NO. 45830-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WANDA RILEY-HORDYK,

Petitioner/Appellant,

-vs-

BETHEL SCHOOL DISTRICT,

Respondent.

PETITIONER/APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Bethel School District asks this Court to abrogate Washington State's tenure system for teachers and principals by allowing school districts to self-determine whether certain actions constitute a "reduction in force." Under the District's suggested policy, administrators can completely avoid the sufficient cause requirements of the tenure statutes by simply self-determining that a reduction in force had taken place, regardless of whether the same number of workers and positions existed in the subsequent year. This policy is contrary to that espoused by the legislature when it enacted the applicable tenure statutes.

Bethel School District inaccurately asserts that a reduction in force occurred among its schools in 2012 when it purportedly closed the Bethel Online Academy. The District's position is not borne out by the facts of this case. It was error for the hearing officer to find that such a reduction in force occurred when the District ended the 2011-2012 school year with exactly the same number of principals with which it began the 2012-2013 school year. Further, it was error for the hearing officer to rule that *Peters v. South Kitsap School District*, 8 Wn. App. 809, 509 P.2d 67 (1973) did not apply to this case when that case addresses the duty of school districts to transfer principals to open positions when said principals are terminated. This Court should remedy the Hearing Officer's error, and that of the Superior Court,

and find that Ms. Riley-Hordyk should have been transferred to an open position because no reduction in force actually occurred.

II. STATEMENT OF THE CASE ON REPLY

The Bethel School District (District) continues to incorrectly assert that it was unable to transfer Ms. Riley-Hordyk to any open positions because of the nature of the supposed reduction in force. As an initial matter, it is indisputable that the District ended the 2011-2012 school year with exactly the same number of principals with which it began the 2012-2013 school year. CP 98:12-15. There was no actual reduction in force. Each other displaced principal and vice principal was offered a position within the District. CP 104:12-21. An individual was hired from outside the District to fill the newly-open principal spot. CP 87:17-23.

Human Resources Director Todd Mitchell also testified that it is standard policy in the District to consider the elimination of any position or program a reduction in force, regardless of whether a reduction in force actually occurred. CP 109:9-19. Thus, he testified, whenever the District decides to terminate someone's employment, if the District states that the position has been eliminated regardless of whether the employment force is ever reduced, no transfer rights will ever apply. *Id.* Nonetheless, Mr. Mitchell actually discouraged Ms. Riley-Hordyk from applying for other positions because the District was still finalizing her termination. CP 160:18-21.

Further, the District is incorrect as to several key facts of this case. The District continues to operate online learning, including online learning at the high school level, simply under a different name. Thus while Ms. Riley-Hordyk's specific position has been eliminated, it appears that her actual job has not. While she was in charge of Bethel Online Academy (BOA), her students were capped at 200. CP 152:1-8. She had seventy-seven students wanting to participate who were forced to transfer to online programs outside the District because of the cap. *Id.* The BOA was thus set to fail by the District because it was impossible to maintain its funding with less than 300 students. CP 178:2-10. Additionally, while the District contends that Ms. Riley-Hordyk was only able to be transferred into a Spanish teacher position, she held three undergraduate teaching degrees and a Master's Degree in Educational Leadership. CP 99:23-100:3; 128:21-22.

The District's actions in terminating Ms. Riley-Hordyk's employment were not taken in good faith. Superintendent Siegel testified that he was "not overly enthusiastic" regarding any continued employment of Ms. Riley-Hordyk by the District, and that he made this position known to Mr. Mitchell. CP 84:9-17. Mr. Mitchell himself admitted that Ms. Riley-Hordyk would have been entitled to transfer to an open teaching position for which she was qualified had a reduction in force not occurred. CP 98:19-99:19. However, because of the District's own designation of the termination as a reduction in force, it was able to avoid any continuing responsibilities toward Ms. Riley-

Hordyk. It was error for the Hearing Officer to find that the District's decision was supported by substantial evidence, and it was error for the superior court to uphold this determination.

III. ARGUMENT

It was error for the Hearing Officer to find that that termination of Ms. Riley-Hordyk was due to a reduction in force. Ms. Riley-Hordyk's position is supported by *Peters v. South Kitsap School District*, 8 Wn. App. 809, 509 P.2d 67 (1973), a decision that remains good law. The District argues that *Peters* has been abrogated by subsequent legislative enactments, but as discussed below, neither the passage of RCW 28A.405.230 nor any court ruling since have invalidated the *Peters* court's holding.

A. Whether a reduction in force occurred is a mixed question of law and fact.

The proper standard of review here is not the "clearly erroneous" standard espoused by the District. Courts recognize that when a mixed question of law and fact is involved in a case, the review should be de novo under the error of law standard in RCW 28A.58.480(4). *Sargent v. Selah School Dist. 119*, 23 Wn. App. 916, 599 P.2d 25 (1979). The determination of the applicability of a particular statute or regulation to a factual situation is a conclusion of law. *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 309, 698 P.2d 578, review denied, 104 Wash.2d 1005 (1985). To find a mixed question of law and fact, there must be a "dispute both as to the

propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term ..." L*eschi Improvement Council v. State Highway Comm'n*, 84 Wn.2d 271, 283, 525 P.2d 774 (1974). In this case, the question of whether the supposed reduction in force triggered Ms. Riley-Hordyk's transfer rights is a mixed question of law and fact that should be reviewed de novo.

Whether or not a reduction in force occurred is a question of both fact and law because the Hearing Officer was required to take the facts and apply them to her interpretation of the law in order to make the determination of whether a reduction in force of the type that could trigger specific legal ramifications had occurred. In other words, whether the District's actions here met the actual definition of a reduction in force determined whether Ms. Riley-Hordyk's legal contractual rights applied, and whether the hearing officer needed to reach the legal transfer rights described in *Peters v. South Kitsap School District*. The facts here are inseparable from application of the relevant law.

It is undisputed that the District ended the 2011-2012 school year with exactly the same number of principals with which it began the 2012-2013 school year. Additionally, the facts show that the BOA, or a close facsimile, is still in existence. It was simply moved to a different form and location. The facts also show that the BOA as headed by Ms. Riley-Hordyk was set up to fail by the District, as its enrollment was capped at less than

necessary to financially sustain the program, despite a waiting list for admittance. Thus, even assuming *arguendo* that the District is correct and the issue regarding whether a reduction in force actually occurred is simply a question of fact, the Hearing Officer's decision is clearly erroneous.

The District has admitted that each other employee who was affected by the alleged reduction in force was offered another position within the District. The District has also admitted that every assistant principal whose position was reduced was offered another position within the District. The District further admitted that it actually hired an employee from outside of the District to fill an otherwise open principal position. Rather than offer Ms. Riley-Hordyk a position, the District chose to bring in an out-of-state candidate.

Mr. Mitchell testified that the District considers any elimination of a position or program a reduction in force regardless of whether a physical reduction in force occurred. The term "reduction in force" does not appear from the record to be defined by a District policy beyond the interpretation of Mr. Mitchell. When construing an undefined term in a policy, it is reasonable to give the term its ordinary, common, everyday meaning. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009). The phrase "reduction in force" ordinarily means having less employees than before, i.e., a reduction in the number of the work force. To adopt the District's definition would allow it to simply fire employees,

rename their jobs under the guise of "eliminating" the position, and perpetually avoid having to enact any transfer rights. It would also serve to eliminate certain other aspects of the tenure statutory system adopted by the legislature. See RCW 28A.405.300. It was therefore clear error for the Hearing Officer to find that a reduction in force occurred when the only fact supporting that position is the self-serving terminology the District uses to describe its actions.

B. *Peters v. South Kitsap School District* is on-point and remains good law.

1. The holding in *Peters v. South Kitsap School District* is not limited to determinations of seniority.

The court in *Peters* did not limit its holding merely to the proposition that seniority does not control in reemployment situations. To the contrary, *Peters* also stands for the proposition that Districts have a duty to offer open positions to employees such as those in Ms. Riley-Hordyk's position. The Washington State Supreme Court expressly noted that *Peters* was not limited to issues of seniority:

> In *Peters*, the Court of Appeals, Division Two, said that where a teacher is nonrenewed for financial reasons, he must be offered any job for which he is qualified, which becomes available before 'termination of his contract.'

Johnson v. Central Valley School Dist. No. 356, 97 Wn.2d 419, 434, 645 P.2d 1088 (1982) (citing Peters, 8 Wn. App. 809). This unambiguous statement,

made years after the legislative acts relied upon by the District, does not support the District's position.

As demonstrated by the *Johnson* opinion, the District's argument that *Peters* is inapplicable to the present issue is misplaced. *Peters* imposes an affirmative duty on a school district, not simply a mechanism for school districts to avoid seniority in reemployment decisions. The District was required by law to transfer Ms. Riley-Hordyk into one of the positions open at the time it closed the BOA. That it chose instead to bring in an out-of-state candidate to fill one of the principal positions is a violation of law.

The holding in *Peters* is thus not limited simply to the position asserted by the District regarding seniority. The District asks this Court, however, to ignore the associated holding also made by the *Peters* court: the District was under an obligation to offer Ms. Riley-Hordyk open positions. The *Peters* court does not say, as the District asserts, that the District merely had to permit Ms. Riley-Hordyk to apply for open positions and consider her for those positions. *Peters* required the District to affirmatively "offer" her those positions. To read the opinion otherwise gives the provision no force: the District could simply state that it considered nonrenewed employees for a job, and then chose in each instance to offer the job to someone else. This would be a terrible policy to enforce, as it would virtually insure that a school district would be insulated from any choices to refuse jobs to nonrenewed employees even when those employees have a transfer right. Such a policy

would further directly conflict with the statutory tenure system created by the legislature to attract teaching professionals. It was error for the Hearing Officer to adopt such an argument. The Court should find that *Peters* is directly applicable to the present case, and impacted the District's duty to offer Ms. Riley-Hordyk open positions. This should be remanded to the hearing officer to correctly apply the law.

2. No subsequent legislative act abrogated Peters v. South Kitsap School District.

There is no authority for the proposition that any subsequent legislative act or case holding abrogated *Peters*. To the contrary, the legislature made clear that they did not intend to abrogate the requirement that nonrenewed principals be offered open positions. The District misunderstands the thrust of Ms. Riley-Hordyk's argument. Petitioner agrees that there is no ambiguity in RCW 28A.405.230. Nowhere does the statute abrogate the pre-existing tenure requirements for principals with which a school district must comply.

Respondent does not cite to the legislative history as evidence that the legislature decided the automatic transfer of teachers, or that there are competing interpretation regarding whether the statute describes the automatic transfer of teachers. Instead, the history demonstrates that the legislature did not abrogate *Peters* through its enactment of RCW 28A.405.230, nor did it intend to remove any transfer rights of principals to

open positions. The discussion cited in Petitioner's opening brief illustrates that the legislators who passed this statute had this very same discussion and came to the same conclusion as Ms. Riley-Hordyk regarding the statute's effect.[1]

Cases decided after the passage of the relevant statutes in 1975 and 1976 demonstrate that those statutes did not have effect on the relevant holding in *Peters*. The District itself cites *Moldt v. Tacoma School Dist. No. 10*, 103 Wn. App. 472, 12 P.3d 1042 (2000) and *Green v. Pateros School District*, 59 Wn.App. 522, 799 P.2d 276 (1990), both decided after 1976, both relying on *Peters*, and neither abrogating any part of that case's holding. The District also argues the paucity of decisions regarding Peters "since 1982," because it apparently seeks to ignore the 1982 *Johnson* holding, discussed above, that directly contradicts the position the District asserts in its brief. There is no authority whatsoever supporting the District's argument that *Peters* was abrogated, and the district has cited to no such authority to support its claim. Instead, the District asks this court to interpret RCW 28A.405.230 in a way that does not flow with the plain language of the statute and which is contrary to the intent of the legislation.

This Court should therefore apply the *Peters* principlel described above to the present case and remand to the hearing officer to find that the

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[1] See Petitioner's Opening Brief of Appeal at p.17-19.

District had a duty to transfer Ms. Riley-Hordyk to an open position for which she was qualified.

IV. CONCLUSION

No reduction in force occurred with principals in the Bethel School District during or after the 2011-2012 school year. The District therefore had an obligation to offer Ms. Riley-Hordyk open positions for which she was qualified. Instead, the District seized the opportunity to remove an employee it considered troublesome by mislabeling its action a reduction in force and terminating Ms. Riley-Hordyk's employment. This Court should remand this case to the hearing officer with direction to correctly apply *Peters v. South Kitsap School District* to the facts of this case.

DATED this the 11th day of June, 2014.

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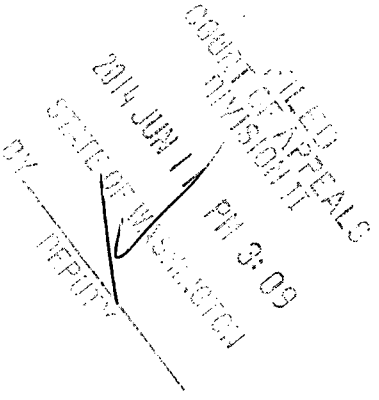
CERTIFICATE OF SERVICE

I certify that I caused one copy of the foregoing Petitioner/Appellant's Reply Brief to be served on the following parties of record and/or interested parties by delivering it via ABC Legal Messsenger, to the below named attorneys:



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