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No. 64108-5

STATE OF WASHINGTON COURT OF APPEALS  
DIVISION ONE

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OAK HARBOR EDUCATION ASSOCIATION,

Appellant,

and

OAK HARBOR SCHOOL DISTRICT,

Respondent.

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On Appeal From Island County Superior Court  
Honorable Alan R. Hancock

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

The Oak Harbor Education Association (“Association” or “Union”) appeals the trial court’s grant of summary judgment to Oak Harbor School District (“District”) and dismissal of the Association’s complaint to compel arbitration of the grievance filed to challenge the discharge of teacher James Pruss. The Association argues (1) that the parties’ collective bargaining agreement (CBA) requires that any disputes regarding substantive arbitrability be submitted to the arbitrator for resolution; (2) that the affirmative defenses of election of remedies and waiver do not apply; and (3) the validity of any affirmative defenses is a question for the arbitrator, not the courts, under the parties’ CBA.

In response, the District advances the following arguments: (1) that under the statutory framework of RCW 28A.405.300, *et. seq.*, Mr. Pruss was “deemed” terminated once he withdrew his statutory appeal and therefore has no right to challenge the termination under the grievance procedures of the CBA; (2) that the application of its affirmative defenses does not require any interpretation of the CBA and that therefore, a court may rule on their validity; (3) that the doctrines of election of remedies and waiver bar the grievance; and (4) that the District would be unduly prejudiced if the arbitration were to proceed now, three years after Mr. Pruss was first issued the notice of probable cause for termination. As will be addressed in detail below, these arguments are without merit.

## II. ARGUMENT

### A. Statutory Framework of RCW 28A.405.300, *et seq.*, Does Not Provide Sole Method of Challenging Termination

Citing *Petroni v. Board of Directors of Deer Park School District No. 414*, 127 Wn. App. 722, 728, 113 P.3d 10 (2005), the District argues that the notice and appeal procedures set forth in RCW 28A.405.300 are “mandatory” on both the district and the teacher. However, nothing in the statutory framework supports the argument that a teacher’s sole method of challenging the discharge is the statutory appeal. Rather, the statute merely affords a teacher such an opportunity. RCW 28A.405.300 provides in relevant part:

In the event it is determined that there is probable cause or causes for a teacher...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. . . .

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).

The District argues that upon his withdrawal of his statutory appeal, Mr. Pruss was “deemed” discharged and that the withdrawal “ended any and all claims he could have pursued through the statutory framework.” Brief of Respondent, page 18. The Association does not dispute the fact that once

withdrawn; the statutory appeal could not be revived since the 10-day period in which to file a notice of appeal would have run. RCW 28A.405.300. But the District's argument that a teacher who fails to pursue a statutory appeal or who withdraws a statutory appeal is, as a matter of law, "deemed discharged" ignores the fact that RCW 28A.405.300 does not provide the sole method of challenging a discharge. Where, as here, there is another mechanism available to challenge the termination—such as a grievance filed under a collective bargaining agreement—then the failure to file notice of a statutory appeal or the withdrawal of a timely filed notice of appeal would not "end" the teacher's right to challenge the proposed termination except with respect to the statutory appeal under 28A.405.300, *et seq.*

As noted above, nothing in the statute itself supports the District's argument. Moreover, the case law cited by the District does not hold that the statutory review procedures are mandatory. The Court in *Petroni*, 127 Wn. App. 722, simply described the statutory hearing process and stated that it governs the discharge of certificated employees. The *Petroni* Court was not presented with the question of whether parties to a collective bargaining agreement, like the parties here, may bargain for additional or different methods to challenge a teacher's discharge.

Likewise, in *Giedra v. Mt. Adams School Dist. No. 209*, 126 Wn. App. 840, 110 P.3d 232 (2005), the Court simply held that the notice requirements of the statute must be followed for a District to discharge a

teacher. In no way did the Court rule that the statutory appeal provided the discharge teacher with his or her only remedy.

The District has also cited *Roberge v. Hoquiam School District No. 28*, 5 Wn. App. 564, 567, 490 P.2d 121 (1971) in support of its proposition that Mr. Pruss' withdrawal of his statutory appeal precludes any other challenge to his termination.<sup>1</sup> The holding, however, was based upon clearly distinguishable facts from those now before this court. In *Roberge*, a teacher voluntarily resigned as part of a settlement agreement after first indicating his intention to appeal his discharge. Several months later, the teacher filed an action in superior court, challenging his termination. The court characterized the *pro se* teacher's suit as one to determine whether the teacher's resignation was voluntary and "therefore an effective waiver of his statutory and contract rights." *Roberge*, 5 Wn. App. at 567. Answering this question in the affirmative, the court dismissed his complaint, and the Court of Appeals affirmed on review. *Id.*

The District argues that Mr. Pruss' voluntary withdrawal of his statutory appeal is akin to Mr. Roberge's voluntary resignation of his teaching position, and that both operate to preclude further challenge to the District's action. Obviously, a voluntary resignation in the context of a settlement agreement would operate to terminate any pending litigation over the

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<sup>1</sup> The District's reliance upon the *Roberge* decision is newly submitted; it was neither presented to the superior court in briefing nor at oral argument.

proposed termination. But there is nothing in the record before this Court to permit the conclusion that a voluntary withdrawal of a statutory challenge—with the intent to pursue instead a viable, pending contractual grievance—would have the same effect. The District’s reliance upon *Roberge* and remaining cited case law fails to articulate any basis in law, equity or otherwise to support its argument that Mr. Pruss voluntary withdrawal of his appeal to pursue contract arbitration challenging his termination should be equated with a voluntary resignation in connection with a settlement agreement.

**B. The CBA Provides that Arbitrability Disputes are the Province of the Arbitrator, so Any Affirmative Defenses Should be Submitted to the Arbitrator, not Decided by the Court.**

Questions of substantive arbitrability – whether the merits of a given dispute are appropriate for arbitration – are generally decided by the courts unless the parties’ negotiated agreement “clearly and unmistakably” grants such authority to the arbitrator. *Mt. Adams School District v. Cook*, 150 Wn.2d 716, 724 (2003). The CBA here expressly states that the arbitrator will decide “any question of arbitrability”. CP 109. As such, any dispute regarding arbitrability, whether of a procedural or substantive character, must be submitted to the arbitrator to decide.

The District argues that its affirmative defenses of waiver and election of remedies were properly decided by the trial court rather than an arbitrator

as required by the CBA because the doctrines are based on independent principles of law and do not require application or interpretation of the CBA. However, our courts have held that these types of common law defenses should be submitted to the arbitrator for resolution.

As already argued, the court in *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn. App. 281, 135 P.3d 558 (2006), expressly stated, “The arbitrator should decide ‘allegations of waiver, delay, or a like defense to arbitrability.’” *Yakima County*, 133 Wn. App. at 287-88, quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983).

The District nonetheless argues that such defenses should be decided by the arbitrator *only* where the defenses require interpretation of the contract itself as happened to be the case in both *Mt. Adams School District* and *Yakima County* relied upon by the trial court. But this position construes the rule too narrowly. In *Moses Memorial Hospital*, cited above and on which the *Yakima County* court relied, the U.S. Supreme Court explained that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, *whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability*”. *Moses Memorial Hospital*, 460 U.S. at 24-25 (italics and bold emphasis added). By this plain language, it is clear that even when defenses such as waiver or delay do not involve “the construction of the contract

language itself,” they are to be decided by the arbitrator. And the issue improperly decided by the superior court below is precisely the issue to be presented to an arbitrator in this grievance: Did James Pruss’ withdrawal of his statutory appeal preclude his prosecution of his grievance under the parties’ collective bargaining agreement? Answering that question requires an interpretation of the collective bargaining agreement.

It is well recognized in the federal courts that arbitrators have broad authority to decide questions of law in resolving disputes arising under parties’ negotiated agreements. In one of the *Steelworkers Trilogy* cases, the U.S. Supreme Court expressly stated that an arbitrator does not exceed his authority in rendering a legal ruling, as the arbitrator’s construction of an agreement may be based upon “many sources” including “the law...in determining the sense of the agreement.” *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-98, 80 S. Ct. 1358 (1960); accord, *Van Waters & Rogers v. International Brotherhood of Teamsters*, 56 F.3d 1132 (9<sup>th</sup> Cir. 1995) (arbitrator’s interpretation of a collective bargaining agreement shall be sustained even if reliance upon principles of external law is the basis of the award). In *Employers Ins. Co. of Wausau v. Certain Underwriters at Lloyds of London*, Slip Copy, 2009 WL 3245562 at page 4 (W.D.Wis. 2009), the court held that all procedural defenses to arbitration must be submitted to the arbitrator, even though the defenses at issue—statute of limitations, equitable estoppel and laches—were based on independent

principles of law, not on the parties' contract. *See also International Union of Painters v. Diversified Flooring Spec.*, 2007 WL 923936 (D.Nev. 2007) (where the district court, in compelling arbitration of a labor dispute, cited numerous authorities for the holding that "procedural defenses which must be resolved by the arbitrator include. . .collateral estoppel, laches, and equitable estoppel and the defense of repudiation)." *Slip Op.* at 4 (citations omitted); and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S. Ct. 588, 154 L.Ed.2d 491 (2002) (where the U.S. Supreme Court held that a defense to arbitration based on the rules of the National Association of Securities Dealers, not the parties' contract, was a question for the arbitrator, not the courts, to decide).

The defenses addressed in these cases are akin to or the same as those which the District here submitted to the superior court for consideration. It is clear from these authorities that any and all defenses, regardless of whether they are internal to or external from the collective bargaining agreement, are matters properly submitted to the arbitrator in the first instance. The absence of case law from the District in rebuttal to this proposition stands as stark testimony in support of such a legal conclusion. And the mere fact that the authorities on which the District relies (*Mt. Adams School District* and *Yakima County*) involved defenses based solely on the contract does not support a broader rule that *only* defenses based on the contract are to be submitted to the arbitrator. Caselaw is clearly to the contrary.

**C. The Doctrine of Election of Remedies does not Bar the Grievance.**

The doctrine of election of remedies is “a rule of narrow scope,” and its “sole purpose” is to prevent a plaintiff from recovering twice for the same wrong. *Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). It may apply to bar a subsequent or parallel action on the same set of facts (see, e.g., *State ex rel. Barb Restaurants, Inc. v. Wash. State Bd. Against Discrimination*, 73 Wn.2d 870, 878-79, 441 P.2d 526 (1968)), or to prohibit a litigant from taking inconsistent positions in the same action, such as by alleging mutually inconsistent causes of action in the same complaint (see, e.g., *McKown v. Driver*, 54 Wn.2d 46, 337 P.2d 1068 (1959)). But in either situation, the following elements must be established before the doctrine will apply: “(1) the existence of two or more remedies at the time of the election; (2) inconsistency between such remedies; and (3) a choice of one of them.... The prosecution to final judgment of any one of the remedies constitutes a bar to the others.” *Stryken v. Panell*, 66 Wn. App. 566, 832 P.2d 890 (1992) citing *McKown*, 54 Wn.2d at 55. None of these elements were met in this case; therefore, reliance and application of the doctrine was in error.

1. Final Judgment is a Necessary Element

Here, the trial court held that Mr. Pruss’ initial pursuit of the statutory appeal was an election barring a subsequent challenge of the termination through the contract grievance procedures. This conclusion is supported neither by the law nor the terms of the applicable collective bargaining

agreement. Nor can this doctrine be invoked to bar Mr. Pruss contract grievance because he did not pursue the statutory hearing to a final ruling.

Contrary to the District's argument and the trial court's ruling, a final judgment is a required element for the doctrine of election of remedies to become operative. *See, e.g., Stryken*, 66 Wn. App. at 571 (including "prosecution to final judgment" as an element of the doctrine); *McKown v. Driver*, 54 Wn.2d 46, 55, 337 P.2d 1068 (1959) (holding that the "prosecution to final judgment of any one of the remedies constitutes a bar to the others"); *see also*, 18 Washington Practice §21.29 ("a party must have actually obtained one remedy before he is barred from having other inconsistent remedies"). And here, withdrawal is not equivalent to a "final judgment" regardless of its finality as to that specific method of achieving a remedy.

Federal law is in accord with the state authorities cited above. In fact, the Ninth Circuit has expressly held that "the doctrine of election of remedies applies only after a judgment on one of the causes of action is entered." *Haphey v. Linn County*, 924 F.2d 1512 (9<sup>th</sup> Cir. 1986), *citing Taylor v. Burlington N.R.R.*, 787 F.2d 1309, 1317 (9<sup>th</sup> Cir.1986). In *Taylor v. Burlington*, a case from Washington State, Taylor was a railroad worker terminated by the Burlington Northern Railroad. Initially, Taylor's union challenged his discharge by filing a suit under the federal Railway Labor Act ("RLA"). The union argued that Mr. Taylor was fit to work and had been wrongfully discharged. In conjunction with the union's lawsuit, Taylor

independently filed suit in federal district court, alleging the abuse he suffered at work had caused a mental breakdown rendering him incapable of performing his job duties.

Thereafter, upon his union's voluntarily withdrawal of the RLA suit, Burlington Northern argued that Taylor was precluded under the election of remedies doctrine from seeking different relief than he had sought in the RLA suit. The district court rejected this argument, and the Ninth Circuit affirmed, explaining: "A plaintiff may prosecute actions on the same set of facts against the same defendant in different courts, even though the remedies the plaintiff seeks may be inconsistent. But as soon as one of those actions reaches judgment, the other cases must be dismissed." *Taylor*, 787 F.2d at 1317 (internal citations omitted). The Ninth Circuit further concluded that the withdrawal of RLA suit did not trigger applicability of the election of remedies defense as "[N]o judgment was rendered in that case." *Id.*

The authority cited by the District itself supports the conclusion that without a final judgment, a subsequent action will not be barred by the election of remedies doctrine. For example, in *State ex rel. Barb Restaurants, Inc. v. Wash. State Bd. Against Discrimination*, 73 Wn.2d 870, 878-79, 441 P.2d 526 (1968), plaintiffs were waitresses who were fired and replaced by employees of a different race. Through their union, the waitresses challenged their termination by filing a "just cause" grievance based upon their collective bargaining agreement. Additionally, the discharged employees filed a

complaint with the Washington State Board Against Discrimination (“Board”), alleging racial discrimination.

While the complaint was being investigated by the Board, the contract grievance proceeded to arbitration, where the grievants sought reinstatement and back pay. At the conclusion of the arbitration – where testimony, documentary evidence and post-arbitration briefing was presented – the arbitrator awarded one day of back pay to the waitresses for improper notice of termination, but denied the request to reinstate them to their former positions.

The Board, however, determined there was sufficient evidence of discrimination. When the Board proceeded to set the matter for public hearing, the restaurant filed an action in superior court and secured a writ of prohibition. On review, the Court held that the waitresses had a choice to challenge their termination through the statute prohibiting racial discrimination or through the collective bargaining agreement. The Court noted that the union, on the waitresses’ behalf “proceeded, step by step, through the procedure prescribed by the collective bargaining agreement in seeking positive relief for the waitresses; namely, their reinstatement with compensation and employment benefits. In addition, the union attorney proceeded with the grievances “through the arbitration processes of that agreement.” *Barb Restaurants*, 73 Wn.2d at 875. Having pursued the grievance to a final arbitrator’s award, thereby obtaining “an impartial review

of their grievances,” the waitresses were not permitted a “second try” under the anti-discrimination statute. Thus, the application of the doctrine in *Barb Restaurants* makes clear that the doctrine of election of remedies will bar a parallel or subsequent proceeding only if there is a final judgment in one of the proceedings.<sup>2</sup>

Authority cited and relied upon by the Court in *Barb Restaurants* court also supports this conclusion. For example, in *Pacific Mutual Life Insurance Co. of California v. Rhame*, 32 F. Supp. 59, 63 (D.C.S.C. 1940) (quoting 20 C.J. 41), the court stated: “The prosecution by plaintiff of an action at law *to judgment*, or a suit in equity *to decree*, with knowledge of this rights and of the facts, is held to be a conclusive election of the tribunal in which the action or suit is prosecuted which will bar subsequent proceedings for the same cause in the other tribunal” (emphasis added).

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<sup>2</sup> The legal vitality of *Barb Restaurants* election of remedies analysis and holding is questionable in light of the rulings of *Reese v. Sears, Roebuck & Co.*, 107 Wn.2d 563, 731 P.2d 497 (1987), wherein the Supreme Court held that the election of remedies doctrine did not preclude double recovery for plaintiffs who prevailed on both workers compensation and handicap discrimination claims.

The *Reese* court carefully points out that the *Barb Restaurants* “election of remedies” ruling was based upon specific language originating within the applicable discrimination statute itself, language which was later removed. 107 Wn. 2d at 575. However, the remainder of the *Reese* court’s analysis suggests that where a statute does not contain such an express direction, the doctrine is without effect. And *Barb Restaurants*, which was not presented to the lower court in this case, has not been cited as authority for the election of remedies holding in any other appellate ruling except *Reese* where it was merely discussed.

The “election of remedies” holding of *Reese*, however, was discussed by the Supreme Court in its later ruling in *Civil Svc. Comm.v City of Kelso*, 137 Wn.2d 166 (1999), which is relied upon by appellant in its initial Brief.

The District also cites to *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 112 (1997) and *McKown v. Driver*, 54 Wn.2d 46, 337 P.2d 1068 (1959) for the rule that no final judgment is required. However, a careful reading of *Birchler* shows that this question was not directly addressed; rather, the issue there was whether a plaintiff was barred by the election of remedies doctrine from recovering common law emotional damages in a statutory suit for timber trespass. The portion of the case cited by the District (Brief of Appellant, page 25) is simply the recitation of the second element of the doctrine that “two or more remedies exist at the time of the election” and nothing more. This is not a citation to pertinent authority for a holding that would guide the Court in the present appeal.

And, as noted above, *McKown v. Driver* expressly contradicts the District’s argument. The Court made clear that it is the “prosecution to final judgment” of one remedy that constitutes a bar to other remedies. *McKown*, 54 Wn.2d at 55. Moreover, the *McKown* case is factually distinct from the instant matter. There, the McKowns were estopped under the doctrine of election of remedies from suing a subsequent purchaser of property after the judgment secured against the sellers proved to be unenforceable. The Supreme Court explained that bringing the first action against the sellers “to final judgment constituted an election of remedies which bars any subsequent action...”. *McKown*, 54 Wn.2d at 55.

In short, the facts of *McKown* are completely dissociated from those of this case, and the holding actually contradicts the District's position in that it was the prosecution to final judgment that required application of an election of remedies. Mr. Pruss did not make an election of remedies in the same manner as the plaintiffs in *McKown*. While he initially pursued his statutory appeal, the Association pursued his grievance. There was no final ruling, no outcome, no judgment on the merits, and no holding to bar the arbitration of the grievance following withdrawal of the statutory appeal.

The District proposes the unique and unsupportable proposition that Mr. Pruss' election occurred at the time he filed his notice of appeal under RCW 28A.405.300. It claims that at that point in time, Mr. Pruss was "forever bound by that choice". Brief of Respondent at 22. There is simply no legal authority to support the contention that the initiation of a parallel or subsequent action bars the prosecution of another action without a final judgment. The elements of the election doctrine require that there be two or more inconsistent remedies available at the time of election, but the "time of election" is not defined in a manner that supports the District's position. The case law is unanimous, including that cited by the District, that the election becomes operative once the final judgment is entered.

The District then argues that requiring a final judgment would make the doctrine of election of remedies indistinguishable from *res judicata*. The fact is, these two doctrines are closely related. See, e.g., *Ladd v. General*

*Insurance Company*, 236 Or. 260, 265, 387 P.2d 572 (1963), citing *Grant v. Yok*, 233 Or. 491, 378 P.2d 962 (1963) (recognizing that “the doctrine of res judicata is similar to that of election of remedies” and that “[c]ourts freely invoke res judicata to prevent double recovery where the claimant has already collected once”). See also, P.V. Smith, Annotation, *Doctrine of Election of Remedies as Applicable Where Remedies Are Pursued Against Different Persons*, 116 A.L.R. 601, 601-02 (1938) (“The doctrine of election of remedies is closely related to, and sometimes not distinguished from, other principles of law and equity, such as ... res judicata”). Indeed, *Dobbs on Remedies* explains that when the doctrine of election of remedies is invoked to bar a parallel action, its application is more appropriately characterized as an application of res judicata:

Remedies are traditionally found to be “inconsistent” when one of the remedies results from “affirming” a transaction and the other results from “disaffirming” a transaction. Most typically the plaintiff has elected, or is forced to elect, between rescission and damages remedies, but the election rule may apply to any pair of affirming and disaffirming remedies, such as replevin and damages. The election of remedies terminology is also sometimes invoked in very different cases that appear in reality to be based on res judicata or satisfaction of the plaintiff’s claim rather than on election as such.

Dan B. Dobbs, *Law of Remedies*, § 9.4. See also, Wright & Miller, 18B Fed. Prac. & Proc. Juris. § 4476 (2d ed.) (acknowledging that judicial decisions have “clearly blended election theories with res judicata theories of claim preclusion in an effort to prevent unnecessarily repetitive actions”).

The bottom line is that whether the argument is characterized as res judicata or election of remedies, Mr. Pruss contract grievance is not barred by his independent filing of his statutory appeal under RCW 28A.405.300. He has not, and cannot, recover twice from the District for the same wrong should he prevail at arbitration. And avoiding that result is the “sole purpose” for the doctrine of election of remedies. *Lange*, 79 Wn.2d at 49.

2. “Repugnant and Inconsistent” Remedies

The District cited and discussed at length *Lange v. Town of Woodway*, 79 Wn.2d 45, 483 P.2d 116 (1971), to support its contention that the statutory and arbitration processes are “repugnant and inconsistent”, but *Lange* has no application here.<sup>3</sup> In *Lange*, the Court was presented with the issue of whether a plaintiff who had applied for a variance from a zoning ordinance would be precluded under the doctrine of election of remedies from challenging the ordinance’s constitutionality. Answering the question in the negative, the Court explained that the positions were not inconsistent but “distinct and cumulative.” *Lange*, 79 Wn.2d at 50. This holding, though, has no application to the facts of the instant case, where the question is whether instituting a statutory appeal precludes Mr. Pruss or the Association from challenging the termination in a different tribunal after the withdrawal of the statutory appeal.

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<sup>3</sup> The *Lange* decision was not cited to the superior court, and its holdings are not only factually distinct but precede the enactment of the Educational Employment Relations Act, RCW 41.59 *et seq.*, which adopted the “arbitration is encouraged as a dispute resolution procedure” provision appearing at RCW 41.59.130, which notably does not create exclusive remedy status for such a procedure.

Moreover, there is nothing inherently repugnant and inconsistent about having more than one avenue to seek redress. As discussed above, the Ninth Circuit in *Taylor* expressly held that a party may maintain more than one action on the same set of facts against a single defendant; what the plaintiff may not do is prosecute an action after one action has been pursued to judgment. *Taylor*, 787 F.2d at 1317.

And as Appellant has already argued, the Supreme Court's ruling in *Civil Service Commission v. City of Kelso*, 137 Wn.2d 166, 969 P.2d 474 (1999), makes it clear that parallel actions may be maintained on the same underlying facts. While the factual background of the *City of Kelso* decision differs slightly from that of the present appeal, it is undisputed that the Court held that two separate actions challenging Officer Stair's disciplinary suspension could be pursued, and the favorable ruling enforced, even though the separate results were inconsistent. Though the Court did not address the election of remedies doctrine, the holding can be interpreted to support the simultaneous prosecution of parallel actions over the same set of facts without being *per se* "repugnant and inconsistent" to the law, as the District argues.

In short, without a ruling from a hearing officer selected to preside over Mr. Pruss' statutory appeal, the elements of election of remedies were not met. The trial court erred in dismissing the Association's claim on the basis that Mr. Pruss' initial pursuit of the statutory hearing constituted an election of remedies barring arbitration of the contract grievance.

**D. There was No Waiver of the Right to Arbitrate the Grievance.**

A party to an arbitration clause may waive that right. *Finney v. Farmers Ins. Co. of Wash.*, 21 Wn. App. 601, 620 586 P.2d 519 (1978). But waiver requires the “voluntary and intentional relinquishment of a known right.” *Lake Wash. School Dist. 414 v. Mobile Modules N.W., Inc.*, 28 Wn. App. 59, 61, 621 P.2d 791 (1980). Waiver will not be found “absent conduct inconsistent with any other intention but to forego that right.” *Shoreline Sch. Dist. No. 412 v. Shoreline Ass’n of Educ. Office Employees*, 29 Wn. App. 956, 958, 631 P.2d 996 (1981). Where there is an express demand to arbitrate, there generally is not waiver. *Id.* And where a waiver of a statutory right is alleged to exist by virtue of collectively bargained language, that waiver must be “clear and unmistakable.” *Pasco Police Officers Assn v. City of Pasco*, 132 Wn.2d 450, 462, 938 P.2d 827 (1997).

The superior court relied primarily upon *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008), and *Otis Housing Assn v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009), in finding that Mr. Pruss and/or the Association had impliedly waived the right to proceed to arbitration. But because both cases can be distinguished from the facts of this case, the court erred in relying on them to conclude that arbitration had been waived.

In *Ives v. Ramsden*, the defendant fully participated in litigation for three and a half years before ever raising as an affirmative defense the argument that the matter should have been submitted to arbitration under a

contract between the parties. By contrast, here the Association timely pursued the grievance procedures under the collective bargaining agreement while at the same time, Mr. Pruss had filed his notice of statutory appeal. Moreover, unlike the facts in *Ives v. Ramsden*, the District was fully informed of the timely effort to invoke arbitration.

Without any cite to authority, the District argues that these factual differences are “not determinative.” The District contends essentially that three and a half years of litigation is the equivalent of the several months that Mr. Pruss spent pursuing his statutory appeal because of the expedited nature of the appeals under RCW 28A.405.300 *et seq.* But despite the District’s characterization to the contrary, the statutory appeal here cannot be compared to three and a half years of litigation. The record before the Court indicates that the parties selected a hearing officer and set a date for hearing within a week’s time (CP 147-49). The “extensive discovery” in which Mr. Pruss purportedly engaged involved a request for copies of the investigative materials compiled by the District or in the District’s possession, as well as copies of correspondence or other documents relating to Mr. Pruss, and copies of school district policies or procedures (CP 150-51). And then, on July 6, 2007, less than one month from the date Mr. Pruss filed his statutory appeal, the District filed a motion for summary judgment with the hearing officer (CP 152-172).

On this limited record—and while the Association was continuing to pursue the contract grievance—the District argues that Mr. Pruss conduct is identical to Mr. Ramsden’s and asks this Court to hold that his conduct is “inconsistent with any other intention but to forgo the right to arbitrate.” But such a conclusion cannot be reached here. The grievance procedures of the contract were independently initiated by the Association on behalf of Mr. Pruss; the Association made a timely demand to submit the matter to arbitration. While Mr. Pruss pursued his statutory appeal, the Association separately requested that the District proceed with the contract grievance. Moreover, the fact that the parties engaged in some discovery in the statutory appeal process does not itself indicate an intention to forgo arbitration. *See, Lake Wash. School Dist.*, 28 Wn. App. at 64 (holding that seeking discovery in litigation “is not inconsistent” with the right to compel arbitration since some discovery is available in arbitration).

Nor does *Otis Housing Ass’n Inc. v. Ha* support the conclusion that the right to arbitrate has been waived. Otis Housing Association (OHA) defended against an unlawful detainer action brought by Mr. and Mrs. Ha, putting at issue the question of whether a purchase option had been exercised. The trial court ruled on that question, found in the Has’ favor, and issued the writ of restitution. The OHA failed to invoke the arbitration clause of the option agreement in the unlawful detainer action. Several days after judgment, OHA demanded that the Has arbitrate the dispute and when they

refused, OHA filed a suit to compel arbitration. On review, the Supreme Court held that OHA's failure to invoke the arbitration clause constituted a "clear and unmistakable waiver" of the right to arbitration.

The present matter is patently distinguishable from the *OHA* case. OHA failed to invoke the arbitration clause until after its substantive rights had been finally litigated by the superior court. The Supreme Court held that OHA was not permitted to "relitigate" the decided issues before an arbitrator. Here, the statutory hearing did not proceed to conclusion, so submitting the dispute to arbitration for resolution could not constitute "relitigating" the matter.

The District argues that like OHA, the Association and/or Mr. Pruss "elected to litigate instead of arbitrate" and that as such, the right to arbitrate has been waived. This is an inaccurate portrayal of the proceedings in this appeal. As noted above, the difference is that OHA litigated the disputed issue to a final ruling by the court. It was only after receiving the unfavorable ruling did OHA seek to arbitrate. By contrast, here, the Association timely pursued and never withdrew or abandoned the contract grievance from the outset of its filing, and does not now seek grievance arbitration after an adverse ruling had been issued by the hearing officer under the statutory appeal process. The distinctions are plain from mere recitation.

As acknowledged by the Court in *Shoreline School District*, a labor organization waives its right to demand contractual arbitration where it pursues litigation and “ignores” arbitration. *Shoreline*, 29 Wn. App. at 958. But arbitration was not ignored here. Mr. Pruss pursued his independent statutory appeal; the Association simultaneously pursued a grievance on his behalf. At no time did the Association relinquish pursuit of the grievance or otherwise abandon its pursuit. There is nothing in the record to support such a finding, and the superior court failed to cite a single shred of evidence to support that conclusion.

**E. There is no Prejudice to the District.**

The District argues that it would be unduly prejudiced if this matter were to be submitted to an arbitrator now, three years after Mr. Pruss was notified of the District’s intent to terminate his employment. The District contends that it would not be able to locate witnesses and that the memories of witnesses will have faded.

But whenever a case is appealed and remanded, whether to a trial court or, in this case, to the arbitrator, a significant amount of time will have passed since the events giving rise to the action. The fact of the matter is that litigation takes time. Here, Mr. Pruss initiated the statutory hearing process on June 1, 2007. CP 251. The statutory challenge was withdrawn on August 3, 2007. CP 238. The District then refused to arbitrate the pending grievance, prompting the Association to file the instant action in September 2007. The

cross-motions for summary judgment in the superior court were heard in July 2009. CP 11. This timely appeal followed. The mere fact that it has taken three years for this case to make its way through the judicial system is not a sufficient reason to preclude this Court from correcting the errors below so that Mr. Pruss' grievance may be heard by an arbitrator. Moreover, it was the District's own action in refusing to arbitrate the grievance that necessitated this action and caused the attendant delay. The District should not now be permitted to argue that it will be prejudiced by the very delay it caused.

The other basis for prejudice claimed by the District is the time and resources it expended between June 1, 2007 when it began preparing for the statutory hearing, and August 3, 2007 when Mr. Pruss withdrew his statutory challenge. This specious argument should be rejected, because the efforts expended by the District in preparation for the statutory hearing would likely be the same or similar as the preparation required for arbitration. It has suffered no loss if the grievance proceeds to arbitration on the merits.

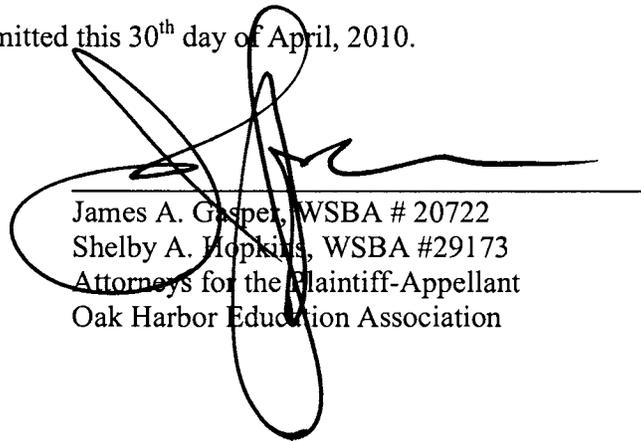
### **III. CONCLUSION**

The important issue for this Court is whether the courts should decide employer defenses to grievances or whether arbitrators should retain the authority and jurisdiction granted to them by the parties to a collective bargaining agreement. The superior court's ruling undermines the public policy favoring arbitration as a negotiated dispute resolution procedure. The arguments of the District can appropriately be submitted to an arbitrator for

consideration and resolution. The lower court's ruling upon and disposition of the defenses raised by the District are not only incorrect, but the lower court has usurped the parties' expectation that the arbitrator will decide such issues.

The Association requests that this honorable Court reverse the lower court and direct the parties to submit their dispute of arbitrability to a duly-selected arbitrator for final and binding disposition in conformity with the contractual language.

Respectfully submitted this 30<sup>th</sup> day of April, 2010.

A large, stylized handwritten signature in black ink, appearing to be 'James A. Gaspert', is written over a horizontal line. The signature is highly cursive and loops around the text below it.

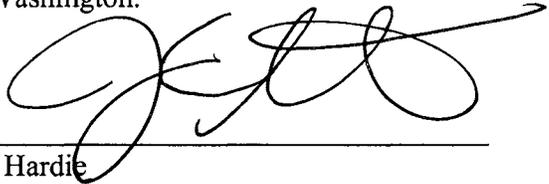
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Attorneys for the Plaintiff-Appellant  
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the attached Reply Brief of Appellant upon the person named below by ABC Legal Messenger:

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