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SUPREME COURT OF
THE STATE OF WASHINGTON

No. 33062-1-III

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

MICHAEL F. CRONIN,

Appellant

vs.

CENTRAL VALLEY SCHOOL DISTRICT,

Respondent

MICHAEL F. CRONIN'S RESPONSE TO CENTRAL VALLEY SCHOOL DISTRICT'S PETITION FOR DISCRETIONARY REVIEW

Larry J. Kuznetz
POWELL, KUZNETZ & PARKER, P.S.
316 W. Boone, Ste. 380
Rock Pointe Tower
Spokane, WA 99201-2346
Phone (509) 455-4151
FAX (509)455-8522
E-mail larry@pkp-law.com
ATTORNEYS FOR PLAINTIFF/APPELLANT

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I. INTRODUCTION

This case involves a unique set of facts and circumstances surrounding a teacher's timely request for a statutory hearing arising out of his termination, a request that was ignored by the school district. After over 4.5 years of litigation and in a second unpublished decision, the Court of Appeals, Division III, agreed with the teacher and remanded this matter back for a statutory hearing on the merits of his termination.

Plaintiff/Appellant, Michael F. Cronin (hereinafter "Cronin") had been employed as a teacher at Central Valley School District (hereinafter "District") for seven years. (CP 31). He was terminated while incarcerated ten days shy of his release from an 80 day jail sentence for a DUI charge unrelated to his teaching activities. (CP 33). Since by statute, he only had a short ten day window to appeal and serve the Superintendent with a request for statutory hearing, he immediately contacted his friend Teresa Anderson. (CP 97). He told her to contact his union representative, Sally McNair, (hereinafter "McNair") and have her take whatever action was necessary to preserve his job. (*Id.*) McNair had represented Cronin after the District placed him on administrative leave and during his incarceration. (CP 33-34; 73). There were meetings between McNair, Cronin and the District while he was incarcerated, to negotiate Cronin's return to work in early January 2012, after he was released from jail. (*Id.*).

McNair thereupon authored and timely served a request for statutory hearing on the Superintendent before the ten days elapsed. (CP 34-35; 74-76; 93). The District ignored and refused to acknowledge McNair's request for statutory hearing, claiming that she was not an employee of the District and had no authority to request a hearing on Cronin's behalf. (CP 1-2; 76; 95). Cronin then filed a Declaratory Judgment action to force the District to proceed to a statutory hearing and to pay his wages and benefits pending the outcome of a hearing on the merits. (CP 29-30; 42-60).

On cross motions for Summary Judgment, the trial court granted the District's motion on the basis that the Court lacked jurisdiction because Cronin failed to timely file his Declaratory Judgment action under RCW 28A.645.010. Cronin appealed to Division III, and the trial court decision was reversed in a March 13, 2014 unpublished opinion. (App. 1). The case was remanded back to the trial court for a determination of the merits of Cronin's Declaratory Judgment action. (CP 20-28).

The District's Motion for Reconsideration by Division III was denied on April 10, 2014. Its Petition for Discretionary Review with this court was denied on August 6, 2014.

Upon remand to the trial court, the parties once again filed cross-motions for Summary Judgment. (CP 29-30; 109-110). The trial court

granted Cronin's motion in part, holding that as his union representative, McNair had the capacity and authority to file an appeal and request a statutory hearing on Cronin's behalf with the District Superintendent. The trial court granted the District's motion finding that although McNair could properly appeal the termination on Cronin's behalf, she failed to timely elect a remedy (grievance or statutory hearing) and thereupon dismissed his case by Order dated December 19, 2014. (*Id.*).

On April 14, 2016, Division III by unpublished opinion (App. 2) reversed the trial court and remanded the matter for a statutory hearing. The court found that as his agent, McNair had authority to file a request for statutory hearing with the District Superintendent. It also found that she did not fail to select a remedy by first timely serving his request for statutory hearing, followed by conferring with Cronin on whether he wished to proceed under the Collective Bargaining Agreement (hereinafter "CBA") grievance process.

The District filed a Motion to Publish the Division III decision. The motion was denied on June 2, 2015. The District's second Petition For Discretionary Review followed to this Court.

II. ISSUES PRESENTED FOR REVIEW

The District misstates the issues it has raised in this case.

"A. . . . Did the Court of Appeals err by requiring the District to accept an agent's hearing request, regardless of the agent's expressed uncertainty about her authority to make it?" (Pet. Rev. 2-3)

Sally McNair expressed no uncertainty about her authority. She was Cronin's union representative and represented him before the District in meetings while he was incarcerated. She expressed no uncertainty about her authority when filing the request for statutory hearing upon the District Superintendent. If anything, it was the District's uncertainty which arose out of its mistaken belief that "only the employee can file a request for hearing". McNair indicated that as union representative, she can and does appeal matters on behalf of members and did so in Cronin's case. (CP 74-75). Aimee Iverson, General Counsel for the Washington Education Association echoed the same position. (CP 105-106).

"B. . . . Do the hearing statutes for non-renewal (RCW 28A.405.210) and discharge (RCW 28A.405.300) permit this delegation?" (Pet. Rev. 3)

Again, neither cited statute prohibits an agent from requesting a statutory hearing on behalf of a teacher. The District ignores a multitude of situations where an agent may have to quickly respond within ten days of the District's notification of termination or non-renewal when a teacher is incapacitated or otherwise unavailable. The District presupposes that it is the employee's responsibility to file a written request for a statutory hearing, but it is clear that the union can and does undertake such action

on behalf of its members. (CP 74 -75; 105- 106). Even the Supreme Court rules of practice only allow "a party" to seek discretionary review of a decision of a court of appeals (RAP 13.3(a)) but attorneys routinely file requests for discretionary review on behalf of clients. RAP 5.1 requires that "a party" file a Notice of Appeal to a trial court decision" with the Court of Appeals. (RAP 5.1(a)). Attorneys routinely initiate a Notice of Appeal seeking review of a trial court decision. The District's first request for discretionary review and this one were not signed by the District. They were signed by their "agent/representatives" (attorneys) who were authorized to file the Petitions. A teacher should have no less right to have his or her representative sign when faced with a shortened timeline and circumstances (created by the District when it served him in jail) that make a personal effort to appeal unavailable.

"C. . . . Did the Court of Appeals err by holding that Ms. McNair had special authority to surrender a substantial right? (Pet. Rev. 3)

The District misstates this issue. The Court of Appeals did not hold that McNair had special authority to surrender a substantial right. The court noted that "McNair did not concede any absence of authority." App. 2 at 24. In fact, "Cronin bequeathed Sally McNair unlimited power to protect his employment rights". *Id., at 25.* Cronin did not question McNair's authority to act on his behalf. *Id.* And no matter what the District

wants to read into McNair's January 11 letter, "McNair did not expressly declare that she lacked authority to exercise the choice." *Id. at 23.* There was no special authority that was necessary to confer on McNair in order for her to act. She was given authority to preserve his job and take whatever action necessary to accomplish that. (CP 74).

"D. ... Did the Court of Appeals err by discern[ing] no reason why Sally McNair could not demand both processes until a later date." (App. 2 at 23).

The District claims that McNair initially opted for both the statutory hearing and grievance procedure, which is not true. (Pet. Rev. at 4). McNair timely requested a statutory hearing. She never filed a grievance. The District has never argued that the request for statutory hearing was untimely. What the District claims is that McNair had no authority to act on Cronin's behalf and nullified her perfected request for a statutory hearing when she noted in her January 11, 2012, letter that she *may* file a grievance. As the Court of Appeals pointed out, the language of the CBA does not establish a time for selection of either the statutory hearing or grievance process. App. 2 at 23. The statute requires a request for statutory hearing to be filed within ten days of termination. RCW 28.A.405.210; 300. If that is not done, then the only remedy available to Cronin would be the grievance procedure. The parties through the CBA simply agreed that one or the other could be selected but not both. McNair

timely perfected Cronin's request for a statutory hearing and then sought to evaluate which procedure her member wished to use. She never did file a grievance, so what was left was her timely request for a statutory hearing. (CP 260). There is no prejudice to the District under the circumstances. At a minimum the District would have had to wait 30 days to see if a grievance was filed. When one wasn't, the District knew that the matter would proceed via statutory hearing.

There is nothing in the CBA or statute that expressly prevents a teacher from initially requesting both a statutory hearing and a grievance. *Oak Harbor Education Assn. v. Oak Harbor School Dist.*, 162 Wn. App. 254, 259 P.3d 274 (2011).

E. The District raises the issue as to whether or not Cronin's "choice of the statutory hearing was untimely?" (Dist. Pet. 4)

The District claims that Cronin did not "commit to pursuing a statutory hearing" until February 8, 2012, 33 days after receiving notice. *Id.* A "commitment" to pursue a statutory hearing is not a requirement under the statute. The District seeks to impose on a teacher an additional legal step not otherwise required before a matter may proceed to a hearing. It claims that first, the teacher must timely file a request for statutory hearing. Then the teacher must "commit" to that remedy. The District argues an obligation ("commitment") which is not required by law. Whether the teacher commits to a statutory hearing or the grievance

procedure has no bearing on whether either was timely. Cronin does not have the added legal obligation of notifying the District of his "commitment" to pursue the statutory hearing.

III. STATEMENT OF THE CASE

Before he was terminated, Cronin had been a successful high school teacher with Central Valley School District. (11/14/14 Cronin Decl., Para. 2; CP 31). There was no evidence that he used alcohol while at work. Cronin's classroom performance was never an issue. (CP 31; 73). Although he had an alcohol problem outside of school, he was never under the influence while at school or performing his teaching duties. (CP 31-33; 73).

On September 30, 2011, Cronin voluntarily entered into an alcohol treatment program with knowledge and notice to the District. (CP 32-33). After discharge from treatment, he reported to Geiger Correctional Facility on October 27, 2011. He was to serve out the remaining 80 days of his 120 day sentence after having been giving credit for the 30 days he spent in treatment. (CP 33). While at Geiger he had work release privileges and could have worked if the District had requested. (CP 33; 73).

In November and December 2011 the District, Cronin and McNair had meetings to negotiate Cronin's return to work upon release from Geiger. (CP 33-34; 73). The District refused and gave Cronin an

ultimatum to either resign or be terminated. (CP 34). He informed the District that he would not resign. (*Id.*)

On January 6, 2012, ten days before his release and while still incarcerated, the District terminated Cronin by certified letter. (CP 34; 40-41). Since he was still incarcerated, he contacted his friend Theresa Anderson and asked her to contact his union representative to appeal the termination and take whatever action was necessary to preserve his job. (CP 97). Ms. Anderson did so and on January 11, 2012, within the 10 day window, McNair timely filed the request for statutory hearing with the Superintendent of Central Valley School District. (CP 34-35; 74-76; 93).

The District's notice of probable cause to Cronin did not identify any specifics. (CP 91-92) The specifics are generally left for discovery between the parties during the statutory hearing process. However, the District's allegations that "you have not been available for work and failed to notify the District of that fact" and "you continue to be unavailable for work" were patently untrue. The District was well aware that Cronin had work release privileges through its meetings with him after placing him on administrative leave. He was, in fact, available to work and the District was well aware of that fact. (CP 33; 73) In this entire litigation, the District has never asserted facts to the contrary.

The fact remains that the District ignored McNair's request for statutory hearing. And although McNair identified herself to the District as Cronin's nominee for purposes of selecting a hearing officer as required by RCW 28A.405.310, the District ignored that request as well. (CP 76; 93).

The District then ignored its statutory mandate to identify a nominee for purposes of selecting a hearing officer, RCW 28A.405.310. (*Id.*) On February 21, 2012, Cronin's counsel wrote the District's counsel about why Cronin's pay and benefits had been stopped after a timely request for statutory hearing. (CP 98-100; 101) Due process required continued payment of wages and benefits pending a decision on the merits of the District's termination. The District's counsel responded that he would check into the matter and get back to the undersigned as soon as possible. (CP 102) The District's counsel never responded to the undersigned. (CP 99).

On February 28, 2012, McNair received a letter from the District Superintendent stating that since she was not the employee who received the notice, her request for statutory hearing "did not constitute a valid appeal." (CP 95). And since Cronin "did not timely appeal", he waived his right to a statutory hearing and was deemed terminated. (*Id.*).

IV. WHY THE DISTRICT'S PETITION FOR REVIEW SHOULD NOT BE GRANTED.

The District fails to recognize and consider the due process rights available to a teacher. It ignored Cronin and argued that the trial court had no jurisdiction because Cronin failed to file a lawsuit to force the District to name a nominee to select a hearing officer. The trial court was convinced but the Court of Appeals was not. (App. 1). On remand, the trial court found that McNair was an agent acting for and on behalf of Cronin and had authority to appeal his termination, but dismissed Cronin's case because of the mistaken belief that McNair was equivocal and did not select a remedy. (CP 311). Although the trial court was convinced, Division III, again, was not. (App. 2).

The District wrongfully and deliberately ignored the teacher's request for a statutory hearing under the guise that it subjectively decided the appeal was improperly authored by someone other than to whom the notice was delivered and McNair had no authority act. That position has soundly been rejected by both the trial court and the Court of Appeals. (CP 311; App. 2 at 17-20).

The decision of the Court of Appeals is consistent with existing law, good practice and common sense. This is not an unsettled area of law. A request for statutory hearing has to be made within ten days or a

teacher's termination is final and binding. RCW 28A.405.210; 300. McNair's request was not equivocal. She perfected the request with service on the superintendent within the 10 days required by statute. (*Id.*) The second option McNair considered was a grievance that was never perfected because it was never filed. (CP 260-261). The Court of Appeals recognized that perfecting one option and not pursuing the other does not negate the first option. App. 2 at 23-24

McNair was acting with direct and express authority, all of which acts were ratified by Cronin in an attempt to preserve his job. (CP 34-35) No special authority was necessary when general authority was granted under the circumstances. The District wants the court to view this as an all or nothing proposition. If the teacher's signature is not on the request for hearing, then the District's position is that the teacher is foreclosed from ever appealing a termination. That flies in the face of reason and common sense considering the limited time frame a teacher has to respond and the teacher's availability to personally do so.

The CBA was negotiated at arm's length. If the District desired greater specificity, procedures or deadlines to select a grievance over a statutory hearing, it could have negotiated that. But the District now wants this Court to impose deadlines and interpret procedure, when the parties did not. As the Court of Appeals pointed out, there is no language in the

CBA as to when the procedure is to be selected, only that one or the other must be selected and not both. App. 2 at 25-26.

The District also contends that this Court should accept review to address its "right to refuse to act on an agent's ambiguous authority". (Pet. Rev. 10). This presupposes the District had some right to refuse a timely request for statutory hearing. The District claims it was appropriate to refuse to act "on her equivocal request". (Pet. Rev. 10). The problem is the District contends it has a "fundamental right . . . to refuse an agent's request made on behalf of the principal . . . ". *(Id.)* There was no equivocal request for a statutory hearing. All McNair did was to point out the obvious in her letter. She had timely served a request for hearing, and would select either the grievance or statutory hearing, but not both. The District opted to serve Cronin in jail knowing full well he was going to be released shortly and had restricted access while incarcerated. The District knew that McNair represented Cronin. It dealt with her as Cronin's representative throughout the course of the events culminating in his termination. (CP 34-35; 73-76). The notice of termination even acknowledged that McNair was Cronin's union representative. (CP 40). The District did not have a "fundamental right" to refuse McNair's request for a statutory hearing under the guise that it subjectively doubted her authority. Under these circumstances and these facts, the District had no

compelling reason to doubt her authority. The District should not be able to set in motion a chain of events that it knew or should have known would frustrate Cronin's right to timely appeal, and then complain about who filed the appeal on his behalf. There is no prejudice to the District. Actual notice that Cronin intended to appeal occurred in this case.

The core presumption the District relies upon is that a discharged teacher may under no circumstance ever delegate his or her right to request a hearing. (Pet. Rev. 10-11). There is no authority for this contention. There is nothing in the statute that prohibits a teacher from delegating authority to perfect an appeal. A teacher may be out of town, in the hospital or out of the country when served with a notice of termination. The courts have stated:

> "...'substantial compliance' with procedural rules is sufficient, because 'delay and even the loss of lawsuits [should not be] occasioned by unnecessarily complex and vagrant procedural technicalities:
>
> [T]he basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as 'the sporting theory of justice.'"

Hall v. Seattle School Dist. 1, 66 Wash.App. 308, 312, 831 P.2d 1128 (1992); See, *Skinner v. Civil Service Com'n of City of Medina*, 168 Wash.2d 845, 232 P.3d 558 (2010). If we follow the District's claim to its logical conclusion, it cannot delegate an appeal or petition for review to

this Court because the right of appeal only exists to the "party" and not the representative. RAP 5.1; 13.3(a). As a result, only the District could exercise its right of appeal and not any representative.

In support of its claim that a challenge to a discharge is personal and non-delegable, the District claims that "the necessary consequence of allowing others to request a hearing is that an employee may not want one". (Pet. Rev. 14). That is speculation considering in this case, Cronin's representative was given unlimited authority to take whatever action to preserve his job, and Cronin ratified her acts on his behalf.

The District postulates that "allowing a union representative to select the procedure subjects the District to two conflicting instructions- one by union representative and a simultaneous but different one by the employee". (*Id.*). That too is speculation and pure conjecture. Cronin's choice was absolute and totally aligned with his representatives' decision. The District was not subject to two conflicting instructions in this case. Even so, that is not a basis to ignore McNair's request for a statutory hearing.

The District contends that the CBA does not permit delegation because it distinguishes between an employee and the employee's union representative in Section E – Right To Due Process section. (Pet. Rev. 14-15; CP 5). It claims that the employee has a further "right, upon request, to

have an association representative present" when the District conducts a "preliminary investigation" into allegations against a teacher, but it is only the employee who may "select the statutory procedures or the grievance procedure." (Pet. Rev. 15) By implication the District claims this supports a claim that the teacher cannot authorize his or her union representative to make the selection. What the District neglects to point out to the court is that no teacher is a signator to the CBA; the union is the sole and exclusive representative of a teacher in dealing with the District. (CP 104). If the union exclusively represents a teacher before the District, then how is it that teacher's union representative can't make a selection to protect the teacher's rights? The District argues that literally, the union cannot file a grievance on behalf of Cronin under this CBA because only the employee can select the grievance procedure. That would be an absurd result and is the antithesis of union representation under a collective bargaining agreement. The District knew full well that the union was the exclusive and authorized representative of Mr. Cronin and in fact acted in that capacity during the course of these events. The Court of Appeals has not amended the CBA by implication and has not deprived the District of the benefit of the bargain.

The District claims that an agent cannot surrender a principal's substantial right without special authority. (Pet. Rev. 16). *Verbeek*

Properties, LLC v. GreenCo Environmental, Inc., 159 Wn. App. 82, 87, 246 P.3d 205 (2010) doesn't apply. It simply stands for the general proposition that a waiver must be knowing and intelligent. There was no such waiver by Cronin of a substantial right. He gave McNair authority to act and she acted in conformance with his wishes. Likewise *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980), does not support the District's positon. In that case, a defense attorney in a personal injury matter made extraordinary decisions without the knowledge, authority or acquiescence of his client. Those decisions resulted in significant harm to the client. In this case, Cronin waived nothing. He asked that his representative take affirmative steps to preserve his job in whatever manner was necessary, and McNair did so, all with his knowledge, authority and acquiescence. Unlike *Graves, supra*, McNair's actions were for the benefit of Cronin and not to harm him.

The District claims that McNair did not receive any express instructions to select a statutory hearing over the grievance procedure or vice-versa. (Pet. Rev. 16). That is irrelevant. She was given the unfettered discretion to take whatever actions she deemed necessary to appeal his termination and preserve his job. (CP 34-35; 74-76). The District claims an additional obligation of McNair not required by law. It claims that she must first receive specific instructions from Cronin as to which procedure

to select. There is no legal requirement or other authority for that position. The fact that she sought further information from Cronin was not evidence that she lacked necessary authority to select a procedure.

McNair had actual authority to select one procedure over the other. Whether her January 11, 2012 letter (CP 93) offered an intention to preserve other procedures never undertaken is not evidence that she had no authority to make a selection at Cronin's request.

The District claims that this court should accept review to "enforce the legislature's deadline for starting the statutory hearing process". It argues that the Court of Appeals permitted McNair to extend Cronin's appeal deadline by 23 days. (Pet. Rev. 17). The District again attempts to impose an additional legal obligation on McNair, where none is required. The District claims McNair now has the additional obligation to notify them of her choice. It claims that although she timely perfected an appeal by requesting a statutory hearing, failure to *choose* one over the other within ten days of the statutory hearing request is fatal. And once having failed to *choose*, she thereupon lost the ability to assert a claim for statutory hearing on Cronin's behalf. This argument imposes an additional obligation where none exists either by statute or case authority. McNair's request for statutory hearing did not involve the added requirement of making a choice and informing the District. This was not a "conditional

request for hearing". (Pet. Rev. 18). McNair selected and preserved the statutory hearing with her timely appeal. She never requested a grievance. She was not obligated to inform the District of her choice, unless she filed for both. If anything, it was the District's unbending position over the past four and a half years that failed to trigger what it believes are the rapid procedures set out in RCW 28A.405.310 including selection of a hearing officer. The District's own conduct frustrated the statutory process.

The District also contends that "the court should accept review to properly enforce the CBA's choice of remedies". And without any evidence or authority, it claims that typical collective bargaining agreements across the state require a teacher to elect either a statutory hearing procedure or the grievance procedure. (Pet. Rev. 18). There are no typical collective bargaining agreements. Each is bargained for separately and negotiated at arm's length. But in this CBA, there are no identified time frames for selection of a remedy or how to address the effects of an employee who initially requested both a statutory hearing and grievance. App. 2 at 23. The District could have taken those concerns to the bargaining table. The court should not now impose deadlines that the parties haven't otherwise bargained for.

The District claims that the Court of Appeals interpretation allows teachers to hedge their bets by opting for both procedures while

continuing to receive pay and dropping one procedure in the future. (Pet. Rev. 19). If the District thinks that's a problem, then it can collectively bargain a solution to that anomaly. All the parties intended under the CBA was that one but not both procedures would be selected. McNair's letter of January 11, 2012, is in keeping with that interpretation as she recognized that both remedies would not be pursued. (CP 93). This court should not impose procedural requirements that the parties have not imposed upon themselves. That is left up to the bargaining agreement process.

IV. CONCLUSION

Cronin complied with both the requirements of the statute to request a statutory hearing and the intent of the CBA. The choices he made were reasonable. The District's Petition for Review should be denied and Cronin allowed to have his day in front of a statutory hearing officer.

Dated this 19th day of July, 2016.

Respectfully submitted:

POWELL, KUZNETZ & PARKER, P.S.

By _____

Larry J. Kuznetz, WSBA #8697
Attorney for Appellant
Michael F. Cronin
316 W. Boone, Ste., 380
Spokane, WA 99201

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 19th day of July, 2016, a true and correct copy of the foregoing was served upon the following:

Philip J. Buri Attorney at Law 1601 F Street Bellingham, WA 98225 e-mail: philip@burifunston.com	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Facsimile [ ] Federal Express [X] E-mail
Paul Clay Attorney at Law 421 W. Riverside Ave. 1575 Paulsen Center Spokane, WA 99201	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Facsimile [ ] Federal Express [ ] E-mail
Marcus Louvier Evan, Craven & Lackie, P.S. 818 W. Riverside Ave., Ste 250 Spokane, WA 99201-0910	[X] U.S. Mail, Postage Prepaid [ ] Hand Delivery [ ] Facsimile [ ] Federal Express [ ] E-mail

Mary E. Zanek

APPENDIX "1"

Washington State Court of Appeals, Division III
Case No. 31360-3-III
Unpublished Opinion dated March 13, 2014

FILED
MARCH 13, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MICHAEL F. CRONIN, Appellant, v. CENTRAL VALLEY SCHOOL DISTRICT, Respondent.	)	No. 31360-3-III UNPUBLISHED OPINION

BROWN, J. — Teacher Michael Cronin appeals the trial court's decision to summarily dismiss his declaratory suit seeking to require the Central Valley School District (District) to comply with his request for a statutory discharge hearing. The trial court reasoned the complaint was untimely and it lacked subject matter jurisdiction. Mr. Cronin contends the court erred in finding the time limit set forth in RCW 28A.645.010 precluded his action. We agree with Mr. Cronin, and reverse.

FACTS

On January 5, 2012, while Mr. Cronin was incarcerated for a driving under the influence conviction, the District notified him it had probable cause for his discharge and probable cause for nonrenewal of his contract. The notice informed Mr. Cronin he had the right to timely file a notice of appeal. Mr. Cronin belongs to the Washington

Education Association (WEA) and the Central Valley Education Association (CVEA). The collective bargaining agreement between the District and Mr. Cronin requires an employee who is discharged and/or nonrenewed to either pursue a grievance procedure that leads to arbitration or a statutory hearing under chapter 28A.405 RCW.

On January 11, 2012, Sally McNair, a UniServ[1] representative with the WEA, wrote the District, on Mr. Cronin's behalf, stating, "I have received the Notice of Probable Cause for Termination of Mike Cronin's employment . . . . I am requesting a closed hearing on Mr. Cronin's behalf to determine whether there is sufficient cause for such adverse action." Clerk's Papers (CP) at 48. Ms. McNair further stated, "Due to the lack of access to Mr. Cronin, I will also be filing a grievance in order to preserve timelines to both procedures." *Id.* The District failed to respond.

On February 8, 2012, Ms. McNair notified the District that Mr. Cronin "has decided to pursue the statutory hearing as described in RCW 28A.405.300 as his election of remedy for the notice of probable cause for discharge. He will not be utilizing the grievance procedure." CP at 49. The District again failed to respond. Mr. Cronin obtained counsel.

On February 21, 2012, Mr. Cronin's attorney contacted the District about its lack of response. On that same day, the District drafted a letter stating it would not be responding to Mr. Cronin's request for a hearing because such requests must be made

[1] WEA UniServ representatives assist regional teachers in such areas as bargaining, contract enforcement, and grievances. http://www.washingtonea.org

by "the employee who receives the notice." CP at 50. This letter was received by Ms. McNair and forwarded to Mr. Cronin's attorney on February 28, 2012.

On March 23, 2012, Mr. Cronin sued for declaratory relief, contending the District was required to respond to his request for a hearing on the finding of probable cause to discharge and nonrenewal. He requested wages from January 1, 2012 through the proceedings.

Both parties requested summary judgment. The court granted the District's request and denied Mr. Cronin's request, finding it lacked subject matter jurisdiction to hear the matter because it was not filed within 30 days of the aggrieved action as required by RCW 28A.645.010(1). After he unsuccessfully attempted reconsideration, Mr. Cronin appealed.

ANALYSIS

The issue is whether the trial court erred in summarily dismissing Mr. Cronin's declaratory suit on lack of subject matter jurisdiction because it was untimely.

We review de novo a trial court's summary judgment decision in a declaratory judgment action. *Internet Comty. & Entm't Corp. v. Wash. State Gambling Com'n*, 169 Wn.2d 687, 691, 238 P.3d 1163 (2010). Likewise, appellate courts review de novo questions of a court's subject matter jurisdiction. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 205, 258 P.3d 70 (2011).

RCW 28A.645.010 grants the superior court jurisdiction to review a decision by a school board. All that is required is that an aggrieved person file and serve a notice of

appeal setting forth the errors complained of within 30 days. *Id.* at RCW 28A.645.010(1). Upon proper filing of the notice of appeal, the superior court obtains subject matter jurisdiction. *Clark v. Selah Sch. Dist. No. 119*, 53 Wn. App. 832, 837, 770 P.2d 1062 (1989).

RCW 28A.645.010(1) partly provides, "Any person . . . aggrieved by *any decision* or order of any school official or board, within thirty days after the rendition of such decision or order, or of the failure to act upon the same . . . may appeal the same to the superior court." (Emphasis added.) RCW 28A.645.010(2) states that appeals "by teachers . . . from the actions of school boards with respect to discharge . . . or failure to renew their contracts . . . shall be governed by the appeal provisions of chapters 28A.400 and 28A.405 RCW[2] . . . *and in all other cases shall be governed by chapter 28A.645 RCW.*" (Emphasis added.)

Here, Mr. Cronin requested declaratory relief after the District refused to appoint a nominee for a hearing on the District's finding of probable cause. This was his remedy election under RCW 28A.405.300, which states that an employee "within ten days after receiving such notice [of a change in contract status], shall be granted opportunity for a hearing pursuant to RCW 28A.405.310." RCW 28A.405.310 specifies the hearing procedure. "In the event that an employee requests a hearing . . . a hearing officer shall be appointed in the following manner: Within fifteen days following the

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[2] Chapter 28A.400 RCW requires employees to be notified of their right to appeal (RCW 28A.400.340) and chapter 28A.405 RCW requires employees to appeal a notice a probable cause to terminate and/or nonrenewal within 10 days (RCW 28A.405.210 and .300).

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." RCW 28A.405.310.

The District refused to comply with the hearing procedure set forth in RCW 28A.405.310. Mr. Cronin's suit to compel the District's compliance is not an action on the probable cause finding. Thus, the time limit set forth in chapter 28A.405 RCW does not apply. This action would fall under the "all other cases" category expressly mentioned in RCW 28A.645.010(2)(a), which carry a 30-day time limit to file an appeal.

By comparison, in *Porter v. Seattle School Dist. No. 1*, 160 Wn. App. 872, 881, 248 P.3d 1111 (2011), citizens filed suit against a school district, challenging the district's approval of a math textbook series for use in the district's high schools. One of the issues was the selection of committee members to review the series. *Id.* The citizens argued teachers and community members willing to publicly question reform methodology were pointedly excluded from the committee. *Id.* Division One of this court held, "The record does not support this allegation, and even if it did, there was not a timely challenge to the committee selection process." *Id.*; *see* RCW 28A.645.010. While the court's statement is dicta, it nevertheless shows the interpretation that an objection to the failure to nominate (in *Porter* a committee member and in this case a nominee to pick a hearing officer) must be made within RCW 28A.645.010's 30-day time limit.

Based on the above, RCW 28A.645.010(1)'s 30-day time limit applies here. The next question, then, is whether Mr. Cronin's action was within 30 days of "any decision" by the District. RCW 28A.645.010(1).

On January 5, 2012, the District notified Mr. Cronin it had probable cause for discharge and probable cause for nonrenewal. On January 11, 2012, Ms. McNair sent a letter to the District stating, "I have received the Notice of Probable Cause for Termination of Mike Cronin's employment . . . . I am requesting a closed hearing on Mr. Cronin's behalf to determine whether there is sufficient cause for such adverse action." CP at 48. The District did not respond. On February 8, 2012, Ms. McNair again notified the District that Mr. Cronin "has decided to pursue the statutory hearing as described in RCW 28A.405.300 as his election of remedy for the notice of probable cause for discharge. He will not be utilizing the grievance procedure." CP at 49. The District again chose not to respond.

Mr. Cronin then obtained counsel. On February 21, 2012, Mr. Cronin's attorney contacted the District about its lack of response. On that same day the District drafted a letter stating it would not be responding to Mr. Cronin's request for a hearing because such requests must be made by "the employee who receives the notice." CP at 50. This letter was received by Ms. McNair and forwarded to Mr. Cronin's attorney on February 28, 2012. On March 23, 2012, Mr. Cronin sued for declaratory relief to compel the District to elect a norninee.

RCW 28A.645.010(1) states, "Any person . . . aggrieved by *any decision* . . . of any school official or board, within thirty days after the rendition of such decision . . . may appeal." (Emphasis added.) Our Supreme Court has observed that this provision "means what it says." *Haynes v. Seattle Sch. Dist. No. 1*, 111 Wn.2d 250, 251, 758 P.2d 7 (1988) (construing identical predecessor statute, former RCW 28A .88.010). Nothing in RCW 28A.645.010 authorizes an appeal from a mere failure to respond; rather, there must be a decision, order, or failure to act. The District argues its failure to act in January made the March appeal untimely. But, the District's February 21, 2012 letter informing Mr. Cronin that it would not comply with RCW 28A.405.310(4) was the rendition of a decision, triggering the 30-day period to appeal.

In *Derrey v. Toppenish School District No. 202*, 69 Wn. App. 610, 613, 849 P.2d 699 (1993), a retired school maintenance supervisor brought an action against the school district for breach of contract and negligent misrepresentation, stemming from reduction of his pension benefits. The superior court dismissed the action as untimely. *Id.* at 613. This court, however, held the district's letter to the retired worker asserting no basis existed upon which to hold the district responsible for a reduction in his pension was a "'decision'" within the meaning of RCW 28A.88.010 (RCW 28A.645.010's identical predecessor). *Id.* at 613. Thus, the letter triggered the 30-day time period.

Similarly, here, the decision appealed was the District's decision asserting Mr. Cronin did not properly elect his remedy received on February 28, 2012. This letter is an unequivocal rejection of Mr. Cronin's request for a hearing and constituted a

"decision or order" within the meaning of RCW 28A.645.010. Mr. Cronin's remedy at that point was an action in the superior court, timely filed on March 23, 2012. Thus, we reason the trial court had subject matter jurisdiction to hear the matter and erred in concluding otherwise. Therefore, the court erred in granting the District's request for summary judgment and not reaching the merits of Mr. Cronin's declaratory suit.

The parties briefed whether Ms. McNair was a proper representative of Mr. Cronin and whether the District improperly withheld wages from Mr. Cronin. Because we hold the summary dismissal of Mr. Cronin's request for declaratory relief was improper and remand for a determination on the merits, we leave these matters for trial court resolution. *See Fisher v. Aldi Tire, Inc.*, 78 Wn. App. 902, 910, 902 P.2d 166 (1995) (holding an award of attorney fees was premature because "it has merely been established that further proceedings are needed.")

Reversed and remanded for further proceedings.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Fearing, J.

APPENDIX "2"

Washington State Court of Appeals, Division III
Case No. 33062-1-III
Unpublished Opinion dated April 14, 2016

FILED
APRIL 14, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MICHAEL F. CRONIN, Appellant, v. CENTRAL VALLEY SCHOOL DISTRICT, Respondent.	)	No. 33062-1-III UNPUBLISHED OPINION

FEARING, J. — This appeal tells the story of Sally's Choice. Michael Cronin's union representative, Sally McNair, demanded a hearing to challenge Cronin's discharge from employment, but she hesitated in selecting one of two procedural options available to Cronin. The options were an appeal pursuant to a Washington statute or a grievance hearing pursuant to a collective bargaining agreement. Because of this hesitation, Cronin's employer, Central Valley School District, claims Cronin cannot exercise either choice. The school district also contends McNair lacked any authority to request either procedure on behalf of Cronin. The trial court agreed with the school district's choice argument and dismissed Cronin's suit to compel the school district to participate in a

statutory proceeding to determine the validity of his discharge from employment. We reverse and remand for entry of an order compelling the school district to participate in the statutory hearing.

FACTS

Because the superior court disposed of this case on summary judgment, we rely on declarations when framing our statement of facts. Appellant Michael Cronin was a tenured school teacher. For seven years, he taught business classes at University High School, a school within Spokane's Central Valley School District. Cronin received high performance evaluations from the school district.

Michael Cronin is a member of the Central Valley Education Association, the teachers' union for the Central Valley School District. Under the collective bargaining agreement between the school district and the education association and under statute, Cronin's employment contract automatically renewed from school year to school year unless the school district gave notice of nonrenewal by May 15 for the upcoming school year. A Washington statute establishes criteria by which a school district may refuse renewal of a contract for performance deficiencies.

The Central Valley School District collective bargaining agreement contained other provisions relevant to this appeal. Under the Employee Rights Section of the agreement, "the private and personal life of any employee is not within the appropriate concern or attention of the District except when it affects the employee's ability to fulfill

the terms of the employee's contract." Clerk's Papers (CP) at 74. The bargaining agreement demanded opportunities for the teacher to correct work deficiencies before a discharge. The agreement read concerning discipline, termination, or nonrenewal:

> **Section E - Right to Due Process**
>
> No certificated employee shall be reprimanded, disciplined, or reduced in rank or compensation without just cause. Any such reprimand, discipline, or reduction in rank or compensation shall be subject to the grievance procedure hereinafter set forth, PROVIDED, however, that in cases of nonrenewal, discharge, or actions which adversely affect the employee's contract status, the employee shall select the statutory procedures or the grievance procedure. In the event the employee serves notice to the Board that he/she is appealing the Board's decision according to the statutory provisions, such cases shall be specifically exempted from the grievance procedure.
>
> When an allegation is made against an employee, the District shall conduct a preliminary investigation and inform the employee that an allegation has been made. The employee has a right to a meeting regarding the allegation(s). The employee further has the right, upon request, to have an Association representative present.

CP at 5. The language in the first paragraph of Section E concerning the selection between the statutory procedures or grievance procedure is the key bargaining agreement provision for purposes of this appeal.

In August 2010, police arrested Michael Cronin for physical control of a vehicle while under the influence of alcohol. He admits having drank alcohol, but denies earlier driving the vehicle. He stood outside the car, while the owner of the car left to attend to some business. The owner left the keys inside the car. Upon his arrest, authorities released Cronin on condition he undergo twice weekly urinalyses until trial on the charge.

The charge lingered for more than one year. Cronin taught through the 2010-11 school year without incident.

On August 29, 2011, Central Valley School District placed Michael Cronin on paid administrative leave. The school district did not inform Cronin of the reason for the leave, but instructed him to remain available for interviews during an investigation of Cronin's conduct.

Michael Cronin decided to attend a residential alcohol treatment program in Selah. He recognized an alcohol problem, although he denied drinking alcohol at school or the alcohol impacting his teaching performance. Cronin wished to preserve his employment with the school district. He therefore informed school district Assistant Superintendent for Human Resources and Operations Jay Rowell and High School Principal Daryl Hart that he voluntarily enrolled in alcohol treatment. Cronin notified the two administrators that he could return to work at any time and he would cooperate with any investigation.

On September 28, 2011, Michael Cronin pled guilty to physical control of a vehicle while under the influence of alcohol. The court sentenced him to one hundred twenty days confinement at Spokane's Geiger Corrections Center. The court allowed Cronin to undergo alcohol treatment before serving his sentence. Cronin thereafter successfully finished his one month treatment and received credit toward his sentence for time spent in treatment.

On October 28, 2011, Michael Cronin commenced serving the remainder of his

sentence at Geiger Corrections Center. The prison granted him work release privileges. In a declaration for this suit, Cronin averred that he advised the school district of his ability to teach while at the corrections center.

On November 18, 2011, Central Valley School District Assistant Superintendent Jay Rowell sent Michael Cronin a letter informing him of a mandatory meeting on November 22 at the school district office. Geiger Corrections Center granted Cronin leave to attend the meeting. Cronin's union representative, Sally McNair, also attended. McNair's duties included assisting union members with performance issues, disciplinary proceedings, and grievances. In a declaration, McNair stated that she was often asked to act on behalf of a union member regarding appeals from discharges and grievances. She does not disclose the details of the requests or whether she granted a request.

Michael Cronin averred in a declaration that he authorized Sally McNair to speak with the school district and "act on [his] behalf for all purposes in dealing with the District." CP at 34. He does not indicate if he granted this authority before the school district served him a notice of discharge and nonrenewal. He does not specify whether he informed the school district of the bestowment of authority. In her declaration, Sally McNair testified that the school district knew she represented Michael Cronin regarding his placement on administrative leave and the district's investigation of Cronin. McNair's basis for testifying to the school district's knowledge was McNair's direct contact with the school district on behalf of Cronin.

During the November 22 meeting, Jay Rowell asked Michael Cronin of his current residence, the reason for residing at the residence, and any pending legal issues. Cronin answered the questions. At this meeting, Cronin discussed his battle with alcoholism, but insisted the disability did not impact his work performance. Cronin agreed to provide the school district with documentation confirming his successful completion of alcohol treatment and his work release authorization from Geiger.

In a November 22, 2011 e-mail message to Jay Rowell, Michael Cronin politely repeated the answers given during the November 22 meeting. In the message, Cronin reiterated his availability to teach.

On December 8, 2011, school district representatives met with Michael Cronin at Geiger Corrections Center. Cronin's union representative Sally McNair attended the meeting. During the meeting, the school district notified Cronin of its intention to terminate his employment unless he resigned from employment within one week. On December 15, 2011, school district representatives returned to Geiger for another meeting. According to Cronin, he told the school district he would not resign and that he could return to his teaching position upon his release from Geiger Corrections Center on January 16, 2012. School district officials deny that Cronin told them of the date of his release from jail.

On January 6, 2012, Michael Cronin received from Central Valley School District Superintendent Ben Small, via certified mail, a "Notice of Probable Cause for Discharge

and Nonrenewal Pursuant to RCW 28A.405.210 and RCW 28A.405.300." CP at 40. The notice alleged:

> 1. You have conducted yourself in a manner unbecoming of a teacher employed by Central Valley School District;
> 2. You have engaged in a pattern of misconduct that includes several alcohol or substance abuse related incidents (at least one of which resulted in your incarceration and others which resulted in your inappropriate and exploitive conduct toward students and others);
> 3. Your pattern of behavior and the notoriety of your behavior reflects negatively on your ability to perform your job and has a substantial negative impact on your ability to do your job;
> 4. You have not been available for work and failed to notify the District of that fact;
> 5. You continue to be unavailable for work;
> 6. You have not been forthcoming with the District regarding behavior that is job-related and that substantially negatively impacts your ability to do your job.

CP at 40. The notice recognized Sally McNair as Michael Cronin's union representative. The notice informed Cronin of a ten-day deadline, under Washington statute, to request a statutory appeal from the discharge and nonrenewal. The school district notice warned Cronin that he must demand any appeal "in writing" and file it with the school district. Note that the school district informed Michael Cronin of both discharge from employment and nonrenewal of his contract for the 2012-13 school year. Although discharge and nonrenewal are distinct acts, our analysis remains the same for each act and we will collectively refer to both as a "discharge." Presumably a valid discharge automatically leads to a nonrenewal of next year's contract.

Remember that, in alternative to a statutory appeal of the employment dismissal, the collective bargaining agreement between the Central Valley School District and the Central Valley Education Association afforded Cronin thirty working days to file a grievance over his discharge. The school district notice did not prompt Cronin about this option.

Because of his incarceration, Michael Cronin could not readily contact union representative Sally McNair. Cronin spoke with friend Terri Anderson and directed her to immediately notify McNair of the termination notice and instruct McNair to appeal his termination. Anderson complied, telephoned McNair, and requested she take "whatever steps were necessary to represent him [Cronin] and preserve his job since he was not in a position to do so from the confines of Geiger." CP at 74.

On January 11, 2012, union representative Sally McNair hand delivered, to Central Valley School District Superintendent Ben Small, a request for a statutory hearing on Michael Cronin's discharge. The request read:

> I have received the Notice of Probable Cause for Termination of Mike Cronin's employment dated January 5th, 2012. Pursuant to RCW 28A.405.300 and .310, I am requesting a closed hearing on Mr. Cronin's behalf to determine whether there is sufficient cause for such adverse action. Until counsel has been appointed, I will serve as Mr. Cronin's nominee for a hearing officer.
>
> Due to the lack of access to Mr. Cronin, I will also be filing a grievance in order to preserve timelines to both procedures. It is clear the contract requires an election of remedies and it is not our intent to pursue both options, only to allow time to consult with Mr. Cronin so he can determine his desired path. We anticipate notifying the District on or

> before February 10th, 2012 as to Mr. Cronin's decision to pursue either the statutory hearing or the grievance. At that time, either this request or the grievance will be withdrawn.

CP at 93. McNair, not Michael Cronin, signed the letter. McNair's attempt, in the January 11 letter to reserve the option for Cronin to pursue the grievance, looms large in this suit.

Sally McNair's January 11 letter referenced Cronin's termination from employment, but not the nonrenewal of his teaching contract. Before the trial court, the school district noted McNair's failure to mention the nonrenewal of the contract in her letter. On appeal, the school district does not contend that Michael Cronin never challenged nonrenewal of the teaching contract.

On receipt of Sally McNair's letter on January 11, school district Superintendent Ben Small concluded that McNair's letter was not a written request by Michael Cronin for a statutory hearing under chapter 28A.405 RCW for either the discharge or nonrenewal actions. Therefore, Small did not respond to the letter. Small did not inform Sally McNair or Michael Cronin that he considered McNair's letter wanting.

On January 16, 2012, Michael Cronin left Geiger Corrections Center. He then discovered that the school district had cancelled his pay and benefits, both of which should have continued upon his request for a statutory hearing.

On February 8, 2012, Central Valley Education Association representative Sally McNair e-mailed Central Valley School District Assistant Superintendent Jay Rowell:

> As a follow-up to my letter from January 11th, 2012, this email is to provide you written notice that Mr. Cronin has decided to pursue the statutory hearing as described in RCW 28A.405.300 as his election of remedy for the notice of probable cause for discharge. He will not be utilizing the grievance procedure.

CP at 94. Neither McNair nor Cronin filed a grievance under the collective bargaining agreement. The school district did not respond to McNair's February 8 correspondence.

On February 21, 2012, Michael Cronin's attorney, Larry Kuznetz, contacted Central Valley School District's attorney, Paul Clay, to ascertain why the school district discontinued Cronin's pay and benefits. Kuznetz believed the school district ceased payment by accident. Clay forwarded the letter to Assistant Superintendent Jay Rowell the next day. Rowell maintains that he called Sally McNair on February 22 and informed her that the school district did not consider her January 11 letter of appeal as a proper request, that the school district terminated Michael Cronin in January, and that Cronin was no longer entitled to pay or benefits. McNair denies receiving a call from Rowell any time after she served the notice of appeal on Superintendent Ben Small.

On February 21, 2012, Central Valley School District Superintendent Ben Small penned a letter to union representative Sally McNair. McNair received the letter on February 28. The correspondence read:

> Thank you for your correspondence dated January 11, 2012. Any appeal of a Notice of Probable Cause under RCW 28A.405.300 and RCW 28A.405.210 must be undertaken by the employee who receives the Notice. Since you are not the employee who received the Notice, your correspondence does not constitute a valid appeal. Further, your

> correspondence does not mention and thus does not constitute an appeal of the Notice of Probable Cause for Mr. Cronin's Nonrenewal.
>
> The employee here, Mr. Cronin, did not timely appeal the Notice of Probable Cause for Discharge or Nonrenewal and thus he has waived his right to a statutory hearing under RCW 28A.405.210 and 28A.405.300. As such, his employment with the District has been terminated.

CP at 95.

PROCEDURE

On March 23, 2012, Michael Cronin filed a declaratory judgment action against the Central Valley School District. He sought to compel the school district to participate in a statutory hearing to address the merits of his discharge from employment and nonrenewal of his teaching contract. He also requested back wages with interest and double damages for the school district's willful withholding of his salary between the time of discharge and the statutory hearing. Among other arguments, the school district contended that, under RCW 28A.645.010, Michael Cronin untimely sued because he did not sue for his employment dismissal within thirty days of Superintendent Ben Small's January 6, 2012 notice of discharge and nonrenewal.

The Central Valley School District and Michael Cronin sought a summary judgment order in each's respective favor. The trial court granted the school district's motion and dismissed Cronin's suit. The trial court reasoned that it lacked subject matter jurisdiction. On March 13, 2014, by unpublished opinion, this court reversed the trial court and remanded for further proceedings. We additionally observed:

> The parties briefed whether Ms. McNair was a proper representative of Mr. Cronin and whether the District improperly withheld wages from Mr. Cronin. Because we hold the summary dismissal of Mr. Cronin's request for declaratory relief was improper and remand for a determination on the merits, we leave these matters for trial court resolution.

CP at 28.

On remand, the parties filed cross motions for summary judgment again. Michael Cronin asked the court to rule as a matter of law that: (1) Sally McNair was his authorized representative for the purpose of requesting a statutory hearing, (2) the school district improperly terminated Cronin's salary and benefits without due process, and (3) the school district had not followed the collective bargaining agreement's evaluation and probation requirements before issuing a notice of probable cause for discharge or nonrenewal. The school district asked the court to rule: (1) Michael Cronin failed to properly request a statutory hearing, (2) Sally McNair lacked authority to file a hearing request for Cronin, (3) even if McNair had authority, she failed to properly elect a remedy in her January 11, 2012 letter to the district, (4) McNair only requested a hearing on discharge and not on nonrenewal, (5) Cronin's second, third, and fourth causes of action should be dismissed as untimely or for failure to exhaust administrative remedies, and (6) school district Superintendent Ben Small held authority to issue a nonrenewal notice.

In support of its motion for summary judgment, the Central Valley School District filed a declaration from its attorney, Paul Clay, to which declaration Clay attached

examples of other statutory hearing requests and a Washington Education Association guide for school employees. Clay declared:

> 3. . . . I have personally practiced in this area of law for some 25 years. I have had occasion to review numerous statutory hearing requests by employees in response to notices of discharge or nonrenewal under RCW 28A.405.210 and .300. To the best of my memory, and based on my personal knowledge, I have not seen a statutory hearing request under RCW 28A.405.210 or .300 by a union representative purporting to act for an employee.
>
> 4. Attached collectively as Exhibit A to this Declaration are several representative examples of the form of statutory hearing requests to which I refer, covering a time span of more than the last decade. The Court may take particular notice that in each of the requests, the employee requesting the hearing was then being represented by the very same law firm that represents plaintiff here.
>
> 5. Attached as Exhibit B to this Declaration is a Washington Education Association Office of General Counsel publication entitled "Reduction In Force Assistance Guide For School Employees." In my role as general counsel for school districts, I often obtain such publications. This WEA publication admits that employees themselves must file written requests for hearings. The publication includes a sample request for hearing letter, which provides for an employee's signature.

CP at 136-37. Michael Cronin moved to strike Paul Clay's declaration as inadmissible evidence in violation of CR 56(e). Cronin maintained the declaration and attached exhibits were irrelevant, lacked foundation, and constituted inadmissible hearsay and opinion testimony.

The trial court granted partial summary judgment to Michael Cronin by ruling that Sally McNair possessed authority to file a statutory appeal request. Nevertheless, the court ruled that McNair's letter failed to elect a remedy between the statutory appeal and

the collective bargaining agreement grievance process. According to the court, Cronin did not make the election between the two processes until Sally McNair's February 8 e-mail message, in which she stated Cronin would not file a grievance. The February 8 election came too late for a statutory hearing, because the selection fell more than ten days after the discharge notice. Therefore, the trial court granted the school district's motion for summary judgment and dismissed Cronin's suit. In a written order, the court listed Paul Clay's November 14, 2014 declaration and attachments thereto as pleadings it considered. The trial court did not directly rule on Cronin's motion to strike Paul Clay's declaration.

LAW AND ANALYSIS

On appeal, Michael Cronin assigns error to: (1) the trial court's grant of summary judgment to Central Valley School District on the ground that he failed to timely elect a remedy, and (2) the trial court's denial of his motion to strike Paul Clay's declaration. Cronin does not appeal the trial court's refusal to grant him summary judgment on any issue or claim. The school district cross appeals the trial court's ruling that Sally McNair held authority to file the demand for a statutory hearing on Cronin's behalf. In the argument of its brief, the school district also objects to this court's consideration of portions of a declaration filed on behalf of Michael Cronin.

Paul Clay Declaration

Michael Cronin first assigns error to the trial court's consideration of the

November 14, 2014 declaration from Paul Clay, and exhibits attached thereto, when ruling on summary judgment. We follow the lead of many trial courts when asked to strike testimony in support of and in opposition to a summary judgment motion. We decline to resolve the assignment of error because its resolution does not impact our decision on the merits. Principles of judicial restraint dictate that if resolution of another issue effectively disposes of a case, we should resolve the case on that basis without reaching the first issue presented. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007); *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000).

Cronin, Anderson, and McNair Declarations

In a footnote, Central Valley School District objects to purported hearsay submitted in declarations of Michael Cronin, Terri Anderson, and Sally McNair. In his declaration, Cronin stated that he asked his friend Terri Anderson to contact McNair and direct her to take whatever action McNair deemed necessary to preserve his job and to appeal his termination. Terri Anderson, in her declaration, testified that Cronin asked her to immediately contact McNair and direct her to take whatever steps she felt necessary and to appeal his termination from employment. Anderson further declared that she called McNair and repeated what Cronin told her, including that Cronin wished to appeal his discharge and take whatever steps were needed to represent him in preserving his job. In her declaration, McNair repeated Terri Anderson's out of court directions to her to

take whatever steps were necessary to represent Michael Cronin and preserve his job since he was not in a position to do so from the confines of Geiger Corrections Center.

On appeal, the Central Valley School District does not show that it objected to the trial court's use of the Sally McNair, Terri Anderson, and Michael Cronin declarations. A party may not generally raise a new argument on appeal that the party did not present to the trial court. RAP 2.5(a); *In re Det. of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007). In its appeal brief, the school district did not assign error to the trial court's consideration of the three declarations. This court will not review a claimed error unless it is included in an assignment of error. RAP 10.3(a)(4); RAP 10.3(g); *BC Tire Corp. v. GTE Directories Corp.*, 46 Wn. App. 351, 355, 730 P.2d 726 (1986); *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 683, 713 P.2d 736 (1986). A footnote does not suffice.

Moreover, the Central Valley School District misunderstands the application of the hearsay rule. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement. *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006). Although the statements of Michael Cronin, Sally McNair, and Terri Anderson indirectly prove that McNair had authority to act for Cronin, Cronin presented the declarations to show that the respective speakers uttered the statements, not for the truth inside the statements.

A principal's oral remarks are relevant to determining if another holds authority to act on his behalf. *Little v. Clark*, 592 S.W.2d 61, 64 (Tex. Civ. App. 1979). When an agent's authority comes from the principal's oral directions, the comments made outside the courtroom loom critical in the resolution of the dispute.

Sally McNair's Authority

If this court invalidates Sally McNair's January 11, 2012 request on behalf of Michael Cronin, for a statutory appeal of his discharge, the school district wins. The school district seeks to annul the request on four grounds. First, Terri Anderson's forwarding of a message from Cronin to McNair granted no authority to McNair. This first argument examines the factual basis for Sally McNair's authority. Second, McNair lacked authority to sign the request because only Cronin could prepare and sign the appeal. This second argument questions McNair's legal authority. Third, McNair lacked authority to select which of two available procedures Cronin could utilize to enforce his rights, and therefore she could not select any procedural option. This third contention again probes the factual underpinning of McNair's authority. Fourth, regardless of McNair's authority to act on Cronin's behalf, because neither McNair nor Michael Cronin elected between the statutory appeal and the collective bargaining agreement grievance process until McNair's February 8, 2012 letter, Cronin did not timely select an appeal process. According to the fourth argument, McNair's reservation of Cronin's option to file a grievance nullified the request for the statutory appeal either immediately

or at least until Cronin announced his intention, in the February 8 letter, to forgo the grievance process. All four arguments overlap. We first address Sally McNair's authority.

Michael Cronin asserts that Sally McNair possessed authority on his behalf to demand the statutory appeal from his discharge, and thus her January 11 letter timely appealed his discharge. Cronin claims that McNair held actual authority by reason of her position as union representative and by reason of Terri Anderson, at his direction, informing McNair to perform whatever tasks were needed to preserve his rights to employment with the school district. Cronin also argues that McNair possessed apparent authority to demand the appeal. We agree with Cronin that McNair owned actual authority by reason of Cronin's directions to her. Therefore, we do not address whether McNair held authority by reason of her position with Cronin's teachers union or whether McNair acquired apparent authority.

Typically, a question of an agent's authority arises in the context of a third party seeking to bind the principal for the conduct of the agent and the principal seeking to avoid liability for the actions of the agent. In other words, the principal, not a third party, eschews authority. Nearly, if not all, Washington decisions address this context. The reverse situation surfaces in this appeal. The principal, Michael Cronin, seeks to show that Sally McNair could sign a statutory hearing request on his behalf. Apparent authority likely is relevant only when a third party seeks to impose liability on the

principal, not when the principal contends he granted an agent authority to act.

Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. *L. Byron Culver & Assocs. v. Jaoudi Indus. & Trading Corp.*, 1 Cal. App. 4th 300, 304, 1 Cal. Rptr. 2d 680 (1991). In an agency relationship, whatever an agent does in the lawful prosecution of the transaction the principal has entrusted to her is the act of the principal. 3 AM. JUR. 2D *Agency* § 2 (2016).

The undisputed facts establish that Michael Cronin deputized Sally McNair, his union representative, to speak with the school district and act on his behalf for all purposes in dealing with the school district. Cronin further authorized McNair to take any steps needed to demand a statutory hearing as a result of his discharge and nonrenewal of employment. The school district does not dispute that Cronin intended to authorize McNair to act on his behalf.

Central Valley School District minimizes Michael Cronin's grant of power for Sally McNair to act as a "cryptic hearsay statement" from a friend of his to take whatever steps McNair felt necessary to appeal the termination and preserve his job. Br. of Resp't at 28. The school district cites no law that precludes a bestowal of authority through an intermediary. The school district cites no case that requires legalese, let alone any specific language, be uttered in order to convey power to act on one's behalf. We decline

to adopt either suggested rules. Michael Cronin sat in jail and encountered difficulties in communicating with the school district and his union representative. He undertook the best steps he considered available to preserve his desired employment. Cronin reasonably chose as his agent his union representative, who the school district had already recognized as acting on his behalf.

The school district next argues that the law does not allow any agent to sign a teacher's request for a statutory hearing of an employment discharge. We disagree.

Any competent person may authorize an agent to act for him or her with the same effect as if such person were to act in person. 3 AM. JUR. 2D *Agency* § 9 (2016). When a duly constituted agent acts in accordance with his instructions, he has power to affect the legal relations of the principal to the same extent as if the principal had so acted. *Am. Home Assur. Co. v. Hapag Lloyd Container Linie, GmbH*, 446 F.3d 313, 318 (2d Cir. 2006); RESTATEMENT (SECOND) OF AGENCY § 12 cmt. a (1958). One may appoint an agent for any purpose whatsoever, and this is no less true when the agent assumes to exercise a statutory right than it is in other cases. *State ex rel. Hansen v. Schall*, 126 Conn. 536, 12 A.2d 767, 769 (1940). An exception lies when the express terms of the statute or necessary effect of the act requires the act to be performed by the person only who is named. *State ex rel. Hansen v. Schall*, 12 A.2d at 769-70.

In *State ex rel. Hansen v. Schall*, the relator Julius Hansen, a resident of West Haven, Connecticut, sought to compel the city clerk to permit his agent to review city

records. A statute demanded that the clerk open all city books, papers, and documents to the inspection of any inhabitant of the city. Hansen's agent was not a resident of West Haven. The city clerk denied access to the records to the designated agent. The Connecticut Supreme Court of Errors reversed. The court noted the general and prevailing view that a principal may perform any act through an agent. The statute opening city records to any inhabitant did not contain any language suggesting that the inspection could not be conducted through an agent, let alone a nonresident agent.

Michael Cronin sought an appeal of his discharge pursuant to RCW 28A.405.300. The statute provides, in pertinent portion:

> 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 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.

RCW 28A.405.300 (emphasis added). Notice that the statute requires notice on the employee "personally" of the notice of discharge from the school district. The statute,

however, does not demand that the teacher "personally" prepare, sign, or file the demand for a hearing.

Central Valley School District emphasizes the language in the statute that reads: "Every such employee so notified, at *his or her* request" may file a demand for the statutory hearing. RCW 28A.405.300 (emphasis added). Nevertheless, use of the two pronouns says nothing about the employee being the only one authorized to prepare and sign the request for hearing. The language is consistent with the teacher permitting someone else to prepare and sign the request. The teacher may still deputize someone else to render "his or her" statutory hearing request.

The Central Valley School District next contends that Sally McNair lacked authority to choose between a statutory hearing and the grievance process under the collective bargaining agreement. From this contention, the school district extrapolates that McNair lacked the authority in the first place to request a statutory hearing. The school district highlights language from Sally McNair's January 11 letter, in which she sought to preserve Michael Cronin's option to enforce his employment rights through a grievance. In the second paragraph of her letter, McNair wrote:

> Due to the lack of access to Mr. Cronin, I will also be filing a grievance in order to preserve timelines to both procedures. It is clear the contract requires an election of remedies and it is not our intent to pursue both options, only to allow time to consult with Mr. Cronin so he can determine his desired path. We anticipate notifying the District on or before February 10th, 2012 as to Mr. Cronin's decision to pursue either the statutory hearing or the grievance. At that time, either this request or the

grievance will be withdrawn.

CP at 94.

The school district contends that Sally McNair, in her January 11 letter, conceded she lacked authority to select among the two alternatives of a statutory appeal or a union grievance. The school district reads into the paragraph what it wishes to perceive. McNair did not expressly declare that she lacked authority to exercise the choice. Michael Cronin's delegation of express authority to McNair was broad and afforded her the option to make the selection if she so chose, particularly if the failure to make a selection endangered his rights. Cronin granted McNair power to perform whatever steps were needed. Out of precaution, McNair preferred to allow Cronin to select the process to advocate his rights.

Assuming she lacked authority to choose between the two available procedures, we discern no reason why Sally McNair could not demand both processes until a later date. RCW 28A.405.300 does not render a timely appeal from a discharge of a teacher's employment null because the appeal notice might seek to temporarily preserve inconsistent rights. The language of the collective bargaining agreement commands a selection between either the statutory process or the grievance, but the agreement establishes no deadline for the selection. Nor does the agreement language address the ramifications of the employee initially requesting both. Lawsuits are full of requests by litigants for relief well beyond that to which they are entitled, but asking for excessive

relief does not prevent any relief. When a party is uncertain in which jurisdiction to file suit and a limitation period will shortly expire, the party may file the suit in two or more jurisdictions until a resolution of the jurisdictional question. Filing the suit in the wrong jurisdiction does not annul the validity of the suit in the correct jurisdiction.

The school district argues that it relied on Sally McNair's concession in her January 11 letter that she lacked power to render a selection between the competing procedures. We already addressed this contention by noting that McNair did not concede any absence of authority. Other facts also belie the school district's argument. In his declaration, Superintendent Ben Small testified that he decided to ignore the appeal request because the request came from Sally McNair, not from Michael Cronin. The declaration claims no reliance on any statement from McNair that she lacked authority to select the hearing process.

Central Valley School District relies on two California cases. In *Blanton v. Womancare, Inc*, 38 Cal.3d 396, 696 P.2d 645 (1985), the California Supreme Court held that an attorney, merely by virtue of his employment as counsel, lacks authority to bind his client to an agreement for arbitration. In *Kanbar v. O'Melveny & Meyers*, 849 F. Supp. 2d 902 (N.D. Cal. 2011), the federal court, following *Blanton*, held that the waiver of the right to a judicial forum is a decision that belongs to the client and not the client's attorney. Each case is readily distinguishable. The clients were not given an opportunity by counsel to make a decision. The principal, not a third party, challenged the agent's

authority. Michael Cronin bequeathed Sally McNair unlimited power to protect his employment rights. Cronin does not question McNair's authority on his behalf.

The Central Valley School District underscores a Washington Education Association guideline that directs the employee to personally sign any appeal from a discharge or nonrenewal. The school district also emphasizes other demands for a statutory hearing signed by the teacher, even when Michael Cronin's counsel represented the other teacher. Nevertheless, courts declare the law. We are not bound by an organization's guideline interpreting the law, even if the organization seeks to protect the interests of a party harmed by the organization's interpretation. Nor are we bound by an attorney's interpretation of the law. For all we know, Michael Cronin's counsel, in other appeals, may have, from caution, counseled his clients to personally sign the demand for an appeal for fear that a school district might assert the incorrect position that only the teacher may sign.

Effect of Additional Request for Bargaining Agreement Grievance

Once again, Central Valley School District contends Sally McNair's January 11, 2012 letter, regardless of McNair's authority to act for Michael Cronin, did not timely ask for the statutory appeal afforded by RCW 28A.405.300. According to the school district, the reservation of the option to seek a grievance nullified the request for the statutory hearing.

The collective bargaining agreement demanded that the employee select between

the two alternative procedures. The agreement read:

> . . . [I]n cases of nonrenewal, discharge, or actions which adversely affect the employee's contract status, the employee *shall select* the statutory procedures or the grievance procedure. In the event the employee serves notice to the Board that he/she is appealing the Board's decision according to the statutory provisions, such cases shall be specifically *exempted* from the grievance procedure.

CP at 5 (emphasis added).

We repeat our earlier analysis. The language of the agreement does not nullify the request for the statutory procedure if the employee also temporarily seeks the grievance procedure, even if the final selection is not within ten days of the discharge. If anything, the language precludes the grievance procedure if the employee first gives notice of selecting the statutory procedure.

We construe collective bargaining agreements according to principles of contract law. *Spokane Sch. Dist. No. 81 v. Spokane Educ. Ass'n*, 182 Wn. App. 291, 305, 331 P.3d 60 (2014). One such well-established principle is that language in a contract is given its ordinary meaning unless sufficient reason exists to apply another meaning. *Patterson v. Bixby*, 58 Wn.2d 454, 458, 364 P.2d 10 (1961). An interpretation that gives a reasonable, fair, just and effective meaning to all manifestations of intention is preferred to an interpretation that leaves a part of such manifestations unreasonable, imprudent or meaningless. *Pub. Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 373, 705 P.2d 1195, 713 P.2d 1109 (1985). This court will

not interpret contractual provisions in a manner that would render contractual obligations illusory. *Spokane Sch. Dist. No. 81*, 182 Wn. App. at 305-06; *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997).

The bargaining agreement reads that if an employee requests a statutory hearing, his case is "exempted from the grievance procedure." "Exempt" means "[f]ree or released from a duty or liability to which others are held." BLACK'S LAW DICTIONARY 692 (10th ed. 2014). The agreement logically means that if an employee requests a statutory hearing, his case is released from the duties and liabilities contained within the bargaining agreement's grievance procedure.

Both parties rely on *Oak Harbor Educucation Association v. Oak Harbor School District*, 162 Wn. App. 254, 259 P.3d 274 (2011) to support their positions. In *Oak Harbor*, this court addressed a different issue on nearly identical facts. The Oak Harbor School District sent James Pruss a notice of probable cause for discharge after a student accused Pruss of touching her inappropriately during basketball drills. Pruss requested a statutory hearing and filed a grievance in accordance with the terms of the collective bargaining agreement governing his employment. Pruss later withdrew the request for a statutory appeal and sought to proceed with the grievance alone. The school district refused to participate in the grievance on the ground that Pruss's election of the statutory hearing prevented him from filing a grievance. Pruss and the union sued to compel the school district to submit the question to the grievance arbitrator of whether Pruss's

grievance was grievable. The trial court granted the school district's motion for summary judgment and dismissed the union's suit on the ground that Pruss had already committed to the statutory procedure.

In *Oak Harbor Education Association v. Oak Harbor School District*, this court reversed and held that the school district must submit to the grievance arbitrator's decision as to whether James Pruss could grieve his employment termination. This court noted the broad language in the collective bargaining agreement that required that the grievance arbitrator determine what claims were grievable. This court issued no ruling on what, if any, procedure should be employed by the parties, but deferred this ruling to the arbitrator.

If *Oak Harbor Education Association* assists any party to this appeal, the party is Michael Cronin. The court did not rule that an initial request for both a statutory hearing and a bargaining agreement grievance quashes the availability of the statutory hearing or denies the teacher the right to later select the preferable procedure. In a footnote, this court observed:

> The District also asserts that because compliance with the statutory requirements under RCW 28A.405.300 and .310 is mandatory, Pruss's decision to withdraw his request for a statutory hearing resulted in termination. Because the trial court did not address this argument below, we decline to do so. Nonetheless, neither the language of the statute nor the [collective bargaining agreement (CBA)] supports the District's contention that withdrawal of the request to proceed with the statutory appeal has any effect on the grievance process, and case law allows Pruss to challenge his termination under both the statute and the CBA.

Oak Harbor Educ. Ass'n, 162 Wn. App. at 262 n.4 (internal citation omitted). The dicta supports a ruling that Michael Cronin could proceed with both procedures, or, at the least, the withdrawal of the request for a grievance does not interfere with the request for a statutory hearing.

Michael Cronin asserts estoppel and other equitable principles for the purpose of precluding Central Valley School District from avoiding the statutory hearing process. Cronin also characterizes the collective bargaining agreement as imposing an "election of remedies." In turn, Cronin argues that the doctrine of election of remedies only requires the election to be made immediately before or upon entry of a judgment. We question the application of the election of remedies doctrine in this context. The bargaining agreement instructed the employee to select between two processes, not remedies. The collective bargaining agreement directed the employee to choose between the forum or hearing process, whose end result would be the award of remedies. Because we resolve the appeal on other grounds, we do not address Cronin's contentions based on equity, estoppel, or election of remedies.

Central Valley School District argues that Michael Cronin and Sally McNair caused it prejudice by the attempt by McNair to reserve both the grievance procedure and the statutory hearing procedure. The school district contends that it needs to know whether to pay the employee beyond the ten-day deadline for the statutory hearing and

whether it should hire a substitute or regular employee and that reserving the grievance procedure interferes with this need. The school district also mentions the prejudice of facing two costly procedures. Of course, Michael Cronin never intended to use both procedures and the school district has not engaged in two costly procedures. Instead, because of the legal positions taken, the school district has incurred significant costs in attempting to deny Michael Cronin his right to the statutory hearing procedure. The school district has not identified any additional costs incurred during the purported twenty-day waiting period.

Central Valley School District also mentions that the statutory hearing procedure was intended to be an expedited process since the employee continues to receive pay during the process. The school district complains that the employee delays the process at least twenty days if the district must wait to learn if the employee selects the grievance procedure instead. In so arguing, the school district does not recognize that it could have taken the position that Cronin had elected the statutory hearing procedure, despite an attempt to reserve the right to exercise the grievance procedure, and the district could have timely appointed a hearing official. The school district would then have positioned itself to claim prejudice. Instead, the district took the uncategorical position that the notice was void, because of the lack of Michael Cronin's signature, regardless of the attempt to reserve, for twenty days, the grievance hearing. The school district also ignores its ability to have contacted either Sally McNair or Michael Cronin in the

meantime to insist on proceeding with the statutory hearing. Sally McNair and Michael Cronin heard only crickets.

Relief for Michael Cronin

Under the undisputed facts, Michael Cronin timely exercised his right to a statutory appeal under RCW 28A.405.300. When the facts are not in dispute, this court may grant summary judgment to the nonmoving party. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992); *Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724 (1967); *Wash. Ass'n of Child Care Agencies v. Thompson*, 34 Wn. App. 225, 234, 660 P.2d 1124 (1983). If we may grant the nonmoving party summary judgment, we should be free to grant judgment to a party who moved for summary judgment below, but who does not appeal the denial of the summary judgment before this court. We grant Michael Cronin's request for declaratory relief to the extent the request demands that the school district participate in the statutory hearing process to resolve the merits of Cronin's discharge from employment and nonrenewal of his teaching contract.

In his summary judgment motion, Michael Cronin argued that the law entitles him to pay and benefits pending and regardless of the outcome of the statutory hearing since he exercised his right to appeal. Cronin may be correct. The trial court did not address this contention because it ruled the request for the hearing void. The parties do not brief this issue on appeal. On remand, Michael Cronin may renew his request before the superior court for pay and benefits pending the hearing on the merits of his discharge and

nonrenewal.

CONCLUSION

We reverse the trial court's grant of summary judgment to Central Valley School District and the trial court's dismissal of Michael Cronin's suit. We grant Michael Cronin judgment and remand to the trial court for entry of an order compelling the school district to participate in the statutory hearing process to determine the merits of Cronin's discharge from employment and nonrenewal of his contract.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, C.J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, J.

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Attached for filing with the Supreme Court is Appellant Michael F. Cronin's Response to Central Valley School District's Petition for Discretionary Review.

Person filing:

Larry J. Kuznetz
Powell, Kuznetz & Parker, P.S.
316 W. Boone, Ste. 380
Spokane, WA 99201-2346
Phone: 509-455-4151
E-mail: larry@pkp-law.com

Mary E. Zanck
Legal Assistant/Bookkeeper
Powell, Kuznetz & Parker, P.S.
316 W. Boone, Ste. 380

Spokane, WA 99201
Phone: 509-455-4151
FAX: 509-455-8522
e-mail: mary@pkp-law.com