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Court of Appeals, Division II – No. 46067-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

TERI CAMPBELL,	)
Petitioner,	)
vs.	)
TACOMA PUBLIC SCHOOLS, a/k/a TACOMA PUBLIC SCHOOL DISTRICT NO. 10,	)
Respondent.	)

PETITION FOR REVIEW

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IDENTITY OF PETITIONER

Teri Campbell was the Petitioner in the RCW 28A.405.300 statutory hearing before Hearing Officer, Judge Terry Lukens (ret.), the Appellant in the RCW 28A.405.320 appeal to the Superior Court, Pierce County, before Judge Kathryn J. Nelson, Case No. 13-2012835-2 and the Respondent in the Tacoma Public Schools ("TPS") appeal to the Court of Appeals, Division II, Case No. 46067-0-II.

Teri Campbell is the Petitioner in this RAP 13.4 Petition for Review to the Supreme Court.

COURT OF APPEALS, DIVISION II, DECISION

The Court of Appeals, Division II, filed its published opinion in this matter on March 8, 2016. A timely RAP 12.4 Motion for Reconsideration was filed by Teri Campbell on March 28, 2016. On March 29, 2016, the Court of Appeals ordered TPS to file an answer to the Motion for Reconsideration. On May 17, 2016, the Court of Appeals filed an Order Denying [Teri Campbell's] Motion for Reconsideration and Amending [the Court of Appeals] Opinion of March 8, 2016.

ISSUES PRESENTED FOR REVIEW

Campbell presents the following issues for review:

(1) the decision of the Court of Appeals incorrectly conflates the probable cause standard of RCW 28A.405.300 with the preponderance of the evidence for sufficient cause requirement of RCW 28A.405.310(8), contrary to this Court's decision in Vinson,[1] and, thereby, reaches an erroneous decision.

(2) the decision of the Court of Appeals overlooked the need to find impairment of performance and lack of remediability before discipline could be imposed as required by Vinson,[2] Clarke[3] and Hoagland.[4]

(3) the decision of the Court of Appeals failed to consider that a finding of sufficient cause for an adverse action against a teacher must include a "nexus between the misconduct and teaching effectiveness."[5] Because the nexus requirement is rooted in the constitution and "it would violate due process . . . . without showing actual impairment to performance."[6]

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[1] Federal Way School Dist. No. 210 v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011).
[2] Id.
[3] Clarke v. Shoreline School Dist. No. 412, 106 Wn 2d 102, 720 P.2d 793 (1986).
[4] Hoagland v. Mount Vernon School Dist. No 320, 95 Wn.2d 424, 623 P.2d 1156 (1981).
[5] Vinson, *supra*, 172 Wn.2d at 771, 261 P.3d at 153.
[6] Hoagland, *supra*, 95 Wn.2d at 429, 623 P.2d at 1159

(4) the decision of the Court of Appeals, which upholds the imposition of a three-year random drug testing regimen, is *ultra vires* and conflicts with another decision of the Court of Appeals in Yakima Police Patrolmen's Ass'n. v. City of Yakima, 153 Wn.App. 541, 547-48, 222 P.3d 1217, 1221-22 (Div. 2 2009).

(5) the TPS actions in this matter -- medical inquiries and TPS-mandated psychiatric IME, disciplinary, 15-day suspension without pay and random drug testing for three years -- violate the ADA and EEOC guidelines.

(6) the requirements for the imposition of discipline on teachers have been governed by a detailed, statutory scheme and the case law developed thereunder for over 40 years and is a matter of substantial public interest because teachers are in a highly-regulated profession that requires exemplary service such that an improvidently-imposed disciplinary finding can all but foreclose future employment opportunities in the teaching profession.

STATEMENT OF THE CASE

Petitioner Teri Campbell (hereinafter "Teri Campbell," "Campbell" or "Teri") started teaching in 2002.[7] She taught U.S. history, language arts, highly capable program, reading and social studies at TPS's

[7] CP 92, lines 23-24.

Mason Middle School.[8] Campbell was diagnosed with Guillain-Barre Syndrome ("GBS") in 2006.[9] She had an intrathecal pump installed in 2007.[10] She reported to her principal, in 2007, that she had an intrathecal pump that administered pain medications.[11] In the ensuing years, the principal always asked, "How is your health? – How are you doing?"[12] Teri had thyroid cancer and a thyroidectomy in the summer of 2011.[13] She had no health issues that prevented her from working.[14]

Campbell took other medications.[15] However, those medications stayed at home except for her Novolog pen (insulin).[16] She had no side-effects from using the intrathecal pump and stated, "I don't know that it's going!"[17] Teri never experienced a fainting spell, dizziness or nausea at work[18] and she did not go to work if she felt dizzy.[19] She only took "drowsy-type" medications after work[20] and she did not take oral pain

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[8] CP 93, lines 17-22 and CP 523, lines 1-9.
[9] CP 95, lines 3-24.
[10] CP 96, lines 11-25 and CP 97, lines 1-13. Campbell had a new intrathecal pump installed in April 2013. CP 98, lines 1-4. As a result of having this new pump installed, Teri was able to forego the use of a wheelchair, motorized scooter, walker or cane on a regular basis. CP 97, lines 5-7.
[11] CP 535, lines 10-25; CP 536, lines 1-25; CP 537, lines 1-15; CP 560, line 2; and, CP 561, line 10.
[12] CP 536, lines 15-20.
[13] CP 524, lines 15-18.
[14] CP 523, lines 20-23.
[15] CP 832 – 833.
[16] CP 525, line 25, and CP 526, lines 1-3.
[17] CP 97, lines 11-16
[18] CP 557, lines 14-15; CP 130, lines 24-25; and, CP 131, lines 1-3.
[19] CP 126, lines 21-25.
[20] CP 557, lines 19-20.

medication before the start of the work day or during the work day. Instead, she had to wait until she got home, after work, and then she could take her oral pain medication.[21]

Prior to November 2, 2011, Campbell never had any problems operating her car – no auto accidents and no driving citations.[22] However, on the way to school, on November 2, 2011, she blacked out and had an accident. This is the one and only episode she ever had of this nature.[23]

Prior to this accident, Teri Campbell had no record of disciplinary actions and was considered "a teacher in good standing."[24] She was ultimately placed on paid administrative leave on January 5, 2012, as a result of the November 2, 2011 accident.[25] However, she was allowed to return to teaching for the 2012-2013 school year and, in fact, did so without any problems that school year.[26]

Following the November 2, 2011 auto accident, Campbell was directed by TPS to have her treating physicians submit letters to TPS regarding her medication regimen. Campbell's primary care physician, Diane Reineman, MD, stated in a January 13, 2012 letter to TPS:

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[21] CP 102, lines 3-18 and CP 148, lines 3-15.
[22] CP 131, lines 2-3.
[23] CP 186, lines 20-25.
[24] CP 77, lines 10-12.
[25] CP 777.
[26] CP 174, lines 14-22.

> Campbell's "current medications taken as directed, that I regulate do not impair Teri's ability to teach or her fitness for duty. Her medications or their interactions, do not affect her behavior to the extent that would impair her ability to work physically, mentally and emotionally with student[s] in the Tacoma school district."[27]

Campbell's pain treatment was through the Seattle Pain Center, which stated in a January 20, 2012 letter to TPS:

> Campbell's "medical treatment, including the [pain] prescriptions that I regulate for Teri's use, does not impair Teri's level of fitness for duty on a usual basis . . . I am confident that Teri is able to work physically, emotionally, and mentally with the students in the Tacoma School District while taking her usual medications as prescribed. During the three plus years that I have been treating her, the patient has been on a stable medication regimen and has been able to work without impairment to her fitness for duty.[28]

On December 5, 2012, eleven months after the physician's letters were submitted to TPS, Tacoma Public Schools issued a RCW 28A.405.300 Notice of Probable Cause ("NOPC")[29] alleging three grounds for discipline:

- Campbell reported or intended to report to work on November 2, 2011 under the influence of illegal chemical substances and opiates;

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[27] CP 287, January 13, 2012 letter from Dr. Reineman to TPS, admitted as part of Campbell's Exhibit "F," page 005, at the Statutory Haring See, CP 179, lines 7-25 and CP 180, lines 1-5, Statutory Hearing, May 31, 2013.

[28] CP 290, January 20, 2012 letter from Sandra Dawson, ARNP, Seattle Pain Center, to Gayle Elijah, TPS director of Human Resources, admitted as part of Campbell's Exhibit "F," page 008, at the Statutory Hearing. See, CP 179, lines 7-25 and CP 180, lines 1-5, Statutory Hearing, May 31, 2013.

[29] CP 1291 – 1300.

- Campbell violated TPS Policy No. 5201 by failing to report to her school principal that she was taking drugs or medications that might adversely affect her ability to perform work in a safe or productive manner, including drugs that are known or advertised as possibly affecting judgment, coordination, any of the senses or those which may cause drowsiness or dizziness; and,
- Campbell failed to report her conviction for a felony drug-related offense to TPS.[30]

The RCW 28A.405.300/.310 Statutory Hearing Officer found that TPS had failed to prove by a preponderance of the evidence the "Under the Influence" allegation[31] and "Felony Conviction"[32] allegation in the December 5, 2012 NOPC. However, the Statutory Hearing Officer found that TPS had met its burden of proof on the "Failure to Report" allegation.[33] Therefore, the Hearing Officer found sufficient cause for a

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[30] Id

[31] Hearing Officer's Findings of Fact, Conclusions of Law and Final Decision, "Under the Influence" section at CP 17-18.

[32] Hearing Officer's Findings of Fact, Conclusions of Law and Final Decision, "Felony Conviction" section at CP 18-19.

[33] Hearing Officer's Findings of Fact, Conclusions of Law and Final Decision, "Failure to Report" section at CP 18.

15-day suspension without pay and the three-year random drug testing regimen sought by TPS.[34]

During the RCW 28A.405.300/.310 statutory hearing, the only evidence that TPS offered for the alleged violation of TPS Policy No. 5201[35] and subsequent discipline of Teri Campbell was a Google-type search in an unknown database by the TPS Director of Employee and Labor Relations for purported side-effects information regarding medications taken by Campbell.[36] TPS did not call any medical witnesses or medical experts at the statutory hearing.[37] Campbell objected to this evidence as not cognizable.[38] In contrast, Campbell proffered expert medical testimony at the statutory hearing that she was on a stable dose of opioid therapy in November 2011 – the time in which her automobile accident occurred;[39] that stable opioid therapy would not adversely affect her judgment, coordination and senses;[40] and, Campbell's diabetes, GBS, hypertension, on-going thyroid cancer treatment – "any of them could lead

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[34] Hearing Officer's Findings of Fact, Conclusions of Law and Final Decision, "Final Decision, "Final Decision," at CP 20.
[35] CP 809-810.
[36] CP 76, lines 4-8 and TPS Exhibit 9, at CP 790-791
[37] The only witnesses called by TPS at the Statutory Hearing on May 30, 2013 and May 31, 2013, other than Teri Campbell, were Patrice Sulkosky, Principal at Mason Middle School (CP 559 – CP 564), Carla Santorno, TPS Superintendent (CP 571 – CP 585), Gayle Elijah, TPS Director of Employee and Labor Relations (CP 73 – CP 92), Lynne Rosellini, TPS Assistant Superintendent for Human Resources (CP 167 – CP 175) and Tacoma Police Department Officer Jeffery Robillard (CP 158 – CP 166).
[38] CP 959-960 and CP 881-882.
[39] CP 109, lines 19-25 and CP 110, line 1.
[40] CP 110, lines 2-25 and CP 111, lines 1-14.

to the [November 2, 2011 black-out] episode that she had, "not her opioid therapy."[41] Furthermore, her intrathecal pump and stable, opioid therapy allowed Campbell to work despite her complex medical history and pathology.[42]

Campbell appealed the decision of the Statutory Hearing Officer to Superior Court pursuant to RCW 28A.405.320.[43] In her appeal to the Superior Court, Teri Campbell challenged:

- TPS's use of the unidentified website information about side-effects of her medications as being non-cognizable evidence;[44]
- TPS's violation of the ADA and Rehabilitation Act in its investigation of the November 2, 2011 accident wherein TPS made unlawful medical inquiries,[45] subjected Campbell to a psychiatric IME[46] and disparate treatment.[47]
- TPS's imposition of three-year random drug testing as being contrary to law;[48] and,

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41 CP 113, lines 4-19.
42 CP 103-121.
43 CP 1-3; CP 975-997; and, CP 998-1018.
44 CP 959-960 and CP 881-882.
45 CP 2; CP 993-995; and, CP 1001.
46 Id.
47 Id.
48 CP 3; CP 995-996; and, CP 1012-1014.

- TPS's imposition of a fifteen-day suspension as being arbitrary and capricious[49] under the circumstances of her case.

After reviewing the 940-page administrative record from the statutory hearing,[50] the briefs of the Parties[51] and holding oral argument,[52] the Superior Court found that:

- TPS's Policy 5201 was vague and enforcement would be arbitrary and violate public policy;[53]
- there was no cognizable evidence to support allegations that Campbell violated TPS Policy No. 5201;[54]
- the choice of disciplinary sanction by a school district is reviewed on appeal by the Superior Court to determine if it is arbitrary, capricious or contrary to law;[55] and,
- a mandatory three-year, random drug-testing regimen for a teacher as part of an RCW 28A.405.300/.310 process would be *ultra vires*, but the Superior Court did not need to

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[49] CP 3, CP 996; and CP 104-1016.
[50] CP 4 – CP 9.
[51] CP 975-997; CP 1019-1038, and CP 998-1018.
[52] RP, February 28, 2014, pages 1-49.
[53] CP 1346-1348.
[54] CP 1348-1351.
[55] CP 1352.

reach this issue because the Hearing Officer's decision was reversed.[56]

As a result of these findings and conclusions of law, the Superior Court reversed the Hearing Officer's Decision,[57] awarded Campbell damages for her lost compensation[58] and awarded Campbell reasonable fees and costs for her appeal to Superior Court.[59] TPS appealed the Superior Court's decision to the Court of Appeals, Division II.

The Court of Appeals, Division II, reversed the Superior Court holding that: (1) "[a]lthough [TPS] Policy 5201 is not a model of clarity, under a plain reading it is non unconstitutionally vague";[60] (2) "there is substantial evidence to support the hearing officer's findings of fact and conclusions of law upholding the District's probable cause determination";[61] (3) "the imposed sanction of a 15-day unpaid suspension and 3-year drug testing requirement is not arbitrary, capricious, or contrary to law";[62] and, (4) the superior court's award of attorney fees and costs to

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[56] CP 1351-1352.
[57] CP 1352
[58] Id.
[59] Id. and CP 1482-1483.
[60] Court of Appeals, Division II, Published Opinion, Case No. 46067-0-II, dated March 8, 2016, as amended May 17, 2016, at page 10
[61] Id., page 1.
[62] Id.

Campbell under RCW 28A.405.350 was not supported by any findings and was improper."[63]

ARGUMENT

Contrary to Vinson, the Court of Appeals Conflates the RCW 28A.405.300 Probable Cause Standard for the Notice of Probable Cause with the RCW 28A.405.310(8) Preponderance of the Evidence Standard Required for an Adverse Contract Action

The Court of Appeals repeatedly referred to "*probable cause*" in its opinion:

- "the hearing officer found the District lacked probable cause for discipline"[64]
- "substantial evidence did not support the District's probable cause determination or the hearing officer's decision"[65]
- "we reinstate the hearing officer's decision upholding the District's probable cause determination"[66]
- "there is substantial evidence to support the hearing officer's decision upholding the District's probable cause determination"[67]

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[63] Id

[64] Court of Appeals, Division II, Published Opinion, Case No. 46067-0-II, dated March 8, 2016, as amended May 17, 2016, fn. 2 at page 2.

[65] Id., at page 6.

[66] Id., at page 12.

[67] Id , at page 16.

- "[w]e reinstate the hearing officer's decision upholding the District's probable cause determination"[68]

[Emphasis added]

However, that is not the standard mandated by RCW 28A.405.310(8). Nor, is it the standard set out in Vinson,[69] Clarke[70] and Hoagland.[71]

RCW 28A.405.310(8) provides that, in order to discipline a teacher and adversely affect her contract status by suspending her for three weeks (15 days), there must be sufficient cause or causes for such action established by a preponderance of the evidence:

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

In Vinson,[72] this Court, citing Clarke[73] and Hoagland,[74] discussed, at length, the definition for sufficient cause that must be established by a preponderance of the evidence before a nonprovisional teacher may be disciplined or discharged. Vinson, 172 Wn.2d at 771-75, 261 P.3d at 153-

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[68] Id.
[69] Federal Way School Dist. No. 210 v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011).
[70] Clarke v. Shoreline School Dist. No. 412, 106 Wn 2d 102, 720 P.2d 793 (1986).
[71] Hoagland v. Mount Vernon School Dist. No. 320, 95 Wn.2d 424, 623 P.2d 1156 (1981).
[72] Id., footnote 69.
[73] Id., footnote 70.
[74] Id., footnote 71.

55. Absent from this discussion in Vinson are references to the District's probable cause determination as a standard of review. Instead, this Court, in Vinson, emphasized the need for the hearing officer to find sufficient cause:

> We further hold that the original Clarke test and the applicable Hoagland factors must be applied in all nonflagrant cases to determine whether sufficient cause exists to discharge a teacher. Only in cases where there is egregious conduct, e.g., sexually exploitive conduct or physical abuse of a student, may sufficient cause be found as a matter of law without applying the original Clarke test and Hoagland factors. [Emphasis added]

See, also, Briggs v. Seattle School Dist. No. 1, 165 Wn.App. 286, 292, 266 P.3d 911, 914 (Div. 1 2011) [sufficient cause required for non-renewal of a teaching contract] and Griffith v. Seattle School Dist. No. 1, 165 Wn.App. 663, 670-71, 266 P.3d 932, 936-37 (Div. 1 2011) [sufficient cause required for suspension for insubordination].

There Was No Evidence of Impairment of Performance and No Evidence That the Failure to Report Was Not Remediable

The uncontested testimony and exhibits proffered at the statutory hearing were as follows:

- Campbell had no side-effects from using her intrathecal pump[75]
- Campbell had no health issues that prevented her from working[76]

[75] CP 97, lines 11-16.
[76] CP 523, lines 20-23

- Campbell never had a fainting spell at work[77]
- Campbell did not go to work if she felt dizzy[78]
- Campbell never had any fainting spells, dizziness, nausea at work[79]
- Campbell never had any problems, no auto accidents, no driving tickets prior to November 2, 2011[80]
- Campbell had no prior disciplinary matters and was "a good teacher in good standing"[81]
- Campbell's stable opioid therapy would not adversely affect her judgment, coordination and senses[82]
- Campbell taught the following school year with no problems[83]

In January 2012, eleven months prior to the December 5, 2012 TPS Notice of Probable Cause, Campbell disputed the Google-type website "side-effects" research proffered by TPS in a letter from her primary care physician, Diane Reineman, MD.[84] In a second letter, the

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[77] CP 557, lines 14-15.
[78] CP 126, lines 21-25.
[79] CP 130, lines 24-25 and CP 131, lines 1-3.
[80] CP 131, lines 2-3.
[81] CP 77, lines 10-12.
[82] CP 110, lines 2-25 and CP 111, lines 1-14.
[83] CP 174, lines 19-22.
[84] CP 287 and pages 5-6, *supra*, for text of a portion of the January 13, 2012, letter to TPS.

Seattle Pain Center (Campbell's pain treatment provider), also, debunked the specious "side-effects" claimed by TPS.[85]

The Court of Appeals overlooked these uncontested facts and letters from Campbell's physicians when it approved the discipline imposed by the District in this matter. Furthermore, the Court of Appeals ignored the need to find impairment of performance and lack of remediability before discipline could be imposed under the dictates of Vinson,[86] Clarke [87] and Hoagland.[88] See, CP 947-949, CP 864-870, CP 1005-1010 and Campbell's Brief before the Court of Appeals, at pages 23-31.

The Court of Appeals Did Not Address the Nexus Between the Misconduct – Failure to Report – and Teaching Effectiveness as Required by Due Process

The Court of Appeals did not address the sufficient cause requirement that there be a nexus between misconduct and teaching effectiveness, as required by due process:

> IV. Sufficient Cause Requires Nexus Between Misconduct and Teaching Effectiveness
> ¶29 The employment contract of a nonprovisional teacher may not be terminated except for "sufficient cause." RCW

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[85] CP 290 and page 6, *supra*, for text of a portion of the January 20, 2012, letter to TPS.
[86] Federal Way School Dist. No. 210 v. Vinson, 172 Wn 2d 756, 261 P.3d 145 (2011).
[87] Clarke v. Shoreline School Dist. No. 412, 106 Wn.2d 102, 720 P.2d 793 (1986).
[88] Hoagland v. Mount Vernon School Dist No. 320, 95 Wn.2d 424, 623 P.2d 1156 (1981).

> 28A.400.300(1). Sufficient cause is *not* defined by statute; thus, our courts have construed the phrase to give it meaning. ¶30 This court in Hoagland interpreted sufficient cause to mean "a showing of conduct which *materially and substantially* affects the teacher's performance." Hoagland, 95 Wash.2d at 428, 623 P.2d 1156 (emphasis added). "[I]t would violate due process to discharge a teacher without a showing of actual impairment to performance." Id. at 429, 623 P.2d 1156. We noted that "because the statutes do not stipulate certain conduct as per se grounds for dismissal, it will be a question of fact whether the complained of acts constitute sufficient cause." Id. at 428, 623 P.2d 1156.

Vinson, 172 Wn.2d at 771, 261 P.3d at 154.

Random Drug Testing as Discipline in This Matter is *Ultra Vires*

The Court of Appeals held that Campbell could challenge the District-imposed drug-testing requirement.[89] The Court of Appeals went on to hold that the random drug testing was not arbitrary or capricious because "Campbell fail[ed] to provide evidence that . . . the District ha[d] treated her differently from any other teacher in a similar situation."[90] However, the Court of Appeals overlooked the contrary-to-law/*ultra vires* argument posed by Campbell.[91]

In this matter, the District's attempt to impose random drug testing is contrary to Washington law. For, it is the law in Washington that drug testing, as part of a disciplinary action, is a mandatory subject of bargaining. City of Tacoma, 4539-A (PECB, 1994). See, also, RCW

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[89] Decision, March 8, 2016, at page 12, fn. 9.
[90] Id., at page 14-15.
[91] CP 885.

41.56.140 and Yakima Police Patrolmen's Ass'n v. City of Yakima, 153 Wn.App. 541, 547-548, 222 P.3d 1217, 1221-1222 (Div. 2 2009). Compare, United Food & Commercial Workers Union v. Foster Food Products, 1994 WL 570367, *19 (E.D. Cal. 1994), *affirmed*, 74 F.3d 169 (9th Cir. 1995) [employer had to bargain over drug testing policy]. The District's Policy No. 5202, "Federal Highway Administration Mandated Drug and Alcohol Testing Program," and Policy Regulation No. 5202R, "Federal Highway Administration Mandated Drug and Alcohol Testing Program," appear to be the only "random" drug testing policies adopted by the District. However, the District has never bargained the issue of random drug testing as part of a disciplinary action regarding certificated employees who are not required to hold a CDL as part of their job responsibilities. See, "Collective Bargaining Agreement."[92] Hence, random drug testing as part of any discipline imposed in this matter is contrary to law.

The Overly Broad Application of TPS Policy 5201 Violated the Americans With Disability Act and EEOC Guidelines[93]

Teri Campbell has Guillian-Barré Syndrome ("GBS"). GBS is covered by the Americans with Disabilities Act ("ADA").[94] The 15-day suspension and random drug testing for three years as a result of the

[92] CP 590-755.
[93] CP 181, CP 325-357, CP 883-885, CP 961-962, CP 993-995 and CP 1001.
[94] Puletasi v. Wills, 290 Fed.Appx. 14 (9th Cir. 2008).

medication inquiries the District demanded from Campbell's treating physicians in January 2012[95] and the District-mandated psychiatric IME[96] are the types of conduct – disability discrimination, retaliation, unlawful medical inquiries and failure to engage in the interactive process – specifically proscribed by the ADA and EEOC Guidelines.[97] See, Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1230-31 (10th Cir. 1997).

Imposition of Discipline on Teachers is Governed by a Detailed Statutory Scheme and the Case Law Developed Thereunder and is a Matter of Substantial Public Interest

The RCW and WAC contain hundreds of pages of statutes and administrative regulations governing teachers.[98] These statutes and regulations have evolved since statehood and show the people's substantial interest – through the legislative and regulatory process – in the development of quality educators and the due process protections afforded those educators. Wojt v. Chimacum School Dist. No. 49, 9 Wn.App.857,

[95] CP 287 and CP 290.
[96] CP 293-302.
[97] Found at http://ww/eeoc.gov/policy/docs/guidance-inquiries.html
[98] See, for example, RCW Chapter 28A.300 [Superintendent of public instruction]; RCW 28A.305 [State board of education]; RCW Chapter 28A.310 [Educational service districts]; RCW Chapter 28A.400 [Employees]; RCW Chapter 28A.405 [Certificated employees]; RCW Chapter 28A.410 [Certification]; RCW Chapter 28A.415 [Institutes, workshops and training]; RCW Chapter 28A.625 [Awards]; RCW Chapter 28A.660 [Alternative route teacher certification], RCW Chapter 28A.690 [Agreement on qualifications of personnel]; RCW Chapter 26.44 [Abuse of children]; WAC Chapter 180-44 [Teachers' Responsibilities]; WAC Title 181 [Professional Educator Standards Board – in particular Chapters 181-85 to 181-87 regarding Professional Certification]; WAC Chapter 181-88 [Mandatory disclosure]; and, WAC Chapter 181-97 [Excellence in teacher preparation award].

862, 516 P.2d 1099, 1103 (Div. 2 1973) ["Much time, effort, and money has been expended by the teacher in obtaining the requisite credentials."] Failure of a school district, hearing officer or court to follow the required due process protections established in the statutes, administrative regulations and case law violates the teacher's right to be disciplined only for sufficient cause established by a preponderance of the evidence[99] -- not based upon "probable cause" in a District's Notice of Probable Cause.

CONCLUSION

Pursuant to Vinson[100] and the arguments presented above, this Court should reverse the Court of Appeals and reinstate the superior court decision, including the award of attorney's fees and costs for the underlying proceeding before the superior court.[101] In addition, this Court should award Teri Campbell her costs for proceedings before this Court pursuant to RAP 14.1 *et seq.*

Dated this 13th day of June, 2016.

Joseph W. Evans

Joseph W. Evans, WSBA #29877
Attorney for Teri Campbell

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[99] RCW 28A.405.310(8)

[100] Federal Way School Dist. No. 210 v. Vinson, 172 Wn.2d 756, 261 P 3d 145 (2011).

[101] Campbell briefed the RCW 28A 405.350 fees and costs issue in superior court at CP 1353-1371 [Application for Fees and Costs]; CP 1372 -1380 [Declaration in Support of Application for Fees and Costs]; CP 1381-1401 [Billing Statements], and, CP 1451-1479 [Reply re: Fees and Costs] See, also, Supplemental Report of Proceedings [Superior Court Oral Argument on August 15, 2014 re: Fees and Costs Application], filed in the Court of Appeals on January 16, 2015

Filed
Washington State
Court of Appeals
Division Two

March 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TERI CAMPBELL, Respondent, v. TACOMA PUBLIC SCHOOLS, a.k.a. TACOMA PUBLIC SCHOOL DISTRICT NO. 10. Appellant.	No. 46067-0-II PUBLISHED OPINION

SUTTON, J. — Tacoma Public Schools (the District) suspended teacher Teri Campbell for 15 days without pay and imposed a 3-year drug testing requirement because she violated District Policy 5201 by not reporting to the District the medications she was taking that could have potentially affected her ability to work safely and productively. A hearing officer upheld the District's decision and the superior court reversed. The District appeals.

We hold that (1) Policy 5201 is not unconstitutionally vague, (2) there is substantial evidence to support the hearing officer's findings of fact and conclusions of law upholding the District's probable cause determination, (3) the imposed sanction of a 15-day unpaid suspension and a 3-year drug testing requirement is not arbitrary, capricious, or contrary to law, and (4) the superior court's award of attorney fees and costs to Campbell under RCW 28A.405.350 was not supported by any findings and was improper. Further, because Campbell does not prevail on appeal, we deny her request for attorney fees and costs on appeal.

Accordingly, we reverse the superior court's judgment and order and its award of attorney fees and costs under RCW 28A.405.350. We reinstate the hearing officer's decision upholding the District's probable cause determination and the sanction imposed, and deny Campbell's request for attorney fees and costs on appeal.

FACTS

Teri Campbell is a certificated teacher in the District and has taught at Mason Middle School since 2004. In 2006, doctors diagnosed her with Guillain-Barre Syndrome, a medical condition resulting in chronic pain, that required Campbell to have a pain pump implanted the following year to manage her symptoms. Campbell disclosed the pain pump to her principal, Patrice Sulkosky, but did not disclose the specific medications that the pump delivered.

On November 2, 2011, Campbell passed out as she drove to work and struck another vehicle in the oncoming lane of traffic. The officer responding to the collision discovered a tin containing 45 Xanax pills in Campbell's purse, and Campbell admitted to smoking marijuana a few days before the accident. As a result, the officer arrested Campbell, and she ultimately pled guilty to vehicular assault.

After recovering from her injuries, Campbell returned to work on January 2, 2012. The District placed Campbell on paid administrative leave on January 5 to conduct an internal investigation of the circumstances surrounding the collision and her arrest. The District sought to determine whether Campbell intended to report to work under the influence.

During the investigation, Campbell and her doctors provided the District with a list of her prescribed medications, and the doctors explained in their letters to the District that none of the medications impaired Campbell's ability to teach or carry out her job duties. On September 26,

Gayle Elijah, the District's Director of Human Resources, advised Campbell in a letter that the District discovered that Campbell failed to disclose a number of prescription medications that she was taking. The District cited the following relevant medications: Metoclopramide, Acyclovir, Estradiol, Tapentadol, Zolpidem, Alprazolam, Lisinopril, Levothyroxine, Sufentanil, and Bupivacain. Because these medications "are known or advertised as possibly affecting" Campbell's ability to perform her job safely and productively, the District alleged that she had violated Policy 5201 by failing to report them. Clerk's Papers (CP) at 788-91.

District Policy 5201, *Drug Free Schools, Community and Workplace*, states in relevant part:

> Any staff member who is taking a drug or medication whether or not prescribed by the staff member's physician, which may adversely affect that staff member's ability to perform work in a safe or productive manner is required to report such use of medication to his or her supervisor. This includes drugs which are known or advertised as possibly affecting judgment, coordination, or any of the senses, including those which may cause drowsiness or dizziness. The supervisor in conjunction with the district office then will determine whether the staff member can remain at work and whether any work restrictions will be necessary.

CP at 809.

Based on the alleged violations of Policy 5201, the District advised Campbell that it was considering terminating her employment and scheduled a *Loudermill*[1] hearing to allow Campbell to respond to the allegations. At the *Loudermill* hearing, Campbell did not dispute that she took the medications listed in Elijah's letter or that the medications had the listed side effects.

[1] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985) (holding that public employees facing termination have a right to the opportunity to respond pretermination).

On December 5, 2013, District Superintendent Santorno informed Campbell in writing that,

> I have determined that there is probable cause to suspend you without pay for fifteen (15) work days. *In addition*, you will be required to submit to random drug tests for a period of three (3) years, and to comply with all District Policies and Procedures, *including* identifying to your supervisor any and all drugs or medications that you are taking that may impact your ability to perform work in a safe and productive matter (sic) as required under District Policy.

CP at 313 (emphasis added). The District found that Campbell violated the reporting requirement in District Policy 5201 by failing to report to her supervisor that she was taking drugs or medications that "are known or advertised as possibly affecting" her ability to work safely and productively.[2] CP at 304.

Campbell appealed the District's probable cause determination to a hearing officer.[3] At the hearing, Campbell admitted, and the hearing officer found, that, although Campbell told Principal Sulkosky that she had a pain pump, Campbell never disclosed the medications administered in her pain pump or any of her other medications to Principal Sulkosky or anyone else at the District. The hearing officer found that, although Campbell relied solely on her doctor's letters and expert testimony that she did not suffer actual side effects, she never disputed her medication usage or their potential side effects as alleged by the District. The hearing officer also found that Campbell had failed to report those medications. Based on these findings, the hearing

[2] The District sought to discipline Campbell on two other alleged violations for which the hearing officer found the District lacked probable cause for discipline. Those two issues were not before the superior court and are not before us on appeal.

[3] RCW 28A.405.310.

officer concluded that, "Policy 5201 is clear that any such use [of medications] must be reported," CP at 18, and that the District had:

> sufficient cause for discipline of Ms. Campbell on the basis that Ms. Campbell failed to report to her supervisor that she was taking drugs or medication that might adversely affect her ability to perform work in a safe or productive manner.

CP at 19.

Campbell appealed the hearing officer's decision to superior court. Campbell disputed only the hearing officer's Finding of Fact No. 21,[4] and because there was no evidence that Campbell actually suffered any adverse side effects, Campbell argued that the District's list of medications and their side effects were insufficient to uphold the hearing officer's conclusion that the District had probable cause to sanction her for violating Policy 5201.[5]

The superior court reversed the hearing officer's decision that upheld the District's probable cause determination. In its ruling, the superior court stated that Policy 5201 was void for vagueness because it lacked specificity as to "who determines which drugs or medications may adversely affect" a teacher's work performance and "what would constitute sufficient reporting." CP at 1492-93. The superior court also ruled that there was "no cognitive evidence" to support the District's probable cause determination because Campbell was on "a stable opioid therapy and other medications that would not adversely affect her judgment, coordination, and senses." CP at

[4] Finding of Fact No. 21 stated, "[Campbell] did not report to Ms. Sulkosky that she had the Xanax pills in her possession at school." CP at 15. This finding is not before us on appeal, and is not relevant to our analysis.

[5] In her appeal to superior court, Campbell did not assign specific error to any of the other findings of fact and does not dispute them. Therefore, these other findings of fact are verities on appeal. *Riley-Hordyk*, 187 Wn. App. 748, 758-59, 350 P.3d 681 (2015).

1494, 1496. The superior court did not reach the sanction issue but stated that the sanction was reviewable on appeal. The court then awarded Campbell $49,476.11 in attorney fees and costs under RCW 28A.405.350. The District appeals.

ANALYSIS

The District argues that the superior court erred when it concluded that (1) the District Policy 5201 was unconstitutionally vague and unenforceable, (2) substantial evidence did not support the District's probable cause determination or the hearing officer's decision, and (3) the sanction was reviewable. It also argues that, without any findings that the District acted in bad faith or upon insufficient legal grounds, the superior court's award of attorney fees and costs to Campbell was improper under RCW 28A.405.350. We agree with the District. In addition, we review the sanction and we find that it is not arbitrary, capricious, or contrary to law.

I. VAGUENESS

The District argues that the superior court erred when it held that Policy 5201 is unconstitutionally vague. We agree.

We examine the validity of an agency rule de novo. *Marcum v. Dep't of Soc. and Health Serv.*, 172 Wn. App. 546, 556, 290 P.3d 1045 (2012). Under the Administrative Procedure Act (APA)[6], we may declare an agency rule invalid if the rule violates constitutional provisions. RCW 34.05.570(2)(c); *Marcum*, 172 Wn. App. at 556. We have a duty to construe an administrative rule or statute to avoid constitutional questions where such construction is reasonably possible. *Arnett v. Kennedy*, 416 U.S. 134, 162, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1975). When construing

[6] Ch. 34.05 RCW.

an undefined term in a rule, we give the term its ordinary, common, everyday meaning. *Stastny v. Bd of Tr of Cent. Wash. Univ.*, 32 Wn. App. 239, 253, 647 P.2d 496 (1982). We presume regulations and statutes are constitutional; however, rules imposing sanctions for unprofessional conduct must not be unconstitutionally vague. *Keene v. Bd. of Accountancy*, 77 Wn. App. 849, 854, 894 P.2d 582 (1995).

A rule is void for vagueness if "it is framed in terms so vague that persons of 'common intelligence must necessarily guess at its meaning and differ as to its application.'" *Keene*, 77 Wn. App. at 854 (internal quotation marks omitted) (quoting *Haley v. Med Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991)). A rule must provide an explicit standard to prevent arbitrary and discriminatory enforcement. *Stastny*, 32 Wn. App. at 253. But a rule is not void for vagueness simply because it uses vague terms or fails to list every possible prohibited behavior, and we do not analyze portions of a rule in isolation from the context in which they appear. *Hayley*, 117 Wn.2d at 741; *Keene*, 77 Wn. App. at 854. If, as a whole, a rule has the required degree of specificity, then it can withstand a vagueness challenge despite its use of terms or phrases which, when considered in isolation, have no determinate meaning. *Haley*, 117 Wn. 2d at 741. To determine whether Policy 5201 is unconstitutionally vague as applied, we determine whether the policy, when read as a whole, gave Campbell adequate notice of what was prohibited or required to comply, and whether it was sufficiently specific to prevent the possibility of arbitrary enforcement.

Here, the superior court held that Policy 5201 was unconstitutionally vague for three reasons. First, the superior court stated that Policy 5201 did not identify "who determines" what drugs "may adversely affect [a teacher's] ability to perform work in a safe or productive manner."

CP at 1492. The superior court's focus ignores the basis of the District's finding that Campbell violated Policy 5201—that Campbell failed to report the drugs or medications she was taking that "are known or advertised" as possibly affecting judgment.[7] Regardless of whether or not the medications actually had adverse effects on her performance, Policy 5201 expressly required Campbell to report her medications because they "were known or advertised" as possibly having adverse effects. CP at 809. The duty to report does not require that anyone determine whether or not her medications had any actual adverse effects on her ability to perform her job safely and productively. Thus, because the duty to report is not dependent upon a determination of whether the medications actually adversely affect the staff member, Policy 5201 is not unconstitutionally vague on the basis that it fails to identify who determines which drugs or medications may adversely affect a staff member's job performance.

Second, the superior court ruled that Policy 5201 was unconstitutionally vague because it "fails to mandate any degree of specificity for reporting," leaves "persons of ordinary intelligence to guess at what would constitute sufficient reporting," and leads to arbitrary enforcement. CP at 1493-94. Policy 5201 requires that "[a]ny staff member" taking a drug or medication, whether prescribed by their physician or not, to report the usage of the drug or medication if it "may adversely affect" the staff member's safe and productive job performance or if it is "known or advertised" as possibly affecting judgment or the senses. CP at 809. Although the policy does not

[7] The superior court did not address or acknowledge the language of Policy 5201's reporting requirement, that school district employees are required to report to their supervisor any drugs or medications they are taking that "are known or advertised as possibly affecting judgment, coordination, or any of the senses, including those which may cause drowsiness or dizziness," but only focused on the language regarding drugs "which may adversely affect" the teacher's ability to perform work in a safe or productive manner. CP at 809.

specifically state that the staff member must report the dosage of a drug, it does require reporting the use of the drug or medication.

Policy 5201 does not define the term "drug" or "medication." CP at 809. Thus, we give those terms their ordinary, common everyday meaning. A "drug" is a substance that is

> recognized in an official pharmacopoeia or formulary; a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals; a substance other than food intended to affect the structure or function of the body of [a human] or other animal . . . a narcotic substance of preparation; [and] something that is narcotic in its effect.

MERRIAM–WEBSTER UNABRIDGED, available at http://unabridged.merriam-webster.com. A "medication" is "a medical substance." *Id.* Giving the terms "drug" and "medication" their ordinary, common, everyday meaning, and reading Policy 5201 as a whole, it is reasonable to infer that "drug" and "medication" mean the specific name of the drug or medication administered to and taken by the staff member. *See Stastny*, 32 Wn. App. at 253.

Policy 5201's use of broad terms or its failure to list every possible prohibited behavior does not invalidate the policy. *See Keene*, 77 Wn. App. at 854-55. Although Campbell reported her pain pump to her supervisor, she did not disclose the names of the medications administered in her pain pump or any of the other medications she took that could have potentially affected her judgment or senses. Under a plain reading of Policy 5201, Campbell was required to report the names of all of the medications administered to and taken by her to constitute sufficient reporting. Because Policy 5201 requires reporting of the actual drug or medication that the staff member uses, it gave Campbell notice of what constitutes sufficient reporting. Thus, Policy 5201 has the required degree of specificity to overcome the vagueness challenge and provides an explicit standard, reporting the usage of *the* drug or medication, to avoid the risk of arbitrary enforcement.

Third, the superior court ruled that Policy 5201 was void for vagueness because it failed to define what the term "taking" means. When construing an undefined term in a rule, we give the term its ordinary, common, everyday meaning. *Stastny*, 32 Wn. App. at 253. The definition of "take," the root form of "taking," when referring to consuming a substance is, "to introduce or receive into one's body (as by eating, drinking, or inhaling)." MERRIAM–WEBSTER UNABRIDGED, available at http://unabridged.merriam-webster.com.

Campbell testified that she was "taking" the medications in the list given to the District, including oral pain medications, Xanax, and sleeping pills. She testified that her pain pump administered pain medications on a dosage schedule and that she took a number of her medications orally. Under a plain meaning of "taking," Policy 5201 requires staff members to report all drugs and medications consumed, at any time, which "may adversely affect that staff member's ability to perform work in a safe or productive manner" including those "known or advertised as possibly affecting judgment, coordination, or any of the senses, including those which may cause drowsiness or dizziness." CP at 809. Thus, Policy 5201's failure to define "taking" does not render it unconstitutionally vague.

Although Policy 5201 is not a model of clarity, under a plain reading it is not unconstitutionally vague. Accordingly, we hold that the superior court erred when it ruled Policy 5201 was unconstitutionally vague.

II. SUBSTANTIAL EVIDENCE

The District next argues that the superior court erred because it failed to give the appropriate deference and apply the correct standard of review to the hearing officer's unchallenged findings of fact regarding Campbell's failure to report her medications to her

supervisor, and that there was substantial evidence to support the hearing officer's findings of fact which supported the hearing officer's conclusions of law. We agree.

We confine our review of the hearing officer's decision to the verbatim transcript and the evidence admitted at the hearing and give no deference to the superior court's ruling. RCW 28A.405.340; *Riley-Hordyk*, 187 Wn. App. at 756. Under RCW 28A.405.340(5), we review a hearing officer's factual determinations under the "'clearly erroneous standard.'" *Riley-Hordyk*, 187 Wn. App. at 755 (quoting *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 109-10, 720 P.2d 793 (1986).

A finding is clearly erroneous if it is not supported by substantial evidence in the record. *Clarke*, 106 Wn.2d at 121. Substantial evidence is evidence sufficient to persuade a fair-minded person of the finding's truth or correctness. *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014). Unchallenged findings of fact are verities on appeal. *Riley-Hordyk*, 187 Wn. App at 758-59; *In re Disciplinary Proceeding Against Jones*, 182 Wn.2d 17, 35, 338 P.3d 842 (2014). We review the hearing officer's conclusions of law and its ultimate conclusion de novo and uphold the hearing officer's conclusions of law and ultimate conclusion if they are supported by the findings of fact. *Jones*, 182 Wn.2d at 35.

The hearing officer's findings of fact support the District's conclusion that there was sufficient cause for the District to discipline Campbell for violating Policy 5201. The hearing officer found that Campbell did not report the specific medications in her pain pump or her other medications to Principal Sulkosky, and Campbell did not dispute the medications or their listed potential side effects. The hearing officer also found that the undisputed potential side effects of the medications could have potentially affected Campbell's ability to perform her job safely and

productively. Campbell does not assign error to these findings,[8] and therefore, they are verities on appeal.

Thus, we hold that the undisputed findings of fact support the hearing officer's conclusion that the District had sufficient cause to sanction Campbell for violating Policy 5201 by failing to report her medications that could have potentially affected her ability to perform her job safely and productively. Accordingly, we reinstate the hearing officer's decision upholding the District's probable cause determination.

III. SANCTION

Next, the District argues[9] that the superior court erred in not deferring to the District's choice of sanction under our precedent in *Simmons v. Vancouver School District No. 37*.[10] In the alternative, the District argues that, if we do review the choice of sanction, its choice of sanction is not arbitrary, capricious, or contrary to law. We depart from our precedent and review the District's choice of sanction. After review, we hold that the District's sanction is not arbitrary, capricious, or contrary to law.

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[8] Campbell disputes only the hearing officer's Finding of Fact No. 21.

[9] The District also argued that the District's collective bargaining agreement (CBA) preempts Campbell from challenging the drug-testing requirement. The CBA specifically exempts "[a]ny matter involving employee probation procedures, discharge, nonrenewal, adverse effect, or reduction in force," from its four-step grievance procedure. CP at 707. The manner in which the District imposed the drug-testing requirement is similar to a probation condition, and does have an adverse effect on Campbell's employment contract. Thus, because of the specific exemptions, the CBA does not preclude Campbell from challenging the imposed drug-testing requirement.

[10] 41 Wn. App. 365, 704 P.2d 648 (1985).

In *Simmons*, we held that, once probable cause is determined, we do not reach review of the District's imposed sanction on a teacher because "determination of the sanction to be imposed is within the province of the District." *Simmons v. Vancouver Sch. Dist. No. 3741*, 41 Wn. App. 365, 704 P.2d 648 (1985). However, *Simmons*, was decided before our legislature enacted the 1988 Administrative Procedure Act. *See* RCW 34.05.001. Because RCW 28A.405.340, also enacted after our decision in *Simmons*, follows the "arbitrary and capricious" standard of RCW 34.05.570, we adopt the procedure set forth in *Griffith v. Seattle School District No. 1*,[11] as the modern standard of review for school district sanctions under RCW 28A.405.340.

"Once sufficient cause is established, the choice of sanction is a policy decision made by the district that we review to determine if it is arbitrary, capricious, or contrary to law." *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 675, 266 P.3d 932 (2011) (citing *Butler v. Lamont Sch. Dist. No. 246*, 49 Wn. App. 709, 712, 745 P.2d 1308 (1987)). An arbitrary and capricious action is "'willful and unreasoning action, without consideration and in disregard of facts and circumstances.'" *Cummings v. Dep't of Licensing*, 189 Wn. App. 1, 25, 355 P.3d 1155 (2015) (internal quotation marks omitted) (quoting *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d. 433 (1995)).

The "'harshness'" of an agency's sanction is not the test for whether the sanction is arbitrary and capricious. *Cummings*, 189 Wn. App. at 26 (quoting *Heinmiller*, 127 Wn.2d at 609). "'Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.'" *Cummings*, 189 Wn. App. at 25-26

[11] 165 Wn. App. 663, 266 P.3d 932 (2011).

(internal quotation marks omitted) (quoting *Heinmiller*, 127 Wn.2d at 609). Because we give an agency's choice of sanction considerable judicial deference, our scope of review here is narrow, and the challenger of the sanction carries a heavy burden. *Cummings*, 189 Wn. App. at 26.

Here, the hearing officer found that, although she reported her pain pump, Campbell failed to report the medications administered by her pain pump as far back as 2007, four years before her November 2011 vehicle collision and arrest. Campbell knew about the reporting requirement; she told Principal Sulkosky that she was on pain medications, but failed to report the specific medications she was taking. Campbell also testified that she had not reported to Principal Sulkosky every medication change her doctor made to her pain pump. The hearing officer also found that Campbell consumed a number of other medications that could have potentially affected her ability to safely perform her job functions and that she never disputed taking the medications or their reported side effects. Based on its findings, the hearing officer determined that the District had sufficient cause to suspend Campbell and impose the drug-testing requirement.

The hearing officer's findings support the conclusion that there was sufficient cause for a 15-day suspension without pay. Under RCW 28A.405.060, the District was within its power to suspend Campbell without pay for failing to comply with the reporting requirement in Policy 5201. Additionally, because Campbell admittedly did not report any medication changes in the pain pump to Principal Sulkosky, the findings support the conclusion that there was sufficient cause to impose the drug-testing requirement to ensure she complies with Policy 5201's reporting requirement.

Campbell argues that her suspension is unsupported, and that the drug-testing requirement is *ultra vires*. However, Campbell fails to provide evidence that, by imposing sanctions, the

District has treated her differently from any other teacher in a similar situation. *See Griffith*, 165 Wn. App. at 675 (noting that the imposed sanction on Griffith was consistent with the imposed sanction on another teacher for violating the same policy). Thus, we affirm the hearing officer's determination that the District had sufficient cause to impose a 15-day unpaid suspension for violating Policy 5201 and a 3-year drug-testing requirement to ensure compliance with Policy 5201. We further hold that the imposed sanction is not arbitrary, capricious, or contrary to law.

IV. Attorney Fees and Costs

Finally, the District argues that the superior court erred by awarding Campbell attorney fees and costs without making any findings under RCW 28A.405.350 to support the award. We agree.

The court may award an employee reasonable attorney fees and costs if the employee prevails and if the court finds that the district's probable cause determination was made in bad faith or upon insufficient legal grounds. RCW 28A.405.350. But the superior court did not make any such findings related to the District's probable cause determination.

Absent such findings, Campbell was not entitled to attorney fees and costs under RCW 28A.405.350, and the superior court erred in awarding $49,476.11 in attorney fees and costs to her.

V. Attorney Fees on Appeal

Campbell asks us to award her attorney fees and costs on appeal under RAPs 14.2, 14.3, and 18.1. However, because Campbell does not prevail in this appeal, we deny her request for an award of attorney fees and costs under RAPs 14.2, 14.3, and 18.1.

CONCLUSION

We hold that (1) Policy 5201 is not unconstitutionally vague, (2) there is substantial evidence to support the hearing officer's decision upholding the District's probable cause determination, (3) the imposed sanction of a 15-day suspension and a 3-year drug testing requirement is not arbitrary, capricious, or contrary to law, and (4) the superior court's award of attorney fees and costs under RCW 28A.405.350 was unsupported and improper. Further, because Campbell does not prevail on appeal, we deny her request for attorney fees and costs under RAPs 14.2, 14.3, and 18.1.

Accordingly, we reverse the superior court's judgment and order and its award of attorney fees and costs under RCW 28A.405.350. We reinstate the hearing officer's decision upholding the District's probable cause determination, and deny Campbell's request for attorney fees and costs on appeal.

SUTTON, J.

We concur:

WORSWICK, P.J.

LEE, J.

Filed
Washington State
Court of Appeals
Division Two

May 17, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TERI CAMPBELL,

Respondent,

v.

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

Appellant.

No. 46067-0-II

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION AND AMENDING OPINION

The published opinion in this case was filed on March 8, 2016. Upon the motion of the respondent for reconsideration of portions of the decision terminating review, it is hereby

ORDERED that the respondent's motion for reconsideration is denied. It is further

ORDERED that after review, the court amends the opinion as follows:

Page 6, beginning at line #15 the following text shall be deleted:

> We examine the validity of an agency rule de novo. *Marcum v. Dep't of Soc. and Health Serv.*, 172 Wn. App. 546, 556, 290 P.3d 1045 (2012). Under the Administrative Procedure Act (APA)[1], we may declare an agency rule invalid if the rule violates constitutional provisions. RCW 34.05.570(2)(c); *Marcum*, 172 Wn. App. at 556.

And replaced with the following paragraph:

We review whether Policy 5201 is unconstitutionally vague de novo. Under RCW 28A.405.340(1), we review a hearing officer's decision to determine whether the decision was "in violation of constitutional provisions." RCW 28A.405.340(1) is analogous to RCW 34.05.570(3)(a) and RCW 34.05.570(2)(c) of the Administrative Procedures Act (APA), which provide for judicial review of an agency's action or rule where the order or the rule violates constitutional provisions. RCW 34.05.570(2)(c), .570(3)(a).

SO ORDERED.

DATED this 17th day of May, 2016.

SUTTON, J.

We concur:

WORSWICK, P.J.

LEE, J.

28A.405.300. Adverse change in contract status of certificated employee--Determination of probable cause--Notice--Opportunity for hearing

In the event it is determined that there is probable cause or causes for a teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with the school district, hereinafter referred to as "employee", to be discharged or otherwise adversely affected in his or her contract status, such employee shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action. Such determinations of probable cause for certificated employees, other than the superintendent, shall be made by the superintendent. Such notices shall be served upon that employee personally, or by certified or registered mail, or by leaving a copy of the notice at the house of his or her usual abode with some person of suitable age and discretion then resident therein. Every such employee so notified, at his or her request made in writing and filed with the president, chair of the board or secretary of the board of directors of the district within ten days after receiving such notice, shall be granted opportunity for a hearing pursuant to RCW 28A.405 310 to determine whether or not there is sufficient cause or causes for his or her discharge or other adverse action against his or her contract status.

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

If such employee does not request a hearing as provided herein, such employee may be discharged or otherwise adversely affected as provided in the notice served upon the employee.

Transfer to a subordinate certificated position as that procedure is set forth in RCW 28A.405.230 or 28A.405.245 shall not be construed as a discharge or other adverse action against contract status for the purposes of this section.

Credits

[2010 c 235 § 305, eff. June 10, 2010; 1990 c 33 § 395; 1975-'76 2nd ex.s. c 114 § 2; 1973 c 49 § 1; 1969 ex.s. c 34 § 13; 1969 ex.s. c 223 § 28A.58.450. Prior: 1961 c 241 § 2. Formerly RCW 28A.58 450, 28.58.450.]

28A.405.310. Adverse change in contract status of certificated employee, including nonrenewal of contract--Hearings--Procedure

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

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

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

(4) In the event that an employee requests a hearing pursuant to RCW 28A.405.300 or 28A.405.210, a hearing officer shall be appointed in the following manner: Within fifteen days following the receipt of any such request the board of directors of the district or its designee and the employee or employee's designee shall each appoint one nominee. The two nominees shall jointly appoint a hearing officer who shall be a member in good standing of the Washington state bar association or a person adhering to the arbitration standards established by the public employment relations commission and listed on its current roster of arbitrators. Should said nominees fail to agree as to who should be appointed as the hearing officer, either the board of directors or the employee, upon appropriate notice to the other party, may apply to the presiding judge of the superior court for the county in which the district is located for the appointment of such hearing officer, whereupon such presiding judge shall have the duty to appoint a hearing officer who shall, in the judgment of such presiding judge, be qualified to fairly and impartially discharge his or her duties. Nothing herein shall preclude the board of directors and the employee from stipulating as to the identity of the hearing officer in which event the foregoing procedures for the selection of the hearing officer shall be inapplicable. The district shall pay all fees and expenses of any hearing officer selected pursuant to this subsection.

(5) Within five days following the selection of a hearing officer pursuant to subsection (4) of this section, the hearing officer shall schedule a prehearing conference to be held within such five day period, unless the board of directors and employee agree on another date convenient with the

hearing officer. The employee shall be given written notice of the date, time, and place of such prehearing conference at least three days prior to the date established for such conference

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

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

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

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

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

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

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

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

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

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

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

(10) A complete record shall be made of the hearing and all orders and rulings of the hearing officer and school board.

Credits

[1990 c 33 § 396; 1987 c 375 § 1; 1977 ex.s. c 7 § 1; 1975-'76 2nd ex.s. c 114 § 5. Formerly RCW 28A.58.455.]

28A.405.320. Adverse change in contract status of certificated employee, including nonrenewal of contract--Appeal from--Notice--Service--Filing--Contents

Any teacher, principal, supervisor, superintendent, or other certificated employee, desiring to appeal from any action or failure to act upon the part of a school board relating to the discharge or other action adversely affecting his or her contract status, or failure to renew that employee's contract for the next ensuing term, within thirty days after his or her receipt of such decision or order, may serve upon the chair of the school board and file with the clerk of the superior court in the county in which the school district is located a notice of appeal which shall set forth also in a clear and concise manner the errors complained of.

Credits

[1990 c 33 § 397, 1969 ex.s c 34 § 14; 1969 ex.s c 223 § 28A.58.460. Prior: 1961 c 241 § 3. Formerly RCW 28A.58.460, 28.58 460.]

RCW 28A.405.330

28A.405.330. Adverse change in contract status of certificated employee, including nonrenewal of contract--Appeal from--Certification and filing with court of transcript

The clerk of the superior court, within ten days of receipt of the notice of appeal shall notify in writing the chair of the school board of the taking of the appeal, and within twenty days thereafter the school board shall at its expense file the complete transcript of the evidence and the papers and exhibits relating to the decision complained of, all properly certified to be correct.

Credits

[1990 c 33 § 398; 1969 ex s. c 223 § 28A.58.470. Prior: 1961 c 241 § 4. Formerly RCW 28A.58.470, 28.58.470.]

28A.405.340. Adverse change in contract status of certificated employee, including nonrenewal of contract--Appeal from--Scope

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

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

(1) In violation of constitutional provisions; or

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

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

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

(6) Arbitrary or capricious

Credits

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

28A.405.350. Adverse change in contract status of certificated employee, including nonrenewal of contract--Appeal from--Costs, attorney's fee and damages

If the court enters judgment for the employee, and if the court finds that the probable cause determination was made in bad faith or upon insufficient legal grounds, the court in its discretion may award to the employee a reasonable attorneys' fee for the preparation and trial of his or her appeal, together with his or her taxable costs in the superior court If the court enters judgment for the employee, in addition to ordering the school board to reinstate or issue a new contract to the employee, the court may award damages for loss of compensation incurred by the employee by reason of the action of the school district.

Credits

[1990 c 33 § 399; 1975-'76 2nd ex.s. c 114 § 7; 1969 ex.s. c 34 § 16; 1969 ex.s c 223 § 28A.58.490. Prior: 1961 c 241 § 6. Formerly RCW 28A.58 490, 28.58.490.]

28A.405.360. Adverse change in contract status of certificated employee, including nonrenewal of contract--Appellate review

Either party to the proceedings in the superior court may seek appellate review of the decision as any other civil action.

Credits

[1988 c 202 § 26; 1971 c 81 § 71; 1969 ex.s. c 223 § 28A.58.500. Prior: 1961 c 241 § 7. Formerly RCW 28A.58.500, 28.58.500.]

28A.405.370. Adverse change in contract status of certificated employee, including nonrenewal of contract--Appeal from--Other statutes not applicable

The provisions of chapter 28A.645 RCW shall not be applicable to RCW 28A.405.300 through 28A.405.360.

Credits

[1990 c 33 § 400; 1969 ex.s. c 223 § 28A.58.510. Prior: 1961 c 241 § 8. Formerly RCW 28A.58.510, 28.58.510.]

28A.405.380. Adverse change in contract status of certificated employee, including nonrenewal of contract--Appeal from--Direct judicial appeal, when

In the event that an employee, with the exception of a provisional employee as defined in RCW 28A.405.220, receives a notice of probable cause pursuant to RCW 28A.405.300 or 28A.405.210 stating that by reason of a lack of sufficient funds or loss of levy election the employment contract of such employee should not be renewed for the next ensuing school term or that the same should be adversely affected, the employee may appeal any said probable cause determination directly to the superior court of the county in which the school district is located. Such appeal shall be perfected by serving upon the secretary of the school board and filing with the clerk of the superior court a notice of appeal within ten days after receiving the probable cause notice. The notice of appeal shall set forth in a clear and concise manner the action appealed from The superior court shall determine whether or not there was sufficient cause for the action as specified in the probable cause notice, which cause must be proven by a preponderance of the evidence, and shall base its determination solely upon the cause or causes stated in the notice of the employee. The appeal provided in this section shall be tried as an ordinary civil action: PROVIDED, That the board of directors' determination of priorities for the expenditure of funds shall be subject to superior court review pursuant to the standards set forth in RCW 28A.405.340: PROVIDED FURTHER, That the provisions of RCW 28A.405.350 and 28A.405.360 shall be applicable thereto.

Credits

[1990 c 33 § 401; 1975-'76 2nd ex.s. c 114 § 8; 1973 c 49 § 3; 1969 ex.s. c 34 § 18. Formerly RCW 28A.58.515.]

CERTIFICATE OF SERVICE

The undersigned hereby swears under penalty of perjury and under the laws of the State of Washington, that the following is true and correct; that I am a citizen of the United States and of the State of Washington; over the age of 18 years of age; not a party of interest in this case. That on June 13, 2016, I caused to be served a true and correct copy of ***Petition for Review*** to Counsel, as noted below:

Via E-mail /Original Mailed

Gregory E. Jackson
Freimund, Jackson & Tardif
701 Fifth Avenue, Suite 3545
Seattle, WA 98104

***Via E-mail to*:** **gregj@fjtlaw.com**
kathief@fjtlaw.com
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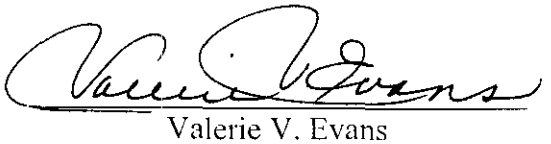

Valerie V. Evans