ORIGINAL

Cause No. 44750-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LYNDA SCHLOSSER)
)
Appellant)
)
vs.)
)
BETHEL SCHOOL DISTRICT,)
)
Respondent)

BRIEF OF APPELLANT

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I. Introduction

Appellant, Linda Schlosser a Continuing Technical Education teacher at Bethel School District was terminated following after twenty seven years teaching for alleged "unsatisfactory performance." Mrs. Schlosser was not afforded a *Loudermill* pretermination meeting with the District Superintendent to dispute the information upon which his decision was based. Ms. Schlosser asserts that the failure to meet with her before the decision was made not to renew her contract violated her rights of due process as expressed in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and that the deficiency was not cured by the post deprivation review that never afforded her the opportunity to invoke the discretion of the decision maker, Superintendent, T.G. Siegel.

The trial court erroneously determined that the failure to afford Ms. Schlosser a *Loudermill* hearing, if required, made no difference and affords Ms. Schlosser no remedy. The trial court erred by disregarding that the Superintendent was unaware of significant information when he issued the notice that her contract would not be reviewed.

The underlying determination that Ms. Schlosser was an "unsatisfactory teacher" is clearly erroneous and contrary to the evidence.

II. ASSIGNMENTS OF ERROR AND

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

A. Errors of the Superior Court

a. The Superior Court Erred When it Held the Post Deprivation Review Specified by RCW 28A.405.310 satisfies due process.

b. The Superior Court Erred When it Held that Even if a *Loudermill* Hearing is Required, It Would Make No Difference and The Teacher Is Entitled to No Remedy.

c. The Superior Court Erred When it Found that the Record Before the Hearing Officer Established the Teacher was an Unsatisfactory Teacher Justifying Non-Renewal of her Contract.

d. The Superior Court Erred When It Found the Following Facts Which Are Not Supported by Substantial Evidence:

i. The overall conclusion that Mrs. Schlosser was not a satisfactory teacher is contrary to the weight of the evidence and should be set aside.

ii. Finding of fact number 2 is not supported by substantial evidence, except for the fact that the evaluations asserted such findings, but the evidence does not support the conclusions reflected in the evaluations.

iii. The hearing examiner stated that there was no evidence Ms. Schlosser could have attended a pre-termination meeting and that it is highly

improbable that a different result would have occurred had she been afforded such an opportunity. (CP 001562).

iv. The hearing examiner found that the teacher non-renewal statutes do not specifically mention a pre-termination hearing and thus, no pre-termination hearing is required. (CP 001562). That is a conclusion of law and not a finding of fact.

B. Issues Related to Assignments of Error.

a. Is A Certificated Teacher Entitled to A Prettermination Opportunity to Invoke the Decision Maker's Discretion Before the Decision to Not Renew a Contract is Made?

b. Does the Failure to Afford a Teacher Opportunity to Invoke the Decision Maker's Discretion Deny the Teacher's Right of Due Process Notwithstanding Post Termination Procedures that Never Afford the Opportunity to Invoke the Decision Maker's Discretion?

c. What are the Appropriate Remedies for a Violation of the Teacher's Due Process Rights?

d. Did the Superior Court Inappropriately Conclude That Any Failure to Provide Due Process Caused No Injury?

e. Does Substantial Evidence Support the Findings of Fact and the Conclusion the Teacher was an Unsatisfactory Teacher?

III. STATEMENT OF THE CASE

A. This Action Is A Review of a Teacher's Contract Non-Renewal Pursuant to RCW 28A.405, *et seq.*

This RCW 28A.405.100(4)(a) action addresses the non-renewal of Lynda Schlosser's contract as a teacher in the Bethel School District. On May 10, 2012 Connie West and Brad Westering (the Evaluators) issued a

report to Bethel School Superintendent T.G. Siegel that Mrs. Schlosser had been evaluated as an "unsatisfactory" instructor. (CP 1144) The next day, without any input from Mrs. Schlosser, Superintendent Siegel issued his notice that Mrs. Schlosser's contract would not be renewed. (CP 1146).

Mrs. Schlosser (referred to herein as "Mrs. Schlosser" or "the Teacher") asserts the "unsatisfactory" rating is unwarranted as unsupported by adequate evidence. Although Mrs. Schlosser asserts that her age was also a substantial factor in the decision to non-renew her contract those issues were not before the hearing officer or this court.

A summary of exhibits is found at CP 1721-23.

B. Mrs. Schlosser is a Twenty Seven Year Veteran Continuing Technical Education Teacher with a History of Favorable Evaluations.

The Teacher was successfully employed as a Continuing Technical Education teacher at Clover Park High School from 1985 until 1998 (CP 599-600). She was recruited to come to work for the Bethel School District, presumably because of her excellence in teaching business for 13 years in the Clover Park School System (CP 601-02). The Teacher was involved in numerous professional organizations related to teaching business subjects, serving in leadership roles and instructional activities for business teachers through out the State. (CP 671-72).

Certification to teach Continuing Technical Education (CTE) requires 2000 hours experience in a related field. (CP 599,, 601) The Teacher's Evaluators were not certified to teach CTE courses. Mr. Westering had been a physical education instructor. (CP 211) as had Mrs. West. (CP 212). Neither evaluator had taught business courses (CP 212, 453). The Teacher taught five different courses, (CP 155) and created her own curriculum because she not have text books for some courses. (CP 641-46). She had also served as the advisor for Future Business Leaders of America her entire tenure at Bethel School District. (CP 686-89)

The Teacher's classes are acknowledged to be chaotic by nature. (CP 199-200; 212) The evaluators lacked knowledge of the students' backgrounds. (CP 214).

The Teacher's evaluations demonstrate a history of strong teaching. (CP 1151-1169) Ignoring years of excellent performance reviews, the Evaluators claimed the Teacher lacked subject matter knowledge. (CP 1121) Even where the evaluators determined Ms. Schlosser demonstrated good teaching skills (CP 420, 1023), she was rated unsatisfactory. (CP 1008) That determination coupled with over twenty five years of strong performance evaluations (CP 1985-2003) Hearing Ex. 18, demonstrates a biased evaluation. Mrs. Schlosser's performance, dedication and work ethic are documented in numerous comments in her

formal evaluations over the years: "Lynda's teaching expertise, knowledge of business education subject matter and desire to improve the program to better prepare students make her a valuable addition to the BHS staff." (Dec. 18, 1998)(CP 1985); "It is refreshing to work with an experienced teacher that continues to experiment with new techniques and activities to improve student learning." (June 1, 1999) (CP 1086) "Mrs. Schlosser has become a very fine member of our Business Education Department.... We are pleased to have her expertise..." (May 25, 2000)(CP 1087); "Mrs. Schlosser has created a positive place within her department and with her students" (May 23, 2001) (CP 1088); "She designs and delivers her lessons in a clear professional manner purposely to help her students understand the objective. (May 15, 2002)(CP 1089); "Lynda is well respected in the vocational community and around the state.... Different learning styles were demonstrated today, depending on the project/assignment each student was completing." (May 5, 2004)(CP 1994); "Mrs. Schlosser has a strong understanding of business education." May 13, 2005. (CP 1999).

"My observation showed the continued ability of Lynda to instruct students either in Computer Applications or Business Law." (May 17, 2006)(CP 2000): "...Mrs. Schlosser reinforced various assignments by addressing individual concerns. Mrs. Schlosser asked questions to help

engage in their understanding of the assignments." (May 22, 2007)(CP 2002); Mrs. Schlosser clearly enjoys working with her students...Her humor is contagious and allows students to make connections with her." (June 11, 2008)(CP 2003).

Bethel School Superintendent T.G. Siegel (CP 53) indicated that he had "an epiphany" and believed that the high percentage of satisfactory teachers was statistically improbable and he determined to eliminate low performing teachers. (CP 58-60; 68) After his "epiphany" thirty percent of Bethel School District's teachers began to be regarded as unsatisfactory in one or more areas. (CP 86-87) Non-tenured teachers were let go, many were encouraged to retire and some, like Ms. Schlosser were "performed out." (CP 60-61; 86-87) Of the 300 unsatisfactory teachers identified, approximately 200 improved and the remaining 100 left for retirement, probationary discharge or non-renewal. (CP 86).

In 2011-2012 Mrs. Schlosser returned to teaching business courses and the yearbook. One of her business course was "financial fitness" which had been approved for fulfilling the student's math requirement. Minimal observations were made of Mrs. Schlosser's yearbook class instruction and only one review of Mrs. Schlosser's Entrepreneurship course. The yearbook prepared under Mrs. Schlosser's guidance and

instruction won a 2012 statewide award and is used as a model for other schools to follow. (CP 75; 2033-34).

The Evaluators overlooked critical information and their "unsatisfactory" rating was being driven by a conclusion to rate Mrs. Schlosser as unsatisfactory regardless of the known facts. For example, even after Mrs. Schlosser pointed out to the Evaluators that students not assigned to her class, but were in the computer lab using the computers on their free periods, Mrs. Schlosser was accused of having many students working off task in a computer lab. (CP 666-67).

Mrs. Schlosser was criticized for not advancing a political agenda embraced by Mrs. West as teaching moments, discussion of Watergate or Mitt Romney's tax rate for example. (CP 1876, 2441; 554-61) The Evaluators blocked Mrs. Schlosser from attending a teaching seminar. (CP 444-45; 651-53). Then claimed she did not meet professional development standards. (CP 1037,1978).

The corrective actions specified in the plan of improvement (CP 1809-1818) is correlated with what Mrs. Schlosser did in the classroom. Under instructional ability Mrs. Schlosser was directed to post and state the learning objectives for the student's each day. (CP 1810) She essentially was doing that throughout her term of probation. (CP 522) In one instance the learning objective was posted in the adjoining classroom,

however, the students were admitted into the other classroom and Mrs. Schlosser felt it would be inefficient to move the students back into the other classroom. (CP 417-19; 522-23) But those facts were omitted by the Evaluators. (CP 1839) Evaluators acknowledged that Mrs. Schlosser used lesson plans, had learning targets posted in her room and had the students engaging in very quick response to learning activity at the beginning of each class. (CP 162)

She was instructed to prepare weekly lesson plans by 7:00 p.m. every Sunday and her lesson plans were described by the evaluators as very good. (CP 409-10) If math was used she was asked to demonstrate the correct way to solve the problems. (CP 3421) She was instructed to use different methods to engage all of the students. She adopted a method of randomly selecting students to call upon students. She used other methods such as joint work, Frayer sheets and having them work out problems on the board (CP 420-21; 425-27; 456-58; 521-22; 560-62; 567-68; 572-73; 576-77); she deviated from her lesson plan where appropriate. (CP 543-44; 566; 669-71).

She was asked to use methods to check student learning, including using a closing activity and she used exit question sheets to review areas where students showed comprehension gaps. (CP 668-69) She was instructed to video tape herself teaching. She asked for assistance in

having her class videotaped, but was not provided any. Mrs. Schlosser purchased her own video camera and videotaped herself teaching. Mrs. West concluded that Mrs. Schlosser was not using the exit slips the students provided to her because she did not see that use. (CP 419) Yet, she only participated in one set of back to back classes, a Business Law Course on March 19th and March 20th. (CP 419; 1964). Like many other observations, Mrs. West's conclusions were unsupported by any objective evidence. Mrs. Schlosser gave tests to the students, but Mrs. West never observed the tests. (CP 424-26) Mrs. West acknowledged that the students had developed competence. (CP 461; 464-65).

Under classroom management she was instructed to teach and re-teach her expectations for the classroom and re-direct off task behavior. (CP 435-39) She prepared a list of classroom expectations and distributed them to her students. (CP 2496-2544) She addressed issues as they arose. (CP 626-29; 694-95) In one instance, she addressed the use of profanity by a student whom had been sexually molested (CP 660-62), but was criticized by the Evaluator because the student had used profanity . (CP 544; 580-83). Some of the students in class had difficult issues with the lack of a stable home or emotional problems. (CP 697-702)

She was told to monitor off task behavior in the computer room. However, she was criticized when students that were not even assigned to

her class but were using the computers on their free periods. (CP 531-535; 666-67; 2380) When students were looking up websites with content of interest to them as part of an assignment, she was criticized because some students were looking at sites for footwear or wedding planning, even though that was consistent with what the students were tasked to do which was to look up pricing on real company's products. (CP 531-35; 708-09; 961)

Under Professional Preparation and Scholarship (CP 980) she was directed to attend outside courses. However, when she located a course to comply the Evaluators prevented her from attending the course. (CP 444-45) In fact Mrs. West alleged falsely the actions Mrs. Schlosser could do to improve her knowledge base did not happen. (CP 447) No other courses were suggested or proposed for her to attend. (CP 443). She was instructed to work with math teachers on curriculum development and improve her math skills. She did meet with a math teacher on issues where she had questions. (CP 636-39; 655-58). Under Effort Towards Improvement When Needed (CP 981) she was instructed to observe other teachers. She did go and observe other teachers at her own school and at the other school in the district. (CP 635-39; 655-58).

During her twenty seven years of teaching Mrs. Schlosser had attended numerous training workshops. (CP 650;1205-17). She had also

put on training for other CTE teachers while serving on the board of their association. (CP 671-639). Mrs. Schlosser did everything in the action plan but was rated unsatisfactory on professional preparation and scholarship. (CP 448).

C. The Evaluations Relied Upon to Terminate the Teacher Are Contradictory and Ignore Crucial Facts.

Numerous examples demonstrate the recorded observations and/or the actual classrooms events conflict with the conclusion the Teacher was "unsatisfactory" in meeting performance rubrics. (CP 558) Conflicting directions are given regarding Mrs. Schlosser's response to student actions the approach of letting certain behavior pass without immediately direction was criticized, but subsequently she was told a better approach was to wait for the student to decide to cooperate. (CP 5568-69).

The Teacher was accused of using the incorrect usage of "principal" for a balance of a loan, where it was the Evaluator who was wrong, (CP 575) demonstrating the Evaluator's bias and a lack of knowledge. Mrs. Schlosser was accused of failing to maintain control of the class room when she reminded the class about appropriate decorum after a female student who was a victim of sexual molestation used profanity after she became upset during a discussion of sexual harassment. (CP 660-65), The evaluators were not in the room the day before when

the incident took place but assumed the event demonstrated poor classroom management. (CP 222-232) Mr. Westering labored under the false impression that Mrs. Schlosser never informed students of classroom expectations. (CP 226-27) Yet he acknowledged that issuing rules and expectations at the start of the semester is a good approach, (CP 229) that is what Mrs. Schlosser did for her classes. (CP 620-21; 6660; 684-86; 701-3; 2496-2544).

Mrs. Schlosser was thrust upon the horns of a dilemma, where she addressed inappropriate student behavior she was told perhaps she should have waited for the student to want to participate (CP 568-70) and if she chose to wait to address behavior she was criticized for not taking action.

When one student demonstrated excellent comprehension of what Mrs. Schlosser had taught, the Evaluators took diametrically opposed views of what Mrs. Schlosser should have done. Mr. Westerly asserted that she should have re-taught the issue. (CP 239) Mrs. West believed Mrs. Schlosser should have left it alone and moved on with the lesson. (CP 574). Both Evaluators ignore Mrs. Schlosser had effectively taught this student and other students recognized his comprehensive answer.

No effort was undertaken by the Evaluators or the District gauge the student's mastery of the subject matter. (CP 236-37; 564-65)

The evaluation process does not define "unsatisfactory" or "satisfactory" or provide guidance on objective standards for evaluation. (CP70-71)

D. The District Did Not Afford the Teacher a Pretermination Hearing Denying Her Due Process.

Due to her husband having open heart surgery in early May 2012, Mrs. Schlosser did not have a closing meeting with her Evaluators. (CP 403-04; 709). On May 10, 2012, the Evaluators forwarded their determination that Mrs. Schlosser was overall unsatisfactory overall, unsatisfactory in "Instructional Skills; Classroom Management; Professional Preparation and Scholarship; Effort toward Improvement When Needed; Handling Student Discipline and Attendant Problems, and Knowledge of Subject Matter to the Superintendent. (CP 1978).

On May 11, 2012, the Superintendent issued a letter informing Mrs. Schlosser probable cause existed to non-renew her employment contract at the end of the 2011-2012 school year. (CP1980) No opportunity was afforded for the Teacher to address the recommendation or correct erroneous information before his decision was made. (CP 710-12;) The Superintendent admitted his decision was based solely on the Evaluators' input (CP 69) without the Teacher's input. (CP 66-67)

The Superintendent was unaware the Teacher had taught a yearbook class that she won an award. (CP 75, 2033-34). The Superintendent did not consider the educational outcomes or grades of the Teacher's students (CP 76, 90) demonstrating they had, for the most part, learned the materials from the Teacher's instruction. (CP 2059-2284). Mr. Siegel was unaware Mrs. Schlosser had requested to attend a training seminar had been denied to her by the Evaluators. He was also unaware that she had gone and observed other teachers. (CP 446, 655-58) He was unaware her requests to have her classroom videotaped were not acted on by the administration. (CP 78-79). He admitted that knowledge of those facts may have impacted his assessment of her "Professional Preparation and Scholarship." (CP 78-79). Mr. Seigel admitted that he would be surprised that the Teacher's request for training was not granted. (CP 80). He indicated that knowledge of the efforts undertaken by Mrs. Schlosser to learn and observe other teaching methods may have impacted his decision, but that he relied solely upon the evaluator's "check mark" of the assessment of those efforts. (CP 80-81). He again relied solely upon the check mark of the Evaluators' assessment for efforts toward improvement being unsatisfactory although he did consider the evaluator's comments as well. (CP 92-93). He acknowledged that Mrs. Schlosser's participation in

professional organizations for CTE instructors may have influenced his assessment of her professional preparation and scholarship. (CP 82).

Mr. Siegel acknowledged that there is a range of acceptable classroom behavior and the students need not be lined up neatly in rows with their hands upon their desks. (CP 82) Mrs. Schlosser testified that she allowed some off task behavior because she is teaching students to prepare them for the work world. (CP 549; 622-26) The relationships that were formed by some students through this process were regarded by her as positive educational outcomes. (CP 625-26) She recounted the interaction of three female students from diverse backgrounds that allowed them all to succeed. (CP 625-26) Mr. Siegel acknowledged that in many classroom there is a lot of activity going on that could cause one to question, "How is this a good classroom?" However, the teacher has a coherency to the lesson and resulting outcomes are good. (CP 83-84). In this instance, Mrs. West as a middle school principal with no CTE instructional experience is significant. She often did not know what she was observing, to her the activity looked like chaos.

Mr. Seigel acknowledged that he was unaware of Mrs. Schlosser's recent experience of simultaneously teaching four different class subjects in a single period. (CP 84, 614-17) He acknowledged that such a skill set might indicate a good instructor. (CP 84). Mr. Seigel acknowledged that

he was unaware that instances of students being off task involved students that were not even members of the class being taught and that such knowledge may have influenced his decision not to renew Ms. Schlosser's contract, but that he relied upon the Evaluators. (CP 84-85). He assumed that such information would have been taken into account by the Evaluator but that a single incident should not have skewed the overall evaluation. (CP 85). He acknowledged that was an assumption on his part without having spoken to the Teacher for her side of the story. (CP 86).

Mrs. Schlosser was well liked by the students, who posted "We Love You Mrs. Schlosser" signs around the building at the end of her year and lobbied for her to retain her job. (CP 249). Mrs. Schlosser was not an "unsatisfactory teacher" and the decision upholding her non-renewal is not supported by the evidence and is the product of a due process violation.

IV. LEGAL DISCUSSION

A. Mrs. Schlosser Had A Property Interest in her Continued Employment and the District's Failure to Provide Her a Pre-termination Hearing Violated Her Constitutional Rights and Requires Reinstatement.

Whether the hearing officer's decision, or the statute supporting the order, violates constitutional provisions is a question of law which is reviewed *de novo*. *Amunrud v. Bd. of Appeals,* 158 Wn.2d 208, 215, 143 P.3d 571 (2006). A hearing officer's findings of fact are reviewed to

determine whether they are clearly erroneous. C*larke v. Shoreline Sch. Dist. No. 412,* 106 Wn.2d 102, 109-10, 720 P.2d 793 (1986). A factual determination is clearly erroneous if it is not supported by substantial evidence in the record. *State v. Jeannotte,* 133 Wn.2d 847, 856, 947 P.2d 1192 (1997). Great deference is given to the hearing officer's findings of fact. However, the determination regarding whether the hearing officer properly applied the correct law to the facts is reviewed *de novo*. *Clark,* 106 Wn.2d at 109-10; Because the Superintendent failed to meet with the Teacher to hear her side of the story he violated the Teacher's rights of due process. He was relying upon the facts stated by the Evaluators. (CP 84-85) As noted above, the decision was based on erroneous information that the Teacher was not afforded the opportunity to address.

A property interest may not be deprived without procedural due process. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Whether such a property interest exists is "defined by existing rules or understandings that stem from an independent source such as state law."*Id.* (citing *Bd. of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)).

Giedra v. Mount Adams School Dist. No. 209, 126 Wn.App. 840, 845-846, 110 P.3d 232, 234 - 235 (2005) held that teachers are employees

whom enjoy protected property interests in their jobs that require a *Loudermill* hearing before they may be terminated. *Giedra* dealt with terminations for expired teaching certificates.

"An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportunity for a hearing appropriate to the nature of the case.' " *Loudermill,* 470 U.S. at 542, 105 S.Ct. 1487 (citing *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The need for "some form of pre-termination hearing" is evidenced by a balancing of the competing interests involved: the private interests in retaining employment against the governmental interests in expeditious removal of unsatisfactory employees, and the risk of an erroneous termination. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Bellevue Public School Dist. No. 405 v. Benson, 41 Wn.App. 730, 707 P.2d 137 (1985) held that certificated employees were entitled to a pre-termination hearing.

In public employee cases, the pre-termination hearing need not definitively resolve the propriety of the discharge, but should serve as an initial check against mistaken decisions—to determine whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action. *Loudermill,* 470 U.S. at 545–46, 105

S.Ct. 1487). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Loudermill, 470 U.S. at 546, 105 S.Ct. 1487.*

An employee cannot be notified of the discharge as a *fait accompli,* but must first be afforded an opportunity to be heard. *Martin v. Dayton Sch. Dist. 2,* 85 Wn.2d 411, 412, 536 P.2d 169 (1975), *cert. denied,* 424 U.S. 912, 96 S.Ct. 1110, 47 L.Ed.2d 316 (1976).

In Wright v. Mead School Dist. No. 354, 87 Wn.App. 624, 628-629, 944 P.2d 1, 3 (1997); *abrogated on other grounds by Federal Way School Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769-775, 261 P.3d 145, 152 - 155 (2011) the court ruled, without any analysis of the purpose behind *Loudermill's* due process requirements, that the post termination hearing provided by RCW 28A.405.210 was sufficient to protect due process rights. The teacher in *Wright* was discharged for alleged sexual misconduct with students. *Wright* should be disregarded as *dicta* because no analysis was done of the *Loudermill* issue of a pretermination hearing.

The very purpose of the *Loudermill* hearing is to permit the employee to invoke the discretion of the decision maker before the adverse decision is announced. *Loudermill* expressly balances the extent

of post termination review available to the employee to help determine the scope of the required pre-termination process that must be afforded to the employee. Pursuant to *Loudermill,* the employee is entitled to be afforded the opportunity to invoke the discretion of the decision maker before the adverse action.

In this case the adverse action was when Superintendent Siegel issued the Notice of Intent not to renew. Thereafter, the Teacher had no opportunity to invoke the discretion of the Superintendent.

> Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Cf. *Califano v. Yamasaki,* 442 U.S. 682, 686, 99 S.Ct. 2545, 2550, 61 L.Ed.2d 176 (1979). Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, **the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect**. See *Goss v. Lopez,* 419 U.S., at 583-584, 95 S.Ct., at 740-741; *Gagnon v. Scarpelli,* 411 U.S. 778, 784-786, 93 S.Ct. 1756, 1760-1761, 36 L.Ed.2d 656 (1973).

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543, 105 S.Ct. 1487, 1494 (1985) (emphasis supplied)

How elaborate the pre-termination hearing is related to the extent of post termination hearings available. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 545, 105 S.Ct. 1487, 1495 (1985). In Ms. Schlosser's case there was no pre-termination hearing of any kind. The

recommendation from the Evaluators (CP 1978) was sent to Superintendent Seigel and he acted upon it the very next day. (1980)

The Hearing Officer relied upon *Petroni v. Board of Directors of Deer Park School Dist., No. 414,* 127 Wn.App. 722, 113 P.3d 10, 11, (2011) for the proposition that Ms. Schlosser had no right to a pre-termination hearing. (CP 11). However, *Deer Park* does not so hold and does not even discuss *Loudermill.* First, Ms. Petroni was a provisional teacher and therefore did not have a protected property interest which is the requirement triggering due process rights. *Deer Park*, 127 Wn. App. at 724-25, 113 P.3d at 11. The *Loudermill* case and the issues implicated by *Loundermill* were not discussed in *Deer Park. Deer Park* does not even cite *Loudermill,* much less analyze the constitutional issue.

Giedra v. Mount Adams School Dist. No. 209, 126 Wn. App. 840, 845-846,110 P.3d 232, 234 - 235 (2005) is controlling. In *Mount Adams,* the Court held that teachers are employees whom enjoy protected property interests in their jobs requiring a *Loudermill* hearing before termination.

The hearing examiner and Superior Court were in error by ruling a 27 year teacher had no property interest in her job triggering the right to some pretermination due process. The opportunity to invoke the discretion of the decisionmaker is never afforded by the hearing examiner's post decision review.

B. Most States Have Embraced the Due Process Protections of *Loudermill* Within the Text of Their Statutes.

1. Overview of Teacher Contract Renewal Statutes.

At oral argument, this Court requested the parties brief the issue of how other States and their courts have addressed this due process issue since *Loudermill* with particular emphasis upon States with teacher non-renewal practices similar to those expressed in RCW 28A.405.210 and RCW 28A.405.310. In response to that direction, counsel provided a detailed analysis of the laws affecting teacher contract renewal. (CP 2835-3174) With the exception of Hawaii, Idaho and New York, states have adopted statutes that specify a due process procedure to provide notice to a teacher of intent not to renew their contract, and afford the affected teacher an opportunity for both pre-deprivation due process and post-termination review of the decision not to renew their contract.

These statutes have names such as the "Teacher Tenure Act", M.S.A. § 122A.41, V.A.M.S. 168.102; "Teacher Due Process Act of 1990", 70 Okl.St.Ann. § 6-101.20; "Students First Act", Ala.Code 1975 § 16-24C-2; "The Teacher Fair Dismissal Act of 1983", A.C.A. § 6-17-1501; "Teachers Due Process Act", K.S.A. 72–5436 *et seq.;* "School Employment Procedures Law", Miss. Code Ann. § 37-9-109; "Tenure Employees Hearing Law", N.J.S.A. 18A:6-10; "Employment and

Dismissal Act", R.I. Code 1976 § 59-25-430; "School Personnel Act", N. M. S. A. 1978, § 22-10A-27; "Term Contract Non-renewal Act", Tex Educ. Code §§ 21-201-211; "Utah Orderly School Termination Procedures Act.", U.C.A. 1953 § 53A-8-101; and the ambitiously titled, "Accountability for Schools for the 21st Century Law" O.R.S. § 342.805.

The procedures adopted by the states use a variety of approaches to address due process concerns including the right to a pretermination hearing. Some states provided an opportunity for a hearing with the decision maker either before or following a recommendation for non-renewal to discuss the evidence upon which the decision is based, after which the termination is effective. Some provide an opportunity for a hearing before the body which will ultimately decide on retention of the teacher following a recommendation for non-retention. Some provide for a referral to a hearing officer to gather the evidence and issue findings of fact and recommendations that will be acted upon by the school board. Most of those states afford both the affected teacher and the administrator who made the initial recommendation for non-renewal to address the school board before action on the recommendation by the board.

Some states have a referral to an arbitrator, subject to consent of both the teacher and the district, and the arbitrator's decision is final and binding with no appeal. Some statutes allow the teacher and the district to

agree to binding arbitration in lieu of other processes available. Some states have set up special administrative bodies or lists of approved hearing examiners to review the actions related to the retention of teachers. For example Oregon's Fair Dismissal Appeals Board. O.R.S. § 342.930. Some of the bodies make advisory reports to the school boards who ultimately vote on the decision. Some of these special bodies are set up only for post deprivation review. Most of the States allow review of the decisions in the court system. A summary of the Notice, Pre-deprivation Process and Post-deprivation process available by State is attached as Exhibit 1 to the Wooster Declaration. (CP 2635-2785).

Washington State's procedure of notice of probable cause for non-renewal of contract per RCW 28A.405.210, and the opportunity for a hearing before a hearing officer RCW 28A.405.310(1) is one of the few states that does not call for an opportunity to invoke the discretion of the decision maker at any time before or after the decision is made. While many states use a hearing office or hearing panel in one form or another, most provide for the decision of the hearing officer to be a recommendation to be acted upon by the school board (the decision maker) with the teacher having an opportunity to address the hearing officer's recommendation before the decision is made.

Washington's statute specifies that the teacher receives the notice of intent not to renew their contract and then the teacher may trigger a hearing before a hearing officer who's decision is final and subject only to court review. Teachers in Washington are never afforded the opportunity to enjoy "the only meaningful opportunity to invoke the discretion of the decisionmaker [which] is likely to be before the termination takes effect."1 The decision of the Superintendent has been made and the proceeding before the hearing officer is akin to an appellate review because the discretion of the decision maker is never again invoked in the process set out under Washington law. This is a fundamental denial of the minimal due process rights outlined in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

As noted above and set out in the state statutes attached to and summarized in the Wooster Decl. (CP 2635-2785) most states have incorporated the pre-termination procedures into their statutes. For example Alaska's statute provides:

> (a) Before a teacher is dismissed, the employer shall give the teacher written notice of the proposed dismissal and a pretermination hearing. A pretermination hearing under this section must comport with the minimum requirements of

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1 *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

> due process, including an explanation of the employer's evidence and basis for the proposed dismissal and an opportunity for the teacher to respond. If, following a pretermination hearing, an employer determines that dismissal is appropriate, the employer shall provide written notice, including a statement of cause and a complete bill of particulars, of the decision. The dismissal is effective when the notice is delivered to the teacher.

AS § 14.20.180

Oklahoma's "Teacher Due Process Act of 1990"2provided:

> 5. "Teacher hearing" means the hearing before a school district board of education after a recommendation for dismissal or nonreemployment of a teacher has been made but before any final action is taken on the recommendation, held for the purpose of affording the teacher all rights guaranteed by the United States Constitution and the Constitution of Oklahoma under circumstances and for enabling the board to determine whether to approve or disapprove the recommendation;

70 Okl.St.Ann. § 6-101.3

The fact that no opportunity is afforded to invoke the decisionmaker's discretion under Washington means that just following the statutory review provisions denies due process. That flaw may be cured by affording the Teacher a pretermination hearing with the Superintendent.

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2 This statute adopted after *Short v. Kiamichi Area Voc. Tech School Dist. No. 7 of Choctaw County*, 761 P.2d 472, 49 Ed. Law Rep. 772 (1988)(discussed *infra)* was repealed in 2011 and there are at least seven bills pending in the Oklahoma legislature to address this void.

2. Washington's Statute Does Not Enumerate Constitutional Protections, But RCW 28A.405 *et seq.* is Not Unconstitutional.

Just because the way the Bethel School District carried out Mrs. Schlosser's contract non-renewal does not mean that the Washington Statutes RCW 28A.405.210, RCW 28A.405.310(1) are unconstitutional. Those statutes do not direct the Bethel School District or any other district to deny the Teacher rights to a pretermination hearing before advancing to the procedures set forth in the statute. Where a statute can be interpreted in a Constitutional manner, Courts will not read into the statute a provision that renders it unconstitutional. *See In re Chorney,* 64 Wn.App. 469, 477, 825 P.2d 330 (1992) (where a statute is susceptible to interpretation which may render it unconstitutional, courts adopt construction which will sustain the statute's constitutionality)

The unconstitutional acts are solely those of the Bethel School District and its Superintendent in denying the Teacher a pre-deprivation hearing so that she had the opportunity to invoke the discretion of the decisionmaker at a meaningful time and in a meaningful manner before the decision not to renew the Teacher's contract was turned over to the hearing officer for review.

This omission of a pretermination hearing is particularly important when the School District urged both this superior court and the Hearing Officer to accord special deference to the decisions of the professional school district administrators whom recommended Mrs. Schlosser's

termination. See: "2. This Court Should Give Weight to the Judgment of Experienced School Administrators Who [sic] All Found Ms. Schlosser's Performance To Be Unsatisfactory. Respondent's [Bethel S.D.] Hearing Brief pages 21-23. " 2. (CP 2597) A Hearing Officer Should Give Weight to the Judgments of Experienced School Administrators" Districts pre-hearing brief pages 7-9.

This assertion overlooks the fact that the Superintendent was never provided the other side of the story by the Teacher, and as noted above among other things, never reviewed Mrs. Schlosser's personnel files, observed her teach, or had knowledge of the excellent educational outcomes for Mrs. Schlosser's students.

C. Courts That Have Addressed Teacher Tenure Statutes Post *Loudermill* Have Uniformly Observed the Importance of Preterminaton Process as Vital to Affording Due Process.

Because of the diversity of approaches among the states in their statutory schemes providing teacher tenure and protecting their due process rights when tenure is to be revoked, there does not appear to be many cases squarely on point regarding an employee's *Loudermill* rights when a referral is made to a hearing examiner after the employer has made an initial determination of non-retention, but failed to provide the employee notice and an opportunity to respond before taking the action

that sent the matter to an outside hearings officer to pass upon the employer's decision as a final and binding outcome.

Giedra v. Mount Adams School Dist. No. 209, 126 Wn. App. 840, 845-846, 110 P.3d 232, 234 - 235 (2005) establishes that teachers are employees whom enjoy protected property interests in their jobs that require a *Loudermill* hearing before they may be terminated.

The most instructive case is *Short v. Kiamichi Area Voc. Tech School Dist. No. 7 of Choctaw County,* 761 P.2d 472, 49 Ed. Law Rep. 772 (1988). After noting that "the right of due process is conferred not by legislative grace but by constitutional guaranties," the court held that a preterminaton hearing is required even though the statutes provided a hearing before an administrative hearing panel. *Id. 746 P.2d at474, 477.* That decision noted the board action at issue was taken only two weeks after *Loudermill* had been decided by the Supreme Court and paid particular interest to the impact of *Loudermill* upon statutorily established procedures for teacher non-retention that mirror those in Washington, RCW 28A.405.210 and RCW 28A.405.310. *Id. at 478.*

Short included a copy of the Oklahoma statute in its appendix. *Id. at 482-483.* That statute called for a recommendation of non-retention from the school district superintendent to the school board, the board then adopts or rejects the recommendation. If the school district adopts the

recommendation, notice of non-retention is sent to the teacher specifying the reasons therefore and advising the teacher of the right to have a hearing before a hearing panel. If the teacher requested a hearing, the matter would be referred to a hearing judge from a pre-approved list. The hearing officer would then conduct a full hearing, with counsel, witnesses, oath's, subpoena power, other due process protections and a transcript. The hearing officer's decision was final and binding subject to appeal as provided by Oklahoma's Administrative Procedures Act. The court ruled that the procedure provided by that statute, which essentially mirrors Washington's statutes at issue in Mrs. Schlosser's case, failed to meet constitutional muster.

> Here, the teacher's interest is clearly sufficient to warrant pretermination procedural safeguards. It is apparent that this claim, like the one of tenured public employees in *Loudermill,* arises to the status of a property interest. Once this interest is established, *Loudermill* requires that some form of pretermination hearing be provided. In the absence of a constitutionally adequate pretermination procedure, the nonrenewal failed to pass constitutional muster. *The statute, 70 O.S. 1981 § 6–103.4(B), insofar as it fails to provide a Loudermill pretermination hearing, is unconstitutional.* Post-termination remedies however elaborate, are insufficient; some form of pre-termination hearing is required. Contrary to the implication in the dissent, we do not strike down § 6–103.4(B) post-termination proceedings. We simply hold that its procedures must be supplemented by a pretermination opportunity to be heard before the board of education reaches a final decision. A pretermination hearing provides additional protection—not less. (It should be noted that the

> pretermination hearing should be held before the local school board, and that one of the crucial reasons for the hearing is to avoid mistaken employment decisions by affording the teacher a pretermination opportunity to be heard. After the board resolves the issue, the post-termination hearing is before a different tribunal, the hearing panel.

Short v. Kiamichi Area Voc. Tech School Dist. No. 7 of Choctaw County, 761 P.2d 472, 477, 49 Ed. Law Rep. 772 (1988)(emphasis in original)..

- The decision in *Short* squarely observes that a statute that provided post deprivation review by a hearing panel failed to satisfy due process. The Court applied its decision prospectively, but its analysis is correct that Oklahoma's statute did not eliminate the right to a pretermination hearing.

In McDaniel v. Princeton City School Dist. Bd. of Educ. 72 F.Supp.2d 874, 882 (S.D.Ohio,1999) summary judgment was entered in favor of the teacher finding that her due process rights had been violated by the employer's failure to provide her with the specific allegations against her or provide her a hearing upon those allegations before it acted to terminate her contract. The court rejected the district's arguments that the state statute procedures overrode constitutional protections.

In multiple post *Loudermill* cases the courts have emphasized the importance of affording this minimal level of due process as an element of fundamental fairness and noting the profound weight afforded to an

individual's ability to continue to earn a wage in the constitutional balancing that lays at the heart of due process analysis.

"The point is straightforward: the Due Process Clause provides that certain substantive rights-life, liberty, and property-cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493 (1985).

The fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The court must balance the competing interests at stake: 1) the private interests in retaining employment, 2) the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and 3) the risk of an erroneous termination. *See id. at* 335 (" *Mathews* test"). Further, due process may require "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in her employment. *Loudermill,* 470 U.S. at 542-543 (1985). Moreover, the employee must have a *meaningful* opportunity to confront the evidence against him, "in

particular that evidence with which the decisionmaker is familiar." *Vanelli v. Reynolds School Dist. No. 7,* 667 F.2d 773, 780 (9th Cir.1982) (emphasis added).

Under the *Mathew's* test, Mrs. Schlosser's twenty seven years teaching and her accolades and awards gave her a significant interest in maintaining her employment. While the Bethel School District has an interest in expeditiously removing unsatisfactory teachers, the administrative burden of affording a teacher a pre-termination hearing with the superintendent and notice of the allegations is not extreme. The post deprivation procedures available establish that the pretermination hearing with the Superintendent need not be a full evidentiary hearing. The risk of an erroneous termination is significant. Mrs. Schlosser's performance, dedication and work ethic is documented in numerous comments in her formal evaluations over the years. On May 11, 2012, Mr. Seigel issued a letter informing Mrs. Schlosser that probable cause existed to non-renew her employment contract at the end of the 2011-2012 school year. (CP1980) The letter was based upon the report from the Evaluators. (P 1978) Mr. Seigel did not meet with Mrs. Schlosser to provide her with an opportunity to address the recommendation before the decision was made or provide information Mr. Seigel might find relevant or correct erroneous information. (CP 66-67; 710-11) Mr. Seigel

admitted he based his decision solely on the Evaluators' input (CP 69) without any input from Mrs. Schlosser before reaching his decision. (CP 66-67) He relied upon the evaluators' recommendations to be accurate. (CP 66) He did not even review Mrs. Schlosser's personnel file. (CP 66). He did not believe he ever personally reviewed Mrs. Schlosser's classroom performance. (CP 65). Superintendent Siegel did not review Mrs. Schlosser's training records. (CP 77-78). Superintendent Siegel was unaware that Mrs. Schlosser had taught the yearbook class or that she had won an award (CP 1199-2000) for the yearbook created by her class during the year she was found to be an unsatisfactory teacher. (CP 75).

Superintendent Siegel did not consider the educational outcomes or grades of the students actually instructed by Mrs. Schlosser. (CP 76, 90). Grades for the students indicated that Mrs. Schlosser had taught demonstrated they had, for the most part, learned the materials from Mrs. Schlosser's instruction. (CP 1224-1449). Mr. Siegel acknowledged that even when students have good teachers, they sometimes fail. (CP 90). The fact that the students mastered the materials undermines the allegations that Mrs. Schlosser was not an effective teacher.

Mr. Siegel was unaware Mrs. Schlosser had requested to attend a training seminar had been denied by her evaluators. (CP 444-45). Mr. Seigel admitted that he would be surprised the request for training was not

granted. (CP 79-81). He was also unaware that she had gone and observed other teachers. (CP 446, 655-57) He was unaware her requests to have her classroom videotaped were not acted on by the administration. (CP 78-79). He admitted that knowledge of those facts may have impacted his assessment of her "Professional Preparation and Scholarship. (CP 79-79).

He indicated that knowledge of the efforts undertaken by Mrs. Schlosser to learn and observe other teaching methods may have impacted his decision, but that he relied solely upon the evaluator's "check mark" of the assessment of those efforts. (CP 80-81). He again relied solely upon the check mark of the evaluator's assessment for efforts toward improvement being unsatisfactory although he did consider the evaluator's comments as well. (CP 92-93). He acknowledged that Mrs. Schlosser's participation in professional organizations for CTE instructors may have influenced his assessment of her professional preparation and scholarship. (CP 82).

Mr. Siegel acknowledged that there is a range of acceptable classroom behavior and the students need not be lined up neatly in rows with their hands upon their desks. (CP 82) Mrs. Schlosser testified that she allowed some off task behavior because she is teaching students to prepare them for the work world. (CP 549; 622-26) The relationships that were formed by some students through this process were regarded by her

as positive educational outcomes. (CP 625-26) She recounted the interaction of three female students from diverse backgrounds that allowed them all to succeed. (CP 625-26) Mr. Siegel acknowledged that in many classroom there is a lot of activity going on that could cause one to question, "How is this a good classroom?" However, the teacher has a coherency to the lesson and resulting outcomes are good. (CP 83-84). In this instance, Mrs. West as a middle school principal with no CTE instructional experience is significant. She often did not know what she was observing, to her the activity looked like chaos.

Mr. Siegle acknowledged that he was unaware of Mrs. Schlosser's recent experience of simultaneously teaching four different class subjects in a single period. (CP 84) He acknowledged that such a skill set might indicate a good instructor. (CP84). Mrs. Schlosser had that experience. (CP 614-17)

Mr. Siegle acknowledged that he was unaware that instances of students being off task involved students that were not even members of the class being taught and that such knowledge may have influenced his decision not to renew Ms. Schlosser's contract, but that he relied upon the evaluator. (CP 84-85). He assumed that such information would have been taken into account by the evaluator but that a single incident should not have skewed the overall evaluation. (CP 85). He acknowledged that

was an assumption on his part without having spoken to Ms. Schlosser for her side of the story. (CP 86) However, the evaluator did not take that into account even after it was pointed out to Mrs. West by Mrs. Schlosser.

In *Stana v. School Dist. of City of Pittsburgh,* 775 F.2d 122, 132 (3rd Cir.,1985) the Court found bypassing a teacher's name from a list of eligible teachers for hire was a violation of her due process rights because it was done without any pretermination notice and hearing. In *Lee v. Giangreco,* 490 N.W.2d 814 (1992) the court found a due process violation where although afforded a meeting with the decision maker, she had not been provided adequate notice of the reasons for the decision before her employment was terminated. In *Grounds v. Tolar Ind. Sch. Dist.* 856 S.W.2d 417 (Tex. 1993) the court found failure to provide reasons for non renewal violated teacher's due process rights. In *Coggin v. Longview Ind. Sch. Dist.*, 337 F.3rd 459 (5th Cir. 2003)(*en banc.*) the court again found a due process violation although a school board asserted that its interpretation of the teacher termination statute did not require the teacher to a hearing because of how his notices were received and the board's belief that no hearing was required because of the teacher improperly lodged his demand for pre-termination hearing. The court engaged in a reasoned discussion of the due process interests at stake and the importance of changes in Texas law to insure the teachers' rights were

adequately protected, including the enumeration of pre-termination rights of notice and hearing.

All a school district need do under Washington law to meet the requirements of due process is to afford the affected teacher notice of proposal to not renew the teacher's contract with a statement of all of the reasons the decisionmaker is relying upon for the decision and afford the affected teacher a conference with the decisionmaker to address the issues upon which the adverse employment action is based. The conference need not be an elaborate evidentiary hearing because of the review provided by the hearing examiner that is available to the employee should the decisionmaker determine after meeting with the teacher and her representative that the decision not to renew the contract is the appropriate action to take after having been told the full story.

D. The Appropriate Remedy for this Due Process Violation is to Reinstate The Teacher's Contract Until Such Time as a Loudermill Hearing with The District Superintendent Can Be Held.

The failure to provide any opportunity to invoke the discretion of the decision maker denied The Teacher her rights of due process. The issue in the case before us is whether a post-termination hearing can remedy the full due process deficiency in the pre-termination proceedings. *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S.Ct.

1446, 149 L.Ed.2d 391 (2001). The appropriate remedy is reinstatement. However, A court may order that a hearing be held as a remedy for a public employee terminated in violation of due process, and, ancillary to that relief, court may order the equitable relief of back pay from the date of termination and reinstatement until such time as a hearing is held, and a court ordering such relief need make no determination as to propriety of the employee's termination. *Brewer v. Parkman,* 918 F.2d 1336, 1341 - 1343 (8th Cir.1990).

In *McMillen v. U.S.D. 380*, 253 Kan. 259, 855 P.2d 896 (1993) the court found the procedures of the collective bargaining agreement and following the procedures spelled out in the Kansas statutes for non-renewal of a teacher's contract did not cure the constitutional violation arising from not affording the teacher a pretermination hearing.

> K.S.A. 72–5436 *et seq.* establish a comprehensive due process procedure which may be invoked by a tenured teacher who disagrees with a school board's notice of intent to nonrenew the teaching contract.K.S.A.1991 Supp. 72–5439 sets forth in detail the procedural and other requirements of the statutory due process hearing. However, nothing in our statutes requires that a nonrenewed teacher's salary must be continued until the statutory due process proceeding and any appeals therefrom are finally completed. As in *Loudermill,* Kansas statutes provide for a full adversarial due process hearing following termination of the teacher's contract. Based upon the decision in *Loudermill* and the failure of our statutes to address the issue, we conclude that McMillen had a

> constitutional right to continue to receive his salary until given a pretermination hearing.

McMillen v. U.S.D. 380, 253 Kan. 259, 266, 855 P.2d at 901-902.

Like the decision in *Short*, the *McMillen* decision reinforces that teachers who possesses a property interest in their employment are entitled to pretermination notice and opportunity to respond and that regardless how elaborate the post deprivation review may be, the teacher's due process rights are violated if the procedures adopted omit the pretermination opportunity to state their side of the story and invoke the discretion of the decisionmaker after having been apprised of the nature of the charges against the employee which the employer relies upon to propose severing the employment relationship. The appropriate remedy is reinstatement until the hearing is held.

In *Nickerson v. City of Anacortes,* 45 Wash.App. 432, 440-441, 725 P.2d 1027, 1032 (1986) the court found the appropriate remedy was, if the superior court finds and concludes that a pretermination hearing as required by *Loudermill* would, within reasonable probabilities, have prevented his discharge, then the employee is entitled to reinstatement with back pay and benefits from the date of his termination. If the superior court finds and concludes that a pre-termination hearing would not have prevented his ultimate discharge, then the employee's remedy is limited to

the recovery of such monetary damages, if any, as the court finds were proximately caused by the denial of a pre-termination hearing.

However, one reason for the pre-termination hearing is to invoke the discretion of the decision maker at a meaningful time, before the decision is made and publicly announced. It is human nature that once one has publicly stated their decision, there is a reluctance to change that position. That is the reason why the pre-termination hearing requirement exists. After that opportunity evaporates, it is highly unlikely the employer would acknowledge that a different decision would have been reached.

In this instance, Superintendent Seigel acknowledged that he was relying upon the facts stated by the evaluators and he could not say how he would have reacted if he had been informed of factual discrepancies in the record including the fact students were alleged to be off task when they were not even in Ms. Schlosser's class (CP 84-86); Ms. Schlosser was prevented from attending training she had requested by actions of the evaluator (CP 78), that Ms. Schlosser had concerns about the bias of the evaluators, he was unaware that Ms. Schlosser's lesson plans were described as fabulous or very good. (CP 73, 431,443) Mr. Westering acknowledged that The Teacher met and succeeded the requirement of using a lesson plan. (CP 150) Mr. Seigel was unaware that Ms. Schlosser

had one of her courses as the yearbook and that the yearbook that year won a significant award from the publisher given to only four high schools in Washington. (CP 74-75). He indicated that had he had an awareness of those factors it may have impacted his decision. (CP 78-79)

Superintendent Seigel indicated that had he been aware of Ms. Schlosser's efforts at improving her instructional skill, which were thwarted by her evaluators, it may have impacted his decision. (CP 81). He did nothing to verify the evaluator's information and relied just upon the evaluator's check marks. (CP 81).

The fact that the Superintendent acknowledged numerous issues that may have impacted his decision to non renew the Teacher's contract undermines the Superior Court's determination that failing to provide the Teacher a *Loudermill* hearing caused her no injury. The superior court was in error in that conclusion.

The appropriate remedy is to reinstate the Teacher with back pay and afford her opportunity to meet with Superintendent Siegel to address the discrepancies in the evaluators' materials before the decision is reached to terminate her contract.

E.The Evidence was Insufficient to Support the Conclusion that Ms. Schlosser was An Unsatisfactory Teacher Justifying Non-renewal of Her Teaching Contract.

1. Review of Findings in Teacher Discharge Cases.

The requirements for termination of public primary and secondary teachers in Washington are provided in four levels of regulation: 1) RCW 28A-Certificated employees; 2) WAC 392.191-[Superintendent] evaluation of the professional performance capabilities; 3) Local School District Collective Bargaining Agreement; and 4) Local School District Board policies and procedures. Review a school district's administrative decisions to determine if it acted arbitrarily, capriciously, or contrary to law. *Haynes v. Seattle School Dist. No. 1,* 111 Wash.2d 250, 255, 758 P.2d 7 (1988). Arbitrary and capricious means "willful and unreasoning action in disregard of facts and circumstances." *Washington Waste Systems, Inc. v. Clark County,* 115 Wash.2d 74, 81, 794 P.2d 508 (1990). Where there is room for two opinions, action is not arbitrary or capricious if exercised honestly and upon due consideration even if this court believes an erroneous conclusion was reached.

Discharge and nonrenewal are separate and distinct methods of school district employee termination, which have different elements that must be proved by a preponderance of the evidence. *Sargent v. Selah Sch. Dist. No. 119,* 23 Wn.App. 916, 920, 599 P.2d 25 (1979). Discharge may occur at any time during the school year as a matter of law due to employee misconduct. However, the evidence supporting discharge must prove the misconduct of the employee (1) was un-remedial and materially

and substantially affected the employee's job performance; or (2) lacked any positive educational aspect or legitimate professional purpose. RCW 28A.405.300; *Wright v. Mead Sch. Dist. No. 354,* 87 Wn.App. 624, 629, 944 P.2d 1 (1997). Nonrenewal, on the other hand, occurs at the end of a contract year and occurs (1) when there are financial considerations, restructuring issues, or other reasons dealing with programs offered by the school district; or (2) due to deficiencies in a person's professional skill and competency. RCW 28A.405.210; *Williams v. Seattle Sch. Dist. No. 1,* 97 Wn.2d 215, 224-25, 643 P.2d 426 (1982).

The two different methods of terminating a school district employee's contract are discussed in *Adams v. Clover Park Sch. Dist. No. 400,* 29 Wn.App. 523, 629 P.2d 1336 (1981).

As noted above, the termination action was unlawful because The Teacher was not afforded pre-termination due process. The termination action was arbitrary and capricious because it is not supported by substantial evidence. The hearing officer accepted the hearsay comment of the Union representative (CP 394) that a union consultant (Carol Coar) who worked with the Teacher as a coach (CP 638) would not be supportive of the Teacher and elevated that conclusion to a cornerstone of his decision. (CP 11). That inference and conclusion is not supported by

the evidence and taints the entire decision requiring reversal of the hearing officer's decision. .

The District further ignored the evidence of her successful accomplishments which were never communicated to the Superintendent and the lack of qualifications of the Evaluators to consider The Teacher's ability in teaching business courses.

2. The Following Findings of Fact Are Not Supported by Substantial Evidence.

The hearing office made a number of findings of fact that are not properly supported by the evidence.

The overall conclusion that The Teacher was not a satisfactory teacher is contrary to the weight of the evidence and should be set aside.

Finding of fact number 2 is not supported by substantial evidence, except for the fact that the evaluations asserted such findings, but the evidence does not support the conclusions reflected in the evaluations.

Due to the failure to acknowledge the students' mastery of the subject matter reflected in the grades, the conclusions of The Teacher's instructional skill as unsatisfactory are not supported by substantial evidence. She was criticized for allowing students to call her by her last name alone, but the unrebutted evidence is that such conduct was an accepted practice at Bethel High School.

Ms. Schlosser was criticized for not doing enough to improve her performance and the hearing office concluded that some acts were taken but were taken too late in her probation. That overlooks that she worked with teachers throughout her probation, her lesson plans were very good or fabulous (CP 443), and her attempts to take seminars to improve her teaching were blocked by the evaluators.

Ms. West criticized Ms. Schlosser for not addressing certain political issues in her business class. However, Ms. Schlosser did speak about deductions that are available and Ms. West simply dismissed those issues as "being over the student's heads."

Neither of the evaluators had the specialized experience in teaching business courses and their deficiency rendered them unfit to properly evaluate Ms. Schlosser's knowledge of the subject matter. The finding that such knowledge is not necessary is undermined by the testimony, the failure to consider student's mastery of the subject matter and the mistakes in several points that The Teacher received criticism for her instruction, which were shown the Evaluator was wrong and the Teacher correct.

The hearing examiner stated that there was no evidence Ms. Schlosser could have attended a pre-termination meeting and that it is highly improbable that a different result would have occurred had she

been afforded such an opportunity. (CP 12). However, there is no evidence to establish she could not have attended. The decision not to renew was issued the day after the recommendation and no opportunity was offered to the Teacher to meet with the Superintendent.

Further, Mr. Seigel indicated that several salient facts may have impacted his decision. The record indicates that the recommendation was submitted to Mr. Siegel and he made the decision to non-renew and communicated that decision without any attempt to gather the Teacher's side of the story.

The hearing examiner and superior court found that the teacher non-renewal statutes do not specifically mention a pre-termination hearing and thus, no pre-termination hearing is required. (CP 12). First, that is a conclusion of law and not a finding of fact. The right to a *Loudermill* hearing arises from the United States Constitutional requirement for due process, not withstanding available post deprivation due process. The scope of the hearing is dependant upon the available post deprivation remedies and the hearing office was wrong in his conclusion that there is no requirement for a pre-termination hearing. See discussion of *Loudermill* requirements above.

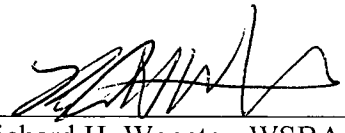
F. The Teacher is Entitled to Be Reimbursed for Her Reasonable Attorney's Fees.

If a district employee prevails at the hearing officer level, RCW 28A.405.310(7)(c) provides for "reasonable attorneys' fees." The Teacher should be awarded her attorney's fees. RAP 18.1.

V. CONCLUSION

A mischarge of justice has occurred that ended the twenty-nine (29) year teaching career of a dedicated professional teacher. The Teacher was non-renewed without the opportunity to invoke the discretion of the decision maker in any fashion. The record reflects numerous issues in dispute regarding what transpired during this evaluation period. A mistake was made and this court should correct the mistake by finding the substantial evidence does not support the conclusion The Teacher was an "unsatisfactory teacher" and that the failure to afford her a pre-termination Loudermill hearing requires that she be reinstated with back pay until such time as the Loudermill hearing can be held.

RESPECTFULLY SUBMITTED this 25th day of June, 2013.



Richard H. Wooster, WSBA 13752
Attorney for Appellant

ORIGINAL

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LYNDA SCHLOSSER	)	
	)	Cause No. 44750-9-II
Appellant	)	
	)	DECLARATION OF
vs.	)	SERVICE
	)	
BETHEL SCHOOL DISTRICT,	)	
	)	
Respondent	)	

KNOW ALL PERSONS BY THESE PRESENTS: That I, Connie DeChaux, the undersigned, of Bonney Lake, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, am over the age required and competent to be a witness;

That on the 25th day of June, 2013, I delivered via ABC Legal Messenger a copy of the following documents:

1. Declaration of Service;
2. Brief of Appellant;

properly addressed to the following person:

William A. Coats
Attorney at Law
1201 Pacific Ave Ste 1900
Tacoma WA 98402

I declare under penalty of perjury under the laws of the State of Washington and of the United States that the foregoing is true and correct.

Signed at Tacoma, Pierce County, Washington this 25th day of June, 2013.

Connie DeChaux

Connie DeChaux

Kram & Wooster, Attorneys at Law
1901 South I Street
Tacoma WA 98405
(253) 572-4161
(253) 572-4167 fax