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STATE OF WASHINGTON

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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
THE HONORABLE SUSAN S. SERKO

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Respondent Tacoma School District asks this Court to rewrite state and constitutional law in order to correct the District's past mistakes. That is not what our judicial system is designed for.

Chapter 28A.405 RCW does not permit a school district to cease paying wages to an employee on administrative leave pending discharge before a hearing has been conducted. Both federal and state laws hold that a public school teacher has property right in continued employment up until his or her discharge hearing. By virtue of the U.S. Constitution and the provisions of Chapter 28A.405 RCW, Mr. Davis had a property right in his continued employment with the District and, accordingly, a property right in continued pay until his hearing in January 2014. The District cannot now retroactively deprive him of that right.

Had the District wished to nonrenew Mr. Davis' contract in addition to discharging him, it should have said so initially in May 2013. It did not. "Logic," "common sense," and "inferences" are no match for the plain language of the statute and the constitutional guarantee of due process. The decision of the trial court should accordingly be reversed and a finding of liability entered on Mr. Davis' behalf.

II. ARGUMENT

A. Mr. Davis was discharged, not nonrenewed.

Respondent contends that notice of nonrenewal is implicit in every notice of probable cause for discharge. This argument ignores the well-recognized legal distinction between nonrenewal and discharge.

Washington has recognized a legal distinction between nonrenewal and discharge for at least four decades. In 1974, the Washington Supreme Court held that the nonrenewal statute did not require school districts to provide a detailed explanation in a notice of nonrenewal. *Pierce v. Lake Stevens Sch. Dist.*, 84 Wn.2d 772, 778, 529 P.2d 810 (1974). The Court contrasted the nonrenewal statute to that governing discharge, noting that the latter “provides for the discharge of an employee during the term of his contract, whereas the nonrenewal statute provides for notice, on or before April 15th of the contract year, that the contract will not be renewed for the year beginning the following September.” *Id.* at 781.

This distinction was recognized again more recently in *Petroni v. Bd. of Dirs. Of Deer Park Sch. Dist. No. 414*, 127 Wn. App. 722, 113 P.3d 10 (2005). In that case, a provisional teacher contended that because her contract was nonrenewed for alleged misconduct, the procedures governing discharge should have applied. *Id.* at 728. The Court of Appeals

rejected this argument because the teacher had been nonrenewed, not discharged. *Id.* The court explained the distinction as follows:

When a decision to discharge is made, the district may notify the employee at any time during the term of the contract and need only pay the teacher until the hearing. See *Sauter v. Mount Vernon Sch. Dist. No. 320*, 58 Wn. App. 121, 134, 791 P.2d 549 (1990). In contrast, when a nonrenewal decision is made, the district must give the employee notice on or before May 15, or, in some circumstances, no later than June 1. RCW 28A.405.220. Also, when a nonrenewal decision is made, the teacher is paid until the end of the teacher's pay period under the contract.

Id.

Finally, this Court very recently reaffirmed the importance of the distinction between nonrenewal and discharge. In *Schlosser v. Bethel Sch. Dist.*, Slip Op. No. 44750-9-II (Div. II, Aug. 26, 2014), this Court noted that “[w]hen applying chapter 28A.405 RCW and when determining due process protections, Washington courts distinguish between nonrenewal of teachers’ contracts and teachers’ discharge from employment.” *Id.* at *3. The importance of this distinction, this Court stated, was that a discharge determination entitles an employee to a pre-termination hearing, whereas a nonrenewal determination entitles an employee to only a post-termination hearing. *Id.* at *5. This Court held that this distinction proved fatal to the plaintiff’s claim that she should have been granted a pre-termination hearing on her nonrenewal. *Id.* at *3.

Here, Mr. Davis was discharged, not nonrenewed. There is no reference in the May 15 probable cause letter to any nonrenewal action. CP 104. The District could have nonrenewed Mr. Davis at that time if it so chose. It did not.

Should this Court affirm the trial court's decision, it will be granting permission to school districts across Washington to circumvent the requirements of Chapter 28A.405 RCW and to deny due process to any teacher it decides to discharge late in the school year. Public school teachers have a property right in continued employment, and employees given notice of potential discharge are entitled to a hearing prior to termination. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); RCW 28A.405.300. Converting a discharge into a nonrenewal would deprive employees of this right whenever a hearing could not be held prior to August 29. *See Schlosser*, at *5. The result would be that employees receiving notice of discharge early in the school year would be entitled to pre-termination hearings, while those receiving notice of discharge late in the school year or in summer would only be entitled to post-termination hearings. Surely

our legislature did not intend to make employees' rights dependent on the month of the year.¹

Respondent contends that it would be "impractical" to require school districts "to go out of their way" to inform certificated teachers that they were being nonrenewed in addition to being discharged. Br. of Respondent at 12-13. Mr. Davis fails to see what is so "impractical" about adding one sentence to a letter. Nevertheless, convenience is not a reason to deny Mr. Davis his statutory and due process rights.

B. Contract Renewal is Automatic Regardless of Whether a New Document was Offered or Signed.

Respondent asserts that RCW 28A.405.300 does not require it to employ a certificated teacher for a new contract term if it did not "offer" a new contract to the teacher. Br. of Respondent at 16-17. Respondent's argument ignores the mandate of RCW 28A.405.210. This statute states that for all certificated teachers not timely notified of nonrenewal,

the employee entitled thereto shall be **conclusively presumed** to have been reemployed by the district for the next ensuing term upon contractual terms identical with those which would have prevailed if his or her employment had actually been renewed by the board of directors for such ensuing term.

RCW 28A.405.210 (emphasis added). Thus, Mr. Davis' continued employment was in no way dependent on whether the District made any

¹ Had the legislature so intended, it would likely be acting in violation of the equal protection clause of the Fourteenth Amendment.

offers or whether he signed any new documents in spring 2013. Because Mr. Davis was not nonrenewed and no decision had yet been rendered on his discharge, Mr. Davis was conclusively presumed to have been reemployed for the 2013-14 school year.

Neither the District nor a court can simply declare Mr. Davis' contract to be terminated. Non-probationary certificated employees may only be discharged or nonrenewed for those reasons articulated by statute. RCW 28A.405.210, 300. "Under this statute, an employee cannot be notified of the discharge as a *fait accompli*." *Bellevue Pub. Sch. Dist. No. 405 v. Benson*, 41 Wn. App. 730, 735, 707 P.2d 137 (1985). Improper nonrenewal or discharge carries with it the presumptive remedy of reinstatement. *Van Horn v. Highline Sch. Dist. No. 401*, 17 Wn. App. 170, 176, 562 P.2d 641 (1977). If the District still wishes to terminate the employee and good cause still exists, the District must start the process anew. *Id.* Moreover,

it is not the function of the superior court to decide that, even though a material procedural defect existed in the proceedings that took place within the school district, the evidence introduced in the superior court trial de novo was sufficient for the trial judge to determine and conclude, by his or her own evaluation of the evidence, that the teacher, though improperly discharged by the school board, should be discharged based upon the evidence introduced at the trial.

Id. The District did not provide Mr. Davis notice of nonrenewal for either the 2012-13 or 2013-14 school years. It cannot unilaterally declare that the 2013-14 contract does not exist.

The purpose of continued pay while a discharge is pending is to protect the employee in the event of an erroneous decision by the district. *Sauter v. Mount Vernon Sch. Dist. No. 320*, 58 Wn. App. 121, 131, 791 P.2d 549 (1990), *partially abrogated on other grounds by Federal Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 261 P.3d 145 (2011). This is so because public school teachers have a property right in continued employment. *Loudermill*, 470 U.S. at 542. If the hearing examiner determines that the district's decision was erroneous, the employee is entitled to reinstatement. *Van Horn*, 17 Wn. App. at 176. This remedy is not dependent on whether any new documents have been signed.² As of August 29, 2013, no decision had yet been rendered- the District had no way of knowing whether its decision would be overruled as erroneous.³ There is no reason to deny Mr. Davis the protection of administrative leave pay based on a then unknown outcome.⁴

² To premise reinstatement on signing of a new document would itself constitute an unauthorized discharge, as it would result in the termination of an employee for a reason not provided by statute. *See* RCW 28A.405.210, .300.

³ Indeed, as was later revealed, the hearing examiner did not accept all of the District's findings.

⁴ Denial of this protection until the hearing examiner renders his or her decision is precisely what the legislature contemplated in drafting House Bill 1851. That the bill

By failing to notify Mr. Davis of nonrenewal and failing to hold a hearing prior to August 29, 2013, Mr. Davis' contract renewed automatically, and he was entitled to wages thereunder until the date of his discharge hearing.

C. No Law Supports the District's Assertion that it may Cease Compensating an Employee on Paid Administrative Leave.

Respondent can cite no law supporting the proposition that a school district may cease paying an employee on administrative leave pending discharge. Respondent claims that *Bellevue Public School District No. 405 v. Benson* supports its contention that a school district is only required to pay an employee on administrative leave until the end of the contract year. *Benson* holds no such thing. In that case, the plaintiff "was notified prior to May 15 that he was to be demoted, he was aware that the District did not intend to renew his contract as principal, and he received a full and fair hearing which also occurred prior to May 15." *Id.* at 737 (emphasis added). The Court held that "[t]his procedure" was sufficient to notify the plaintiff of nonrenewal. *Id.* at 737-38. In contrast, the only action that occurred before May 15 in this case was that Mr. Davis received a notice of potential discharge.⁵ That letter made no mention of nonrenewal.

was introduced indicates that the legislature does not interpret the current law to allow the withholding of wages.

⁵ Respondent also contends that Mr. Davis received a full and fair hearing because a "meeting" was held prior to May 15. Br. of Respondent at 20. A "meeting" does not

Respondent further contends that RCW 28A.405.300 permits a school district to cease compensation for employees on administrative leave when the prior year's contract ends. This statute states:

In the event any such notice or opportunity for hearing is not timely given, or in the event cause for discharge or other adverse action is not established by a preponderance of the evidence at the hearing, such employee shall not be discharged or otherwise adversely affected in his or her contract status for the causes stated in the original notice for the duration of his or her contract.

RCW 28A.405.300. The fatal flaw in Respondent's argument is that Mr. Davis was not discharged during the 2012-2013 contract year. The hearing officer rendered his final decision on January 31, 2014. CP 212-14. Terminations are not retroactive to the date of notice. *See Giedra v. Mt. Adams Sch. Dist. No. 209*, 126 Wn. App. 840, 849, 110 P.3d 232 (2005) (teachers have a property interest in continued employment at least until provided with a hearing).

Mr. Davis was not discharged until January 2014. No decision having been made before August 29, 2013, Mr. Davis' contract renewed automatically. *See section B, supra*. If the above-quoted portion of RCW

suffice as a full and fair hearing. *Giedra v. Mt. Adams Sch. Dist. No. 209*, 126 Wn. App. 840, 849, 110 P.3d 232 (2005). This is especially so when the meeting took place before the alleged notification letter was sent. *See* RCW 28A.405.300 ("Every such employee so notified, at his or her request made in writing and filed with the president, chair of the board or secretary of the board of directors of the district within ten days after receiving such notice, shall be granted opportunity for a hearing...") (emphasis added).

28A.405.300 has any application in this case, it would apply to the 2013-14 contract year, not the 2012-13 contract year, as the District contends.⁶

Contrary to Respondent's assertion, the law operates in Mr. Davis' favor, not the District's.

D. Whether Mr. Davis "Performed Work" for the District is Irrelevant.

Respondent asserts that because Mr. Davis did not "perform work" for the District during the period at issue, the District does not owe him any wages. Respondent's concern is not relevant to this appeal. A teacher on paid administrative leave is not, technically speaking, "performing work" for the school district. Yet, Respondent does not argue that it ceased owing Mr. Davis wages at the moment he was placed on administrative leave.⁷ The purpose of continued pay while a discharge is pending is to protect the employee in the event of an erroneous decision by the district, not to compensate the employee for work performed. *Sauter*, 58 Wn. App. at 131. Respondent's assertion is irrelevant and should be disregarded.

⁶ Similarly, RCW 28A.405.470 also has no application to the present case. Mr. Davis' sole reason for drawing this Court's attention to RCW 28A.405.470 was to demonstrate to this Court that the legislature is capable of denying wages to an employee pending discharge, but that it explicitly chose not to do so in all situations. Mr. Davis does not, contrary to Respondent's assertion, argue for RCW 28A.405.470's application to this matter. Mr. Davis has not been charged with any crime against children; thus, RCW 28A.405.470 does not govern his discharge.

⁷ Nor could it, as such an argument would be contrary to RCW 28A.405.300.

E. Tacoma School District Fraudulently Promised Mr. Davis that he would be Paid his Wages Pending his Appeal.

Respondent contends that the trial court did not err in dismissing Mr. Davis' claim for material misrepresentations because it did not intend for Mr. Davis to rely on its statements and that Mr. Davis' subsequent reliance was unreasonable. In doing so, Respondent attempts to disclaim or downplay its prior statements and again asks this Court to retroactively correct the District's errors.

In a July 22, 2013 letter from Lynne Rosellini, Assistant Superintendent of Human Resources, the District told Mr. Davis, "You will remain on administrative leave pay status pending your appeal." CP 60. On September 23, 2013, Respondent filed a motion with the trial court, under penalty of perjury, arguing:

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. At no time did the District ever indicate to Mr. Davis that it would cease paying him before his hearing.

Respondent attempts to disclaim its promises by stating that Ms. Rosellini was "not involved in the hearing scheduling discussions, nor was she aware at the time the letter was sent that Mr. Davis' hearing might

occur after August 29, 2013.” Br. of Respondent at 25. Ms. Rosellini is an employee of the Tacoma School District, and was acting in this capacity when she sent the letter to Mr. Davis. Where an agent has authority to make statements on the principal’s behalf, those statements are attributable to the principal itself. *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 163, 422 P.2d 496 (1967). Respondent does not argue that Ms. Rosellini lacked the authority to issue the letter to Mr. Davis.⁸ Thus, the letter is attributable to the District. Respondent cannot disclaim the actions of its employee simply because it is convenient for them to do so.

Respondent also attempts to downplay its statement that it would suffer financial hardship if Mr. Davis’ hearing were continued to January 2014. This statement was made in a pleading submitted to the court, and carried with it the penalty of perjury if falsely asserted. Mr. Davis had every right to rely on the statement as truth. Surely Respondent contemplated this, as it premised a request for relief on its assertion. At the very least, there is a question of fact such that dismissal of Mr. Davis’ claim for material misrepresentation on summary judgment was improper.

III. CONCLUSION

Tacoma School District was under a legal obligation to pay Mr. Davis his wages until the hearing officer rendered a decision. It was error

⁸ Nor could it, as her position as Assistant Superintendent of Human Resources surely contemplates a duty to issue such letters.

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 decision and remand this case for a trial on the merits.

DATED this the 3 day of October, 2014.



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