NO. 46067-0-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

TERI CAMPBELL,

Respondent,

v.

TACOMA PUBLIC SCHOOLS, a/k/a
TACOMA SCHOOL DISTRICT NO. 10,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant, Tacoma Public Schools a/k/a Tacoma School District No. 1 (hereafter "the District"), submits this brief in reply to the Brief of Respondent Teri Campbell.

Despite her briefing of the issue, Campbell has not disputed that an employment policy, such as Policy 5201, is reviewed under a more lenient constitutional vagueness standard than a criminal statute or ordinance. Under that more lenient standard, Policy 5201 was not vague as applied to her. The Superior Court's *sua sponte* determination to the contrary, which did not consider the applicable law, was error.

District Policy 5201 did not require Campbell to determine whether the long list of controlled substances she was taking, most of which were opioids and narcotics, would actually cause her to be impaired. Rather, it merely required that she verify that they were "known or advertised as possibly affecting judgment, coordination, or any of the senses, including those which may cause drowsiness or dizziness" and report them to her supervisor accordingly. CP 1316-17. Either Campbell never made any effort to verify that virtually all of the drugs she had been taking for years met these criteria, or else she knew they met the criteria and failed to report them anyway. In either case, her conduct violated the District's policy and justified the fifteen-day suspension that the Hearing

Officer imposed. The Hearing Officer's decision should consequently be reinstated and the Superior Court's judgment reversed.

II. ARGUMENT

A. FEDERAL CONSTITUTIONAL LAW CONTROLS THE COURT'S REVIEW OF AN EMPLOYMENT POLICY FOR VAGUENESS

As explained by the District in its opening brief, under *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L.Ed.2d 15 (1974), the standard for reviewing an employment policy for vagueness is substantially more lenient than for a criminal statute or ordinance. *Id.* at 159. Campbell claims that *Arnett* and federal case law are "inapposite," apparently suggesting that the analysis under Washington law is somehow different. Respondent's Brief, p. 10. Campbell is wrong.

The vagueness doctrine is an embodiment of the due process clause. *Am. Legion Post No. 149 v. Dept. of Health*, 164 Wn.2d 570, 612, 192 P.3d 149 (2008). Campbell does not argue that the Washington constitution affords any greater due process protections with respect to vagueness than the federal due process clause, nor does she undertake any *Gunwall*[1] analysis. In the absence of some showing that the Washington

[1] In *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), the Washington Supreme Court set out six non-exclusive criteria that should be used to determine whether the scope of state constitutional protections is greater than their federal counterparts. *Id.* at 58-59. "Washington courts have never decided whether the state constitution provides superior rights to the accused in the context of vague statutes, since

constitution's protections regarding vagueness are more extensive, the court decides the issue under federal constitutional law. *Spokane v. Douglass*, 115 Wn.2d 171, 176-77, 795 P.2d 693 (1990). Indeed, Campbell goes on to cite a multitude of Washington cases that explicitly cite *Arnett* and follow its holding. Respondent's Brief, pp. 11-12, fn. 55. Thus, the court should reject Campbell's fallacious assertion that federal case law does not control a federal constitutional question.

As explained in the District's opening brief, federal cases since *Arnett* have made clear that an employment policy is reviewed under a much more lenient vagueness standard than criminal statutes or ordinances.[2] Campbell has neither addressed these cases nor disputed this well-settled legal proposition.

Campbell concedes that she never challenged Policy 5201 as unconstitutionally vague, either at the statutory probable cause hearing or in the Superior Court.[3] Thus, the Superior Court never considered the Supreme Court's opinion in *Arnett* or any of the federal or Washington cases that rely on its holding, which analyze the vagueness doctrine in the

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no appellant has analyzed the question under the *Gunwall* analysis." *State v. Harrington*, 181 Wn. App. 805, 823, 333 P.3d 410 (2014)(citing cases).

[2] *See* Appellant's Brief, pp. 20-21 (citing cases).

[3] Campbell claims that the court "discussed the vagueness issue at oral argument on February 28, 2014 and discussed it at length with counsel at that time." Respondent's Brief, p. 16, fn. 66. However, this assertion is refuted by the record. Outside of opining that Policy 5201 was "poorly written" based on hypothetical questions that did not relate to the facts of the case at bar, the Superior Court undertook no discussion of the vagueness doctrine. VRP 31:14-22.

context of an employment policy. This explains why the Superior Court instead improperly relied on *Douglass*, a case involving a criminal ordinance, to support its erroneous conclusion that an employment policy was impermissibly vague.

B. CAMPBELL CLEARLY VIOLATED POLICY 5201 UNDER THE UNDISPUTED FACTS, AND CONSEQUENTLY THE POLICY WAS NOT VAGUE AS APPLIED TO HER

Because Campbell has not raised any First Amendment concerns, a facial challenge to Policy 5201 would be improper. *Douglass*, 115 Wn.2d 182-83. Thus, even Campbell agrees that any review of Policy 5201 for vagueness must be done on an as-applied basis. Respondent's Brief, p. 10. Where a challenge is made on an as-applied basis, the court must review a policy in the context of the actual conduct of the party making the challenge and not base its decision on periphery hypothetical situations. *Douglass,* 115 Wn.2d at 182-83. Yet, hypothetical scenarios were at the heart of the Superior Court's reasoning for its determination that Policy 5201 was impermissibly vague.

For example, the court was concerned that the policy "leaves persons of ordinary intelligence guessing who determines which drugs or medications 'may adversely affect [a teacher's] ability to perform work in a safe or productive manner,' by failing to identify such a person." CP

1329. Policy 5201 requires employees to report drugs which "may" cause impairment, but it also specifically defines drugs that must be reported as those which are "known or advertised" as having identified side-effects. CP 1316-17. Drug manufacturers must make this information available by law. *See, e.g.*, 21 CFR §801.109(c); 21 CFR §202.1(e). Given that a drug's "known or advertised" side-effects can be objectively verified, Campbell was not required to guess about who would determine whether her medications must be reported under the policy, as the Superior Court posited. Virtually all of the opioid and narcotic drugs Campbell had been consuming since at least 2010 were "known or advertised" to have side-effects that required her to report them.

Likewise, the Superior Court reasoned that Policy 5201 was vague based on its concern about possible ambiguity in the meaning of the word "taking" when referring to the consumption of controlled substances. CP 1331. Campbell never disputed she "took" intrathecal drugs for years, which Policy 5201 required her to report. The undisputed evidence was that she had been taking these opioid and narcotic drugs since at least 2010.

While arguing on one hand that Policy 5201 did not require her to report the drugs she was taking to her supervisor, on the other Campbell inconsistently argues that she actually did comply with the policy by

simply disclosing to her supervisor that she was taking unspecified pain medications. Respondent's Brief, p. 15. This claim is simply untenable. At the probable cause hearing, Campbell admitted that she never reported any of the specific drugs that she was taking to her supervisor. CP 536. Obviously, a specific drug or medication would have to be identified for anyone to be able to determine whether Policy 5201 was even implicated. Any reasonable interpretation of Policy 5201 requires an employee to disclose taking a specific drug or medication covered by the policy. Under the undisputed evidence in this case, Campbell violated the policy by failing to disclose taking the multitude of opioids and narcotics that she was being prescribed.

C. CAMPBELL NEVER ASSIGNED ERROR TO ANY OF THE HEARING OFFICER'S FINDINGS OF FACT IN HER SUPERIOR COURT BRIEF

As explained by the District in its opening brief, the court should reinstate the Hearing Officer's decision without even undertaking a review of the sufficiency of the evidence, because Campbell failed to assign error to any of the Hearing Officer's findings of fact. By focusing on which specific unchallenged findings of fact the District has pointed to at various times in its briefing, Campbell plays a shell game to avoid a fundamental dispositive issue: there was no assignment of error regarding any finding of fact in Campbell's brief filed in Superior Court. CP 975-97.

Campbell does not dispute that, as the petitioner in Superior Court, it was her burden to assign error to findings that she intended to challenge: "absent an assignment of error to a finding of fact of an administrative agency, that finding is a verity on appeal." *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 29, 891 P.2d 29 (1995). The District, as the respondent in Superior Court, is responsible only for responding to the alleged errors of the Hearing Officer that were actually raised by Campbell in her briefing.

Had the Superior Court followed the appropriate standard of review, it would not have revisited the Hearing Officer's findings to determine whether they were supported by substantial evidence, because they were verities. *Goodman v. Bethel School Dist.*, 84 Wn.2d 120, 124, 524 P.2d 918 (1974). Instead, the court should have simply determined whether the conclusions of law are supported by the findings of fact. *Id.* Accepting the Hearing Officer's findings of fact requires upholding the Hearing Officer's legal conclusion that sufficient cause existed to sanction Campbell.

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D. UNDER THE SUBSTANTIAL EVIDENCE STANDARD OF REVIEW, THE COURT MUST GIVE DEFERENCE TO THE HEARING OFFICER'S VIEW OF THE EVIDENCE

Although Campbell often repeats the refrain that there is no "cognizable evidence" to support the Hearing Officer's factual determination that she violated Policy 5201, this conclusory assertion is belied by the record. Campbell fails to address the evidence presented at the hearing establishing that virtually all of the drugs she had been consuming for years had "known and advertised" side-effects, which Policy 5201 required that she report to her supervisor. Furthermore, she ignores the applicable deferential standard of review to be applied to the Hearing Officer's factual determinations. The substantial evidence standard requires that the evidence and all reasonable inferences be construed in the District's favor and "necessarily entails acceptance of the [Hearing Officer's] views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993) (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217, *review denied*, 120 Wn.2d 1008, 841 P.2d 47 (1992)).

First, Campbell claims that a report by Dr. Lanny Snodgrass, which indicated that Campbell's "marijuana use could augment side effects of opioid analgesics and thus have an impact on her ability to teach" is not evidence that the court should consider. CP 825. Campbell's only explanation for this argument is that the report was "admitted only on the reliance issue." Respondent's Brief, p. 13, fn. 59. The only limitation with respect to this document's admissibility that the Hearing Officer expressed was as follows:

> I understand there was an objection to the issue of the doctor's comments on interactions, and I believe I was admitting it for purposes of reliance, that the District relied, may or may not have relied on that statement as part of making his [sic] probable cause determination. So it's going to be admitted with that limitation.

CP 177. The "reliance issue," which Campbell fails to explain, was precisely the purpose for which the District offered the document at the hearing. The applicable statute requires the District Superintendent to make a determination whether there is "probable cause or causes for a teacher . . . to be discharged or otherwise adversely affected in his or her contract status . . . ." RCW 28A.405.210. District Superintendent Carla Santorno specifically cited Dr. Snodgrass' report in her letter to Campbell as evidence she relied upon in making the determination that there was probable cause for imposing a fifteen-day suspension and random drug

testing. CP 308. Campbell's inexplicable assertion that the court should refuse to consider the documents and information that were before the Superintendent when she made this determination should be rejected.

Campbell also fails to mention the portion of the testimony given by Dr. Asokumar Buvanendram, a medical doctor whom Campbell herself called to testify at the probable cause hearing, where he explained that most of the intrathecal drugs Campbell had been taking since at least 2010 were opioid derivatives and narcotics. CP 108. Additionally, Campbell's brief is tellingly silent regarding her own criminal guilty plea, in which she admitted that "everything combined" – which she specifically described as including "pain killers" and "1 nanogram of THC in [her] system" – caused her to black out and crash her car on her way to work. CP 76-77, 785. Under ER 701, a lay witness may testify to opinions or inferences when they are rationally based on the perception of the witness and helpful to the trier of fact. *State v. Fallentine*, 149 Wn. App. 614, 623, 215 P.3d 945 (2009). A layperson's observation of intoxication is an example of a permissible lay opinion. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Campbell's guilty plea admission is evidence not only that the cocktail of controlled substances she was consuming "may" adversely affect her ability to perform work in a safe or productive manner, but that it in fact did have

such an adverse effect. Campbell concluded that the controlled substances she was consuming caused her to black out after the accident occurred, and the Hearing Officer reasonably concluded that she would have understood that this potential for danger existed before the accident, as well. Again, Superintendent Santorno specifically cited Campbell's guilty plea as evidence she considered in making the determination that probable cause existed to suspend Campbell, and the Hearing Officer properly considered it as support for his findings in the District's favor. CP 308.

Campbell implicitly suggests that the testimony by Gayle Elijah should not be considered by the court as proof that the multitude of drugs she was taking were "known or advertised" to cause side-effects that required that they be reported under Policy 5201. Ms. Elijah testified that she consulted an online resource confirming the symptoms, which were outlined in both the *Loudermill* and probable cause letters to Campbell. CP 75-76. At no point during the *Loudermill* or probable cause hearing did Campbell ever dispute that the medications she was consuming had the "known or advertised" side effects outlined by the District. CP 76-77. During the probable cause hearing, there was no objection to Ms. Elijah's testimony regarding her confirmation of the "known or advertised" side-effects of Campbell's medications. CP 75-76. Moreover, Campbell cites no authority holding that a lay witness is incapable of consulting a medical

resource to verify "known or advertised" side-effects, or that such testimony is inadmissible.

E. THE DISTRICT'S CHOICE OF SANCTION SHOULD BE AFFIRMED

In its opening brief, the District acknowledged a split between divisions of this court regarding the propriety of the Hearing Officer and/or the court's review of the appropriateness of the particular sanction chosen by a school district in a proceeding under RCW 28A.405, *et. seq.* However, as the District noted, the most recent holding of Division II on this issue in *Simmons v. Vancouver School Dist. No. 37*, 41 Wn. App. 365, 704 P.2d 648 (1985), makes clear that in this court's view, review under the statute is limited to determining whether there was probable cause for the District to impose a sanction and does not extend to the District's choice of sanction. *Id.* at 380. Campbell fails to address this split in authority or to explain why this court should not follow its own precedent.

Assuming, *arguendo*, that the court reviews the District's sanction in this matter, Campbell fails to explain how the sanction was arbitrary or capricious. As the District pointed out in its opening brief, there was no evidence at the hearing that the District was ever made aware of any other employees who had engaged in misconduct similar to Campbell's. Given that the District only imposed a fifteen-day suspension with random

testing and did not seek to terminate Campbell for her conduct, there is no basis for concluding that the sanction was arbitrary or capricious. *See Griffith v. Seattle School Dist. No. 1*, 165 Wn. App. 663, 674-75, 266 P.3d 932 (2011) (holding that sufficient cause for a suspension is less than for a discharge).

Campbell's continued challenge to the District's random drug testing requirement is likewise beyond the scope of review.[4] Campbell apparently argues that the statute at issue provides unlimited "protections for teachers," giving her the right to a hearing on any complaint relating to her employment as a teacher. Respondent's Brief, pp. 33-34. Campbell's expansive view of the statute's protections is not legally sound. Unlike a suspension or termination, the random testing requirement did not result in Campbell being "adversely affected in her contract status," and thus the hearing procedure in RCW 28A.405.300 would simply not apply to it. Moreover, given that Campbell complains about the District's testing requirement as a putative violation of the Collective Bargaining Agreement (CBA)[5], she fails to address well-settled authority holding that

[4] Campbell's assertion that the District "abandoned" its argument that the court should uphold the drug testing requirement in Superior Court is refuted by the record. The District argued in the Superior Court, just as it argues here, that Campbell's challenge to the drug testing requirement was pre-empted by the applicable Collective Bargaining Agreement. CP 1030.

[5] In Superior Court, Campbell argued that the drug testing requirement was unlawful, because it was not collectively bargained for. CP 995-96.

her failure to utilize the CBA's grievance procedures precludes this challenge. *Moran v. Stowell*, 45 Wn. App. 70, 75, 724 P.2d 396 (1986). Her only response is to cite to inapposite cases and RCW 28A.72.030, a statute that Campbell concedes was long ago repealed. Respondent's Brief, p. 35, fn.99.

F. THERE IS NO BASIS FOR ANY AWARD OF ATTORNEY FEES TO CAMPBELL BY THE SUPERIOR COURT

This court should reverse the Superior Court's award of attorney fees to Campbell for the same reasons that it should reinstate the Hearing Officer's decision in this matter. Furthermore, as explained in its opening brief, even if this court upholds the underlying decision of the Superior Court, its award of attorneys' fees should be reversed. Nothing established that the District disciplined Campbell in "bad faith" or based on "insufficient legal grounds," as required to support an attorneys' fee award under RCW 28A.405.350.

Campbell's reliance on *Tondevold v. Blaine School Dist.*, 91 Wn.2d 632, 590 P.2d 1268 (1979), is misplaced. There, a teacher was terminated by the employer school district based on a "mandatory retirement" provision contained in a collective bargaining agreement that was no longer effective at the time of her termination:

> [T]he board's mandatory retirement provision was included in the contract for 3 years. Although the provision had existed as board policy prior to 1972 when it was incorporated into the agreement between the parties, it became a matter of contract. While the policy could continue to exist, its validity depended upon the terms in the agreement. When the agreement eliminated any reference to mandatory retirement, the board policy did not survive.

Id. at 635-36. Because the basis for the District's termination was a contract provision in an outdated contract that had been superseded, the court affirmed the trial court's award of attorneys' fees under the statute on insufficient legal grounds. Here, there is no dispute that Policy 5201 was effective at the time of Campbell's suspension.

Similarly unpersuasive is Campbell's reliance on *Hyde v. Wellpinit School Dist.*, 32 Wn. App. 465, 648 P.2d 892 (1982). There, a school district terminated a principal after disregarding its statutory obligation to use specified criteria. *Id.* at 473. The remanding for an award of attorneys' fees, the court specifically noted, "This disregard constituted legally insufficient grounds, not merely a failure of proof." *Id.*

In contrast to either *Tondevold* or *Hyde*, the legal basis for the District's sanction on Campbell was set forth in Policy 5201. Even if this court agrees with the Superior Court's misguided view of the evidence, that view can only be characterized as a "failure of proof" by the District to show that Campbell violated the policy. This precise distinction was

recognized by the court in *Hyde* when holding that attorneys' fees were appropriate in that case. *Hyde*, 32 Wn. App. at 473.

G. THERE IS NO BASIS FOR AWARDING CAMPBELL ATTORNEYS' FEES ON APPEAL

Finally, the court must also reject Campbell's request for attorney's fees on appeal. RAP 18.1 permits attorney fees on appeal only "[i]f applicable law grants to a party the right to recover attorney fees or expenses on review before either the Court of Appeals or Supreme Court...." RAP 18.1(a). Thus, the court must look to RCW 28A.405.350, the statute authorizing attorneys' fees below, to determine whether it authorizes them in on appeal in this court.

If a statute's meaning is plain on its face, the court must "give effect to that plain meaning as an expression of legislative intent." *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The plain language of RCW 28A.405.350 does not authorize an award of attorney fees in either the Court of Appeals or the Supreme Court. The statute provides that the Superior Court "may award to the employee a reasonable attorneys' fee for the preparation and trial of his or her appeal . . . ." RCW 28A.405.350. The language "trial of his or her appeal" clearly refers to the "appeal" identified in RCW 28A.405.340, which is an "appeal to the Superior Court." *See Broughton Lumber Co. v.*

BNSF Ry., 174 Wn.2d 619, 627, 278 P.3d 173 (2012) (holding that plain meaning of a statute may be discerned from related statutes which disclose legislative intent about the provision in question). The statute does not allow for attorney's fees on appeal beyond the Superior Court level. Thus, regardless of which party prevails, the court must reject Campbell's request for attorneys' fees on appeal in this court.

III. CONCLUSION

The Superior Court's reversal of the Hearing Officer's decision in this case resulted from a misapplication of the court's appellate standard of review and a *sua sponte* constitutional challenge that neglected to consider the controlling law. For all the reasons above, this court should reverse the Superior Court and reinstate the Hearing Officer's well-supported decision affirming the District's probable cause determination.

RESPECTUFLLY SUBMITTED this 20th day of February, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on February 20th, 2015, I served the foregoing Reply Brief of Appellant to the Court and to the parties to this action as follows:

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DATED this 20th day of February, 2015, at Seattle, Washington.

Kathie Fudge

KATHIE FUDGE

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