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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO: 297578-III

(Yakima County No: 10-2-04284-8)

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

EAST VALLEY SCHOOL DISTRICT, NO. 90,

Petitioner,

vs.

MICHELE TAYLOR,

Respondent.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. **This Matter Should Not be Remanded to the Superior Court But Rather the Court of Appeals Should Review the Entire Record and Render a Decision Finding Sufficient Cause for Discharge of Michele Taylor.**

1. **East Valley School District has a Right to Judicial Review of the Hearing Officer's Decision.**

In the case of Federal Way School District No. 210 v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011), the Supreme Court preserved the right of Petitioner, East Valley School District No. 90 (hereinafter "School District), to a judicial review of the hearing officer's decision.

¶ 24 A constitutional right to judicial review still exists notwithstanding the district's inability to appeal. CONST. art. IV, § 6; Williams v. Seattle Sch. Dist. No. 1, 97 Wash.2d 215, 643 P.2d 426 (1982). The District did not specifically request review under this court's constitutional authority; however, the pleadings were sufficient to raise the issue of our inherent power to review. CONST. art. IV, § 4; see also Bridle Trails Cmty. Club v. City of Bellevue, 45 Wash.App. 248, 254, 724 P.2d 1110 (1986).

¶ 25 The Washington State Constitution recognizes the right to seek discretionary review of an administrative agency decision under the court's inherent constitutional power (also known as constitutional or common law certiorari). CONST. art. IV, §§ 4, 6. "The scope of review is limited to whether the hearing officer's actions were arbitrary, capricious, or illegal, thus violating a claimant's fundamental right to be free from such action." Foster v. King County, 83 Wash.App. 339, 346, 921 P.2d 552 (1996); Bridle Trails, 45 Wash.App. at 252, 724 P.2d 1110;

Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wash.2d 690, 693–94, 658 P.2d 648 (1983) (constitutional certiorari is limited to a review of the record to determine whether the challenged decision or act was arbitrary and capricious or contrary to law). “The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority.” Saldin Secs., Inc. v. Snohomish County, 134 Wash.2d 288, 292, 949 P.2d 370 (1998). Thus, a court will accept review only if the appellant can allege facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious. Pierce County Sheriff, 98 Wash.2d at 693–94, 658 P.2d 648.

Even if East Valley School District did not specifically request review under constitutional authority, the pleadings are sufficient to raise the issue of the inherent constitutional power of this Court. See Vinson, *supra*. at 152.

2. This Court is Authorized to Review the Record and Render a Decision Regarding Sufficient Cause.

Respondent, Michelle Taylor (hereinafter “Taylor”), *incorrectly* argues that this Court is not authorized to review the entire record and render a decision regarding sufficient cause for discharge of Taylor.

As previously identified in Commissioner’s Ruling No. 29757-8-III (dated May 11, 2011) within this matter, and contrary to the asserted position of Taylor, it is well established that review by this Court is on the administrative agency (hearing officer’s) record, not on the superior

court's record, findings, and conclusions. This Court stands in the same position as the superior court when reviewing the decision of an agency. Waste Management v. WUTC, 123 Wn.2d 621, 632-34, 869 P.2d 1034 (1994); Herman v. Shorelines Hearings Bd., 149 Wn. App. 444, 454, 204 P.3d 928 (2009).

As a result, and as previously argued by the School District, the Court of Appeals can, and should in accordance with Federal Way School District No. 210 v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011), review not only the order of dismissal of the case by the Yakima County Superior Court, but also the entire record of the statutory hearing held pursuant to RCW 28A.405.310 to determine sufficient cause. Upon review, for the reason's previously identified by Petitioner and those included herein, the Court should render a decision finding that the School District had sufficient cause to discharge Taylor from employment.

3. Taylor's Request for Remand is Untimely as Taylor Has Already Invoked the Jurisdiction of this Court.

Respondent Taylor's request for remand is untimely. Taylor has invoked the jurisdiction of the appellate court on numerous issues, inclusive of a motion on the merits. It is untimely to now request a remand. See Hough v. Ballard, 108 Wn. App. 272, 278, 31 P.3d 6 (2001).

B. The School District has a Cognizable, Legal Basis for a Constitutional Writ of Review.

The School District has already specifically briefed its position, in Petitioner's Amended Opening Brief, that the hearing officer's decision was arbitrary, capricious, or contrary to law / illegal, thus entitling the School District to a constitutional writ of relief and a finding of sufficient cause for discharge. For the sake of judicial efficiency, the School District will not re-address every argument but instead will address the relevant arguments incorrectly asserted by Taylor.

1. The Hearing Officer Acted Illegal / Contrary to Law.

Taylor *incorrectly* asserts that it is the School District's argument that the hearing officer committed "errors of law," thus triggering "illegal / contrary to law" under a constitutional writ. This assertion is incorrect. It is the School District's position, as clearly stated in its Amended Opening Brief, that the hearing officer acted illegally / contrary to law, thus triggering a constitutional writ, by acting contrary to her statutory authority.

An illegal / contrary to law act, in the context of administrative agency / hearing officer action, is an act which is contrary to statutory authority. King County v. Washington State Bd. of Tax Appeals, 28 Wn. App. 230, 242, 622 P.2d 898, 904 (1981) (citing Leschi Improvement

Council v. State Highway Comm'n, 84 Wn.2d 271, 279, 525 P.2d 774 (1974). The court in Port Townsend School Dist. 50 v. Brouillet, 21 Wn. App. 646, 587 P.2d 555 (1978), equated the illegal act requirement with a requirement that the agency has acted outside the scope of its statutory authority. The review is whether the hearing officer acted within her authority as defined by the constitution, statutes, and regulations. King County, 28 Wn. App. at 242-43.

As previously argued, the School District has a fundamental right to have an agency / hearing officer abide by the rules to which the agency is subject to or, in the alternative, to be free from the agency decisions that do not. Vinson, 172 Wn.2d at 769; Pierce County Sheriff, 98 Wn.2d at 694.

An agency's violation of the rules which govern its exercise of discretion is certainly contrary to law and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental. . . . The courts thus have inherent power to review agency action to assure its compliance with applicable rules.

Pierce County Sheriff, 98 Wn.2d 690, 694, 658 P.2d 648 (1983)

(internal citations omitted) (emphasis added).

The School District has a fundamental right to have the hearing officer abide by the rules to which she is subject to or, in the alternative, to be free from her decision that does not. Vinson, 172 Wn.2d at 769; Pierce

County Sheriff, 98 Wn.2d at 694. The School District did not receive a fair hearing by: the hearing officer failing to use the required sufficient cause standard for discharge required under RCW 28A.405.310, the hearing officer improperly considering remediation, the hearing officer failing to make appropriate evidentiary rulings pursuant to the rules of evidence as required by RCW 28A.405.310, and the hearing officer improperly excluding post-probable cause notice conduct.

a. **The Hearing Officer Acted Outside of Her Authority (contrary to law / illegally) by Failing to Use the Required Sufficient Cause Standard Required Under RCW 28A.405.310 and Respective Case Law.**

RCW 28A.405.310 establishes the jurisdiction and authority of the hearing officer. More specifically, RCW 28A.405.310(7)(a)(b)(c) and (8), set forth the jurisdiction and authority of the hearing officer in cases involving the discharge of a certificated employee. A hearing officer's decision would be illegal if it violates any of the parameters set forth within RCW 28A.405.310(7) and (8).

RCW 28A.405.310(8) indicates in pertinent part:

Any final decision by the hearing officer ... to discharge the employee, ... shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action. (Emphasis added).

“The employment contract of a nonprovisional teacher may not be terminated except for ‘sufficient cause.’ RCW 28A.400.300(1).

Sufficient cause is *not* defined by statute; thus, our courts have construed the phrase to give it meaning.” Vinson, 172 Wn.2d at 771. Keeping in mind, a common thread running through many Washington cases is the concern for the health, safety, and welfare of the student. Clarke v. Shoreline School District No. 412, 106 Wn.2d 102, 114, 720 P.2d 793 (1986).

Sufficient cause for teacher discharge “may be found as a matter of law, without applying the *Clarke* test or *Hoagland* factors, in only the most egregious cases.” Vinson, 172 Wn.2d at 773; See Clarke v. Shoreline Sch. Dist. No. 412, 106 Wn.2d. 102, 720 F.2d 793 (1986); See Hoagland v. Mount Vernon School Dist. No. 320, 95 Wn.2d 424, 623 P.2d 1156 (1981). If the matter is not an “egregious” case, “the *Clarke* test and *Hoagland* factors (citation omitted) must be applied in all nonflagrant instances of misconduct.” Vinson, 172 Wn.2d at 773 (emphasis added). There is no discretion afforded a hearing officer in applying the outlined sufficient cause standards. The School District believes this case to be an

egregious case where sufficient cause can be found as a matter of law, but in the alternative, the Clarke test was met.¹

Clarke provides that “[s]ufficient cause for a teacher’s discharge exists as a matter of law where the teacher’s deficiency is unremediable [sic] and (1) materially and substantially affects the teacher’s performance (citations omitted) *or* (2) lacks any positive educational aspect of legitimate professional purpose.” Clarke, 106 Wn.2d 113-14. The Hoagland factors are considered “to determine whether the teacher’s conduct substantially undermines a teacher’s effectiveness.”² Vinson, 172 Wn.2d 772.

In the case before this Court, the hearing officer acted outside her authority by not applying the Clarke test nor the Hoagland factors as required by RCW 28A.405.310 and the Washington State Supreme Court. Vinson, 172 Wn.2d at 773. No findings of fact or conclusions of law were

¹ Not only were Taylor’s actions inappropriate for a student-teacher relationship, but Taylor’s conduct also completely disregarded her duty to report observations of a breakdown in the health and safety of students. See **CP 1636-1637** (Taylor testified believing one (1) student was “depressed” and “tanking.” Yet, Taylor did not report the same to any official). The hearing officer even found that “[i]t would have been prudent for Appellant to have reported Student A’s personal issues to a counselor” (**CP 2258**); RCW 26.44.030.

² Evidence was presented showing the negative effect this matter had on both male students involved, showing Ms. Taylor’s effectiveness had been undermined. (**CP 1426:15-1427:25; CP 1570:17-1572:10**). No Finding of Fact or Conclusion of Law was issued regarding the same.

issued regarding the Clarke test nor Hoagland factors. (See **CP 2258-59**). Failure to follow this statutory standard and case law created formula is contrary to law / illegal and arbitrary and capricious warranting a reversal of the decision. (See **CP 2258-59**, Hearing Officer's Finding of Fact Nos. 3, 4, and 10; Conclusions of Law Nos. 2, 3, 4, 5, and 6; and Final Decision; Coupeville School Dist. No. 204 v. Vivian, 36 Wn. App. 728, 677 P.2d 192 (1984) (holding that considering all factors, including teacher's misconduct in allowing two students to drink at his home and its impact on his teaching ability, school district conclusively established both misconduct and its material and substantial effect upon his future performance, and thus he could properly be discharged from his employment with school district)).

The School District has a fundamental right to be free from the hearing officer's decision as the hearing officer failed to abide by the rules she was subject to (acting illegal / contrary to law). Vinson, 172 Wn.2d at 769; Pierce County Sheriff, 98 Wn.2d at 694.

b. The Hearing Officer Acted Outside her Statutory Authority by Improperly Considering "Remediation."

i. Improper to Consider Remediation According to RCW 28A.405 et seq. and Respective Case Law.

As stated above, a hearing officer is charged to determine sufficient cause under RCW 28A.405 et seq. The term "sufficient cause"

under RCW 28A.405.310 has been limited by court interpretation to prohibit discharge for a “remediable teaching deficiency,” unless school authorities comply with the probation statute, RCW 28A.405.100. Clarke, supra at 113; Wojt v. Chimacum School Dist. No. 49, 9 Wn. App. 857, 516 P.2d 1099 (1973).

Areas of remedial deficiency have been defined by RCW 28A.405.100. Those include:

Instructional skill; classroom management, professional preparation and scholarship; effort toward improvement when needed; the handling of student discipline and attendant problems; and interest in teaching pupils and knowledge of subject matter. RCW 28A.405.100(1)(a).

At any time after October 15th, an employee whose work is not judged satisfactory based on district evaluation criteria shall be notified in writing of the specific areas of deficiencies along with a reasonable program for improvement. . . . (Emphasis added). RCW 28A.405.100(4)(a).

Termination is divided into two types: (1) teacher performance, and (2) teacher misconduct. Weems v. North Franklin School District, 109 Wn. App. 767, 37 P. 3d 354, 358 (2002). “Remediability” is only a consideration when discharge follows deficient teacher performance. That is, some professional shortcoming that can be remedied with training, more work or other instruction - for example, if the student’s files here

were left incomplete or poorly maintained, rather than falsified. Weems, 109 Wn. App. 767; Pryse v. Yakima School District, 30 Wn. App. 16, 632 P.2d 60 (181) (sexually exploitive conduct is conduct which cannot be remediated); Mott v. Endicott School District, 105 Wn.2d 199, 713 P.2d 98 (1986) (striking students' genitals is conduct which cannot be remediated).

The case before this Court does not contain an allegation or bring to issue a question of Ms. Taylor's classroom *teaching* performance or *teaching* deficiency. The allegations set forth in the Notice of Probable Cause do not address *teaching* deficiencies. To the contrary, they address misconduct, most of which occurred outside the teaching day, at night, or on weekends. The conduct found by the hearing officer to have occurred does not pertain to *teaching* and therefore is not subject to remediation. Weems, supra. The hearing officer's conclusions on remediation do not follow the law on, and are not based upon findings of teaching deficiency. Remediation does not apply to this case.

The hearing officer was required by statute (RCW 28A.405.310) and case law to make findings and conclusions regarding egregious or non-egregious conduct and if non-egregious findings and conclusions whether the conduct of the employee "(1) materially and substantially affects the teacher's performance, Hoagland, at 428, 623 P.2d 1156, Mott,

105 Wash.2d at 203, 713 P.2d 98; or (2) lacks any positive educational aspect or legitimate professional purpose. *Pryse*, 30 Wash.App. at 24, 632 P.2d 60; *Potter*, 31 Wash.App. at 842, 644 P.2d 1229.” See *Clarke*, *supra* at 113-14. The *Hoagland* analysis was restated as being required in *Vinson*, *supra* at 153.

The hearing officer in this case made certain conclusions or law regarding the conduct of Ms. Taylor, which the hearing officer found to be improper. (CP 2259 (Concluding Taylor’s violation of the School District’s medication policy, failure to refer Student A to counseling, and attempts to counsel or mentor Student A were all errors in judgment)). Rather than determine egregious conduct or if non-egregious conduct apply *Hoagland* factors to determine if the conduct undermined the teacher’s effectiveness and apply *Clarke* standard of lack of positive educational aspect or legitimate education purpose, the hearing officer arbitrarily, capriciously, and contrary to law / illegally determined that the conduct was “remediable.”

A review of “remediation” was not available for this matter. The hearing officer’s Conclusions of Law (Nos. 4, 5, and 6) that Taylor’s conduct was “remediable” is arbitrary, capricious, or contrary to law / illegal. (CP 2259). Furthermore, the hearing officer’s failure to make findings and conclusions regarding whether the conduct found to be committed by Ms.

Taylor materially and substantially affected Ms. Taylor's performance is arbitrarily, capriciously, contrary to law / illegally, and in spite of the evidence and findings of misconduct.

ii. Improper to Consider "Remediation" According to Established Entitlement of and Purpose of Public Schools.

"[P]ublic schools are not established for retraining unqualified teachers." Coupeville, 36 Wn. App. at 739. "The year following [a teacher's] discharge [is] a critical year for the students then in school and the entire community. It would be of small benefit to those students to retain [the teacher] during that year even though in subsequent years [the teacher] might again become an effective teacher." Id. at 739. Public schools are "entitled to a teacher who would be an effective role model and teacher on the date of [her] discharge, not the following day, or the following month or the following year." Id.

The hearing officer found that the District had shown that Ms. Taylor is in need of additional training and/or counseling regarding the Districts' medication policy and effective response to student requests for guidance. (CP 2259). Despite finding that Taylor's conduct was not "prudent," was "misguided," and was based on "poor judgment," the hearing officer concluded "remediation" was needed and restored Ms. Taylor to her employment position. (CP 2253 - 59). This is arbitrary,

capricious, or contrary to law / illegal as the School District is entitled to a teacher who would be an effective role model and teacher on the date of their discharge. Coupeville Sch. Dist. v. Vivian, 36 Wn. App. 728, 677 P.2d 192 (Div. 1, 1984). The School District is not established for retraining unqualified teachers. Students should not be the pawns or guinea pigs of a misguided or unqualified teacher.

c. The Hearing Officer Acted Outside of her Statutory Authority by Failing to Make Appropriate Evidentiary Rulings Pursuant to the Rules of Evidence as required by RCW 28A.405.310.

The hearing officer was required to strictly follow the rules of evidence at the statutory hearing. RCW 28A.405.310(7)(a) indicates the hearing officer “shall: make rulings as to the admissibility of evidence pursuant to the rules of evidence applicable in the superior court of the state of Washington.” (emphasis added). The hearing officer has no discretion to act otherwise and relied on improper evidence in rendering her decision.

Rumor evidence in general is inadmissible hearsay according to ER 801 and 802. Statements made that are based on rumors or speculations are inadmissible. Lockwood v. AC & S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987). Under the hearing officer’s discussion of “Testimony and Other Evidence,” the hearing officer finds that, in regards to the allegation the Ms.

Taylor having sexual intercourse with student Jeremy Standfill, “[c]redible evidence exists of rumors that Student B claimed to have had sex with Appellant in the Kmart parking lot earlier than February.” (CP 2256) (emphasis added). As a result of the rumors, “[i]t is highly likely that Student B’s claims prior to May that he had sex with Appellant in the Kmart parking lot were empty boasting at the expense of an attractive young female teacher, and remain empty boasting.” (CP 2256).

Despite the School District’s continuing objection, the hearing officer allowed rumor evidence into the record regarding the referenced Kmart incident. The hearing officer acted outside of her statutory authority in admitting and heavily relying upon rumor testimony as “credible evidence.” (CP 2256). The hearing officer’s admission of and heavy reliance upon said rumor evidence as “credible evidence” goes contrary to the statutory requirements that she strictly follow the rules of evidence, to the direct and substantial prejudice of the School District, and is a reversible error under our constitution as it fundamentally prevented the School District from receiving a fair hearing. Vinson, 172 Wn.2d at 769.

2. The Hearing Officer's Decision was Arbitrary and Capricious.

Arbitrary and capricious actions are “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.” Vinson, 172 Wn.2d at 769 (quoting Foster, 83 Wn. App. at 347). A “careful deliberation” is required for a case to NOT be deemed arbitrary and capricious. Vinson, 172 Wn.2d 769-70 (emphasis added). Likewise, a case is deemed arbitrary and capricious if a careful deliberation is not had.

Again, for judicial efficiency, the School District will not re-argue its previously asserted positions regarding arbitrary and capricious action. However, it should be reiterated that for the reasons previously asserted in Petitioner's Amended Opening Brief, it is the School District's position that the hearing officer DID NOT engage in a careful deliberation of this matter. Petitioner's Amended Opening Brief contains citations to the record for the hearing officer's failure in the following areas. The hearing officer acted arbitrary and capricious by: wrongfully issuing a finding of fact that Taylor did not send the sexually suggestive photo on June 6, 2009; wrongfully issuing a finding of fact that Taylor did not violate District training or policies; failing to issue a finding of fact that Taylor violated District directives; failing to issue a finding of fact that Taylor

violated her closed hearing request; failing to issue a finding of fact that Taylor lied regarding violating District directives; failing to issue a finding of fact that Taylor changed her testimony previously provided under oath at her criminal trial; failing to issue and finding of fact that Taylor lied to a minor student; failing to issue findings of facts regarding Taylor's credibility, propensity for truthfulness, or blatant disregard for process; and wrongfully issuing a finding of fact that intent is required for an action to be a valid District violation. Full citations and references supporting the above arguments pertaining to arbitrary and capricious can be found in Petitioner's Amended Opening Brief.

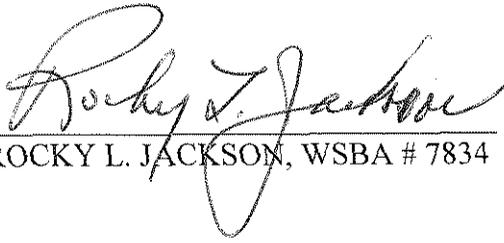
The totality of these areas, as previously identified, clearly illustrate that the School District was not provided a fundamentally fair hearing as required by the Constitution.

II. CONCLUSION

For the reasons stated above, and for those reasons previously stated in Petitioner's Amended Opening Brief, this Court should find that the trial court erred in dismissing the School Districts' request for a Writ of Review for lack of jurisdiction. This Court should review the entire record and reverse Hearing Officer Nelson's decision as it is arbitrary, capricious, and contrary to law / illegal. This Court should order that the

employment of Taylor should be terminated for sufficient cause, and that Taylor should not be awarded reasonable attorney's fees and costs.

Respectfully submitted this 1ST day of June 2012.


ROCKY L. JACKSON, WSBA # 7834

Certificate of Service

I certify, under penalty of perjury, under the laws of the State of Washington, I am a citizen of the United States and of the State of Washington; over the age of 18 years of age; not a party interested in the above matter and competent to be a witness in said cause. That on this 15th day of June, 2012, I served true copies of *PETITIONER'S REPLY BRIEF* to the following parties as identified below:

Original and One copy via UPS Next Day Courier:

Ms. Renee Townsley, Clerk / Administrator
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201-1905

One Copy via Email and U.S. Mail:

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Dated in Yakima, Washington, this 15th day of June, 2012.



Natalie K. Bennett