

74931-5

74931-5

NO. 74931-5-I

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

JONATHAN GREENBERG,

APPELLANT

v.

SEATTLE SCHOOL DISTRICT,

RESPONDENT

APPEAL FROM KING COUNTY SUPERIOR COURT

**REPLY BRIEF OF APPELLANT JONATHAN
GREENBERG**

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SUPERIOR COURT
KING COUNTY
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I. INTRODUCTION

The purpose of court rules is “to secure the just, speedy, and inexpensive determination of every action.” CR 1. To ensure that both parties can fairly adjudicate their case, court rules should be followed as written. Here, the superior court dismissed Mr. Greenberg’s claims without adhering to court rules, including CR 41 and LCR 98.40. This error was not harmless by any means. This Court should correct that error, and remand this case to be adjudicated on its merits.

II. ARGUMENT

A. There are no jurisdictional flaws in Appellant’s claims that would justify dismissal.

The District asserts that, regardless of the limitations of CR 41, the superior court had the authority to dismiss Mr. Greenberg’s claims under CR 12(h)(3) for lack of subject matter jurisdiction. The District then throws around the word “jurisdiction” to every defense it can plausibly assert. This Court has cautioned against such indiscriminate use of the word to make all problems sound jurisdictional.¹

¹ “[I]mprovident and inconsistent use of the term ‘subject matter jurisdiction’ has caused it to be confused with a court’s authority to rule in a particular manner.” *Shoop v. Kittitas Cnty.*, 108 Wn. App. 388, 394, 30 P.3d 529 (2001), *aff’d on other grounds*, 149 Wn.2d 29, 65 P.3d 1194 (2003) (citing *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994)).

Every court has two types of jurisdiction: personal jurisdiction and subject matter jurisdiction. Subject matter jurisdiction is defined as “a tribunal's authority to adjudicate the *type of controversy* involved in the action.” *Shoop v. Kittitas Cnty.*, 108 Wn. App. 388, 393, 30 P.3d 529 (2001), *aff'd on other grounds*, 149 Wn.2d 29, 65 P.3d 1194 (2003) (emphasis added). A court’s subject matter jurisdiction is prescribed by the constitution and cannot be limited by statute. *Id.* at 396.

The Constitution states that superior courts shall have subject matter jurisdiction “in all cases in equity,” “for such special cases and proceedings as are not otherwise provided for,” “all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court,” and jurisdiction to “issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus.” Const. Art. IV § 6. There is no dispute that superior courts have the authority to hear declaratory judgment actions and can issue writs. Anything that delves into the particulars of this case (mootness, adequate legal relief, etc.) is simply not a jurisdictional issue. *Cf. Bowen v. Dep't of Soc. Sec.*, 14 Wn.2d 148, 153, 127 P.2d 682 (1942) (refusal to take moot case “does not rest upon a want of jurisdiction”).

The only argument the District presents that actually is related to jurisdiction is its claim of federal preemption.² Washington law does not favor findings of federal preemption. *Dep't of Labor & Indus. of State of Wash. v. Common Carriers, Inc.*, 111 Wn.2d 586, 588, 762 P.2d 348 (1988). Instead, “there is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption.” *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054 (1993). With respect to the Labor Management Relations Act (LMRA), the Washington Supreme Court has held that section 301 of the Act does not “preempt nonnegotiable or independent negotiable claims.” *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn. 2d 120, 131, 839 P.2d 314 (1992). Accordingly, “mere similarity between a state law and the terms of a collective bargaining agreement will not preempt the state law.” *Miller v. AT & T Network Sys.*, 850 F.2d 543, 546-47 (9th Cir. 1988).

Adverse employment actions must be adjudicated pursuant to the procedures set forth in RCW 28A.405.310. This is a right granted by state statute, not by the CBA. Thus, determining which forms of discipline may be subject to grievance procedures, and accordingly what may be

² A claim of preemption is a claim that jurisdiction rests exclusively in some other court. In this case, the District contends that jurisdiction rests exclusively in federal court.

contemplated by the arbitrator, depends not upon interpretation of the CBA, but upon RCW 28A.405.300 and relevant case law.

Furthermore, as Division II of the Court of Appeals has held, a certificated teacher's rights under the provisions of RCW 28A.405 cannot be waived by a CBA. *Kelso Educ. Ass'n v. Kelso Sch. Dist. No. 453*, 48 Wn. App. 743, 749, 740 P.2d 889 (1987). As noted by the court in *Commodore*, such nonnegotiable rights are necessarily independent of the collective bargaining agreement and cannot be preempted by the LMRA. 120 Wn.2d at 131 (citing Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 210-11 n. 13 (1989)).

The authority of the arbitrator in this case is limited by Mr. Greenberg's nonnegotiable statutory due process rights under RCW 28A.405.310. That this limitation is written into the CBA does not suddenly make Mr. Greenberg's claim dependent on the CBA. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 410, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988) (inclusion of "just cause" provision in collective bargaining agreement did not preclude claim for wrongful termination for firing worker's compensation claim). The superior court does not need to interpret the CBA in order to determine that the arbitrator did not have the authority to impose a ten-day suspension. Appellant's claim is not

preempted by the LMRA and, therefore, the superior court had subject matter jurisdiction to hear the matter.

B. The superior court did not follow the strictures of CR 41 in dismissing the case.

Defendant additionally asserts that the superior court's dismissal of this action was not *sua sponte*, because it asked for the claims to be dismissed in its response to a motion made by Mr. Greenberg. Defendant's argument again ignores important court rules. For a claim to be dismissed on its merits, the defendant must file a motion affirmatively requesting that relief. CR 12; CR 41(b)(3). Defendant's one sentence within its framing of the issue is not a motion in any sense of the word.

Furthermore, a superior court that dismisses a claim on its merits must make findings of fact and conclusions of law supporting its decision. CR 41(b)(3) ("If the court renders judgment on the merits against the plaintiff, the court **shall** make findings as provided in rule 52(a).") (emphasis added)). The court here made no such findings or conclusions. The dismissal therefore cannot be considered one on the merits, as the prerequisites for such a dismissal were notably missing.

C. Dismissal on the merits was not warranted.

This Court need not address the merits of Appellants' claims, as it can resolve this appeal on its procedural irregularities alone. Nonetheless,

because Respondent asserts that any procedural errors are harmless, discussion of the merits of Mr. Greenberg's claims is necessary. Respondent's contentions are addressed as follows.

1. Mr. Greenberg did not consent to permitting the arbitrator to exceed his authority.

The District contends that Mr. Greenberg had an adequate remedy at law through the grievance proceeding, as evidenced by Mr. Greenberg's consent to the arbitrator's framing of the issue. This argument does not comport with the facts. Mr. Greenberg initiated the grievance proceedings in this matter in order to dispute the imposition of a letter of reprimand and involuntary transfer to another school. He did so under the terms of the CBA, and expected that all such terms would be followed. Until the arbitrator imposed a ten-day suspension, those terms *were* followed. Mr. Greenberg had no way of knowing that the arbitrator would impose, let alone consider, an adverse employment action when none had been previously contemplated. In fact, suspension was not even discussed during the arbitration itself.

Mr. Greenberg has a due process right to have all adverse employment actions³ adjudicated by a hearing examiner, with a right of

³ Respondent claims that chapter 28A.405 RCW makes no distinction between adverse employment actions and other actions. This argument is utter nonsense. The statute itself refers to "adverse action against her or her contract status." RCW 28A.405.300. There are volumes of case law discussing which forms of discipline are subject to the statute's due

appeal to the courts. RCW 28A.405.310; *Giedra v. Mount Adams Sch. Dist. No. 209*, 126 Wn. App. 840, 846, 110 P.3d 232 (2005); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Courts will not find a waiver of due process rights unless the waiver is clearly articulated. *Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972); *Rogoski v. Hammond*, 9 Wn. App. 500, 506, 513 P.2d 285 (1973).

No clear waiver of rights was articulated here. The CBA certainly did not waive Mr. Greenberg's right to a hearing on adverse employment actions; to the contrary, the CBA expressly preserves that right. CP 49. ("This section shall not apply to matters covered by statutory due process procedures."). Nor is there any evidence indicating that Mr. Greenberg waived his rights at any time during the proceedings.

The arbitrator was free to consider any form of discipline not considered an adverse action against Mr. Greenberg's contract status. What he was not free to do was to violate Mr. Greenberg's statutory due process rights. While Mr. Greenberg assented to the arbitrator's framing of the issue, he did not assent in any way to permitting the arbitrator to impose

process requirements and which are not. *See e.g. Giedra*, 126 Wn. App. 840; *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 674, 266 P.3d 932 (2011); *Myking v. Bethel Sch. Dist. No. 403*, 21 Wn. App. 68, 72, 584 P.2d 413 (1978).

discipline that was specifically excluded from consideration by the CBA and by statute.

Similarly, Mr. Greenberg's use of the grievance procedure was not an election of remedies, as the District contends. Election of remedies only applies where the following three elements are present: "Two or more remedies must exist at the time of the election; the remedies must be repugnant and inconsistent with each other; and the party to be bound must have chosen one of them." *Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). Here, the first element is missing. Mr. Greenberg could not have insisted upon a statutory hearing to contest the proposed involuntary transfer, because neither statute nor the CBA permitted it. CP 49 ("Any disciplinary action, except an oral warning not documented or recorded in the employee's personnel file, **shall** be subject to the grievance procedure including binding arbitration."); *see also Lake Wash. Sch. Dist. No. 414 v. Lake Wash. Educ. Ass'n/Wash. Educ. Ass'n*, 109 Wn.2d 427, 433, 745 P.2d 504 (1987) (transfers not included in continuing contract statutes). A person cannot elect a mandatory remedy; election of remedies requires choice. The District's proposed form of discipline mandated the grievance procedure. It is not an election of remedies or waiver of rights to expect that the rules would be followed.

2. This case is not moot.

The District asserts that the issue in this case is moot because the District has considered the ten-day suspension to already have been served. This argument fails to consider the collateral consequences that record of a ten-day suspension will have on Mr. Greenberg's future employment.

A case is not moot if an already-completed action will have significant collateral consequences for the aggrieved person. *In re Det. of M.K.*, 168 Wn. App. 621, 626, 279 P.3d 897 (2012) (appeal not moot due to collateral consequences of involuntary detention). Unlike an involuntary transfer, a suspension is considered an adverse change in contract status. RCW 28A.405.300; *Griffith v. Seattle Sch. Dist. No. 1*, 165 Wn. App. 663, 674, 266 P.3d 932 (2011); *Myking v. Bethel Sch. Dist. No. 403*, 21 Wn. App. 68, 72, 584 P.2d 413 (1978). Once a teacher has suffered an adverse change in contract status, record of that action becomes a permanent part of the teacher's personnel file and employment record. The adverse action must be disclosed on all future applications for employment, and will operate to preclude inter-district transfers.

Furthermore, evidence of prior discipline can be considered in future probable cause hearings. *McCorkle v. Sunnyside Sch. Dist. No. 201*, 69 Wn. App. 384, 392, 848 P.2d 1308 (1993). For districts that use a progressive

discipline system,⁴ suspension is typically considered to be the last option for discipline before termination. A record of suspension thus increases the risk that Mr. Greenberg will have his employment terminated should he be subject to discipline in the future.

A case can only be considered moot if there is no way for the court to provide effective relief. *Jumammil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 678, 319 P.3d 868 (2014). The Court here can provide relief by declaring the arbitration decision invalid and striking the suspension from Mr. Greenberg's records. This will relieve Mr. Greenberg of the collateral consequences he would otherwise suffer if the suspension were to remain on his record. This matter is thus not moot.

3. A suspension is not a “lesser” sanction than an involuntary transfer.

The District further argues that the arbitrator acted within his authority because a ten-day suspension is a “lesser” sanction than involuntary transfer. This is not the case. As discussed in subsection 2, *supra*, a suspension is considered an adverse change in contract status, whereas an involuntary transfer is not. Something that negatively affects a teacher's contract cannot be “lesser” than something that has no such effect.

⁴ Such as the Seattle School District. CP 49.

A teacher can be involuntarily transferred for many reasons, including administrative or budgetary needs of the district. Suspension, on the other hand, is only appropriate for discipline.⁵ It is considered a particularly harsh penalty by any standards and for this reason is considered the last step in progressive discipline before termination. As the arbitrator noted, Mr. Greenberg had never been subject to discipline before this incident. CP 200. Now, however, any misstep puts him at substantial risk of losing his job. Discipline cannot be considered “lesser” if it increases the risk of termination.

4. Mr. Greenberg’s claims were timely asserted.

Mr. Greenberg’s claims were timely asserted, as they fell within the most closely analogous statute of limitations. “A declaratory judgment action must be brought within a reasonable time, determined by analogy to the limitation period for a similar suit.” *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 187 Wn. App. 210, 220, 349 P.3d 53 (2015).⁶ The relief Mr. Greenberg seeks through this action is to have the decision of the

⁵ The arbitrator cited decisions finding that transfer is an especially harsh penalty; however, in each of these cases, the employee was transferred into an unpleasant job with harsher working conditions. CP 201. *Parkside Manor*, 53 LA 410 (1969) (transfer from day shift to night shift); *City of Stamford, Conn.*, 49 LA 1061 (1967) (transfer to job shoveling garbage); *Consolidated Foods Corp.*, 47 LA 1162 (1967) (transfer to job with more manual labor and significant time in freezer).

⁶ For constitutional writs of review, the determination of what constitutes a reasonable time is made without reference to analogous statutes of limitations. *Clark Cnty. Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 848, 991 P.2d 1161 (2000).

arbitrator declared void. Thus, the most analogous statute of limitations is the rule that applies to vacation of arbitration awards, not RAP 5.2 or RCW 28A.405.320. Under both the Uniform Arbitration Act and the Federal Arbitration Act, actions challenging the decision of an arbitrator must be asserted within 90 days of the date of entry of the final award. RCW 7.04A.230(2);⁷ 9 U.S.C. § 12.

In the arbitrator's decision here, the arbitrator explicitly retained jurisdiction over the grievance until 4:30 p.m. on October 13, 2014. CP 203. When an arbitrator retains jurisdiction over a matter, the award is not considered final until such jurisdiction ceases. *Orion Pictures Corp. v. Writers Guild of Am., W., Inc.*, 946 F.2d 722, 724 (9th Cir. 1991); *Millmen Local 550, United Bhd. of Carpenters & Joiners of Am., AFL-CIO v. Wells Exterior Trim*, 828 F.2d 1373, 1376-77 (9th Cir. 1987) ("Moreover, the fact that the arbitrator here specifically retained jurisdiction to decide the remedy if the parties could not agree indicates that the arbitrator did not intend the award to be final."). Thus, the decision did not become final until October 13, 2014. This action was filed on December 23, 2014, less than 90 days after October 13, 2014. This action was therefore timely.

⁷ RCW 7.04A.230 was enacted to replace the former RCW 7.04.180.

The District also asserts that laches bars Mr. Greenberg's declaratory judgment and writ of review actions. It does not. The doctrine of laches consists of only two elements: (1) inexcusable delay and (2) prejudice, both of which must be affirmatively proven by the party asserting it. *Auto. United Trades Org. v. State*, 175 Wn.2d 537, 542, 286 P.3d 377 (2012). Except in the most unusual of circumstances, laches should not be applied to bar an action before the statute of limitations. *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 375, 680 P.2d 453 (1984). The District cannot meet its burden here. Mr. Greenberg's "delay" in filing this action is in no way unreasonable or inexcusable. In the declaratory judgment case cited by the District, the plaintiff delayed bringing a cause of action for **80 years**. *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 374, 940 P.2d 286 (1997). Two to three months pales in comparison. Further, the District can hardly claim that it was prejudiced by a two-month delay, when grievance proceedings had already been ongoing for over a year.

5. The arbitrator and School District acted in a judicial capacity by imposing a suspension on Mr. Greenberg.

Contrary to the District's assertions, there is no blanket exclusion of arbitrations from writs of review. Rather, whether an action is judicial is determined by the four factor test articulated in *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d 1204 (1992). The four factors

are as follows:

(1) whether a court could have been charged with making the agency's decision; (2) whether the action is a type that courts have historically performed; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of the courts as opposed to that of legislators or administrators.

Jones v. Pers. Res. Bd., 134 Wn. App. 560, 570, 140 P.3d 636 (2006) (citing *Raynes*, 118 Wn.2d at 244-45). Unlike those cases in which a writ of review is held to be unavailable on an arbitration, such as those cited by the District, here Mr. Greenberg is not challenging the substance of the award. Rather, he is seeking review of the scope of the arbitrator's authority. Determination of an arbitrator's authority is historically and regularly an action performed by courts. See e.g. *Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg*, 101 Wn. App. 119, 125, 4 P.3d 844 (2000).

The District also asserts that it was not acting in judicial capacity because it did not hold a hearing on Mr. Greenberg's suspension. This argument begs the question, and asks this Court to hold that a District's failure to follow the law is not subject to judicial review. The two cases cited by the District both involved principals who were moved to teaching positions. *Williams v. Seattle Sch. Dist.*, 97 Wn.2d 215, 643 P.2d 426 (1982); *Odegaard v. Everett Sch. Dist. No. 2*, 55 Wn. App. 685, 780 P.2d

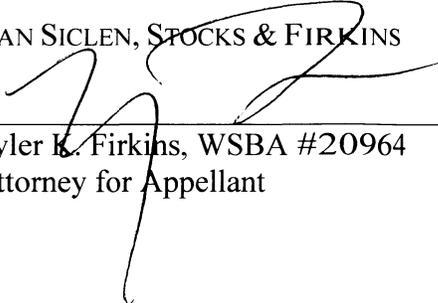
260 (1989). The reassignment of administrators is governed RCW 28A.405.245, which has no application here. Ironically, these two cases also involve involuntary transfers, not suspensions, the important distinction of which has already been discussed. Mr. Greenberg's suspension should have been heard by the superintendent under RCW 28A.405.300, and the District's decision not to hold a hearing was judicial in nature pursuant to *Francisco v. Bd. of Dirs. of Bellevue Pub. Sch. Dist. No. 405*, 85 Wn.2d 575, 580, 537 P.2d 789 (1975). The District does not get to ignore RCW 28A.405.300 and then claim immunity for doing so.

III. CONCLUSION

Superior courts can only dismiss a matter on its own initiative under a limited set of circumstances. None of those circumstances were present in this case. It was error for the superior court to subject Mr. Greenberg's request for declaratory judgment to an inapplicable rule, and it was error for it to dismiss all claims without a motion by the District. This Court should REVERSE the decision of the superior court and remand to assign this matter to a case schedule.

DATED this 22nd day of August, 2016.

VAN SICLEN, STOCKS & FIRKINS



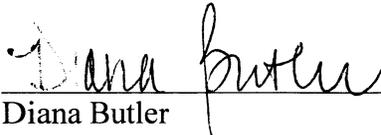
Tyler K. Firkins, WSBA #20964
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CERTIFICATE OF SERVICE

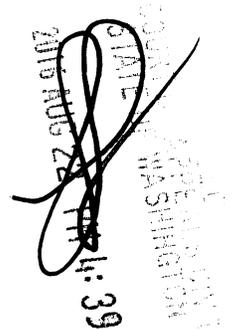
I certify that on August 22, 2016, I caused a copy of the foregoing document to be served on the following party of record and/or interest party as follows:

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DATED this August 22, 2016 at Auburn, Washington.



Diana Butler


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