

38947-9-II

NO. 81567-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Richard Lindeman & Ginger Lindeman,

Appellant,

v.

Kelso School District No. 458,

Respondent.

RECORDED
INDEXED
STATE OF WASHINGTON
SUPREME COURT
08 OCT -7 AM 7:46
BY RONALD R. CARPENTER
CLERK

RESPONDENT'S BRIEF

Clifford D. Foster Jr.
WSBA #9523
Lisa M. Worthington-Brown
WSBA #34073
Attorney for Kelso School District
No. 458

Dionne & Rorick
Attorneys at Law
900 Two Union Square
601 Union Street
Seattle, Washington 98101
Tel: (206) 622-0203
Fax: (206) 223-2003

TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF ISSUE PERTAINING TO
ASSIGNMENT OF ERROR 1

III. COUNTERSTATEMENT OF THE CASE..... 2

IV. ARGUMENT..... 3

 A. The Determination of the Statutory Penalty Is Reviewable Under
 An Abuse of Discretion Standard..... 3

 B. The Trial Court Decision was Reasonable and Based Upon
 Applicable Law..... 5

 C. The Trial Court Properly Determined that the District Acted in
 Good Faith. 7

V. CONCLUSION 14

TABLE OF AUTHORITIES

Cases

<i>Amren v. City of Kalama</i> , 131 Wn.2d 25, 929 P.2d 389 (1997)	7
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006)	5
<i>Rosso v. State Personnel Bd.</i> , 68 Wn.2d 16, 411 P.2d 138 (1966).....	6
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007).....	5
<i>Yousoufian v. County Executive</i> , 152 Wn.2d 421, 98 P.3d 463 (2004)....	passim
<i>Yousoufian v. The Office of Ron Sims</i> , 137 Wn. App. 69, 151 P.3d 242 (2007)	5, 6, 7

Statutes

34 CRF §99.12(a).....	10
RCW 28A.605.030.....	12
RCW 42.17.070.....	12
RCW 42.17.260(1)	12
RCW 42.17.310(1)(a)	8, 9, 10, 12
RCW 42.17.310(a).....	11
RCW 42.17.340.....	9
RCW 42.17.340(4)	1, 2

I. INTRODUCTION

The Lindemans' appeal from the trial court's decision to impose a \$5 per day statutory penalty against the respondent Kelso School District under former RCW 42.17.340(4). This appeal follows this Court's decision to reverse the Court of Appeals and trial court's decision holding a school bus surveillance tape was exempt from public disclosure. The District believes the trial court's decision to impose the \$5 per day penalty for the 1,387 days between the District's denial of the records request and production of the tape following the Supreme Court's decision must be upheld because the trial court properly applied the legal standards for determining the penalty amount and did not abuse its discretion in concluding the District had acted in good faith in denying release of the tape.

II. COUNTERSTATEMENT OF ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The District provides the following counterstatement of the issue for review:

Did the trial court abuse its discretion in awarding a statutory penalty of \$6,935.00 under former RCW 42.17.340(4) based upon a daily penalty of \$5 per day for 1,387 days?

III. COUNTERSTATEMENT OF THE CASE

On November 16, 2007, the Washington Supreme Court issued its opinion in this litigation reversing the trial court and Court of Appeal's decisions that a school bus video tape was exempt from public disclosure. The District provided the Lindemans the video tape on November 20, 2007. Declaration of Jim Biver, CP 130-131. Pursuant to the this Court's order of remand to the trial court to award the Lindemans reasonable attorney fees and costs, and the daily penalty under former RCW 42.17.330(4), the parties stipulated to entry of an order regarding the amount of attorney fees and costs and the number 1,387 as the number of days the penalty must be assessed. Finding of Fact, Conclusions of Law and Order on Statutory Penalty, CP at 133, lines 4-6. They could not agree, however, on the amount of the daily penalty.

On March 5, 2008, the trial court heard the Lindemans' motion to set the statutory penalty. Following consideration of the parties' written briefs, Declarations, and Affidavits the parties had submitted during the initial trial court proceedings in 2004, and oral argument, Judge Warning determined the \$5 per day penalty was appropriate because the District had acted with a "good faith, but mistaken belief" that the tape was exempt from public disclosure. CP at 133. The trial court entered findings of fact,

conclusions of law, and an order awarding the \$6,935 penalty on April, 9, 2008. CP 133-134.

IV. ARGUMENT

A. The Determination of the Statutory Penalty Is Reviewable Under An Abuse of Discretion Standard.

In *Yousoufian v. County Executive*, 152 Wn.2d 421, 98 P.3d 463 (2004) (hereafter *Yousoufian I*), this Court held that a trial court's determination of the amount of the daily penalty for violation of the Public Disclosure Act (PDA) is a discretionary decision for the trial court. Rejecting the plaintiff's argument that the Court should review such a decision *de novo*, this Court held that "the PDA's penalty provision clearly grants the trial court 'discretion' to determine the appropriate per day penalty, and this grant of discretion is only meaningful if appellate courts review the trial court's imposition of that penalty under an abuse of discretion standard." 152 Wn.2d at 431.

This Court also set forth the standards for trial courts in making penalty determinations:

The process for determining the appropriate PDA award is best described as requiring two steps: (1) determine the amount of the days the party was denied access and (2) determine the appropriate per day penalty between \$5 and \$100 depending on the agency's actions . . . The determination of the number of days is a question of fact . .

. [T]he determination of the appropriate per day penalty is within the trial court's discretion.

Id. at 439.

The trial court's decision followed this process: The parties agreed that the Lindemans were denied access to the tape from February 13, 2004, the date the District denied the records request for the tape, until it was provided to them on November 20, 2008, following this Court's November 16, 2007, decision reversing the lower courts' decisions that the tape was exempt from public disclosure. CP 130-131; 132. The trial court's finding of fact #1 incorporates this time period and the order awarded the daily fee for 1,387 days. CP 132.

Regarding the amount of the daily penalty, the trial court concluded that a \$5 per day penalty was appropriate because the District had denied the records request

based upon a good faith, but mistaken belief that the Public Records Act required it to protect the student information contained in the record; the statements by the District regarding the ability of the plaintiff to obtain the record by a subpoena in a tort action do not indicate bad faith because the District never retracted from its position that the record was not subject to disclosure under the Public Records Act.

CP 133, COL 2.

In reviewing this decision, therefore, the Court must determine whether the trial court abused its discretion. The following principles guide this review:

A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Id.*

State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). Under these standards no abuse of discretion occurred.

B. The Trial Court Decision was Reasonable and Based Upon Applicable Law.

The trial court's analysis of the penalty amount was a reasonable interpretation of the applicable law. In *Yousoufian v. The Office of Ron Sims*, 137 Wn. App. 69, 151 P.3d 242 (2007) (*review granted*, 162 Wn.2d 1011) (*Yousoufian II*), the Court of Appeals adopted standards for determining daily penalties within the \$5 through \$100 range.

Initially, the court rejected the argument, advanced in Justice Sanders' concurring/dissenting opinion in *Yousoufian I*, that trial courts should presume that a mid-range fine of \$52.50 is appropriate and adjust it upward or downward based on various considerations: "Because it appears

the Supreme Court majority implicitly declined to adopt the factors enumerated by Justice Sanders in his dissent . . . we will not adopt those factors here.” 137 Wn. App. at 77-78.

A penalty analysis guided by a mid-range dollar presumption, moreover, conflicts with the common law “presumption that public officers will properly and legally perform their duties until the contrary is shown.” *Rosso v. State Personnel Bd.*, 68 Wn.2d 16, 20, 411 P.2d 138 (1966).

The *Yousoufian II* Court adopted guidelines for determining the appropriate daily penalty. The minimum statutory penalty should be applied “for such ‘instances in which the agency has acted in good faith but, through an understandable misinterpretation of the PRA or failure to locate records, has failed to respond adequately.’” 137 Wn. App. at 249, (quoting *Yousoufian I*, 114 Wn.2d at 854).

For penalties above the minimum, the court relied on the WPI Jury Instructions and noted:

working up from the minimum amount on the penalty scales, instances where the agency acted with ordinary negligence would occupy the lower part of the penalty. Instances where the agency’s actions or inactions constituted gross negligence would call for a higher penalty . . . and instances where the agency acted wantonly would call for an even higher penalty.

Id.

The higher range of penalties should be reserved for situations when an “agency acted willfully and in bad faith,” such as when an “agency refused to disclose information it knew it had a duty to disclose in an intentional effort to conceal government wrongdoing and/or to harm members of the public.” *Id.*

Although this Court has accepted the decision in *Yousoufian II* for review, determining whether the agency acted in “good faith” when denying a request has long been recognized as a key and appropriate factor in determining a penalty award. *Amren v. City of Kalama*, 131 Wn.2d 25, 37, 929 P.2d 389 (1997); *ACLU v. Blaine S.D.*, 95 Wn. App. 106, 975 P.2d 536 (1999). As discussed below, the trial court’s determination of good faith was based on factors recognized in this Court’s *Yousoufian I* decision, 114 Wn.2d at 854, and provide an appropriate legal basis for its exercise of discretion.

C. The Trial Court Properly Determined that the District Acted in Good Faith.

The trial court determined, and the record fully supports, that the District consistently acted with a good faith legal belief that the tape was exempt from disclosure throughout the litigation.

The record shows Plaintiff's former attorney initially requested the video tape and several other records from the District by letter dated January 30, 2004, because the family had requested him to "review the assault of Michael Lindeman, which occurred while he was under the supervision and care of Rose Valley Elementary School." Ex. A to Affidavit of Jamie Imboden, CP at 28.

The District responded by letters dated February 13, 2004, CP 29 - 30, and February 23, 2004, CP 33, and honored them for non-exempt records, but denied the request for the tape, stating it was exempt from disclosure under both former RCW 42.17.310(1)(a) and the federal Family Educational Rights and Privacy Act.

The gist of the Lindemans' argument, however, is that when the District was served with the judicial show cause order under the PDA to produce the video tape, the District, through its legal counsel during a phone conversation with the Lindemans' attorney, (1) offered to provide the tape pursuant to a subpoena, which demonstrated it knew it had a legal duty to produce the tape under the PDA, and (2) then later withheld the tape when it refused to honor a subpoena to deprive them of their right to attorney fees in the PDA action.

This argument, however, ignores the Declaration of Cliff Foster, filed March 12, 2004, CP 49-64, addressing the parties' discussion of obtaining the subpoena based on discovery in a tort action against the District, which plaintiffs were considering. The Declaration states:

2. On March 3, 2004, I contacted Mr. Imboden and stated that although [sic] the District believed the videotape was exempt from public disclosure under RCW 42.17.310(1)(a). I also explained that in a proceeding, such as a tort action against the District or a suit between the two families, the tape would be subject to discovery because FERPA allows the release of student records in response to a lawfully issued subpoena or court order if the parent of the student involved is provided prior notice of the District's compliance. I suggested that if a discovery subpoena duces tecum for the record was received, the District would not object to it and would comply with the FERPA notice to other parents to permit its release on the condition that plaintiffs' drop their request for attorney fees and costs under RCW 42.17.340. *I also indicated the District would be willing to stipulate to allow the current complaint to be held in abeyance so that plaintiff could later seek to amend it if they decided to proceed with a tort action against the District in an effort to save them the costs of re-filing and serving a new complaint. Mr. Imboden indicated he did not know if he could drop the request for fees.*

3. By letter dated March 4, 2004 Mr. Imboden transmitted a subpoena duces tecum for the videotape, returnable on March 12, 2004, but the letter stated that plaintiffs would not drop their request for fees and costs of \$763.00 unless the District agreed to pay them. A true copy of the letter is attached as Exhibit 1 hereto.

4. I replied by letter dated March 8, 2004 stating that the District did not agree to pay the attorney fees and costs and would seek to quash the subpoena. A true copy of that letter is attached as Exhibit 2.

CP 49-50 (emphasis added).

The letter in question stated:

I have received your letter of March 4, 2004 and the subpoena duces tecum.

As I believe I indicated in our phone conversation, my statement that I would honor the subpoena duces tecum for the videotape was based on the assumption that you would not pursue a claim for attorney fees. I do not believe that a subpoena for the challenged record resolves the legal issue of whether the tape is subject to disclosure under chapter 42.17 RCW. As I stated, under RCW 42.17.310(1)(a), 34 CFR §99.31(a)(9), and 34 CRF §99.12(a) (copy enclosed), personally identifiable information may not be released without consent of the parent or adult student involved.

As we further discussed, the District may release such information in response to a valid court order or subpoena if it provides advance notice of the subpoena or court order to the parents of the students involved. Absent a resolution of the question of your fees, I cannot agree to follow this process. The videotape would be discoverable in the event of a tort action, and subject to subpoena in the discovery process. But in your public disclosure proceeding, a subpoena duces tecum for a document otherwise exempt from public disclosure is not discoverable or subject to the subpoena power. I do not believe that you have any basis under chapter 42.17 RCW to have a court enter an order making this document discoverable and thus justify an award of attorney fees.

Accordingly, unless we can enter a stipulation that drops your claim for fees, the District will move to quash the subpoena and defend against the show cause order on March 15th. Please give me a call to discuss this matter.

CP 54.

In the 2004 show cause proceedings, the trial court did not enforce the subpoena and ruled that the Lindemans were not entitled to the video tape because it was exempt from public disclosure under former RCW 42.17.310(a). CP 84-87.

In determining the District acted in good faith, Judge Warning first analyzed the issue without considering the communications between counsel regarding the subpoena and possible tort action. CP at 138. He observed that the District denied the request based on its belief that the PDA required it to protect student information; that this concern was a part of the statutory framework of the PDA; that the trial court and Court of Appeals agreed with that concern; and that the District was not attempting to hide any governmental conduct. CP 139-140. He then considered whether the discussions between counsels should change this analysis. Relying on the letter of the District's legal counsel, he disagreed with the reading of it offered by the Lindemans' counsel and concluded that although the District acknowledged the tape could be provided

pursuant to a subpoena in a tort action, it never retracted from its position that the tape was exempt from disclosure under the PDA. CP at 140-42.

Based on the factual materials in the record, this determination of “good faith” and award of the statutory minimum penalty was not an abuse of discretion. The record shows the District promptly fulfilled its duties under the PDA to review and respond to the request, determine whether any materials were exempt, explain the grounds for the claimed exemption, and produce all non-exempt records. Former RCW 42.17.260(1), 42.17.320.

The District and its counsel’s correspondence with the Lindemans’ attorney consistently denied the request for the video tape based upon the exemption from disclosure or student information found in formal RCW 42.17.310(1)(a) and the federal Family Educational Rights and Privacy, which former RCW 42.17.070 and RCW 28A.605.030 incorporate.

The letter of the District’s counsel and his Declaration clearly show, as well as the District’s prior briefs filed with the court for the 2004 show cause motion, CP 37-43 and 65-74, that: (1) the District continued to believe it did not have the a legal obligation to provide the video tape under the PDA, and thus it did not have a legal obligation to pay plaintiffs’ attorneys fees and costs under the pending PDA action; (2) it acknowledged

that in a non-PDA legal action, such as a tort action, the tape would be discoverable despite the PDA exemption and that, pursuant to a discovery subpoena in such an action, the federal Family Educational Rights and Privacy Act would allow disclosure of the tape; (3) it was willing to stipulate to an amendment of plaintiffs' current PDA action to include a tort claim (which would make issuance of a discovery subpoena for the tape legally appropriate); and (4) it would not honor a discovery subpoena solely in a PDA action or pay attorney fees under the PDA because the tape was exempt from disclosure and the PDA does not allow "discovery" of otherwise exempt records.

Judge Warning, moreover, who had reviewed these materials and the parties' arguments during the initial proceedings in 2004, was also in a unique position to evaluate the issue of good faith. The record showed he applied the appropriate law and possessed an adequate factual basis for his determination that the District acted in good faith and that a minimum penalty was warranted. His evaluation and rejection of the Lindemans' argument for "bad faith" conduct was reasonable and not a determination that "no reasonable person" could adopt. Accordingly, no abuse of discretion occurred.

V. CONCLUSION

For the reasons stated above, the trial court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of October, 2008.

DIONNE & RORICK



By: Clifford D. Foster Jr., WSBA #9523
Lisa M. Worthington-Brown,
WSBA #34073
Attorneys for Kelso School District
No. 458

g:\kelso\014a\81006response.brf.doc

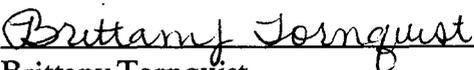
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent via U.S. first class mail, postage prepaid, Respondent's Brief, to the following:

Supreme Court of Washington
Temple of Justice
Post Office Box 40929
Olympia, Washington 98504

James Kieran Morgan
Attorney at Law
1555 Third Avenue, Suite A
Longview, Washington 98632-3268

Dated this 6th day of October 2008.


By: Brittany Tornquist