IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 330621 -III

MICHAEL F. CRONIN

Appellant/Cross-Respondent

vs.

CENTRAL VALLEY SCHOOL DISTRICT

Respondent/Cross-Appellant

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Cronin/Appellant Michael F. Cronin (hereinafter "Cronin", hereby replies to Central Valley School District/Respondent's (hereinafter "District") response brief as follows:

II. ARGUMENT

A. The union representative's hand delivered letter requesting a hearing on behalf of Cronin was a perfected appeal to his termination and non-renewal under RCW 28A.405.300.

RCW 28A.405.300 governs the procedural requirements that are mandatory for a school district to follow in order to discharge a teacher. Under this provision, the teacher must be notified in writing of the District's decision to terminate, and written notification must "specify the probable cause or causes for such action". RCW 28A.405.300. Upon receipt of the Notice of Probable Cause, the teacher has ten days to *request a hearing* under 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". *Id.* RCW 28A.405.300 specifies that such *request for hearing* must be made in writing and "filed with the President, chair of the board or secretary of the Board of Directors of the

District." [1] A teacher may be discharged if he or she "does not *request a hearing* as provided herein." *Id.*

One of the questions in this case is whether union representative Sally McNair's hand delivered letter to Superintendent Small requesting a hearing constitutes a request for hearing under RCW 28A.405.300. Here, Ms. McNair, acting in her capacity as agent and representative of Cronin and at his direction, "filed" Cronin's request with the District by delivering the request for hearing to the Superintendent. The District contends that since Ms. McNair was not an employee of the District, she lacked the capacity to file an appeal and therefore, the District properly terminated Cronin along with his pay and benefits. There is nothing in the statute that supports such a position.

The court has previously rejected this kind of argument based on substantial compliance with the statute. *Hall v. Seattle School District No. 1*, 66 Wn. App. 308, 831 P.2d 1128 (1992)(notice of appeal served on the secretary of the chair of the school board rather than on the chair was substantial compliance, relying on *In Re Saltis*, 94 Wn.2d 889, 621 P.2d 716 (1980)). In *Saltis*, the court looked at the sufficiency of process in the context of an appeal to Superior Court from a decision of the Board of Industrial Insurance Appeals. The Industrial Insurance Act requires that a

[1] Superintendent Small is the secretary of the Board of Directors of the District, so there is no dispute that service upon him was proper.

Notice of Appeal be served both on the Director of the Department of Labor and Industries and on the Board of Industrial Insurance Appeals. Although there was no evidence that the Director had been *served* with the Notice of Appeal, it was undisputed that the Director had received actual notice of the Notice of Appeal. The Court held that the appellant had complied with the statutory service requirement considering "there is evidence that the Director actually received the Notice of Appeal". *Saltis*, 94 Wn.2d 895. The Court further explained that the statutory notice requirement "is a practical one meant to insure that interested parties receive actual notice of appeals of Board decisions". *Id.* The court stated:

> Substantial "compliance" with procedural rules is sufficient, because "delay and even the loss of law suits (should not be) occasioned by unnecessarily complex and vagrant procedural technicalities.

Saltis, 94 Wn.2d at 896, quoting *Curtis Lumber Company v. Sortor*, 83 Wn.2d 764, 767, 522 P.2d 822 (1974).

The *Hall* court applied the same logic to the service requirement and RCW 28A.58.460 (presently RCW 28A.405.320) which governs appeals from a decision of a hearing officer to Superior Court:

> The chair of the school board is a part-time unpaid position. Thus the person serving as chair is not available every day at the school board office for service. Indeed, the chair could easily be unavailable for service for long periods, by being out of state on vacation or by reason of business travel. After an adverse decision, a teacher may need some time to decide whether to appeal, leaving

> only a few days for service. It is incomprehensible that the legislature intended that inability to serve a specific individual, particularly one with limited availability, should preclude an appeal.

66 Wn. App. at 312.

In *Black v. Department of Labor & Industries*, 131 Wn.2d 547, 933 P.2d 1025 (1997), service on an Assistant Attorney General assigned to represent the Department of Labor and Industries substantially complied with the requirement that service be made on the Department through its director.

As in *Saltis*, the court found that the appellant had substantially complied with the requirement to serve the chair of the board by serving the chair's secretary since such service was "calculated to give notice to [the chair] and the district". *Hall*, 66 Wn. App. at 313. The court observed:

> Undoubtedly, service on the secretary achieved the same result as if Ms. Smith, the chair, had been in her office and served personally. The defect in service is purely formal, without practical importance, and not a proper basis to deny Hall's access to the courts.

Id.

As in *Hall* and *Saltis*, Cronin's request for a hearing to challenge his discharge provided actual notice to the District of such request. Judge O'Connor recognized that actual notice of Cronin's intentions to appeal his termination by requesting a statutory hearing was provided the District. (RP 5:2-6) As such, the "interested parties" received notice of Cronin's

appeal, thereby fulfilling the intent of the "practical" statutory notice requirement. *See Saltis*, 94 Wn.2d at 895. And as in *Hall*, any defect in the appeal letter is "purely formal [and] without practical importance". *Hall*, 66 Wn. App. at 313Moreover, the District can show no prejudice as a result of this claimed defect since it received timely actual notice of Cronin's intent to appeal his termination and request a statutory hearing. The court in *Hall* concluded that "where timely notice is in fact received by the District and there is absolutely no prejudice, we fail to see any reasonable policy basis for not holding substantial compliance sufficient". *Hall*, 66 Wn. App. at 314.

If a teacher fails to request a hearing within 10 days of receiving a District's Notice of Probable Cause for termination, then the employee is considered terminated. RCW 28A.405.300. In this case Cronin, through his agent and representative, requested a hearing within 10 days after receiving the District's notice of termination. (CP 93) The statute was designed to simply provide notice to the District of the teacher's intent to appeal. Whether the teacher signed the request for hearing is not fatal. The statute does not state nor require that a teacher must sign the request for hearing or personally serve it him/herself.

Cronin has substantially complied by having his union representative, as his agent, sign and serve the request for hearing on his

behalf. Sally McNair's request for "a closed hearing on Mr. Cronin's behalf to determine whether there is sufficient cause for such adverse action" was actual compliance with the minimum statutory requirement of requesting a hearing to preserve all issues before a hearing officer.

B. Cronin's request for hearing is not invalid because Sally McNair, his union representative, signed and filed his request for hearing.

Cronin is not a provisional status employee. This is undisputed. Therefore, he is subject to probable cause for discharge (under RCW 28A.405.300) and probable cause for non-renewal (pursuant to RCW 28A.405.210). Both statutes contain the exact same language for a right to a statutory hearing provided under RCW 28A.405.310:

> Every such employee so notified, at his or her *request made in writing* and filed with the president, chair or secretary of the board of directors of the district within ten days after receiving such notice, *shall* be granted opportunity for hearing pursuant to RCW 28A.405.310 to determine whether there is sufficient cause or causes for **his or her discharge or other adverse action against his or her contract status]**. (emphasis added).

RCW 28A.405.300

> Every such employee so notified, at his or her *request made in writing* and filed with the president, chair or secretary of the board of directors of the district within ten days after receiving such notice, *shall* be granted opportunity for hearing pursuant to RCW 28A.405.310 to determine whether there is sufficient cause or causes for **non-renewal of contract**. (emphasis added).

RCW 28A.405.210

The presumption under either scenario is that after a request for hearing, the teacher "shall" be granted an opportunity for hearing pursuant to RCW 28A.405.310. Neither the non-renewal statute (RCW 28A.405.210) nor the discharge statute (RCW 28A.405.300) identify the form or necessary contents of a *request for hearing*. Both statutes have the same language stating: "Every such employee so notified, at his or her *request made in writing* . . . .". The statutory hearing statute (RCW 28A.405.310) references both the non-renewal and discharge statutes and recognizes a "request for hearing" under either scenario:

> (1) Any employee receiving a notice of probable cause for discharge or adverse effect in contract status pursuant to RCW 28A.405.300, or any employee with the exception of provisional employees...receiving a notice of probable cause for nonrenewal of contract pursuant to RCW 28A.405.210, shall be granted an opportunity for a hearing pursuant to this section.
>
> (2) In any request for a hearing pursuant to RCW 28A.405.300 or 28A.405.210, the employee may request either an open or closed hearing.

RCW 28A.405.310 (1) and (2).

The only requirement for a teacher to preserve his/her right to a hearing for any adverse action is to simply request a hearing in writing and serve it on the Superintendent. A request simply has to place the District on notice that the teacher is requesting a hearing from any adverse action. The statute requires no magical language in order to accomplish a request

for hearing. There is no form for such a request or required language. All that needs to occur is a "request for hearing." Ms. McNair's request for hearing was clear and unequivocal. It placed the District on notice that this termination was being disputed.

In fact, a notice that "I would appreciate reconsideration" was a sufficient response to indicate quite clearly to the school board that the teacher desired the statutory hearing. *Zeller v. Prior Lake Public Schools*, 259 Minn. 487, 198 NW.2nd 602 (1961) as cited in *Beckwith v. School Administrative District No. 2*, 243 A.2d 62, 64 (Maine 1968).

Cronin charged Ms. McNair with the responsibility of requesting a hearing on his behalf, which she did. (CP 33-35; 74-76 ¶8&9) As Judge O'Connor recognized, although the union is not required to do this, Cronin was asking her and she is familiar with the process. (RP 4:16-25; 5:1-2) As incorrectly argued out of context by the District, Judge O'Connor did not reject Cronin's argument that it is "not a function of the union" to select a hearing over a grievance. *Respondent's Brief* at 30. What she stated was:

> I think we would all agree that it is not a function of the union to do this, i.e. it is not required of the union to do this."

The union can and does make a selection of a statutory hearing or grievance on behalf of its member. (CP 74. ¶8; 105-106). Ms. McNair's

letter of January 11, 2012, (CP 93), acknowledged that she had received the "Notice of Probable Cause for Termination of Mike Cronin's employment dated January 5, 2012".[2] She requested a closed hearing "to determine whether there is sufficient cause for such adverse action". "Such adverse action" refers to Cronin's termination and included both the discharge and non-renewal elements. Her intentions were to appeal Cronin's termination. (CP 76, ¶9) Ms. McNair's timely request for a statutory hearing preserved his right to appeal his termination. There is nothing in the statute that requires a request for hearing reference the letter which took adverse action or cite portions of the letter or statute. What triggers the employee's right to a statutory hearing on the facts of a termination is simply a written request for hearing, not appeal language that appeals a Notice of Discharge or Non-Renewal or citations to any statute.

Washington is a notice pleading state requiring "only a short and plain statement of the claim showing the pleader is entitled to relief."

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[2] Without any reference to the record, the District claims that as of January 11, it "made the decision to wait for a further response from Ms. McNair." *Respondent's Brief* at 7, 20-21. That is directly contrary to Superintendent Small's sworn declaration stating that he had already decided that he "need not and would not respond to Ms. McNair's letter of that date. (CP 1-2, ¶3) Its position all along has been that Ms. McNair had no authority to act on Cronin's behalf. It decided not to communicate with Ms. McNair, even after her February 8, 2012 email. The District responded to Ms. McNair on February 28, 2012, only after my communication to Mr. Clay trying to understand why the District hadn't communicated after her timely filed request for hearing on behalf of Cronin.

Burchfiel v. Boeing Corp., 149 Wn. App. 468, 495, 205 P.3d 145 (2009) citing CR 8(a)(1) and *Champagne v. Thurston County,* 163 Wn.2d 69, 84, 178 P.3d 936 (2008). Pleadings must be construed to do substantial justice. CR 8(f). The superior court civil rules and rules of evidence apply in teacher termination cases. RCW 28A.405.310 (6)(c) and (7)(a). The non-renewal and discharge statutes are "notice" statutes. They require the teacher give notice to the district of his/her intention to request a hearing. General notice of the teacher's intent to request a hearing is all that is required. The only jurisdictional element of the statute is that a request for hearing must be filed within 10 days.

Superintendent Small made a "decision" to terminate Cronin: "If you do not appeal, my decision will become final, binding and non-appealable." (CP 91-92) Notice within 10 days was provided to the District by Ms. McNair through her letter requesting a hearing on the adverse action taken.

The claim that Ms. McNair was not authorized by Cronin to submit the request for hearing is frivolous. Dismissing Cronin's right to a statutory hearing would be inconsistent with the court's general belief that matters should be heard on the merits, and that "slavish adherence" to procedure when actual notice occurred is to be avoided. *In re Saltis*, 94 Wn.2d at 896.

C. The statute does not prohibit an agent from requesting a hearing on behalf of a teacher.

The District claims that Judge O'Connor held that Ms. McNair did not possess authority to select the statutory hearing procedure on behalf of Cronin. *Respondent's Brief* at 2. Judge O'Connor said nothing of the sort. The Court discussed agency principles and that Cronin had requested via his friend that Ms. McNair handle filing the request for statutory hearing. She agreed that the teacher could make such a request and Ms. McNair, as his union representative, could undertake such a task. (RP 2-5; CP 309-312). Judge O'Connor granted summary judgment in Cronin's favor on that issue. (RP 5:12-13) The District claims that Judge O'Connor found "that Ms. McNair was acting as a special agent for plaintiff." (*Respondent's Brief* at 2) which is also inaccurate. Judge O'Connor did not determine that a union representative could not select a procedure on behalf of its member. She determined that under these facts and agency principles, Ms. McNair could file Cronin's request for hearing on his behalf.

The District contends that it is only the "employee" and not the union representative who can request a statutory hearing. *Respondent's Brief* at 28-41. The District has cited no case supporting its claim that a teacher must sign the request for hearing or the request is defective. Under both the non-renewal and discharge statutes, there is no

requirement that a teacher personally sign a request for hearing or that a request for hearing is invalid unless a teacher personally signs the document. If that argument is followed to its logical conclusion, then not only must the "employee" sign the request for hearing, but he/she must also personally serve it on the appropriate District representative. RCW 28A.405.210; RCW 28A.405.300 ("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...") Yet the District hasn't objected nor disputed the validity of service of the request for hearing on the Superintendent by Ms. McNair although service wasn't accomplished by the "employee."

The District's argument would lead to an absurd result. If the District sent notice of probable cause for discharge by certified mail[3] to a teacher who was out of town or in a coma in the hospital, then the teacher's failure to request a hearing within ten days would result in termination being final and binding. RCW 28A.405.300 ("If such employee does not request a hearing as provided herein, such employee

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[3] The District claims it "personally served" its notice of probable cause on Cronin. *Respondent's Brief* at 4. It did not. The notice was sent by certified and regular mail. (CP 91) The District may serve a notice of termination on the teacher either personally, by certified or registered mail, or by abode service. RCW 28A.405.210; RCW 28A.405.300. There is no corresponding right of the teacher to so serve a request for hearing on the District after receiving a notice of probable cause for discharge or non-renewal from the District. That is why a teacher does not mail a request for hearing to the school district when appealing a termination.

may be discharged or otherwise adversely affected as provided in the notice served upon the employee.") There is no corresponding similar language in the non-renewal statute, RCW 28A.405.210.

There is nothing in the statute that limits or prevents anyone from appealing a termination on behalf of a teacher. It can be signed by the teacher, union representative, or attorney. (CP 105-106) The law is not so restrictive and the District has pointed to no case or other support where their construction of the statute has been upheld.

The Court in *McAnulty v. Snohomish School District No. 201*, 9 Wn. App. 834, 515 P.2d 523 (1973), recognized that an attorney could in fact be an agent for the teacher for purposes of service. In that case, plaintiff had been represented by an attorney in a discharge that had occurred in June 1970. That matter was resolved and the teacher returned to the classroom. However, in November 1970 the District again terminated plaintiff. The court held that the school board had "an absolute statutory duty to serve McAnulty himself unless the November 1970 discharge was in fact the culmination of the single matter of the June 1970 discharge". *McAnulty*, 9 Wn. App. at 837. In other words, if the November discharge was ongoing and related to the June discharge, the court left open the fact that the attorney could be served by the district as agent.

This is consistent with the Court of Appeals decision in *Russell v. Maas*, 166 Wn. App. 885, 272 P.3d 273 (2012), in which the court held that an attorney could sign a request for trial de novo although the MAR only provides that an "aggrieved party" has that right. Once a party has designated an attorney, the court and other parties are entitled to rely on that authority until the client's decision to terminate the relationship is brought to their attention. Signing a request for trial de novo was a procedural act and considered to be the act of the client. The court pointed out that RAP 3.1 only allows an "aggrieved party" to seek appellate review, yet the court regularly accepts appeals only signed by a party's attorney. Likewise, Mr. Cronin's appointment of his union representative was appropriate to request a hearing.

D. Union representative Sally McNair had either actual or apparent authority to file a request for hearing on behalf of Cronin to his termination.

The District contends that since Sally McNair lacked access to Cronin and did not speak with him prior to submitting the request for hearing, she had no authority to act. *Respondent's Brief* at 29. On the contrary, as his union representative, she had authority to act on his behalf "for all purposes in dealing with the District." (CP 34, ¶13). Mr. Cronin contacted his friend, Teresa Anderson, when he received the notice of termination while he was in jail. (CP 97, ¶ 5) He wanted her to contact

Ms. McNair and request she take immediate steps to appeal the adverse action. *Id.* Ms. Anderson contacted Ms. McNair and informed her that Mr. Cronin wanted her to take whatever action was necessary to appeal the termination and preserve his job. (CP 97, ¶ 6) Whether or not Cronin provided direct authority to Ms. McNair to appeal the termination is irrelevant and begs the issue. Cronin adopted and ratified Ms. McNair's actions to request a hearing. (CP 34-35, ¶15&16) Hornbook agency law allows a principal to affirm and ratify the acts of an agent. Restatement (Second) of Agency § 82, 84, 85 (1958). Cronin did not repudiate her actions. Rather, he accepted and adopted her efforts to preserve his job. *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 369, 818 P.2d 1127 (1991).

Under the statute, the District is not required to provide actual notice of termination to the teacher. The District is only required to serve a teacher with a notice of termination either personally *or* by registered or certified mail. RCW 28A.405.300. All the District has to do, as they did in this case, is send a notice of termination by certified mail even though the teacher would never receive actual notice. If a teacher leaves at the end of the school year and goes to Europe for the summer, but is notified by their house sitter of the District's letter of probable cause, then the District's position is that the teacher is out of luck since he/she has to sign

the request for hearing. Under that circumstance, someone other than the teacher has to be in a position to appeal the teacher's termination. Being unable to respond to the District's notice of termination, someone would have to appeal the notice of termination within ten days. There are a myriad of circumstances when a teacher cannot personally appeal and must rely on someone else to assure a request for hearing is timely made.

The facts reflect that Sally McNair had *actual* authority to request a hearing on Cronin's behalf. Actual authority may be express or implied. Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess. *King v. Riveland*, 125 Wn.2d 500, 508, 886 P.2d 160 (1994); *Deers, Inc. v. DeRuyter*, 9 Wn. App. 240, 242, 511 P.2d 1379 (1973) (citing 3 Am.Jur.2d Agency § 71 (1962)). Both actual and apparent authority depend upon objective manifestations made by the principal. *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 363, 818 P.2d 1127 (1991), *review denied*, 118 Wn.2d 1023, 827 P.2d 1392 (1992) (citing Restatement (Second) of Agency § 7 cmt. b, at 29 (1958)). With actual authority, the principal's objective manifestations are made directly to the agent; with apparent authority, they are made to third persons. *Smith*, 63 Wn. App. at 363, 818 P.2d 1127.

The request for hearing was made to Ms. McNair at Cronin's direct

request and at his direction. (CP 74-76, ¶8&9). Cronin informed his friend Teresa Anderson to have the union take such action as necessary to preserve his job. (CP 34-35, ¶15&16) Ms. Anderson related her discussion to Sally McNair and Sally McNair took the action necessary to appeal Cronin's termination. (CP 97, ¶5&6) McNair's statements are admissible to show that as Cronin's agent, she was doing what she was authorized to do. Cronin ratified McNair's actions. (CP 34-35, ¶15&16) Cronin's statements to his friend Teresa Anderson to have her contact McNair to file an appeal to preserve his job are not hearsay. They are not offered to prove the truth of the matter asserted. They are a statement of a party and go to his state of mind and his intent. Teresa Anderson's statements to Sally McNair are not hearsay. Teresa Anderson's discussions with Sally McNair go to Cronin's state of mind and intent. McNair's conversation with Cronin ratifying his acts is not hearsay. It too goes to his state of mind and intent.

Sally McNair also had *apparent* authority to act on behalf of Cronin. The District had been dealing with Ms. McNair as Cronin's representative throughout the course of the investigation and Cronin's administrative leave. (CP 70-76, ¶1,3,7,&8) The actions of an agent sufficient to bind the principal depends upon the objective manifestations of the principal to third parties. *McCormick v. Lake Washington School*

Dist., 99 Wn. App. 107, 114, 992 P.2d 511 (1999); *State v. French*, 88 Wn. App. 586, 595, 945 P.2d 752 (1997) (citing *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994)). The principal has to have knowledge of the act committed by its agent. *French*, 88 Wn. App. at 595, 945 P.2d 752, (citing *State v.. Parada*, 75 Wn. App. 224, 231, 877 P.2d 231 (1994)). The principal may also be bound by the agent's actions if he places the agent in a position that persons of " 'ordinary prudence, reasonably conversant with business usages and customs, are thereby led to believe and assume that the agent is possessed of certain authority, and to deal with him in reliance of such assumption.' " *Schoonover v. Carpet World*, 91 Wn.2d 173, 177, 588 P.2d 729 (1978) (citing *Lumber Mart Co. v. Buchanan*, 69 Wn.2d 658, 662, 419 P.2d 1002 (1966)).

The District knew that Ms. McNair was his exclusive representative under the CBA since she represented him during the course of various meetings with the District regarding his return to work. *Id.* Furthermore, under the CBA with the District, the union is the exclusive representative of its members:

> Section E – Status of the Agreement. The District recognizes that the rights and obligations afforded to the Association under the terms and conditions of this Agreement are granted pursuant to the Association's exclusive right to represent the certificated employees covered. (emphasis added).
>
> (CP 104)

It was objectively reasonable for the District to deal with Ms. McNair on Cronin's behalf. Her conduct was authorized and sufficient to request a hearing on behalf of Mr. Cronin.

The District argues that Cronin's claims should be dismissed unless Ms. McNair had actual or apparent authority with specific instructions from Cronin as to which remedy he was electing. *Respondent's Brief* at 36-41. There is no factual or legal basis for that contention. Her task was to take whatever action was necessary to preserve his job and appeal his termination. She did so by requesting a hearing on the merits of his termination.

The District also claims that unless Cronin was grieving his termination under the CBA, the District could not deal with Ms. McNair as his representative since she could only represent him for bargaining agreement rights. *Respondent's Brief* at 29-35. It claims the union has no authority to act as litigating agent for its members. Respondent's Brief at 30. That is incorrect. There is a body of labor law addressing issues concerning a union representative handling matters outside the CBA. For instance, cases in which a current or former union member alleges the union gave inaccurate legal information outside the context of the CBA include *Collins v. Lefkowitz,* 66 Ohio App.3d 378, 584 N.E.2d 64 (1990) which was a malpractice allegation against a union attorney for failing to

timely perfect a state court action challenging the plaintiff's discharge. The action, which Lefkowitz allegedly failed to perfect, was a judicial appeal of an administrative decision before the Ohio State Personnel Board of Review. As in Washington, the Personnel Appeals Board process is separate from the grievance and arbitration process. RCW 41.64. *See Also*, *United Steel Workers of America v. Craig,* 571 So.2d 1101 (Sup. Ct. Ala. 1990)(malpractice allegation that the Union failed to "adequately represent the plaintiff in a litigated discrimination suit" after plaintiffs' discharge.); *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985)(discussing in dicta the *Atkinson* rule for malpractice immunity against a union attorney, determining that the rule is inapplicable where legal services unrelated to the CBA are performed.) Union representatives and union attorneys do represent members and give advice in matters unrelated to CBA rights.

The cases cited by defendant involve the union's capacity to sue under the Labor Management Relations Act. None of the cases cited involved a teacher termination. And unlike Cronin's situation, all of the cases involved lawsuits brought by a union in a representative capacity in which it was determined that they were not the real party in interest. *Local Union No. 185 v. Copeland*, 273 F.Supp. 547 (D.Mont. 1967)(Union not real party in interest in claim against a surety on a

performance bond.) *Drilling Local No. 17 v. Mason & Hangar Co.*, 90 F.Supp. 539 (S.D.N.Y. 1950)(Union was not real party in interest since it was not suing on the CBA, but was seeking damages suffered by some employees against defendant who bribed a union agent to pay lower wages.) *United Brotherhood of Carpenters v. Woerful Corp.*, 545 F.2d 1148 (8th Cir. 1976)(Union was not real party in interest under Miller Act to prosecute claim for unpaid wages in absence of an assignment for those wages.)

Defendant also claims that *Taylor v. Fee*, 233 F.2d 251 (7th Cir. 1956) supports its position. That case is not a Washington case or a teacher case. It involved a labor grievance filed by certain employees to compel the adjustment board to take jurisdiction over their claims. The court, in part, was trying to determine if a prior state court decision against the union bound the employees by res judicata. The court analyzed the case as to whether or not the employees had consented to the union representing their interests in the state claim. There was nothing to suggest that the employees contractually obligated themselves or authorized the union to act for them in that action. The court concluded the former case was not res judicata against them. *Taylor* does not stand for the proposition that a member cannot authorize his/her union representative to represent the member's interests. None of the cases cited

bear on a union representative's right to represent individual members in a matter outside the CBA.

Besides, any effort by the District to communicate that the District did not consider Ms. McNair's request for hearing effective, was only made to Ms. McNair, not to Cronin. (CP 95). The District's letter was not sent to Cronin. (CP 95) It wasn't even copied to Cronin. If the District did not believe that Ms. McNair had any authority to represent Cronin, then why communicate this letter to her alone? The District can't have it both ways. They can't argue on one hand that Ms. McNair was not his representative, and had no authority to request a hearing on his behalf, but at the same time ignore Cronin, communicate only with Ms. McNair and treat her as if she were his exclusive representative. When it suits the District, they want to deal with Ms. McNair directly regarding Mr. Cronin. When it doesn't suit them, they want to argue she had no authority to deal with them or represent Cronin's interests. Ms. McNair was given the authority by Cronin "to take whatever action Ms. McNair felt necessary..." to preserve his job and appeal his termination. (CP 35, ¶ 15). Cronin gave her authority to handle appealing his termination which she did. Judge O'Connor correctly determined that Ms. McNair had authority to act on Cronin's behalf to sign and serve the request for statutory hearing.

The District claims that *Blanton v. Womancare, Inc.*, 38 Cal.3d 396, 407, 696 P.2d 645 (1985), supports its contention that since an attorney has no authority to bind a client to particular judicial forum, a union representative must likewise be prohibited. *Respondent's Brief* at 33-34. But that case is factually distinguishable from the instant case. In *Blanton*, the client was unaware the attorney had noted her malpractice claim for arbitration. It was made without her knowledge or consent. When apprised of what her attorney had done, she immediately objected, repudiated his act, and fired the attorney. This case supports Cronin's position because unlike *Blanton*, Cronin requested Ms. McNair to act, her request for hearing was done with his consent and knowledge, and he ratified her acts.

Likewise, in *Kanbar v. O'Melveny & Meyers*, 849 F. Supp. 2d 902, 913 (N.D. Cal. 2011), the court found that after the plaintiff personally made the decision to stipulate to arbitration after conferring with her attorney, she waived the right to a judicial forum. Her attorney had not stipulated to arbitration without her consent. Like *Kanbar*, Cronin gave authority to Ms. McNair to take the action necessary to appeal his termination, and after conferring with Ms. McNair, ratified her efforts.

E. The election of remedies argument is moot and irrelevant since Cronin elected to pursue a statutory hearing and there is no prejudice to the District.

Judge O'Connor incorrectly viewed McNair's request for a statutory hearing as needing to comply with the CBA:

> The next question becomes, and the more salient question, is the content of the notice. Did that content comport with the requirements of the collective bargaining agreement? (RP 5:14-17)

McNair's request for a statutory hearing to the District only needed to comply with the statute which requires that it be filed within 10 days after receiving the notice of probable cause. RCW 28A.405.210; 300. There is nothing in the statute or CBA requiring that a teacher give notice to the district of which remedy the teacher elects to proceed with. Judge O'Connor incorrectly assumed that Cronin was required to provide some kind of selection notice to the District based on the CBA. This was error. The CBA only requires that a teacher select a remedy, not provide notice to the district of which remedy or why. The District has provided no support for its contention that Cronin was obligated to provide the District with notice of his election.

The District argues that by allowing a union representative to request a statutory hearing and purport to preserve the grievance option, circumvents the election of remedies requirement under the CBA.

Respondent's Brief at 15-17.[4] It claims that by doing both, Cronin has elected neither since his "decision" to elect the statutory hearing process rather than a grievance was not timely elected within 10 days. *Respondent's Brief* at 11-12. Having left open the possibility he might file a grievance, the District contends that Cronin made no timely election which is fatal to his case. *Respondent's Brief* at 13.

There is no deadline under the CBA whereby a teacher is required to make a choice as to remedy. The CBA mandates only that a teacher served with a notice of probable cause elect to proceed on his termination either by a statutory hearing or grievance, but not both:

> ". . . in cases of non-renewal, 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 5, Section E – Right to Due Process).

A teacher has the ability to file a grievance within 20 working days (30 calendar days). (CP 16). A request for hearing must be made within 10 days of the notice of probable cause. RCW 28A.405.210; 300. Ms. McNair legally perfected a request for a statutory hearing under the terms

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[4] The District contends that the CBA is a "selection procedure" and not an election of "remedies" requirement. *Respondent's Brief*, at 26. Their claim is a distinction without a difference. The District has cited nothing in support of its argument. The "selection" procedure under the CBA is an election of remedies provision as interpreted under the cases. See Appellant's opening brief, pages 21-24; infra p. 37.

of the statute by timely serving the Superintendent with Cronin's request for hearing within 10 days of the District's notice of probable cause. (CP 91-93) This preserved Cronin's right to a statutory hearing. Ms. McNair also notified the District that due to her lack of access to Mr. Cronin, she intended to file a grievance in order to preserve timelines to both procedures. (CP 93) If she had filed a grievance within the 30 days and preserved that remedy after preserving the statutory hearing, an election would have to be made at some point since both remedies would have been available, but only one could be pursued. There is no deadline in the CBA for electing one over the other.

The timing on the selection of a preserved statutory hearing is not fatal to Cronin's appeal because the statutory hearing was already preserved. It is undisputed that Ms. McNair preserved Cronin's right to statutory hearing. The request was timely served within 10 days of the notice from the District. What the District contends (and what Judge O'Connor found) is that there was an additional required step that Cronin failed to take which was to notify the District within 10 days of which procedure (hearing or grievance) he was electing to proceed with, or be barred from proceeding altogether. There is nothing in the CBA or law requiring such notice. The District now claims a two-step process exists whenever a discharge or non-renewal occurs. First Cronin must timely

appeal and request a hearing or grievance within 10 days.[5] Second, Cronin must also timely notify the District within 10 days of his intent to proceed with that hearing or select the grievance procedure. The District's claim for a second step is not required under the CBA or law, and makes little sense. The District knows a decision must be made in 10 days for either a grievance or hearing. If a hearing is selected, the grievance is barred:

> "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 5)

Under the CBA, once Cronin requests a hearing, he has made his selection and loses the right to pursue a grievance. *Id.* The District however argues that plaintiff hasn't truly made his selection until such time as he gives the District notice of which procedure he elects to pursue.

The District can't have it both ways. It can't claim on one hand, that although Cronin timely requested a statutory hearing (first step), he really didn't because unless he confirms his selection within 10 days (second step), he is barred from proceeding. The second step is not required. There is no notice that has to be provided to the District once Cronin timely preserved his request for hearing. This is not a

[5] Even though a grievance doesn't have to be filed for 30 calendar days, the request for statutory hearing has to be accomplished within 10 days of the District's notice of probable cause or it is barred. RCW 28.405.210; 300.

circumstance where Cronin missed both the deadline for a statutory hearing and grievance. His deadline for a statutory hearing was timely made and legally preserved. No further notice was required to be given the District. Cronin didn't waive his right to a statutory hearing simply because he didn't confirm with the District which procedure he was pursuing. There is nothing under the CBA or law that prevents Cronin from preserving both procedures by filing for both within 10 days, and then waiving one or the other.

What is the difference between Ms. McNair filing a request for hearing to preserve that remedy and notifying the District she may file a grievance, and someone who files and serves a personal injury claim in Idaho before the Idaho statute of limitations runs (two years) but considers filing in Washington as well in order to preserve that claim when faced with the uncertainty of whether Washington or Idaho is the proper jurisdiction for the claim? If opposing counsel is notified that a claim will not be prosecuted in both jurisdictions and the intent is to elect one or the other, the personal injury claim isn't barred in Idaho simply because the selection was made to pursue the Idaho suit and not file the action in Washington. Like Cronin's request for a statutory hearing, the Idaho lawsuit was preserved when it was filed and served. It did not matter what became of the potential Washington claim. There was no additional

requirement to inform anyone of the selection. The District's argument is tantamount to barring the Idaho lawsuit because the decision to go forward in Idaho (although preserved because it was filed and served) was not selected until after the two year statute of limitations had passed for the Idaho claim. What the District fails to acknowledge is that Cronin met all necessary requirements to preserve his right to a hearing. Whether he notified the District of his decision after 10 days had passed is irrelevant. The request for hearing was still preserved.

McNair didn't waive Cronin's right to a statutory hearing by attempting to preserve his option to file a grievance. Her member was in jail and she had not been able to speak with him. A grievance didn't have to be filed for 30 days. A request for hearing had to be filed within 10 days. Ms. McNair filed for the hearing within the deadline required and was not required to notify the District of her selection after that under the guise that she really hadn't selected anything because the second paragraph of her letter suggested she may file a grievance.

The fact remains that the District intentionally ignored Ms. McNair's letter and email so it is difficult to understand how it can now claim foul. If the District felt it was being prejudiced by any delay resulting from the 30 day grievance deadline, they could have contacted Ms. McNair or filed an action forcing Cronin to elect his remedy.

What if Cronin had preserved both the hearing and the grievance by timely filing for both? Would the District argue he has no remedy because he never made a selection? The District ignored McNair. The Superintendent never objected to any failure to elect one remedy over another in his letter dated February 21, 2012, to Ms. McNair. (CP 95) The Superintendent never objected to McNair's request for hearing, never raised an objection until now that Cronin hadn't timely selected a remedy, cut off his pay and benefits, and now argues it was unfair to the District because it was not timely notified which procedure Cronin was going to undertake? The District never claimed it needed to be notified of any selection or set some deadline for Cronin to make a selection. His election to pursue a statutory hearing was made and preserved because it was filed with the Superintendent within 10 days. At this point the District should either be estopped or has waived any claim that Mr. Cronin's request for hearing was somehow untimely.

F. The District has shown no prejudice in allowing a statutory hearing.

Judge O'Connor felt that in "fairness to the school district, they do not have any idea what actually is going to happen." (RP 7:5-8; *Respondent's Brief* at 27. That is not accurate. The District knows full well a request for statutory hearing has to be filed within 10 days. It also

knows that a grievance must be filed within 30 days. Under the CBA, the District would have to wait for at least 30 days to determine which remedy a teacher might decide to pursue. Judge O'Connor felt that the election of remedies "needs to be made at the time that the initial response by the teacher is made to the district." (RP 8:11-14). There is nothing in the statute or in the CBA to support that contention. That argument makes the parties collectively bargained agreement of a 30 day window to file a grievance meaningless. When carried to its logical conclusion, this argument requires an immediate decision on a remedy within 10 days to the exclusion of the 30 days allowed to file a grievance under the CBA. Nothing in the statute or CBA requires that a request for hearing filed with a school district identify which remedy is being elected. (CP 5) Nor is there anything in the statute or CBA that prohibits preserving both remedies and waiving one or the other. *Id.*

Cronin did timely file his request for hearing within 10 days as required by statute. RCW 28A.405.210; 300. The District ignores this and argues that by allowing Cronin to select a remedy within the 30 day grievance window would frustrate the deadlines set forth in RCW 28A.405.310. *Respondent's Brief* at 18. The District can't have it both ways. It can't claim that Cronin must make a final selection within 10 days, but then having filed a request for statutory hearing within 10 days,

now argue that his case must be dismissed because McNair had not made a final selection when she suggested she would file a grievance which was never accomplished. The District knew that when a grievance was not filed by the end of the 30 day window, that Cronin was pursuing his already perfected statutory hearing.

Even waiting until the 30 day window has passed to determine if a grievance will be filed does not frustrate the purpose and deadlines imposed by RCW 28A.405.310. First of all, the District ignored McNair's request for statutory hearing and all the deadlines thereafter. The statute does not contemplate all of the statutory deadlines will be accomplished within 30 days, as argued by the District. *Respondent's Brief* at 18. There is no support for that in the statute. The reality is that under the statute, if the parties can't agree on a hearing officer (no deadline is set in the statute for the parties to agree), then either party can apply to superior court for appointment of a hearing officer. RCW 28A.405.310(4). And even after a hearing officer is appointed, although a hearing is to be set within 10 days of the prehearing conference, it is continued for discovery if the employee (not the district) "requests a continuance, in which event the hearing officer shall give due consideration to such request." RCW 28A.405.310(6)(d). The fact remains that although the District is to "specify the probable cause or causes for such action," it did not do so.

(CP 91-92); RCW 28A.405.300. It has only identified very general and not specific basis for its termination decision . *Id.* As a result, discovery is undertaken including interrogatories and depositions before any hearing occurs. RCW 28A.405.310(6)(b) & (c). So any hearing is not accomplished until beyond 30 days to afford both parties an opportunity to conduct discovery. The District is not prejudiced by waiting 30 days to see if a grievance is filed. And of course if no request for hearing is filed, the District has to wait during the 30 day window to see if a grievance will be filed.

Cronin could have filed a grievance before filing his request for a statutory hearing, preserving both remedies and selecting one and waiving the other. *Oak Harbor Educ. Assn. v. Oak Harbor School Dist.,* 162 Wn. App. 254, 259 P.3d 274 (2011). This case does not support the District's position. Would the District argue that the teacher must pursue his/her grievance since that was the first remedy selected? Or can the teacher waive one or the other? The teacher can waive one remedy and pursue the other, as long as one is selected. *Id.* The fact that the CBA in the *Oak Harbor* case did not have an election of remedies clause is not determinative. There is no deadline set in Cronin's CBA as to when the District is to be notified by the teacher of any particular selection. The parties could have bargained for some sort of deadline, but did not. The

CBA simply exempts one process if the other is pursued. It does not prohibit preserving both and then electing which remedy to proceed. If the parties desired, they could have collectively bargained something more specific as to deadlines for selecting a remedy. But the District cannot read into the CBA a deadline which does not exist.

The argument by the District is really form over substance. It ignored the request for hearing filed by Ms. McNair. It ignored her email identifying her selection of the statutory hearing process. (CP 93) It ignored the undersigned's letter to Mr. Clay. (CP 101) The District was never disadvantaged or prejudiced by the timing of Ms. McNair's selection. The fact remains that Ms. McNair did request a hearing on the merits of Cronin's termination in the first paragraph of her letter. (CP 93) In the second paragraph, she also notified the District that she was placing them on notice that she would be filing a grievance as well to preserve both procedures. However, no grievance was ever filed. (CP 259-261) After she conferred with Cronin, she notified the District that Cronin would be proceeding with his already timely perfected statutory hearing. (CP 94)

Ms. McNair's February 8, 2012 letter to the District was not even necessary. The District knew that the perfected request for statutory hearing was the procedure he would pursue since he didn't file a timely

grievance. The District knows from the CBA that when one is selected, the other is excluded. The District's position seems to be that a teacher can ignore the 10 day window to select a statutory hearing and still grieve within 30 days, but can't select the statutory hearing within the 10 day window and ignore filing a grievance. The District's argument makes a nullity of the 30 day grievance window since requiring a decision within 10 days makes the 30 days to file a grievance superfluous. That is neither a reasonable nor fair reading of the CBA. The carefully bargained for terms of the CBA would render the grievance deadline meaningless because if a statutory hearing weren't elected before the 10 day timeline, a grievance would be the only remedy. Selecting the statutory hearing in this instance triggered the election regardless of what Ms. McNair intended or thought she was trying to accomplish in pursuing a grievance: "In the event the employee serves notice to the [School] Board that he/she is appealing the [School] Board's decision according to the statutory provisions, such case shall be specifically exempted from the grievance procedure." (CP 5, Section E – Right to Due Process)

The District argues, that the CBA "does not allow selection of both procedures followed by a subsequent waiver, withdrawal, abandonment, rejection or whatever other new theory plaintiff might offer to pretend that the first selection was not made." *Respondent's Brief* at 16. If so, then

Ms. McNair's unequivocal request for a statutory hearing timely served was the selection no matter what her subsequent after the fact efforts or intentions were to preserve a grievance.

Cronin is not requesting that the 10 day deadline to file for a statutory hearing be extended. Ms. McNair timely perfected that remedy in the first paragraph of her January 11, 2012 request for hearing. (CP 93) If the CBA election provision is "disjunctive" as argued by the District, (*Respondent's Brief* at 18), then Ms. McNair's election to perfect a statutory hearing was not affected by the second paragraph of her letter that sought to preserve a grievance, no matter what her intentions were. (CP 93) His appeal for a statutory hearing was already legally perfected by the first paragraph of her letter, and precluded Cronin from filing a grievance without withdrawing his request for statutory hearing.

Ms. McNair appealed the termination decision according to the statutory provisions. If an appeal to the termination decision is made "according to the statutory provisions", then the case "is specifically exempted from the grievance process." The issue is not whether the District received notice of an election of remedy; the issue is whether the "statutory provisions" were followed. The statutory provisions were followed and Cronin timely requested a hearing on the merits of his termination. As a result, the District's argument is moot. Cronin has not

attempted to enforce his right to both remedies. The District has provided no legal authority to support its contention that the initiation of one action is barred simply because a subsequent action is contemplated. The "time for election" is not identified in the CBA nor defined in a manner that supports the District's position. The case law is unanimous that the election becomes operative once final judgment has been entered. *Stryken v. Panell*, 66 Wn.App. 566, 832 P.2d 890 (1992) (citing *McKown*, 54 Wn.2d at 55). No final judgment has been entered in this matter.

G. Cronin was unable to request a hearing on his own because of his incarceration.

Once Cronin received notice of termination on January 6, 2012, he had to request a hearing within ten days by "filing" a request for hearing with the Superintendent. RCW 28A.405.210 and .300. The District claims it did not know when Cronin would be released from jail. *Respondent's Brief* at 5. That is not accurate. The District knew Cronin was in jail when it sent the notice of termination to him. (CP 34, ¶14; CP 258, ¶5; 259, ¶2). They knew his release date was January 16, 2012. *Id.* The District contends that Cronin could request a hearing by mail. *Respondent's Brief* at 43. However, the statute does not allow a teacher to request a hearing by mail. A teacher's request for hearing must be "filed" with the Superintendent, which is not by mail. RCW 28A.405.210; 300.

Personal service has been the method to assure a request for hearing is "filed".

The District claims that Cronin was still within the ten days to appeal at the time he was released from Geiger. How does the District suggest Cronin timely appeal when his discharge from jail is on the tenth day? Even Judge O'Connor recognized the predicament faced by Cronin. (RP 4:3-15) His release from Geiger occurred on the tenth day of the appeal period. (CP 258, ¶6) Cronin had his friend Teresa Anderson contact his union representative to take such action as necessary to appeal the termination. This could not have been accomplished while he was incarcerated without the help of his union representative or someone to assure an appeal was timely filed.

The District cites to *Robel v. Highline Public Sch. Dist.*, 65 Wn.2d 477, 398 P.2d 1 (1965) for the proposition that it too made "several" attempts to provide the notice of probable cause to Cronin. It also claims this case rejects the argument that Cronin "needed an agent to select a hearing procedure because it would be inequitable to require him to do so while incarcerated." *Respondent's Brief* at 42.

First of all, the District did not make "several" attempts to notify Cronin. They simply sent the notice by certified and regular mail, of which certified mail is a form of service that complies with the statute.

(CP 91-92); RCW 28A.405.210; 300. The notice was received by Cronin when he was in jail and he acted as quickly as possible to preserve his job. (CP 34-35, ¶15 & 16) The District knew he was incarcerated when they sent him notice. (CP 34, ¶14; CP 259-261)

In *Robel*, the teacher was nonrenewed for performance deficiencies. The post office attempted delivery of the district's registered letter of nonrenewal three times and left a "mail arrival notice" each time which the teacher ignored. The court found that the notice of nonrenewal had been timely and properly given and knowingly or negligently ignored. The court did not reject the argument that an agent could act for and on behalf of a teacher. That argument was neither presented nor addressed by the court.

Unlike *Robel*, Mr. Cronin did not ignore the notice he received. He took immediate measures to assure his job was protected. He could not rely on the mail service in the jail to assure a timely response to the notice. (CP 257-258) The District received actual notice of Cronin's intent to appeal his termination so this argument is moot.

H. The District and taxpayers suffered no prejudice.

The District claims prejudice by Cronin's failure to elect a remedy. *Respondent's Brief* at 27-28; 44. That prejudice includes having to pay a teacher wages and benefits pending a statutory hearing, the need to hire

substitutes to teach Mr. Cronin's classes, the claim that students suffer because they are deprived of a regularly hired employee, and that public resources are wasted "by pursuing two costly procedures (a hearing and grievance procedure) at one time." *Respondent's Brief* at 28-29; 44-46.

The District argues that "selection of the statutory procedures within the ten-day deadline is based on fairness to the District." *Respondent's Brief* at 27. The prejudice that the District now claims is nothing more than what they are obligated to perform by law anytime they terminate a teacher. The District is obligated to pay a teacher pending a hearing.[6] *Foster v. Carson School Dist.*, 63 Wn.2d 29, 385 P.2d 367 (1963); *Benson v. Bellevue School District No. 405*, 41 Wn. App. 730, 707 P.2d 137 (1985); *Noe v. Edmonds School District No. 15*, 83 Wn.2d 97, 515 P.2d 977 (1973). A public employee's property interest in continued employment is protected by the due process clauses of the state and federal constitutions. *Olson v. University of Washington*, 89 Wn.2d 558, 573 P.2d 1308 (1978); *Sneed v. Barna*, 80 Wn. App. 843, 850, 912 P.2d. 1035 (1996).

The District is also obligated to hire a substitute teacher to teach. The District was the one that decided to place Cronin on administrative

[6] The District acknowledges that a teacher receives pay and benefits pending a decision by a statutory hearing officer: "An employee continues to receive pay if the employee selects the statutory procedure." *Respondent's Brief* at 28-29.

leave before school started in the Fall of 2011, so knew that replacement coverage was necessary from that point forward until they terminated him, and thereafter. (CP 32, ¶6) The District claims it was left with "uncertainty" in the employment plans of the teacher and the district for the ensuing term. *Respondent's Brief* at 27-28. The District terminated Cronin and didn't want him back. Whether he requested a statutory hearing or grievance, the District would not allow him to return. They wouldn't allow him to return when he had work release privileges. (CP 33, ¶11) They were not going to allow him to return after they had terminated him. There was no uncertainty in the District's decision to terminate and need to hire a replacement for Cronin for the ensuing school year. Whether or not students suffer is speculation and conjecture. There is no evidence in the record to support any effect on students.

There is no prejudice to the District by affording Mr. Cronin a hearing on his termination. Any claimed failure to elect a remedy is harmless and has caused no prejudice to the District. The District's claim that it needed prompt notice of his decision is illusory. Any impact on the tax paying public is irrelevant. The District has not spent one cent on either a statutory hearing or grievance. It has not been subjected to two costly procedures so no prejudice has occurred.

I. Equity and estoppel should prevent the District from taking

the position that Ms. McNair failed to properly request a hearing.

The District's acts and conduct are inconsistent. On one hand it agreed to deal exclusively with Sally McNair as Cronin's union representative under the CBA. On the other hand it claims it cannot deal with her because she cannot sign a request for hearing as such an act is outside the scope of her representation under the CBA. Then on one hand it acknowledges she can be his designee for purposes of selecting a hearing officer, since any person can perform that act. See RCW 28A.405.310(4). But on the other hand it continued to deal directly with her and not Cronin, sending her its February 28, 2012 letter declining to accept her request for hearing on behalf of Cronin. The District made no effort to contact Ms. McNair after she filed her January 11, 2012 request for hearing on behalf of Cronin. If, as the District claims, that such a collegial relationship existed between Mr. Rowell from the District and Ms. McNair representing Cronin ("As I have worked with Ms. McNair and the Washington Education Association (WEA) for several years, I chose to respond directly to Ms. McNair out of respect for my working relationship with her." CP 214, ¶5:15-18), then why did the District wait until well after the deadline had passed for Cronin to request a hearing or grievance? Rowell's claim that he even contacted McNair on February 22, 2012, is disputed. (CP 260, ¶4) If he had a conversation with her,

then why would it be necessary for the Superintendent to send his letter of February 28, 2012? (CP 95) There was no contact with McNair before the Superintendent's letter of February 28, 2012. Otherwise, she would have acted immediately. (CP 260, ¶4) As Ms. McNair stated, the letter from the Superintendent was the first communication from the District after the request for hearing was served on the Superintendent. *Id.*

These inconsistent acts and conduct should not be rewarded. The District's inaction constitutes a waiver. Waiver is the "intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." *Schroeder v. Excelsior Mgmt. Grp.*, LLC, 177 Wn.2d 94, 106, 297 P.3d 677, 683 (2013); *Albice v. Premier Mortgage Servs. of Washington, Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277, 1282 (2012) (waiver is an equitable principle that can apply to defeat someone's legal rights where the facts support an argument that the party relinquished their rights by delaying in asserting or failing to assert an otherwise available adequate remedy).[7]

J. The District representative, Jay Rowell, did not have any conversation with McNair after she requested a statutory hearing.

[7] The District claims that although there is no requirement in the law to provide Cronin information regarding the proper process to appeal, it did so in this case. *Respondent's Brief* at 2; 22. That is not accurate. When a teacher has a right of appeal to a discharge, the law requires that the notice of discharge from the District "shall contain notice of that right, notice that a description of the appeal process is available, and how the description of the appeal process may be obtained." RCW 28A.400.340.

The District claims that there were direct communications between the District representative Jay Rowell and Ms. McNair. *Respondent's Brief* at 8. There was no correspondence or communication with McNair by the District between the time she requested a statutory hearing and served the Superintendent on January 11, 2012, to the time she received the Superintendent's letter on February 28, 2012. (CP 259-261) Jay Rowell of the District had no conversations with Ms. McNair to clarify the District's intentions. *Id.*

Without any citation to the record, the District claims that "Ms. McNair communicated the District's position with Mr. Kuznetz." *Respondent's Brief* at 9. Ms. McNair had no conversations with the undersigned between the time my fax letter was sent to Mr. Clay (CP 101) and the time she received the Superintendent's response. (CP 95) She then forwarded it to me. (CP 259-260. ¶3&4) There was no reason for the undersigned to contact Mr. Clay after Ms. McNair received the Superintendent's letter on February 28, 2012. (CP 95) Mr. Clay had obviously advised his client on the position they wished to take and since I now understood that the termination of Cronin's pay and benefits was intentional and the District intended to claim that Cronin's request for hearing was not effective because it wasn't signed by him, a declaratory judgment action was filed to seek his back pay and benefits along with a

statutory hearing to determine the correctness of the District's actions.

K. The declaration of Paul Clay is inadmissible and should not be considered.

As argued in our opening brief, this declaration should not be considered and is argument and hearsay dressed up as expert testimony. Prior argument will not be repeated. Ms. McNair was Cronin's agent. WEA (Washington Education Association) Union as an organization was not Cronin's speaking agent. There is no foundation that Ms. McNair had even read the information identified by Mr. Clay that he asserts should bind her.

Mr. Clay's testimony is not factual and is an effort to inject his personal view and become a witness of these proceedings. His claim "for decades WEA has had teachers sign specific documents" is hearsay, without any foundation, self-serving, and an opinion that is not relevant. His declaration is not evidence that should be considered.

III. CONCLUSION

The important issue for this Court is whether Cronin should be able to have his day in front of a statutory hearing officer to determine the merits of his termination (non-renewal and discharge) issues. The superior court's ruling undermines the strong public policy favoring a determination on the merits. Judge O'Connor has injected a new

requirement for notice to the District of an election of remedies that neither the statute nor CBA require.

Mr. Cronin respectfully requests that this Court affirm the trial court's decision to partially grant his motion for summary judgment, and reverse the trial court's decision granting the District's motion for summary judgment. This matter should be remanded for a statutory hearing on the merits.

Dated this 12th day of August, 2015.

Respectfully submitted:

POWELL, KUZNETZ & PARKER, P.S.

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