405.210 and .300 require service of the termination notices "personally" on Plaintiff. Assuming proper service of the termination notices, the employee must then

personally request a hearing. Just as the District could not serve a notice of probable cause on a designee of Plaintiff, a designee of Plaintiff cannot request a hearing. Plaintiff here did not himself request a hearing. Instead, a designee did so. CP 7, 15, 136.

Not only did Plaintiff fail to personally request a hearing, the hearing request on which he now purports to rely (which, again, was filed by someone else) was, by Plaintiff's own admitted facts, not filed by anyone with authority to file such a request on Plaintiff's behalf. CP 14, 31-32, 135-36. Ms. McNair admits that she **never** spoke with Plaintiff prior to submitting what she purports was Plaintiff's hearing request. CP 31. To re-emphasize: Ms. McNair admits that she did **not** receive authority from Plaintiff to request a hearing on his behalf. Her subsequent letter to the Superintendent confirmed this, when she said that she had no "access to Mr. Cronin" prior to submitting the purported hearing request. CP 48.

Even assuming, for argument's sake, that Ms. McNair did have authority to act on Plaintiff's behalf without having spoken to him, the letter itself from Ms. McNair is hardly an equivocal request for a hearing. Instead, it is at best a vague, evasive attempt to extend the right to request a hearing beyond the ten days mandated by statute. Thus, even if Ms. McNair had authority to request a hearing, her letter does not do so.

Moreover, the Collective Bargaining Agreement between the parties contains an Election of Remedies provision which expressly mandates that the employee is the only person who can elect the statutory hearing process versus an internal grievance process. CP 139 & 152. Again, Plaintiff did not elect (and has never elected) a remedy.

If a union representative were permitted to do what was attempted here, in every case where an election of remedies is required, a union representative and employee could circumvent the election of remedies requirement simply by having the union representative file a request for hearing (under the statute) while the employee files a grievance (under the CBA). Moreover, an employee or a union representative could file an equivocal or vague request for hearing (as was done here) while also purporting to preserve a right to file a grievance at some future date. In all, the approach used here would allow a union and employee to circumvent the election of remedies requirement every single time an employee is nonrenewed or discharged.

Based on the above, the School District Superintendent determined that Ms. McNair's letter was not a valid request for hearing. CP 135-36. As such, the Superintendent failed to act on the purported request. *Id.* The District's failure to act was hardly bad faith as imputed by Plaintiff. Instead, it was born out of a simple abundance of caution that any action

by the District would result in an argument by Plaintiff that the District waived its ability to contest Ms. McNair's letter as a purported hearing request. In any event, it is the District's failure to act on Ms. McNair's purported hearing request that triggered the initial 30 day time line at issue here under RCW 28A.645.010.

Not only did the Superintendent fail to act on the purported hearing request by Ms. McNair, the School Board also failed to act on Plaintiff's request to be paid. CP 7 & 15. As mentioned above, on February 21, 2012, Mr. Kuznetz requested that Plaintiff be paid his January 31st monthly salary. CP 24. The School Board failed to act on that request, for the same reasons that it failed to act on the purported hearing request (i.e., the hearing request was not timely made, thus entitling the School District to terminate Plaintiff's employment). Again, the District's failure to act on the request to be paid triggered the 30 day time line under RCW 28A.645.010.

C. Plaintiff's Declaratory Judgment Action Was Not Timely.

RCW 28A.645.010 requires Plaintiff to bring his underlying action within 30 days of when the Superintendent **failed to act** upon Plaintiff's request for a hearing and within 30 days of the School Board's **failure to act** on Plaintiff's request to be paid. As explained in more detail below, for the trial court to order the School District to act upon Plaintiff's

purported hearing request, the trial court needed subject matter jurisdiction to issue such an order. The trial court only has subject matter jurisdiction to issue such an order if: (1) Plaintiff filed his action within 30 days of the Superintendent's failure to act on Plaintiff's January 11th (purported) request for a hearing; or (2) Plaintiff filed this action within 30 days of the School Board's failure to act on Plaintiff's request to be paid. Plaintiff did not file this action within thirty days of any of the above. Subject matter jurisdiction thus does not exist.

1. The Statute At Issue.

By way of more detail, the first paragraph of RCW 28A.645.010 says, in material parts:

> Any person, or persons ..., aggrieved by **any** decision or order of any school official or board, within **thirty days** after the rendition of such decision or order, **or of the failure to act** upon the same when properly presented, may appeal the same to the superior court ....

(Emphasis added).

The second paragraph of RCW 28A.645.010 says:

> **Appeals** by teachers ... from the actions of school boards with respect to **discharge** ... or failure to **renew** their contracts ... shall be governed by the appeal provisions of chapters 28A.400 and 28A.405 RCW therefor and **in all other cases shall be governed by chapter 28A.645 RCW**. (Emphasis added).

According to the Washington Supreme Court, this statute "means what it says." *Haynes v. Seattle School Dist. No. 1*, 111 Wn.2d 250, 255, 758 P.2d 7 (1988). The annotations to RCW 28A.645.010 show that the 30-day bar against judicial appeals to decisions of school boards has been applied in numerous school district circumstances over the 100-plus years that RCW 28A.645.010 or its predecessors have been in effect, and many of them in cases where some might describe the result as having been particularly harsh. *See, e.g., Benson v. Roberts*, 35 Wn.App. 362, 368, 666 P.2d 947 (1983) (upholding dismissal of appeal and claim for damages filed against District on 31st day after appealed-from decision was made); *State ex rel. Bohanon v. Wanamaker*, 47 Wn.2d 794, 803, 289 P.2d 697 (1955) (school principal's appeal that he was wrongfully discharged after "many years" of service, in violation of his statutory "continuing contract" rights, held, properly dismissed for failure to file appeal within 30-days); *see also Blunt v. School Dist. No. 35*, 12 Wn.2d 336, 340, 121 P.2d 367 (1942) (teacher's appeal for employment contract damages, held, properly dismissed for failure to file within 30-days).

In its most simple terms, RCW 28A.645.010 says you have to sue within 30 days of a school official's or board's **decision** or of **the failure to act upon a request for a decision.** It also says that the actual appeal of a

discharge/nonrenewal is governed by Chapter 28A.405, but **all other cases** are governed by Chapter 28A.645 RCW.

The overall purpose of Chapter 28A.645 RCW is to allow individuals to sue school districts. It is an extremely broad granting of rights—it allows **any** person to hold a school district accountable by suing the district for decisions and failures to act. In order to hold school districts accountable, the legislature determined that school districts should not be able to circumvent the law by not acting. Instead, if a school district fails to act, a person is able to challenge the failure to act. At the same time, the legislature recognized the need for balance by imposing a 30 day timeline for bringing actions. Thus, in addition to allowing an extremely broad right to challenge any failure to act, the legislature imposed a strict timeline on the challenge to the failure to act. A strict timeline is needed to allow school districts to implement their decision soon after making them without fear of being challenged.

2. Failure to Act by Failing to Appoint a Nominee.

As described above, there are two timeline issues in this case. The initial issue focuses on the Superintendent's "failure to act" on Plaintiff's purported request for a hearing. There are only four material facts pertaining to Plaintiff's failure to timely file his action based on the failure to act on his purported hearing request: (1) Plaintiff purportedly requested

a hearing on January 11, 2012 (CP 7); (2) When an employee requests a hearing, a school district has fifteen days to act on the employee's decision by appointing a nominee (RCW 28A.405.310 is explicit that the District "**shall**" act within fifteen days by appointing a nominee); (3) The School District failed to act on Plaintiff's purported decision to request a hearing by failing to appoint a nominee within fifteen days—the last day of which was January 26, 2012 (CP 7 & 135-36); and (4) Plaintiff did not initiate this action within 30 days of January 26th (CP 1).

Applying those facts to RCW 28A.645.010 results in lack of subject matter jurisdiction. In its most simple form, RCW 28A.645.010 says: "**Any** person" who's aggrieved by **"any" "failure to act"** can bring an action in Superior Court. Plaintiff brought an action in Superior Court based on the School District's failure to act on Plaintiff's purported decision to request a hearing. RCW 28A.645.010 requires that Plaintiff bring his action within 30 days of the Superintendent's failure to act on his purported hearing request. The initial failure to act here was the School District's failure to appoint a nominee when requested to do so.

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Examining the above in more detail, we begin by assuming, **for argument's sake**, that Ms. McNair did indeed properly request a hearing.[2] The Court's assumption, then, is that Ms. McNair properly presented a hearing request on January 11th. Assuming Plaintiff properly requested a hearing, Plaintiff triggers the School District's obligation under RCW 28A.405.310(4) to "appoint a nominee" for selection of a hearing officer.

RCW 28A.405.310(4) states in no uncertain terms: "Within fifteen days following the receipt of any such request the board of directors of the district or its designee ... shall ... appoint one nominee." So, assuming Plaintiff properly presented a request for a hearing on January 11th, one of two things **must** occur:

> (1) The Superintendent or Board must act on that properly presented request by appointing a nominee within 15 days; or
>
> (2) The Superintendent or Board must fail to act on that request by not appointing a nominee within 15 days.

Of course, the School District failed to act on Plaintiff's request for appointment of a nominee. So, again, assuming for argument's sake that Plaintiff properly presented a request for a hearing, the District failed to

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[2] Indeed, the Court can make no other assumption. To do otherwise would force the Court to make a decision on the underlying merits of Plaintiff's declaratory judgment action without first making a decision on subject matter jurisdiction. While apparently confusing to Plaintiff, the Court has no choice other than to first decide whether it has jurisdiction in order to then decide whether, on the merits, Plaintiff properly appealed. Moreover, the only other assumption to be made would be that Plaintiff never properly requested a hearing, thus rendering this entire matter moot.

act on that properly presented request as of the fifteenth day after the request (i.e., by January 26th).

Plaintiff's Complaint challenges the District's failure to act on his purported hearing request. That, after all, is what has deprived Plaintiff of his opportunity for a hearing (and, indeed, his subsequent pay). RCW 28A.645.010 says Plaintiff needed to file this lawsuit within 30 days of the District's failure to act. He did not do so and thus cannot challenge the District's failure to act upon such request.

3. Failure to Act by Failing to Pay.

Plaintiff's declaratory judgment action likewise asks the Court to order the School District to pay him back pay starting in January 2012. Again, however, Plaintiff's March 23rd filing of this action was not within 30 days of the School Board's **failure to pay him** or within 30 days of his request (through his legal counsel) to be paid. Plaintiff had notice as of the end of January that he was not getting paid and, admittedly, had notice at the very latest as of February 21, 2012 (when his counsel inquired about the School District's failure to pay).

Plaintiff's request for back pay is similar to the high school teacher's request for back pay in the *Blunt* case, *supra*, 12 Wn.2d at 340. In *Blunt*, the Washington Supreme Court rejected the teacher's request for back pay in part because the teacher did not file an action within 30 days of the school

board's failure to act upon his request for back pay. *Id.* at 337. Blunt made a request to the school board on February 3, 1938 to pay to him salary provided for by his employment contract. The board took no action on this demand and thus "ignored his written salary demand of February 3rd." *Id. a*t 339. On March 22nd Blunt appealed, seeking back pay. *Id.* at 337.

The Washington Supreme Court **linked** Blunt's back pay request with the **prior** discharge decision. *Id.* at 339 ("The board could not lawfully have granted his demand without first setting aside its [prior] decision discharging him. His demand, therefore, was merely an indirect attack upon such [prior] decision."). Had it not been for the prior discharge decision, there would be no back pay request. The Supreme Court rejected Blunt's claim and said at page 339: "When the Plaintiff failed to appeal within thirty days from the board's decision discharging him, such decision became final, and he lost his right to resort to the courts." The Court elaborated:

> The board of school directors discharged Plaintiff, and, since he failed to appeal within thirty days,[3] its action, as we have stated, became final and conclusive. When the Plaintiff thereafter attempted to appeal from the board's **failure to act upon his salary demand**, his contract with the district had been finally cancelled and his status as a teacher of the district terminated. (Emphasis added).

[3] The reference to a 30 day appeal time line for Blunt's discharge refers to the fact that, at the time of Blunt's discharge, the appeal time line for teacher discharges was also 30 days.

Id. at 340. The Washington Supreme Court in *Blunt* thus took the position that a teacher who seeks back pay based on a terminated employment contract must bring an action within 30 days of the teacher's discharge.

There is no dispute, of course, that Plaintiff here did not bring this action for back pay within 30 days of the issuance of the Notice of Probable Cause, nor even within 30 days of the date upon which he knew he was not getting paid, nor even within 30 days of the date upon which his legal counsel contacted the School District's attorney to request such back pay. Subject matter jurisdiction thus does not exist over Plaintiff's back pay claim since it was not timely filed under RCW 28A.645.010.

D. Plaintiff's Arguments

Plaintiff has made several arguments (some of which he appears to abandon on appeal) that are similar to, and have already been rejected by, other courts.

1. Plaintiff's Declaratory Judgment Action Is Not An Appeal From His Discharge.

Plaintiff argues that **his declaratory judgment case** is the same the **appeal of his discharge** and that, because of the second paragraph of RCW 28A.645.010, this declaratory judgment case is not governed by RCW 28A.645.010 and instead is governed by Chapter 28A.405 RCW. Brief of Appellant at 8. Indeed, on page 5 of Plaintiff's Response to Defendant's

Motion for Summary Judgment (CP 217), he says "[t]his matter is an 'appeal' to plaintiff's termination."[4] Plaintiff then concludes that the second paragraph of RCW 28A.645.010 provides an exception to the 30 day time line.

The second paragraph of RCW 28A.645.010 does not support Plaintiff's argument and, in fact, directly supports the School District's position. The second paragraph of RCW 28A.645.010 carves a very narrow exception out of the 30 day jurisdictional time line by recognizing that an employee's **actual appeal** of a nonrenewal or discharge is governed by the 10 day time line in Chapter 28A.405 RCW. The second paragraph says:

> **Appeals** by teachers ... with respect to discharge or other action adversely affecting their contract status, or failure to renew their contracts for the next ensuing term shall be governed by the appeal provisions of chapters 28A.400 and 28A.405 RCW therefor and **in all other cases shall be governed by chapter 28A.645 RCW.** (Emphasis added).

This paragraph distinguishes between an employee's **actual** appeal of a discharge/nonrenewal decision (governed by Chapter 28A.405 RCW) and "**all other cases**" by an employee, including declaratory judgment cases

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[4]Interestingly, Plaintiff's Complaint does not seek any relief under the authority of Chapter 28A.405 RCW. Instead, Plaintiff Complaint makes clear that his action is brought as a declaratory judgment action under the auspices of Chapter 7.24 RCW. CP 3. Nowhere in Plaintiff's Complaint does he state that Chapter 28A.405 RCW is the basis for this action or that it provides a jurisdictional basis for this action. Again, Plaintiff relies solely on Chapter 7.24 RCW.

(governed by RCW 28A.645.010).[5] All other cases by an employee, according to the second paragraph of RCW 28A.645.010, "shall be governed by chapter 28A.645 RCW." Thus, the second paragraph of RCW 28A.645.010 explicitly says that the 30 day time line applies to "all other cases" besides the actual appeal of Plaintiff's discharge/nonrenewal. Plaintiff's Complaint in this case is not his discharge/nonrenewal appeal. As such, it is exactly the type of "other cases" referenced in the second paragraph of RCW 28A.645.010.

There are several differences between this declaratory judgment action and an actual discharge/nonrenewal appeal: (1) The issue in a discharge/nonrenewal appeal is whether sufficient cause exists for the actual discharge/nonrenewal; sufficient cause is not an issue in this case in any way; (2) An appeal is a hearing officer's review of the actual notice of probable cause; this case does not in any way require or contemplate the Court's review of the notice of probable cause; (3) This is a superior court declaratory judgment case; an appeal is an administrative action. Obviously, this is not an appeal by a teacher respecting his discharge or nonrenewal and

[5] The plaintiff in *Clark v. Selah,* 53 Wn.App. 832, 835, 770 P.2d 1062 (1989), like here, attempted a declaratory judgment action, seeking to appeal a district decision to deny her an employment related benefit. Here, Plaintiff likewise seeks a declaratory judgment as to an employment related benefit. The *Clark* court held, however, that the declaratory judgment action was, in effect, an appeal from a school district decision and that RCW 28A.645.010 applied. Because *Clark's* declaratory judgment lawsuit was brought some 59 days after the school district's decision, the Court of Appeals upheld dismissal of her declaratory judgment complaint.

just as obviously it makes no sense to argue that the jurisdictional time line in RCW 28A.645.010 does not apply.

Moreover, even if this Court were to assume, for argument sake, that Plaintiff is correct, then the Court would need to look to Chapter 28A.405 RCW to ascertain where this declaratory judgment action is contemplated or allowed. If Chapter 28A.405 RCW governs and controls this matter as argued by Plaintiff, where in Chapter 28A.405 RCW does it allow Plaintiff to bring this action?[6] And, more importantly, what is the time line for bringing such an action under Chapter 28A.405 RCW? Obviously, this action is nowhere allowed or contemplated in Chapter 28A.405 RCW. As such, RCW 28A.645.010 is the logical source of jurisdiction in this case.[7]

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[6] RCW 28A.405.310 does provide a very specific avenue of relief when parties are unable to agree upon the hearing officer. Subsection (4) allows either party to "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 ...." Had the legislature intended to provide a similar procedural method of relief in Chapter 28A.405 RCW as Plaintiff argues, it could easily have done so, just as it did for the above scenario.

[7] The Uniform Declaratory Judgments Act, Chapter 7.24 RCW, includes no timeliness provisions. As a result, Washington courts have taken the position that "declaratory judgment actions must be brought within a reasonable time." *Brutsche v. City of Kent*, 78 Wn.App. 370, 376, 898 P.2d 319 (1995) (*quoting Federal Way v. King County*, 62 Wn.App. 530, 536, 815 P.2d 790 (1991)). A "reasonable time" is determined "by analogy to the time allowed for appeal of a similar decision as prescribed by statute, rule of court, or other provision." *Brutsche*, 78 Wn.App. at 376-77. As mentioned in footnote 5 *supra*, the 30-day timeline in RCW 28A.645.010 has previously been applied in declaratory judgment actions. E.g., *Clark v. Selah School Dist.*, 53 Wn.App. 832, 770 P.2d 1062, *rev. denied*, 113 Wn.2d 1003 (1989). That same 30-day timeline should thus govern here, just as it did in *Clark*.

Plaintiff seems to argue that he is left without a remedy were this Court to reject his argument. He says that "Cronin has no other remedy other than a declaratory judgment action to enforce his rights." Brief of Appellant at 8. The School District does not dispute that a declaratory judgment action is allowed; the District merely points out that the action needs to be timely filed. Plaintiff very easily could have filed this action in a timely manner but simply failed to do so and has presented absolutely no reason for his failure.

It is imperative to recognize what the second paragraph of RCW 28A.645.010 does and what it does not do. What it does is carve a very narrow exception out of the 30 day jurisdictional time line for an employee's actual 10-day "appeal" of a nonrenewal or discharge. What it does not do is apply to "all other cases" by an employee. It specifies that "all other cases" (e.g., declaratory judgment cases) are governed by the 30 day timeline.

2. Plaintiff Seeks a Determination on the Merits Prior to a Determination on Jurisdiction.

The School District urges this Court to make an assumption for the limited jurisdictional purpose of triggering the 30 day time line in RCW 28A.645.010 that, indeed, Plaintiff did properly request a hearing on January 11, 2012. The School District urges this assumption so that the Court can know when to start counting days for purpose of applying not only the

fifteen day time line in RCW 28A.405.310, but also the 30 day timeline in RCW 28A.645.010. Plaintiff turns this limited assumption into a verity.

Plaintiff takes the position that, once the Court assumes he properly requested a hearing on January 11th (in order to determine the start of the 15 day requirement for appointing a nominee), the Court must continue to assume that he properly requested a hearing **for all other purposes**. Indeed, throughout Plaintiff's Brief of Appellant and throughout his briefing in the lower court, Plaintiff repeatedly uses this assumption as a conclusion. Plaintiff seems to fail to grasp the concept of hypothetical syllogisms in argument. The assumption that he properly appealed is a **hypothetical** proposition for purposes of deducing whether the underlying appeal was timely made. Stated in traditional logic terms:

> If Plaintiff properly appealed on January 11th then we begin counting fifteen days from January 11th;
>
> If we begin counting days on January 11th then the District failed to act on the fifteenth day (January 26th);
>
> If the District failed to act on January 26th, then Plaintiff did not bring this action within 30 days of January 26th failure to act.

Just because we offer a **hypothetical** proposition (for argument's sake) that Plaintiff properly appeal on January 11th, it does not mean he actually did properly appealed for all other purposes. In all, Plaintiff asks the Court to **decide** for all other purposes that Plaintiff did indeed properly

request a hearing and that the District is thus entirely unable to say "no, you didn't."[8]

Clearly, this Court must first address and determine whether it has subject matter jurisdiction under RCW 28A.645.010 before it can determine on the merits whether Plaintiff's purported request for hearing was indeed valid. This is a well-established rule. *See Indoor Billboard/Washington, Inc. v. Integra Telecom, In.,* 162 Wn.2d 59, 70-71, 170 P.3d 10 ("As a threshold issue, we first determine whether the superior court had subject matter jurisdiction to decide Indoor Billboard's claim."). In *Indoor Billboard*, the Washington Supreme Court recognized that subject matter jurisdiction can be raised on a cross-appeal and, when it is so raised, shall nevertheless be decided first. *Id.* at 69 ("Although the issue of the trial court's subject matter jurisdiction was raised in the cross appeal, we address it first.").

The School District, of course, contests whether the "appeal" at issue was properly perfected and, at the same time, presents a threshold issue of whether jurisdiction exists to even decide if Plaintiff properly perfected his appeal. That jurisdictional issue is the "threshold" question. *Somers v. Snohomish County,* 105 Wn.App. 937, 939, 21 P.3d 1165 (2001). Thus, the

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[8] Plaintiff's approach is apparent on page 7 of his Response to Defendant's Motion for Summary Judgment. CP 219. Plaintiff says "RCW 28A.645.010 does not apply when a teacher has perfected his/her appeal." Plaintiff goes on to say "[o]nce the 'appeal' is perfected, the entire matter is governed by RCW 28A.405." Again, Plaintiff does not just have this Court assume he perfected his appeal for purposes of counting days, Plaintiff also has this Court deciding that he did indeed perfect his appeal on the merits.

first question for the Court is whether it has jurisdiction under RCW 28A.645.010 to address the second question of whether Plaintiff properly requested a hearing. This Court can (and must) assume that he made a proper request for a hearing on a particular date solely for the limited jurisdictional purpose of determining when to start counting the days for assessing the jurisdictional question of whether Plaintiff timely filed this action.

To answer the jurisdictional question at hand, the Court must look to the statutory language at issue: RCW 28A.645.010. It requires Plaintiff to file this action within 30 days of a "failure to act" when "properly presented" with a request to act. As explained by the District, this statute provides Plaintiff with the right to challenge a school board's or school official's failure to act when properly asked to do so—but Plaintiff must do so within 30 days of the failure to act.

Here, Plaintiff says he properly presented a request for action by the District on January 11, 2012 when Ms. McNair submitted a letter to the District Superintendent. Thus, for jurisdictional purposes, let's assume Plaintiff did indeed, make such a request on January 11th. According to Plaintiff, his January 11th request for action was a request for the "board of directors of the district or its designee" to appoint a nominee. It is, of course, undisputed that the Board or its designee failed to act on his

request and failed to appoint a nominee within the required fifteen days of January 11th. It is likewise undisputed that Plaintiff failed to file his action within 30 days of the failure to act. Thus, the trial court lacks jurisdiction.

Not to beat the proverbial dead horse, but as discussed above, Plaintiff uses the jurisdictional assumption to make other assumptions, including that the District had no authority to "fail to act" on his request for a hearing. Plaintiff argues that, because he did indeed properly request a hearing (based on the jurisdictional assumption that he did so), the District had no authority to fail to act on his properly requested hearing. [9] Again, what Plaintiff really says is that once we assume (for purposes of counting days) that he requested a hearing on January 11th, the School District is entirely unable to say: "you didn't actually request a hearing on January 11th, but let's assume you did for counting days."

Of course, Plaintiff's argument is absurd. RCW 28A.405.310 only requires the District to appoint a nominee if Plaintiff actually made a proper hearing request. The School District is entirely able to preserve its argument that no such proper hearing request was made, but even if one

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[9] He says exactly that in his Memorandum in Support of Reconsideration: The District "did not have authority to refuse to name a nominee." Reconsideration Memorandum at 3-4. CP 254-55. He repeats this argument in his Brief of Appellant at 20.

were made, this action seeking to enforce such a request was not timely brought.[10]

A hypothetical example highlights the absurdity of Plaintiff's assertion on this issue. Assume a superintendent issued a discharge notice to a teacher on January 2, 2012. Assume the teacher then submitted a request for hearing on January 15, 2012. The teacher thus **actually** missed the 10 day timeline for requesting a hearing by 3 days. Because of the missed timeline, the superintendent refused to respond to the teacher's request. The teacher then files a declaratory judgment action in Superior Court asking the court to compel the superintendent to take action on his "properly presented" request for hearing. The teacher, however, files the declaratory judgment action more than 30 days after the superintendent failed to appoint a nominee. The superintendent responds to the teacher's declaratory judgment action by asserting that the court does not have jurisdiction because the declaratory judgment action was not timely filed.

For purposes of determining whether the declaratory judgment action was filed within 30 days of the superintendent's failure to act, the

[10] Plaintiff repeatedly uses the metaphor of "cherry picking." What Plaintiff fails to note, however, is that the Court has no choice about counting days for jurisdiction. RCW 28A.645.010 requires a counting of days from a trigger event. Here, this assumption of the trigger event is urged upon the Court **by both parties**. It is urged upon the Court by the Plaintiff because otherwise he could not bring this action (i.e., he could not bring this action without pleading that he made a proper hearing request). And it is urged upon the Court by the District because of the need to address the jurisdictional argument. This assumption is not urged upon the Court **by both parties for any other purpose** nor is it necessary for the Court to make such an assumption **for any other purpose.**

court in the hypothetical must identify and determine **when** the superintendent "failed to act" on a properly presented request for hearing. To do so, the court must first make an assumption (or, in logic terms, offer a hypothetical proposition) as to **when** the teacher properly requested a hearing. So, the court assumes (i.e., presents a hypothetical proposition), for argument's sake, that the teacher properly requested a hearing on January 15th. Even though we know that the hearing request was not proper (because it was not actually made in a timely manner), the court makes such an assumption in order to determine the threshold jurisdictional issue.

If the teacher in the above hypothetical case were to take the same position that Plaintiff takes in the present case, the hypothetical teacher would argue that the District could not contest whether his initial (albeit untimely) hearing request was proper—after all, the teacher would say, the court **assumed** he properly requested a hearing for counting days so the court must also **decide** that the District is unable to dispute his request for all other purposes (even though the District disputes it for all other purposes and even though it was not actually filed timely). The teacher in the hypothetical would also argue that the District had no authority to intentionally fail to act on his request for a hearing—after all, the teacher would say, the court **assumed** he properly requested a hearing (for

counting days) so the court must also **decide** that the District could not ignore his request. The teacher in the hypothetical would make an additional argument, as Plaintiff here does, that the independently filed declaratory judgment action is actually an appeal of his discharge/nonrenewal governed by RCW 28A.405.310 (as opposed to a declaratory judgment action brought to determine whether he actually did appeal his discharge/nonrenewal)—after all, the teacher would say, once the court **assumed** that he properly appealed for purposes of counting days, the court must also **decide** that all further matters are governed by the discharge appeal statute. Finally, the teacher would make an argument (as Plaintiff here does) that the District had unclean hands because it failed to respond to the teacher's appeal—after all, the teacher would say, the court **assumed** that the appeal was proper for purposes of counting days so the court must also **decide** that the District acted in bad faith by failing to act on his presumably timely appeal (even though it was not an actual timely appeal).

To summarize, for this Court to rule on the relief sought by Plaintiff, the Court must determine that it has subject matter jurisdiction to issue the relief sought by Plaintiff. The School District has conclusively and repeatedly demonstrated that the Court does not have subject matter jurisdiction to order the District to act upon Plaintiff's purportedly proper

request for a hearing or request to be paid, because Plaintiff did not bring this action within 30 days of the District's failure to act upon Plaintiff's purportedly proper request for a hearing and because Plaintiff did not bring this action within 30 days of the District's failure to act on Plaintiff's request to be paid.

3. RCW 28A.645.010 Applies to "Procedural" Decisions.

Plaintiff argues that RCW 28A.645.010 only applies to substantive or jurisdictional decisions as opposed to procedural decisions. Brief of Appellant at 12; *see also* CP 222 ("Since the selection of a nominee is procedural and not a "decision", there is no obligation to appeal within 30 days."). Plaintiff specifically argues that the Superintendent's or Board's failure to appoint a nominee falls outside the parameters of RCW 28A.645.010 because it is a "procedural" decision.

Notably, Plaintiff does not make the same assertion as to the failure to pay him. Presumably then, those decisions are substantive and Plaintiff would concede that RCW 28A.645.010 applies to them. As such, because he failed to bring this action within 30 days of when the School Board failed to pay him or failed to act on his request to be paid, the Court has no jurisdiction to order the School District to pay him.

As to this alleged distinction between substantive and procedural decisions, Plaintiff argues that this matter is like a lawsuit in that "[o]nce a

lawsuit is filed and the appropriate parties are timely served" the case is perfected and there is nothing else that needs to be done because all further work on the case is governed by procedural rules of RCW 28A.405.310. CP 219. Plaintiff's argument again defies common sense.

If this case were as Plaintiff describes, then why did Plaintiff need to file a declaratory judgment action in Superior Court? Why did Plaintiff not simply bring a procedural motion before a hearing officer under RCW 28A.405.310. In other words, if this declaratory judgment case was akin to a proceeding within an existing lawsuit, Plaintiff needs to explain why he did not simply rely on a "procedural rule" within RCW 28A.405.310 to request relief from a hearing officer. Obviously he did not do so because there is no such procedural rule and, indeed, there is not even a hearing officer.

What Plaintiff really wants the Court to do is ignore that he himself did not bring this action under any authority set forth in RCW 28A.405.310. Instead, while he alleges a violation of statutes in Chapter 28A.405 RCW, the authority under which Plaintiff himself brought this action is not RCW 28A.405.310, but instead the Declaratory Judgment statute, Chapter 7.24 RCW. CP 3. His Complaint is fashioned strictly as a declaratory judgment action and what he asks the Court to do is: (1) declare that the District wrongly failed to act on his hearing request and his request to be paid; and, (2) compel the District to act on his request for

a hearing despite the District's failure to act. CP 7-9. It is the District's failure to act that forms the entire and exclusive basis upon which he calls himself an aggrieved party.

Moreover, the argument that a procedural decision is outside the ambit of RCW 28A.645.010 was rejected in *Porter v. Seattle School Dist.*, 160 Wn.App. 872, 880, 248 P.3d 1111 (2011). In *Porter,* one of the decisions at issue was a failure to act upon a request to appoint certain individuals to a curriculum committee. The court framed the issue as a procedural decision:

> The challengers argue that the adoption committee **process** was biased in favor of inquiry-based math. They say teachers and community members willing to publicly question reform methodology were pointedly excluded. The record does not support this allegation, and even if it did, there was not a timely challenge to the committee selection **process**. *See* RCW 28A.645.010.

Id. at 880. (Emphasis added). The *Porter* court ruled that RCW 28A.645.010 deprived the court of subject matter jurisdiction because the plaintiff did not timely challenge a **procedural** failure to put certain parents on a committee. The Court expressly identified the failure to act as a **procedural** failure and nevertheless held that RCW 28A.645.010 deprived the court of jurisdiction because the failure to put certain citizens

on the committee was not appealed within 30 days. Plaintiff's assertion that RCW 28A.645.010 does not apply to procedural decisions or failures to act on requests for procedural decisions is simply incorrect and contrary to express, recent, controlling case law.

Plaintiff tries to distinguish *Porter* by arguing that the operative language is *dicta*. It is not *dicta* but instead is an alternative basis for the court's reasoning that RCW 28A.645.010 precludes the plaintiff parents' claim for failure to appoint someone to a committee. Here, RCW 28A.645.010 precludes this lawsuit for failure to appoint someone to be a nominee. RCW 28A.645.010 cuts a wide swath and applies to any decision and any failure to act. *Porter* applied it to a procedural failure to appoint certain community members. Plaintiff's attempt to limit *Porter* as dicta fails and thus Plaintiff fails to explain how this case is any different from the ruling in *Porter*.

Moreover, as to Plaintiff's argument that RCW 28A.645.010 does not apply to procedural decisions, Plaintiff ignores the plain language of the statute itself. RCW 28A.645.010 says the failure to act upon **any** decision must be appealed from within 30 days; otherwise the court has no subject matter jurisdiction. To repeat, by its own terms, RCW 28A.645.010 applies to **any** decision. It does not need to be a particular kind of decision. It can be a substantive decision or a procedural decision.

It can be really important decision or a relatively trivial decision. It applies to **any** decision. And, not only does it apply to **any** decision, it also applies to the failure to act upon **any** properly-presented request. It could be a request for a substantive decision or a request for a procedural decision. It could be a request for a trivial decision or a request for a really important one. The Superintendent's failure to act upon **any** request deprives this Court of subject matter jurisdiction to order such action 30 days after the request. Again, it can be a request to act upon a really important decision, a minor decision, a substantive decision or a procedural decision. The type of request is completely irrelevant. Thus, when Plaintiff asked the Superintendent to appoint a nominee, that request was subject to RCW 28A.645.010. Therefore, 30 days after Plaintiff requested the Superintendent to appoint a nominee, Plaintiff lost all rights to challenge the Superintendent's **failure to act** on that request.

In the court below, Plaintiff repeatedly referred to the District's failure to appoint a nominee as either "jurisdictional" or "non-jurisdictional." CP 180-81. Plaintiff seems to have abandoned that argument and rightly so because it misunderstands the jurisdictional analysis here. RCW 28A.645.010 applies to **any** decision and **any** failure to act. It allows a plaintiff to bring this type of action and it requires him

to do so within 30 days. The statute does not distinguish between "jurisdictional" or "non-jurisdictional" decisions or failures to act.

What Plaintiff really wants the Court to conclude is that there are certain decisions exempt from RCW 28A.645.010 and that this should be one of them because of how he characterizes the decision or failure to act (that is, because of how he characterizes a decision as jurisdictional or not). Washington courts have repeatedly rejected this argument by pointing out that a plaintiff cannot re-characterize his complaint in order to escape the confines of RCW 28A.645.010. Here, Plaintiff cannot say that his declaratory judgment action is any different from the declaratory judgment action in the *Clark* case. 53 Wn.App. at 835. In that case, the court pierced the veil of plaintiff's declaratory judgment action and called the complaint what it was: a challenge to a school district decision. Here, Plaintiff's declaratory judgment action is nothing more than a challenge to the District's failure to act. And, **any** failure to act, upon which an aggrieved Plaintiff sues a School District in Superior Court, triggers the 30 day timeline in RCW 28A.645.010.

4. Plaintiff Does Not Say What Limitations Period Applies.

Plaintiff seems to have abandoned his argument that the **two year statute of limitations** in RCW 4.16.130 applies instead of the 30 day timeline in RCW 28A.645.010. Plaintiff previously took the position that he

can request a hearing (properly or not) and then, if the School District does not act on that request, Plaintiff can wait two years before filing a declaratory judgment action in Superior Court. CP 219. Regardless of the inequity of requiring a school district to wait two years for such a lawsuit, the law is plainly opposite.[11]

In particular, RCW 4.16.005 expressly states that "**except when in special cases a different limitation is prescribed by a statute not contained in this chapter,** actions can only be commenced within the periods provided in this chapter after the cause of action has accrued." (Emphasis added). RCW 28A.645.010 is just such a different limitation. Chapter 4.16 RCW thus does not apply. RCW 28A.645.010 means what it says and it says that a party must bring an action within 30 days of any **decision** or of **any failure to act**. RCW 28A.645.010 also means what it says when it says that **all cases** other than a teacher's actual

[11] To highlight the inequity, a two year statute of limitations would allow an employee to request a hearing and then, if the school district does not actually receive the request (due to, for example, a clerical error), the employee can wait two years before suing the school district for back pay. All of this, despite that the employee would know right away of the district failure to act on his appeal (by failing to appoint a nominee). Indeed, Ms. McNair's January 11 letter reflects this very approach--the whole point of the letter was to seek more time than the allotted 10 days. Ms. McNair followed up with an email on February 8, over a month after the issuance of the notice of probable cause, saying that Plaintiff finally decided he wanted a hearing. Then, Plaintiff's lawyer sent a letter on February 21 (now over a month and half after the notice of probable cause), saying Plaintiff wants to get paid. And, what Plaintiff argues in this case is that he should be able to wait an entire two years before he is required to bring an action challenging the District's failure to act on his purported hearing request all the while he should get paid or accrue back pay.

discharge/nonrenewal appeal are governed by the 30 day deadline--not a separate two year statute of limitations.

5. RCW 28A.645.010 Applies to Failures to Act.

Plaintiff previously appeared to argue that RCW 28A.645.010 only applies to **decisions** of which notice is provided rather than also to "**failures to act**." CP 215 & 220-22. The statute, however, is abundantly clear that it applies when a Plaintiff does not timely challenge a "failure to act." Moreover, as mentioned above RCW 28A.645.010 does not merely impose a 30 day jurisdictional bar. To the contrary, RCW 28A.645.010 is an enabling statute that affirmatively empowers **any** aggrieved person to challenge **any** action of a superintendent or school board in superior court. The statute also empowers any person to challenge, in superior court, the **failure** of a superintendent or school board to act when properly requested to do so. The statute creates extremely broad rights that allow any person to challenge any action or failure to act. Were it not for the failure to act language, the statute would lose all force and power given that a school district could avoid challenge by not making a decision when requested to do so. The legislature expressly rejected such a result by providing broad remedial rights in RCW 28A.645.010 that allow superior court challenges to any decision or failure to act.

Plaintiff, seemingly unaware of the empowering aspects of RCW 28A.645.010, criticizes the School District for relying on the Superintendent's intentional "failure to act and appoint a nominee." CP 221 (Plaintiff Response to Defendant's Motion for Summary Judgment at 9). Plaintiff says the School District's failure to act was intentional and that it is bad faith for the District to rely on its own intentional failure to act. The Superintendent, however, has no obligation to respond to an improper hearing request. It is hardly bad faith to fail to act when that failure is based on Plaintiff's own failure to properly request a hearing.

6. Plaintiff Makes a New Argument Based on Equal Protection.

It is difficult for the School District to ascertain, but Plaintiff now seems to argue that there is no limitations period for his underlying declaratory judgment action because any such limitations period would be arbitrary and would "violate equal protection under the 14th Amendment due process." Brief of Appellant at 13. Plaintiff makes this argument for the first time on appeal and provides the Court with no analysis as to how application of RCW 28A.645.010 here violates the 14th Amendment.[12]

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[12] To establish an equal protection violation, Plaintiff would have to show that RCW 28A.645.010 treats unequally two similarly situated classes of people. *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 635, 911 P.2d 1319 (1996). Moreover, an equal protection claim such as this is not based on a suspect classification. *See, eg., Meyers v. Newport Consol. Joint School Dist. No. 56-415,* 31 Wn.App. 145, 150, 639 P.2d 853 (1982). Thus, the "rational basis" test applies. *Marquez v. University of Washington,* 32 Wn.App. 302, 308, 648 P.2d 94 (1982).

Plaintiff cannot show that RCW 28A.645.010 differentiates between similarly situated classes of people (i.e., employees and non-employees). Rather, RCW 28A.645.010 is analogous to limitations on time to file notice of appeals such as RAP 5.2(a) and applies equally to anyone who challenges a school board or school official action.

Plaintiff seems to argue that, if a teacher never appoints a nominee under RCW 28A.405.310, then the School District is precluded from ever precluding the teacher from having a hearing. Plaintiff's argument, however, ignores judicial use of concepts such as waiver, estoppel and/or laches. Moreover, Plaintiff seems to want to differentiate between the applicability of RCW 28A.645.010 toward school districts versus individuals who sue school districts. A school district, however, would never bring an action against itself under RCW 28A.645.010. Thus, the School District and Plaintiff are not similarly situated classes of people and there could be no equal protection claim on such a basis.

7. Plaintiff Appears to Abandon His Estoppel Claim.

Plaintiff previously made what could only be characterized as a desperate plea for estoppel. CP 183. He argued that the District should be estopped from denying Ms. McNair's purported request for appeal. Plaintiff, however, has never mentioned any admission, statement or act

by the District that is inconsistent with the District's position or claim here. He also did not identify any action that he took in reliance on anything the District did. Plaintiff may very well have relied on misguided action taken by Ms. McNair, but Ms. McNair's action is not action of the District.

Moreover, Plaintiff's estoppel argument has previously been rejected in *Greene v. Pateros School Dist.*, 59 Wn.App. 522, 535, 799 P.2d 276 (1990):

> The elements of estoppel are: (1) an admission, statement or act inconsistent with a claim afterward asserted; (2) action by another in reliance upon it; and (3) injury to the relying party from allowing the contradiction or repudiation. *Board of Regents of UW v. Seattle*, 108 Wash.2d 545, 551, 741 P.2d 11 (1987). 'However, in order to create an estoppel, the party claiming to have been influenced by the conduct or declarations of another must have been unaware of the true facts.' *Luna v. Gillingham*, 57 Wash.App. 574, 582, 789 P.2d 801, review denied, 115 Wash.2d 1020 (1990).
>
> **Mr. Greene can hardly complain he was unaware of the true facts necessary to perfect his appeal. The notice of nonrenewal informed him of his right to appeal his contract nonrenewal pursuant to RCW 28A.67.070.**

(Emphasis added).

Precisely the same analysis applies here. How can Plaintiff claim he was unaware of the true facts needed "to perfect his appeal" given that the Notices of Probable Cause informed him of his right to request a hearing and **even enclosed copies of both statutes** (incidentally, there is no requirement in the law that the District enclose both statutes).

Related to an estoppel argument, Plaintiff also seems to argue that the District was somehow laying in wait for him to file this action beyond the 30 day timeline. CP 221. Plaintiff asserts bad faith and unclean hands based on nothing more than an **unsubstantiated assumption** that the District and the undersigned engaged in a Machiavellian plot as of January 26, 2012 to wait 30 days until telling Plaintiff of the reason why the District had not responded to Ms. McNair's letter. The truth is actually in keeping with the far more simple fact (which has already been mentioned above): The District chose not to respond to what it considered an improper hearing request out of concern that any such response would be considered an admission that Ms. McNair's letter was a proper request and out of concern that a District response would act as a waiver of the ability to argue that Ms. McNair's letter was not a proper request.

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8. Plaintiff Argues That the School District Must Give Him Notice of its Failure to Act.

Plaintiff appears to have abandoned his assertion that the School District had an obligation to inform him of the District's failure to act. Again, rightly so since the *Blunt* case (*supra,* 12 Wn.2d at 340) addresses this very argument and points out that a school district is under no obligation to inform anyone of a failure to act. In *Blunt*, the School Board never informed the employee of its decision not to pay him. The point from *Blunt* is that the employee can inquire or, instead of inquiring, simply bring an action in Superior Court to preserve his rights. Plaintiff here never inquired about why the School District failed to appoint a nominee. He certainly could have and nothing in the record shows that he was prevented from doing so. Moreover, nothing prevented Plaintiff from suing within 30 days of when the District failed to pay or from 30 days of when the School District failed to act on his request via his lawyer to be paid.

9. Plaintiff Argues That None of the Cases Relied Upon by the District Are Termination Cases.

Plaintiff seems to argue that this case is different from all other prior cases decided under RCW 28A.645.010. The School District has already pointed out the similarities between the *Blunt* case and the *Porter*

case. Numerous cases in addition to *Blunt* and *Porter* have a commonality to this case. In *Clark*, 53 Wn.App. at 835, the plaintiff was an employee who was suing for an employment benefit (sick leave benefit). In *Schmidtke v. Tacoma School Dist.*, 69 Wn.App. 174, 848 P.2d 203 (1993), the plaintiff was an employee who was suing for an employment benefit (back pay). In *Benson v. Roberts*, 35 Wn.App. 362, the plaintiffs were five employees who were suing for an employment benefit (personal leave). In *Haynes v. Seattle School Dist.*, 111 Wn.2d 250, the plaintiff was an employee who was suing for an employment benefit (appointment to a certain job). All of those cases involve employees seeking a certain benefit tied to their employment. In all of those case, RCW 28A.645.010 applied to their claims. Just like those cases, this case is an employee seeking a certain benefit tied to his employment—in his case, appointment of a hearing officer and back pay.

10. Plaintiff Argues That Failure to Act on His Appeal Is Not a Final Decision in the Course of Administering the School.

Plaintiff makes two new arguments on appeal based on *Mountain View School v. Issaquah School Dist.*, 58 Wn.App. 630, 794 P.2d 560 (1990), *Bremer v. Mount Vernon School Dist.*, 34 Wn.App. 192, 660 P.2d 274 (1983), and *Nielson v. Vashon Island School Dist.*, 87 Wn.2d 955, 558 P.2d 167 (1976). Brief of Appellant at 9. As to *Mountain View*, Plaintiff

argues that the Superintendent and School Board have no authority over how or whether to respond to a terminated employee's purported hearing request. *Id.* Plaintiff essentially argues that a superintendent cannot refuse an improper hearing request and a school board cannot refuse to pay a terminated employee. The Washington Supreme Court has previously rejected this very argument.

In *Haynes v. Seattle School District*, 111 Wn.2d at 252-53, the Court articulated the broad swath of RCW 28A.645.010 when it comes to employee contract rights. *Haynes* says: "Review of a school board's decision respecting an **employment right established by contract** is clearly governed by RCW 28A.88.010 [the predecessor to RCW 28A.645.010]." *Id.* at 252 (emphasis added). *Mountain View* expressly deferred to *Haynes*:

> In *Haynes*, the school board had the authority to decide the **teacher's rights under her contract** with the school board. RCW 28A.88.010, in addition to other statutes, gives school boards that authority. See also former RCWs 28A.58.0951, 28A.58.096, 28A.58.098, 28A.58.099, 28A.67.065, 28A.67.070, 28A.67.072. [Each of these former statutes addressed employment matters over which the school district has authority].

Mountain View, 58 Wn.App. at 633.

Plaintiff's apparent assertion that his claim is not based on an employment right established by contract seemingly ignores the very basic concept that Plaintiff's right to continued employment is based solely on the existence of a contract. Without a contract, plaintiff has no right to continued employment and thus no rights under RCW 28A.405.210 and .300 (the two statutes on which the Notice of Probable Causes were issued to Plaintiff). The Superintendent has authority to issue notices of probable cause terminating Plaintiff's contract under those statutes (based on the Plaintiff's contract with the School District). How then does the Superintendent not also have authority under those same statutes to determine that Plaintiff did not properly appeal the notices of probable cause?

Plaintiff relies on *Bremer* and *Neilson* for the notion that the superintendent's failure to act on his hearing request was not a final failure to act. Brief of Appellant at 9. The School District is left to wonder what else needs to happen after the fifteenth day in order for the School District to have finally failed to act on Plaintiff's purported hearing request. Likewise, what else needs to happen in order for the School District to have finally failed to pay or act on the request for payment? Moreover, if there is no final action, one has to wonder how there is a justiciable controversy on which Plaintiff can bring a declaratory judgment action.

Clearly, as of the fifteenth day when the Superintendent failed to act to appoint a nominee, a failure to act occurred, thus triggering the thirty day timeline for Plaintiff's action. Nothing more needed to occur. The District did not act within the 15 days allotted by statute as of the fifteenth day. Likewise, nothing more needed to occur in order for the School District to have failed to pay Plaintiff as of January 31st . These new arguments by Plaintiff on appeal are without merit.

Moreover, Plaintiff seems to mix issues when he asserts that the Superintendent has no authority to refuse to appoint a nominee. Brief of Appellant at 10. Plaintiff again extends the assumption that he properly requested a hearing (to a verity) and thus uses that assumption to argue that the Superintendent is without power to ignore Plaintiff's supposed proper request. Again, Plaintiff ignores that the Court cannot make such a determination on the merits unless and until a jurisdictional determination is made.

In simple terms, Plaintiff wants this Court to decide on the merits (not just assume for the purpose of counting days) that he did indeed properly request a hearing and that the School District thus has no authority to contest whether he did indeed properly request a hearing. The School District, however, clearly has a right to contest whether Plaintiff

properly requested a hearing and thus to not act on what it considered to be an improper hearing request.

11. Plaintiff Relies on a Faulty Presumption.

Plaintiff has previously argued that his lawyer assumed the School District had made a mistake when it failed to pay plaintiff on January 31st. CP 191. This was clearly an erroneous assumption and it is hardly the School District's fault that such an erroneous assumption was made. The fact that an erroneous assumption was made does not, in any way, lessen or mitigate the preclusive jurisdictional impact of Plaintiff failing to bring this action within the required 30 day timeline. Plaintiff waited more than 30 days to sue after the admission by Plaintiff's lawyer that Plaintiff knew he was not getting paid. RCW 28A.645.010, however, does not allow for a tolling of the 30 day limitations period because Plaintiff made an assumption that he should not have made.[13]

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[13] Worth noting is that the School District, as a courtesy, did send a response to Ms. McNair that the District did not consider her hearing request to be a valid request. CP 26. The School District provided that response on February 28, 2012--within 30 days of the end of January. CP 32. Thus, as of the date of the School District's notice explaining why Plaintiff was not getting paid, Plaintiff still had time to initiate this action. That is, within 30 days of January 31, 2012 (when Plaintiff knew he was not getting paid) Plaintiff (and his legal counsel) had express notice and full knowledge of the School District's decision to not pay him along with the exact reason why. Plaintiff can hardly complain now that he had to be a mind reader or that he didn't know within 30 days of not getting paid that the School District had indeed made a decision to give no effect to his purported hearing request.

12. Plaintiff Argues He Did Not Ask the School District to Act.

Plaintiff makes an unusual new argument on appeal, asserting that he "did not request that the School District act" on his appeal and that "[n]othing was presented by Cronin to the School District to decide." Brief of Appellant at 20. Plaintiff seems to argue that the purported hearing request by Ms. McNair was not a request for any action by the School District. Plaintiff appears to fall back on the repeated argument that the School District had no choice, once he properly requested a hearing, to do anything other than fall in line and appoint a nominee.

Again, Plaintiff suspends reality and seemingly fails to grasp that just because he says he properly requested a hearing, it does not make it so. Likewise, just because he says he properly requested a hearing, it does not mean the School District must give validity to such a request. Further, just because he says he properly requested a hearing, it does not mean the School District must appoint a nominee. And, finally, just because the Court presumes he properly requested a hearing in order to start counting the 15 days for appointment of a nominee, it does not mean the School District had to actually appoint a nominee. In all, Plaintiff repeatedly and without any basis argues that the School District is unable to reject what the District considered (and still considers) a faulty request for hearing.

13. Plaintiff Abandons His Argument That He Met the 30 Day Timeline.

Plaintiff previously argued that he did actually meet the 30 day timeline in RCW 28A.645.010. He appears to have abandoned that argument. Rightly so as there are three hurdles that plaintiff could not overcome.

First, RCW 28A.645.010 does not provide, as Plaintiff argues, for commencement of an action within 30 days of when Plaintiff knew the **reason** for the District's failure to act. Plaintiff says that he did not know the reasons why the District failed to act until February 28, 2012 when the District explained its reasons in a letter from the Superintendent.[14] RCW 28A.645.010 contains no such provision and no Court has ever adopted such an approach. Moreover, that approach is inimical to the very purpose behind the thirty day timeline and would allow for significant delay in the filing of cases such as this.

Second, Plaintiff completely ignores that he knew, fifteen days after he supposedly requested a hearing (on January 26, 2012), that the District had failed to act on his request. Again, RCW 28A.405.310 requires the District to appoint a nominee within 15 days of the Plaintiff's request for hearing. On the fifteenth day (January 26, 2012), when the

[14] Again and as mentioned above, Plaintiff still had time to initiate a claim as of February 28, 2012.

District clearly and unmistakably failed to act on Plaintiff's hearing request, Plaintiff knew without any doubt that the District had failed to act on his request. Plaintiff, however, makes an absurd argument that the District is somehow required to notify Plaintiff that the fifteen days have elapsed.

What Plaintiff would have the District do is provide a notice such as: "As you can readily see (because you have access to a calendar and know how to count), fifteen days have expired since you supposedly requested a hearing and, as you can also readily see, the District has not responded to your hearing request." No statute and no case require a school district to notify a teacher of what is readily apparent. The simple fact is that Plaintiff knew the District was required to appoint a nominee within 15 days (after all, the District gave him a copy of the statute saying so) and Plaintiff knew the District failed to appoint a nominee within 15 days (because he can count and has access to a calendar). Plaintiff simply did nothing about it for nearly two months.

Third, Plaintiff completely ignores that he knew as of January 31, 2012—payday—that he was not receiving pay from the District. For Plaintiff to argue that he had no idea, as of January 31, 2012, that there might be reason to inquire of the District is absurd. Yet, for no reason yet explained by Plaintiff, he waited until February 21, 2012, to inquire about

why he was not paid three weeks prior and then he waited an entire additional month before filing the underlying action.

V. CONCLUSION

Plaintiff filed this action more than 30 days after the January 26th failure to appoint a nominee, more than 30 days after the January 31st failure to pay Plaintiff, and more than 30 days after Plaintiff's lawyer's February 21st request for payment. RCW 28A.645.010 mandates the filing of this action within 30 days of any one of the above. It is a plain, unambiguous statute with broad yet fair application. Nothing prevented Plaintiff from filing this action within 30 days of the above. The School District thus respectfully requests that this Court uphold the trial court's decision to grant the District's Cross-Motion for Summary Judgment Dismissal of Plaintiff's Complaint.

DATED this 16th day of May, 2013.

Respectfully submitted,

STEVENS-CLAY-MANIX, P.S.

By: _____, WSBA # 36811, FOR:
PAUL E. CLAY, WSBA #17106
Attorneys for Central Valley School District

CERTIFICATE OF SERVICE

I do hereby certify that on this 16th day of May 2013, I served a true and correct copy of the above and foregoing SCHOOL DISTRICT'S RESPONSE BRIEF on the following, in the method indicated:

Larry Kuznetz
Powell Kuznetz & Parker
316 W. Boone Ave., Suite 380
Spokane, WA 99201

___ U.S. mail
___ Overnight mail
X Hand-delivery
___ Facsimile transmission
____Email

KIMBERLY N. REBER