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NO. 46334-2-II

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

ANTHONY DAVIS,

APPELLANT

v.

TACOMA SCHOOL DISTRICT,

RESPONDENT

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
CAUSE NO. 13-2-15955-0

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Petitioner Anthony Davis was employed by the Tacoma School District from July 31, 2007 until his termination in May of 2013. Mr. Davis appealed his termination, and it was subsequently upheld in January of 2014. During the period between May 15, 2013 and January 23, 2014, Mr. Davis was on administrative leave. However, Tacoma School District only paid Mr. Davis until August of 2013, the current period of his otherwise automatically-renewing contract.

It is undisputed that Tacoma School District both affirmatively stated that Anthony Davis would be paid through the pendency of his appeal, and that Tacoma School District relied on this supposed-payment to argue against a continuance in Mr. Davis' appeal from his underlying termination. Further, the District's statements and actions communicated that Mr. Davis would continue to receive his wages during the appeal process. Tacoma School District nonetheless then argued that Mr. Davis was actually nonrenewed, improperly conflating nonrenewal and termination. It then used its flawed interpretation to justify withholding pay to which Mr. Davis was both entitled and promised by Tacoma School District. Washington's legislature and its courts have long distinguished between discharge and nonrenewal, yet the superior court adopted Tacoma School District's conflated definition. Under the law of Washington and

Tacoma School District's promise, Mr. Davis is entitled to his pay through the pendency of his appeal.

II. ASSIGNMENTS OF ERROR

1. It was error for the superior court to deny Petitioner Anthony Davis's Motion for Partial Summary Judgment on Liability.
2. It was error for the superior court to grant Respondent Tacoma School District's Motion for Summary Judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Anthony Davis discharged from employment with the Tacoma School District, and not non-renewed?
2. Was Tacoma School District prevented from discharging Mr. Davis once he had filed his appeal?
3. Does RCW 28A.405 *et seq.* prohibit suspension or denial of pay pending a hearing officer's decision on the Notice of Probable Cause for Termination?
4. Does RCW 49.48.010 require Tacoma School District to pay Mr. Davis all of his wages during the period of his administrative leave?
5. Is Tacoma School District bound by its promise to pay Mr. Davis all of his wages pending his appeal?

IV. STATEMENT OF THE CASE

Petitioner Anthony Davis, a resident of Tacoma, Washington, was employed by Tacoma School District (District) as a teacher beginning July 31, 2007. Clerks Papers (CP) 6; 54. Tacoma School District is a public agency operating in Pierce County, Washington and organized under the laws of the State of Washington. CP 6-7. At the time of Mr. Davis' hiring

in July of 2007, he was a certificated teacher through the laws and licensing requirements of the State of Washington. CP 7; 54. As such, he was subject to the rights and the procedures described in RCW Chapter 28A.405.

Beginning in the 2007-2008 school year, Mr. Davis taught in a variety of capacities in the special education program at Mt. Tahoma High School in Tacoma, Pierce County, Washington. CP 55. In the 2012-2013 school year, Mr. Davis was moved from the Therapeutic Learning Program for Behaviorally Disabled Students, to the Developmentally Delayed Program, and then back into the Therapeutic Learning Program for all but one period of the day. *Id.* By that school year, he earned \$53.54 per hour and worked full time. *Id.* Mr. Davis also received benefits and access to retirement through the Washington State Department of Retirement Systems. CP 7; 54.

In early 2013, the Tacoma School District concluded an investigation into alleged misconduct by Mr. Davis. CP 55; 93-104. The Tacoma School District determined there was probable cause to terminate Mr. Davis' employment and notified him by letter. CP 104. Mr. Davis was formally placed on paid administrative leave by his employer on May 15, 2013. CP 55; 90. On May 17, 2013, Mr. Davis filed a notice of appeal of the Superintendent's determination of probable cause and

requested a statutory hearing pursuant to RCW 28A.405.310. CP 58. Under RCW 28A.405.310, any employee receiving a notice of probable cause for discharge or adverse effect in contract status shall be granted the opportunity for a hearing. RCW 28A.405.310; CP 7. Once an appeal is filed the employee is continued in their employment until a hearing officer determines whether there is sufficient cause for discharge. RCW 28A.405.300. Despite this process to which Mr. Davis was entitled and availed himself, the District avers Mr. Davis' termination was actually "effective" August 29, 2013. CP 7.

In prior correspondence dated July 22, 2013, Tacoma School District affirmed that Mr. Davis was on paid administrative leave pending his statutory hearing. CP 55. In that correspondence from the Assistant Superintendent for Human Resources addressed to Davis, the District states:

In accordance with the Tacoma Education Association Collective Bargaining Agreement, which states that employees shall receive twice monthly status updates of their case, this letter is to inform you that you continue to be on paid administrative leave and that you are to abide by conditions that were noted in your administrative leave letter.

You will remain on administrative leave pay status pending your appeal.

CP 60. (Emphasis added).

The last pay period Mr. Davis was compensated for was August of 2013. CP 55; 62. From September 5, 2013, to the date the hearing officer issued his determination on January 23, 2014, the Tacoma School District has failed and refused to compensate Mr. Davis. *Id.*

Indicative of its intent, the Tacoma School District was on notice that Davis was not being compensated months in advance of the statutory hearing, and yet the District chose to do nothing to address the issue. In its September 30, 2013, Response in Opposition to Anthony Davis' Motion to Continue Hearing, the Tacoma School District opposed a continuance of the statutory hearing on the grounds that it would be required by law to keep paying Mr. Davis. CP 37-44. Specifically:

To allow Mr. Davis to obtain a continuance in this fashion would be unjust and would unduly prejudice the District, which has already suffered financial hardship as a result of keeping Mr. Davis on paid administrative leave while this appeal has been pending.

CP 42.

A representative for the District declared under penalty of perjury that Mr. Davis had been on paid administrative leave status since notifying the District of his intent to appeal. CP 37. This was completely untrue, as soon afterwards became apparent. CP 26. By the time of the October 4, 2013, telephonic ruling on the Employee's Motion to Continue, the District acknowledged Mr. Davis was not being compensated while on

administrative leave. *Id.* In spite of its earlier argument in opposition to continuance (that pay would be required during administrative leave for Mr. Davis), the District neither reinstated wages nor provided back pay to Mr. Davis. CP 56.

A tort claim for damages was served upon the Tacoma School District while the time for Mr. Davis' hearing was pending. CP 26. There was no response from the District. *Id.* After the requisite 60 day period had elapsed, Mr. Davis filed the summons and complaint that initiated this matter on or about December 27, 2013. *Id.*

Mr. Davis' statutory hearing occurred on January 14 and 15 of 2014. CP 25. A decision was issued by the Hearing Officer on January 23, 2014, which found Mr. Davis' termination was supported by sufficient cause. CP 26. Mr. Davis has appealed the Hearing Officer's decision by filing a notice of appeal dated February 7, 2014. CP 27. As of the time of this writing, Mr. Davis has not received payment for the compensation he is owed. CP 56.

Mr. Davis moved for partial summary judgment on liability. CP 13-24. Tacoma School District then filed a cross-motion for summary judgment on all claims. CP 63-78. On May 16, 2014, the trial court denied Mr. Davis's motion and granted summary judgment for the District. CP 765-66. Mr. Davis timely appealed.

V. ARGUMENT

This appeal addresses the question of whether a school district can withhold payment of wages to a discharged teacher pending that teacher's appeal, and when the district has expressly promised that teacher that he would be paid. This brief will examine the erroneous contention that Mr. Davis was nonrenewed rather than discharged, and then examine why Washington law requires the District to pay Mr. Davis's wages during the pendency of his appeal. Finally, it will discuss the promise made by the District to pay Mr. Davis's wages. Because the District failed to establish a legal basis to withhold Mr. Davis's wages, it was error for the trial court to grant its motion for summary judgment and error for the trial court to dismiss Mr. Davis's motion for partial summary judgment.

A. Standard of Review

An appellate court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). The reviewing court must construe all evidence and reasonable inferences in the light most favorable

to the nonmoving party. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). In this case, both parties agree that there are no material facts in dispute: this case hinges on whether the District is legally required to pay Mr. Davis the wages it promised to pay him.

B. Mr. Davis was discharged, not nonrenewed.

The District argued that Mr. Davis's termination from employment had the same legal impact as if he were nonrenewed. This is incorrect, yet was adopted by the trial court. Under RCW 28A.405.210, known as the "continuing contract" statute, teachers are employed for one-year terms which are automatically renewed each year. *Kirk v. Miller*, 83 Wn.2d 777, 780, 522 P.2d 843, 845-46 (1974); RCW 28A.405.210. The statute, however, permits school districts to prevent the renewal of teacher contracts with notice and for cause. Nonrenewal may be for financial reasons or for performance deficiencies, and it severs the employment relationship prospectively at the end of the current school year. Conversely, discharge, which typically occurs in cases of employee misconduct, can occur at any time. Discharge is governed by the procedures found in RCW 28A.405.300. The District and the trial court conflated these two concepts, but courts have consistently distinguished between them.

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), the U.S. Supreme Court interpreted the Fourteenth Amendment's protection of a person's liberty or property interest to determine whether procedural due process requirements, namely a statement of reasons and a hearing, applied to a school's decision not to renew a non-tenured teacher's one-year contract. *Id.* at 569. The *Regents* Court held that nonrenewal did not implicate the non-tenured teacher's right to liberty because it did not "seriously damage his standing and associations in his community," such as would a charge of dishonesty or immorality. *Id.* at 573. Conversely, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the Supreme Court found that broader protections should be afforded the discharged employee because he must have the opportunity to respond to charges of dishonesty. *Id.* at 546.

Washington courts have long followed the nonrenewal/discharge distinction under *Roth* and *Loudermill*. See, e.g., *Barnes v. Seattle School District No. 1*, 88 Wn.2d 483, 487-88, 563 P.2d 199 (1977) (the discharge statute was unavailable to terminate employees whose positions had been eliminated because of the adverse financial condition of the district); *Pierce v. Lake Stevens School District*, 84 Wn.2d 772, 529 P.2d 810 (1974) (citing *Roth* for the proposition that different procedures govern

nonrenewal and discharge); *Petroni v Bd. of Directors of Deer Park Sch. Dist. No. 414*, 127 Wn. App. 722, 113 P.3d 10 (2005) (the procedural protections governing discharge do not apply to the nonrenewal of a teacher); and *Carlson v. Centralia School District*, 27 Wn. App. 599, 619 P.2d 998 (1980) (Washington's statutory process for teacher nonrenewal satisfies due process requirements, citing *Pierce*).

In *Petroni v. Deer Park*, the court considered a teacher's argument that the procedures governing discharge should govern her nonrenewal. *Petroni*, 127 Wn. App. at 727-28. The *Petroni* court noted the differences between nonrenewal and discharge:

Here, the Board did not discharge Ms. Petroni and the Board's decision did not adversely affect her contract status. By making a nonrenewal decision, the Board afforded Ms. Petroni the opportunity to find another job while receiving pay for the remainder of the contract period.

Id. at 728. The court then applied this principle to hold that the procedural protections governing discharge did not apply to the nonrenewal of a teacher. *Id.* at 729 (“the procedural protections of RCW 28A.405.310 [governing teacher discharge] do not apply to a provisional teacher receiving a notice of nonrenewal.”)

Similarly, the court held in *Barnes v. Seattle School District* that the discharge statute could not be used to terminate employees whose positions had been eliminated because of the district's poor financial

condition. The court stated that the nonrenewal statute was the exclusive means to terminate certificated employees for financial reasons. *Id.* at 488-89. These cases clearly establish that the nonrenewal and discharge statutes are not interchangeable. The District's assertion that Mr. Davis should have understood his termination under RCW 28A.405.300 to be the same as a nonrenewal under RCW 28A.405.210 is thus patently incorrect.

The District argued that a June 14, 2013 letter to Mr. Davis was notification of nonrenewal, but this argument is flawed. *See* CP 405. First, RCW 28A.405.210 requires that notification of nonrenewal be given on or before May 15. The letter here is dated nearly a month past the final cutoff date. Second, the June 14, 2013 letter contains no facts supporting probable cause, nor does it reference the prior adverse contact action against Mr. Davis. The District based its termination of Mr. Davis on alleged misconduct under RCW 28A.405.300. The District could have nonrenewed Mr. Davis at the same time if it so chose. It did not. There is no reference in the May 15 probable cause letter to any nonrenewal action, only to termination. The District chose to discharge Mr. Davis, not nonrenew him, and it was error for the trial court to accept this contention.

C. Mr. Davis's appeal stayed Tacoma School District's ability to discharge him.

Mr. Davis timely appealed his termination by the District. Once an appeal is filed the employee is continued in their employment until a hearing officer determines whether there is sufficient cause for discharge. RCW 28A.405.300. It is only if such employee does not request a hearing that the employee may be discharged or otherwise adversely affected as provided in the notice served upon him. *Id.* RCW 28A.405.300, providing certificated employees holding positions with the school district may not be discharged without "probable cause," creates a property right in continued public employment for those who fall under the statute. *Giedra v. Mount Adams School Dist. No. 209*, 126 Wn. App. 840, 110 P.3d 232 (2005), *reconsideration denied, review denied* 156 Wn.2d 1016, 132 P.3d 147.

Accordingly, once Mr. Davis timely appealed he could not have been terminated or have his compensation cut off before the outcome of the statutory hearing pursuant to the decision by the hearing officer. In this case, that was on January 23, 2014. The District nonetheless argued that Mr. Davis's compensation was cut off because he had already been "terminated". CP 7. This is in violation of RCW 28A.405.300, and there is no factual basis for cutting off Mr. Davis' compensation while he

otherwise remained on administrative leave pending appeal. This view appears to have been previously shared by the District when, by its July 22, 2013 correspondence, the District informed Mr. Davis that “you will remain on administrative leave pay status pending your appeal.” CP 60.

The District maintained its position that Mr. Davis was on paid administrative leave well into the underlying employment appeal. In fact, the District unsuccessfully argued to its benefit that a continuance of the appeal should not be grounds because the District would be required to keep paying Mr. Davis during the additional time. CP 37; 42. The doctrine of judicial estoppel prevents a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position in another court proceeding. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wn.App. 95, 98, 138 P.3d 1103 (2006)). Three factors determine whether a party should be judicially estopped: (1) whether a party's current position is inconsistent with an earlier position; (2) whether judicial acceptance of an inconsistent position in the later proceeding will create the perception that the party misled either the first or second court; and (3) whether the party asserting the inconsistent position will obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) (quoting *Arkison*, 160 Wn.2d at 538–39). A trial court's

application of judicial estoppel is reviewed for an abuse of discretion. *Miller*, 164 Wn.2d at 536.

Here, the District opposed a continuation of the initial hearing from October of 2013, arguing that Mr. Davis was on paid administrative leave and receiving pay, and thus any continuation would be to the District's financial detriment. This was untrue, as Mr. Davis had not been paid since August of 2013, but the District nonetheless implicitly acknowledged at that time that it could not terminate Mr. Davis until his appeal resolved. The District should be judicially estopped from now asserting that it had already purportedly "nonrenewed" Mr. Davis and stopped paying him prior to the outcome of his hearing. Pursuant to the statutory framework protecting certificated employees, Mr. Davis' "termination" by his employer was not final pending the outcome of his hearing, and compensation was required during the period he was placed on administrative leave. It was error for the trial court to find otherwise.

D. RCW Chapter 28A.405 does not permit suspension or denial of pay pending a decision on the Notice of Probable Cause for Termination.

The Washington Legislature has enacted a comprehensive set of statutory rights for teachers regarding hiring and termination, salary and compensation, and termination of certificated staff. *See* RCW Chapter

28A.405.300-900. The statutory scheme does not allow suspension of pay pending a decision on Notice of Probable Cause issued by the Defendant.

As a certificated employee, the applicable statutes for adverse change or nonrenewal to Mr. Davis' teaching contract are RCW 28A.405.300-380. Nothing in the applicable statute sections permits withholding or denial of pay pending disciplinary action. Indeed, elsewhere in the statute a mechanism for recovery of salary or compensation during administrative leave in the case of plea or conviction of a certificated employee to any felony crime is contemplated. See RCW 28A.405.470. This would imply that even in a circumstance of administrative leave pending criminal charges (not Mr. Davis' circumstance) salary and compensation continue to be drawn by certificated employees.

In *Bellevue Public School District No. 405 v. Benson*, 41 Wn. App. 730, 707 P.2d 137 (1985), a principal was demoted to a teaching position and his salary reduced prior to the time of his statutory hearing. The hearing officer, the trial court, and the Court of Appeals each determined the District could not reduce a certificated employee's salary before the opportunity for the statutory hearing pursuant to RCW 28A.58.450 (now RCW 28A.405.300):

The examiner ordered the District to pay the salary Benson lost from the time of his actual demotion to the time of the examiner's decision, because the District had not followed the statutory procedure which requires the opportunity for a hearing prior to any adverse action.

Benson, 41 Wn. App. 734-36.

Because there had been no pre-termination hearing, the superior court determined that Benson was entitled to back pay. *Id.* at 734. The Court of Appeals affirmed the Superior Court, holding that a hearing was required prior to demotion under RCW 28A.58.450 (now RCW 28A.405.300), and that the lower court did not err in awarding back pay. *Id.* at 740.

A comparison Mr. Davis' circumstance to that in *Sauter v. Mount Vernon School District No. 320*, 58 Wn. App. 121, 131-134, 791 P.2d 549, 556-557 (1990), *partially abrogated on other grounds by Federal Way School District No. 210 v. Vinson*, 172 Wn.2d 756, 772-73, 261 P.3d 145, 154 (2011), is illustrative:

The District paid appellant his monthly salary preceding the hearing officer's affirmance of his discharge. Under these circumstances, appellant was protected in the event that the hearing officer determined that the district's decision was erroneous. To hold that appellant is also entitled to his salary for the period after his discharge was affirmed would result in appellant receiving a windfall. Thus, we conclude that the trial court did not err by affirming the District's discontinuance of appellant's salary after the hearing officer affirmed his discharge.

Sauter, 58 Wn. App. at 131.

It is precisely such protection, in the event the hearing officer determined that the District's decision was erroneous, that was denied to Mr. Davis in the instant case. The District clearly viewed Mr. Davis'

termination as a *fait accompli* by stripping him of his salary prior to due process having occurred.

The state legislature has proposed amendment of specific sections of RCW 28A.405 *et seq.* to achieve exactly the outcome unlawfully rendered here by the District, but no such amendment has ever been enacted. If withholding or denial of pay by the employer pending the outcome of the hearing was authorized by the current law, such amendment would be entirely unnecessary. House Bill 1851 was an act relating to compensation for certificated employees in the event of notice of probable cause for discharge. CP 46-50. A review of the history of the bill indicates the sponsor, Representative Klippert, has reintroduced the bill on several occasions, but it has yet to be enacted into law. *See also* CP 52-53.

As of January 13, 2014, HB 1851 was reintroduced and retained in present status, but did not make it through this legislative session. *Id.* The bill has sought to amend RCW 28A.405.300 to include the following language:

Upon service of a notification of probable cause or causes for discharge, and until and unless the hearing officer's final decision is in favor of the employee, a school district must not continue to pay the employee salary or compensation. If the employee requests a hearing to determine whether or not there is sufficient cause or causes for the employee's discharge, the district shall, pending a final decision of the hearing officer, deposit into an

interest bearing trust account money that would be sufficient to compensate the employee for back pay if the final decision is in favor of the employee.

CP 47.

Additionally, House Bill 1851 sought to amend RCW 28A.405.310(7)(c) to include the following additional language:

(c) Within ten days following the conclusion of the hearing transmit in writing to the board and to the employee, findings of fact and conclusions of law and final decision. If the final decision is in favor of the employee, the employee shall be restored to his or her employment position, compensated for any back pay or compensation including interest, and shall be awarded reasonable attorneys' fees.

CP 49.

That this legislative effort has transpired at all demonstrates there is no serious, present interpretation of RCW 28A.405.300-380 that permits an employer to withhold or deny payment for certificated employees during administrative leave pending a statutory hearing. It was error for the trial court to deny Mr. Davis's motion for partial summary judgment on these grounds.

E. Tacoma School District was required to pay Mr. Davis all of his wages under RCW 49.48.010.

The Tacoma School District violated RCW 49.48.010 by not paying Mr. Davis all wages that were his due for each established pay period from September 5, 2013, to the outcome of his statutory hearing on January 23, 2014. When any employee ceases to work for an employer,

whether by discharge or by voluntary withdrawal, the wages due him on account of his employment shall be paid to him at the end of the established pay period. RCW 49.48.010. It is unlawful for an employer to withhold wages absent certain defined circumstances that are not present here (requirement by state or federal law, prior written agreement, or for medical services pursuant to regulation). *Id.*

The comprehensive scheme of wage and hour statutes shows the Legislature's strong policy in favor of payment of wages due employees. *Almquist v. City of Redmond*, 140 Wn. App. 402, 166 P.3d 765, review granted 163 Wn.2d 1039, 187 P.3d 269 (2007). To this end, the statute providing that payment of wages due to employee ceasing work are to be at end of pay period is a remedial statute that must be liberally construed to effect its purpose. *Bates v. City of Richland*, 44 P.3d 914, withdrawn from bound volume, on rehearing, 112 Wn.App. 919, 51 P.3d 816 (2002). Applying it to the instant case demonstrates that Mr. Davis should have received his wages.

Mr. Davis has not been paid from the pay period ending in August of 2013 to the decision of the hearing officer on January 23, 2014. CP 56. This fact is undisputed. There is no valid exemption for withholding of pay under either RCW 49.48.010 or contained in RCW Chapter 28A.405 *et seq.* Mr. Davis is entitled to the compensation he is owed for his

employment by the Tacoma School District. It was error for the trial court to dismiss his claim on summary judgment.

F. Tacoma School District promised Mr. Davis that he would be paid his wages pending his appeal.

The District promised Mr. Davis that he would be paid through his appeal. Unfortunately, the District's statements were fraudulent. Fraud occurs if (1) a defendant represents an existing fact; (2) the fact is material; (3) the fact is false; (4) the defendant knew the fact was false or was ignorant of its truth; (5) the defendant intended the plaintiff to act on the fact; (6) the plaintiff did not know the fact was false; (7) the plaintiff relied on the truth of the fact; (8) the plaintiff had a right to rely on it; and (9) the plaintiff had damages. *Baertschi v. Jordan*, 68 Wn.2d 478, 482, 413 P.2d 657 (1966). Each element must be shown by clear, cogent, and convincing evidence. *Id.* at 483. Here, Mr. Davis has met these elements.

On July 22, 2013, the District sent Mr. Davis a letter stating that he would "remain on administrative leave pay status pending [his] appeal." CP 60. The District thus affirmatively represented to Mr. Davis that he would continue to be paid until his appeal was resolved. The District again represented that Mr. Davis would be paid during his appeal when Mr. Davis moved for a continuance in October of 2013, arguing that such a continuance would financially prejudice the District. CP 42. The District

thus appears to have represented even to its own attorneys that Mr. Davis should have been paid while his appeal was pending. There is no reasonable way for anyone to interpret the District's representations other than to mean that Mr. Davis would be paid during his appeal.

The District's representations are indisputably false – the District has not paid Mr. Davis since August 29, 2013. Further, the District knew or should have known that these representations were false. Regardless of whether Lynne Rosellini, the Assistant Superintendent for Human Resources and the letter's author, was involved in scheduling Mr. Davis' hearing, she knew or should have known that (a) Mr. Davis was placed on paid administrative leave when he appealed his termination; (b) the appeal was ongoing; and (c) teacher contract renewals or nonrenewals come into effect at the end of August, approximately one month from when the letter was sent. CP 79-80. The letter contains no qualifications that payment would stop on August 29, 2013, and in fact affirmatively states that Mr. Davis would “remain on administrative leave pay status pending your appeal.” CP 60. For the District to now argue that Mr. Davis should have understood the District's letter to mean that he would only receive one additional month's pay, when the author herself did not even know whether that was the case, is absurd.

Mr. Davis reasonably believed the District's representation to be an affirmation that he would remain on paid administrative leave until his hearing, and relied on the District's representation. CP 55. Under RCW 28A.405.300, Mr. Davis had a right to rely on the District's assertion that he would continue to be paid, and in fact he did rely on it by not seeking other employment during the appeal period. Mr. Davis was damaged by the loss of his source of income, and was eventually forced to seek unemployment.

Even *assuming arguendo* that RCW 28A.405.300 permits the District to halt payment when an appeal is pending, which it cannot, the District's statements and actions would lead any reasonable person to believe that he or she would continue to be on paid administrative leave while the appeal was pending. Because Plaintiff has demonstrated that the District's actions were fraudulent, its Motion for Summary Judgment should have been dismissed and Mr. Davis's Motion should have been granted.

VI. CONCLUSION

Tacoma School District was under a legal obligation to pay Mr. Davis his wages until the hearing officer rendered a decision. The District itself appears to have previously held this view when it both promised to make such payments and when it relied on its belief that Mr. Davis was

being paid to oppose Mr. Davis's motion to continue. It was error for the trial court to dismiss Mr. Davis's claims on summary judgment and it was error for the trial court to deny Mr. Davis's motion for partial summary judgment on liability. This Court should reverse the trial court's erroneous decision and remand this case for a trial on its merits.

DATED this the 8th day of August, 2014.



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CERTIFICATE OF SERVICE

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CERTIFIED MAIL
[Signature]

I certify that I caused one copy of the foregoing Opening Brief of Appellant to be served on the following parties of record and/or interested parties by E-mail and ABC Legal Messenger, delivery to the same to the below named attorneys as follows:

Charles P.E. Leitch, WSBA#25443
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Dated this 8th day August, 2014, at Auburn, Washington.

Diana Butler
Diana Butler