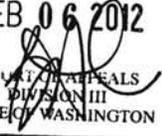


FILED

FEB 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By 

Case No. 297578

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

EAST VALLEY SCHOOL DISTRICT NO. 90,

Petitioner,

vs.

MICHELE TAYLOR,

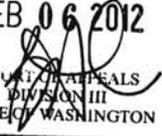
Respondent.

BRIEF OF APPELLANTS

ROCKY L. JACKSON
Menke Jackson Beyer Ehlis Harper
& Plant, LLP
807 North 39th Avenue
Yakima, WA 98902
(509) 575-0313

FILED

FEB 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By 

Case No. 297578

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

EAST VALLEY SCHOOL DISTRICT NO. 90,

Petitioner,

vs.

MICHELE TAYLOR,

Respondent.

BRIEF OF APPELLANTS

ROCKY L. JACKSON
Menke Jackson Beyer Ehlis Harper
& Plant, LLP
807 North 39th Avenue
Yakima, WA 98902
(509) 575-0313

TABLE OF CONTENTS

	Page(s)
ASSIGNMENTS OF ERROR, WITH ISSUES	1
Assignments of Error	1
Issues Pertaining to Assignments of Error	1
I. STATEMENT OF THE CASE	3
A. The Notice of Probable Cause for Discharge and the Amended Notice of Probable Cause for Discharge	3
B. The Record of Hearing Officer Luella E. Nelson	4
1. The Hearing Officer’s Application of the Law	4
a. The Hearing Officer Concluded Ms. Taylor’s Admitted Conduct is “remediable”	4
b. Hearing Officer’s Conclusion that Rumor Evidence is Credible Evidence	5
c. Hearing Officer Concluded Taylor needed “additional training and/or counseling” on the Date of Discharge, But Ordered Reinstatement	7
d. Hearing Officer Concluded Post-Termination Conduct Was Not a Proper Basis for Termination	8
2. Findings of Facts and Conclusions of Law Issued by the Hearing Officer and Admissions Made by Taylor Regarding Taylor’s Conduct	8
a. Taylor Counseled or Mentored Minor Student Fernando Valencia Outside of Her Teaching Capacity and Training.....	8
b. Taylor Provided Medication to Minor Student Jeremy Standfill	10

c.	Finding of Fact that Taylor Did Not Send the Sexually Suggestive Photo	11
d.	Finding of Fact that Taylor Did Not Violate District Training or Policies Regarding Teacher / Student Relationships	12
e.	Finding of Fact that a Wrongful Intent is Required for an Action to be a Valid Violation of District Training and Policies	13
3.	Findings of Facts and Conclusions of Law Not Issued by the Hearing Officer, But Uncontroverted and Supported by Substantial Evidence	14
a.	No Finding of Fact that Taylor Violated District Directives to Not Communicate About this Case / Was Insubordinate	15
b.	No Finding of Fact that Taylor Lied at the Statutory Hearing	16
c.	No Finding of Fact that Taylor Changed Her Testimony Previously Provided Under Oath at Her Criminal Trial	17
d.	No Finding of Fact that Taylor Lied to Minor Student Fernando Valencia	17
e.	No Finding of Fact Regarding Taylor’s Credibility or Propensity for Truthfulness	18
C.	Procedural Status	18
1.	Superior Court Review	18
2.	Court of Appeals Review	19
II.	ARGUMENT	19
A.	Summary of Argument	19

B. The Trial Court Erred in Dismissing East Valley School District No. 90’s Request for a Writ of Review	20
1. A Hearing Officer’s Decision Issued Under RCW 28A.405 <u>et. seq.</u> is Reviewable Under a Constitutional Writ of Review	21
2. The School District’s Pleadings Were Sufficient to Raise Inherent Power of Review	21
C. The Court of Appeals Should Review the Entire Record and Render a Decision Finding Sufficient Cause for Discharge of Michele Taylor	22
D. The Hearing Officer’s Decision was Arbitrary, Capricious, Contrary to Law / Illegal, thus Entitling the School District to Constitutional Writ Relief and a Finding of Sufficient Cause for Discharge	24
1. The Standard Under a Constructional Writ of Review ...	24
2. The Hearing Officer Acted Outside Her Statutory Authority by Failing to Use the Proper Sufficient Cause Standard Required Under RCW 28A.405.310 and Respective Case Law	26
a. The Hearing Officer Failed to Use the <u>Clarke</u> Test or the <u>Hoagland</u> Factors	26
b. The Hearing Officer Improperly Considered “Remediation”	28
1. Improper to Consider Remediation According to RCW 28A.405 <u>et. seq.</u> and Respective Case Law	29
2. Improper to Consider “Remediation” According to Established Entitlement of and Purpose of Public Schools	31

3. 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	32
a. Improper Evidentiary Ruling Regarding Rumor Evidence	32
b. Improper Evidentiary Ruling Regarding Post-Probable Cause Notice Conduct	34
4. The Hearing Officer Acted Arbitrarily and Capriciously by Making Findings of Facts and Conclusions of Law Regarding Taylor’s Conduct that Support Discharge But Then Rendering a Final Decision That There Was Not Sufficient Cause for Discharge	36
a. Taylor Counseled or Mentored Minor Student Fernando Valencia	36
b. Taylor Provided Medication to Minor Student Jeremy Standfill	38
5. The Hearing Officer Acted Arbitrarily and Capriciously By <i>Making</i> Findings of Facts and Conclusions of Law <u>Not Supported</u> by Substantial Evidence and by <i>Failing To Make</i> Findings of Facts and Conclusions of Law That <u>Were Supported</u> by Substantial Evidence	39
a. Finding of Fact that Taylor Did Not Send the Sexually Suggestive Photo	40
b. Finding of Fact that Taylor Did Not Violate District Training or Policies	42
c. No Finding of Fact that Taylor Violated District Directives	42

d.	No Finding of Fact that Taylor Violated Her Closed Hearing Request	43
e.	No Finding of Fact that Taylor Lied Regarding Violating the District Directive	44
f.	No Finding of Fact that Taylor Changed Her Testimony Previously Provided Under Oath at Her Criminal Trial	45
g.	No Finding of Fact that Taylor Lied to Minor Student Fernando Valencia	46
h.	No Finding of Fact Regarding Taylor’s Credibility, Propensity for Truthfulness, or Blatant Disregard of Process	47
i.	Finding of Fact that Wrongful Intent is Required for an Action to be a Valid Violation of District Training and Policies is Arbitrary and Capricious	48
E.	Reversal of Hearing Officer’s Decision Prevents Attorney’s Fees Award	49
III.	CONCLUSION	50

TABLE OF AUTHORITIES

<u>State Cases</u>	<u>Page(s)</u>
<u>Bridle Trails Cmty. Club v. City of Bellevue,</u> 45 Wn. App. 248, 724 P.2d 1110 (1986)	22, 24
<u>Coupeville Sch. Dist. v. Vivian,</u> 26 Wn. App. 728, 677 P.2d 192 (Div. 1, 1984)	31, 32 29
<u>Clarke v. Shoreline Sch. Dist. No. 412,</u> 106 Wn.2d 102, 720 P.2d 793 (1986)	27, 28, 29, 31, 34, 40, 45, 47, 48
<u>Federal Way Sch. Dist. No. 210 v. Vinson,</u> 154 Wn. App. 220, 225 P.3d 379 (2010)	19, 21, 45
<u>Foster v. King County,</u> 83 Wn. App. 339, 921 P.2d 552 (1996)	24, 25
<u>Herman v. Shorelines Hearings Bd.,</u> 149 Wn. App. 444, 204 P.3d 928 (2009)	24
<u>Hoagland v. Mount Vernon School Dist. No. 320,</u> 95 Wn.2d 424, 623 P.2d 1156 (1981)	27, 28, 30, 31
<u>King County v. Washington State Bd. of Tax Appeals,</u> 28 Wn. App. 230, 622 P.2d 898, 901-02 (1981)	21, 24, 25
<u>Leschi Improvement Council v. State Highway Comm'n,</u> 84 Wn.2d 271, 525 P.2d 774 (1974)	20, 25
<u>Lockwood v. AC & S, Inc.,</u> 109 Wn.2d 235, 744 P.2d 605 (1987)	33
<u>Mott v. Endicott Sch. Dist. No. 308,</u> 105 Wn.2d 199, 713 P.2d 98 (1986)	30

<u>Potter v. Kalama Public School Dist. No. 402,</u> 31 Wash.App.838, 644 P.2d 1229 (1982).....	31, 40
<u>Pierce County Sheriff v. Civil Serv. Comm'n,</u> 98 Wn.2d 690, 658 P.2d 648 (1983)	23, 24, 26, 36
<u>Port Townsend School Dist. No. 50 v. Brouillet,</u> 21 Wn. App. 646, 587 P.2d 555 (1978)	25
<u>Pryse v. Yakima Sch. Dist. No. 7,</u> 30 Wn. App. 16, 632 P.2d 60 (1981)	31, 40
<u>Saldin Secs., Inc. v. Snohomish County,</u> 134 Wn.2d 288, 949 P.2d 370 (1998)	25
<u>Simmons v. Vancouver Sch. Dist.,</u> 41 Wn. App. 365, 704 P.2d 648 (1985)	38, 40, 44, 45
<u>State ex. Rel Cosmopolis Consol. School Dist. 99</u> <u>v. Bruno</u> 59 Wn.2d 366, 367 P.2d 995 (1962)	20, 21
<u>State x. rel. Hood v. State Personnel Bd.,</u> 82 Wn.2d 396, 511 P.2d 52 (1973)	23
<u>Waste Management v. WUTC,</u> 123 Wn.2d 621, 632-34, 869 P.2d 1034 (1994)	23
<u>Weems v. North Franklin Sch. Dist.,</u> 109 Wn. App. 767, 37 P.3d 354 (2002)	30, 34, 35, 45, 47, 48
<u>Williams v. Seattle Sch. Dist. No. 1,</u> 97 Wn.2d 215, 643 P.2d 426 (1982)	21
<u>Wojt v. Chimacum School Dist. No. 49,</u> 9 Wn. App. 857, 516 P.2d 1099 (1973)	29

State Statutes

RCW 7.16.040 19

RCW 28A.405. et. seq. 1, 21, 29

RCW 28A.405.100 29

RCW 28A.405.310 2, 4, 19, 24, 26, 27,
28, 29, 32, 33, 34, 35,
44, 50

CONST. Art. I, §§ 4 22

CONST. Art. IV, §§ 4, 6 21

CONST. Art. I, §§ 6 21

ASSIGNMENTS OF ERROR, WITH ISSUES

Assignments of Error

1. The trial court erred in dismissing East Valley School District No. 90's request for a Writ of Review.
2. The hearing officer's decision was arbitrary, capacious, or contrary to law / illegal. (Hearing Officer's Findings of Fact Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11; Hearing Officer's Conclusions of Law Nos. 2, 3, 4, 5, 6; and Final Decision).
3. Reversal of the hearing officer's decision makes the award of reasonable attorney's fees to Michele Taylor improper.

Issues Pertaining to Assignments of Error

1. Is a hearing officer's decision under RCW 28A.405 et seq. reviewable under a constitutional writ of review? (Assignment of Error No. 1).
2. Were the School District's pleadings sufficient to raise the trial court's inherent power of review? (Assignment of Error No. 1).
3. Should this Court review the entire statutory hearing record and render a decision regarding sufficient cause for discharge of Michele Taylor? (Assignment of Error No. 1).
4. Was the hearing officer's decision arbitrary, capricious, or contrary to law / illegal, thus entitling the School District to constitutional

writ relief and a finding of sufficient cause for discharge? (Assignment of Error No. 2).

5. Did the hearing officer act outside of her statutory authority (contrary to law / illegal) by failing to use the proper sufficient cause standard required by RCW 28A.405.310 and respective case law? (Assignment of Error No. 2).

6. Did the hearing officer act outside of her statutory authority (contrary to law / illegal) by failing to make appropriate evidentiary rulings pursuant to the rules of evidence as required by RCW 28A.405.310. (Assignment of Error No. 2).

7. Was the hearing officer's decision arbitrary and capricious by making findings of facts and conclusion of law regarding Michele Taylor's conduct that support discharge, but then rendering a final decision that there was not sufficient cause for discharge of Michele Taylor because that conduct was remediable? (Assignment of Error No. 2).

8. Was the hearing officer's decision arbitrary and capricious by making findings of facts and conclusions of law not supported by substantial evidence? (Assignment of Error No. 2).

9. Was the hearing officer's decision arbitrary and capricious by failing to make relevant findings of fact and conclusions of law that

were uncontroverted and supported by substantial evidence? (Assignment of Error No. 2).

10. Was the hearing officer's decision arbitrary, capricious, or contrary to law / illegal in awarding Michele Taylor attorney fees?

(Assignment of Error No. 3).

I. STATEMENT OF THE CASE

A. The Notice of Probable Cause for Discharge and The Amended Notice of Probable Cause for Discharge.

On November 2, 2009, a Notice of Probable Cause was issued to Ms. Taylor finding that there was probable cause to discharge her from employment as a certificated employee of East Valley School District No. 90. (**Sup. Ct. 001192**).¹ The reasons for the determination were listed as: Sexual misconduct with a minor student; Excessive and inappropriate text messaging with two (2) minor students; and Failure to comply with prior training regarding appropriate student-teacher relationship. (**Sup. Ct. 001192-193**). A hearing on the Notice of Probable Cause matter was stayed pending the outcome of Ms. Taylor's criminal trial.

On July 28, 2010, after the criminal trial, an Amended Notice of Probable Cause Letter was issued to Ms. Taylor amending and

¹ All documents cited in this brief as "Sup. Ct. ___" were exhibits presented at the statutory hearing and were provided to the superior court as part of the record. The superior court advised that the exhibits could not be scanned into their system and therefore do not reflect a Clerk's Papers (CP) number.

supplementing the prior Notice of Probable Cause Letter. (**Sup. Ct. 001202**). The reasons for the decision to discharge Ms. Taylor from employment as a certificated employee of the East Valley School District were listed as: Inappropriate contacts, communication, counseling/mentoring with student Fernando Valencia; Inappropriate communication and contacts with student Jeremy Standfill; and Sexual misconduct with a minor student. (**Sup. Ct. 001202-208**). The contact described was found to have no legitimate educational purpose and to be directly contrary to training provided to Ms. Taylor. (**Sup. Ct. 001208**). Within the Amended Notice of Probable Cause, it was identified that Ms. Taylor admitted to violating a District directive to not contact or communicate with anyone regarding this case. (**Sup. Ct. 001203**).

B. The Record of Hearing Officer Luella E. Nelson.

The statutory hearing under RCW 28A.405.310 relating to this matter came on for hearing before Hearing Officer Luella E. Nelson on September 27 through October 1, 2010. The hearing officer issued the following Findings of Facts and Conclusions of Law relevant to this appeal.

1. The Hearing Officer's Application of the Law.

a. The Hearing Officer Concluded Ms. Taylor's Admitted Conduct is "remediable."

The hearing officer concluded that Ms. Taylor's attempt to counsel or mentor student Fernando Valencia is a remediable error in judgment. (CP 2259)². The hearing officer found that Ms. Taylor's error in judgment to not report Fernando Valencia's personal issues to a counselor is a remediable error. (CP 2259). The hearing officer concluded that Ms. Taylor's attempt to counsel or mentor Fernando by discussing her infidelity with her husband is a remediable error in judgment. (CP 2259). The hearing officer further concluded that Ms. Taylor's violation of the District's medication policy by giving Jeremy Standfill ibuprofen is a remediable error. (CP 2259).³

b. Hearing Officer's Conclusion that Rumor Evidence is Credible Evidence.

The testimony of Cord Brown, offered by Ms. Taylor over the continuous objection by the District (CP 1812-13; CP 1840-41), provided references to alleged rumors. Cord Brown was a student at East Valley High School at the time of his testimony. Cord Brown testified under oath at the criminal trial that:

Q. Okay. Now, with regards to the rumors that you've heard, was that – can you tell me that this occurred – this this rumor started after the police and school officials were notified about the incident?

² All citations reflecting a "CP" are Clerk's Papers as assigned by the superior court.

³ It should be noted that evidence was presented showing the negative effect this matter had on both male students involved, showing Ms. Taylors' effectiveness as a teacher 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.

A. Yes, I did, but after gathering my thoughts, it was – I heard about it before the cops got involved.

Q. Okay. “Gathering your thoughts,” that’s when you were talking to Mr. Klein; is that correct?

A. Well, I was think about it after I talked to you, and then – as well as when I talked to him.

Q. Okay. Also while you were – you were in the hallway over here waiting for the trial to commence; is that correct?

A. Yes, sir.

Q. And during the gathering over there, there was yourself and several other seniors, other kids from East Valley High School; is that correct?

A. Yes, sir.

Q. Including, I believe, Kayla Davis, Karlee Harris, and other individuals; is that correct?

A. Yes, sir.

Q. And that hallway over there, not only was Mr. Klein talking to you, but Kevin Taylor was talking to you also, is that correct?

A. Yes, sir.

Q. And there was discussions about what you will be testifying to, about; is that correct?

A. Yes, sir. (Sup. Ct. 002902/1337:8 –1338:10).

Cord Brown first told the prosecuting attorney that he recalled the rumors regarding Jeremy Standfill and the Kmart parking circulating *AFTER* the police and school officials were involved. Cord Brown then changed his testimony, just moments before testifying, that he recalled the rumors circulating *PRIOR* to the police and school officials becoming involved. Cord Brown’s recollection changed after talking to Ms. Taylor’s criminal defense attorney – Mr. Klein, Ms. Taylor’s husband – Kevin Taylor, and two (2) other student witnesses testifying on behalf of Ms. Taylor – Kayla Davis and Karlee Harris.

Under the hearing officer's discussion of "Testimony and Other Evidence," she found that, in regards to the allegation of 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, "[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).

c. Hearing Officer Concluded Taylor needed "additional training and/or counseling" on the Date of Discharge, But Ordered Reinstatement.

The hearing officer concluded that the District had shown that Taylor is in need of additional training and/or counseling regarding the District's medication policy and effective response to student requests for guidance.

Respondent has not shown, by a preponderance of the evidence, that sufficient cause exists for Appellant's discharge. It has shown that Appellant is in need of additional training and/or counseling regarding Respondent's medication policy and effective responses to student requests for guidance. Such training and/or counseling can effectively be provided within the employment context.

Appellant shall be restored to her employment position and reimbursed for reasonable attorneys' fees. (emphasis added). (CP 2259).

The hearing officer found that Taylor's conduct was not "prudent," was "misguided," and was based on "poor judgment," and that Taylor needed "remediation" on the date of discharge. (CP 2253-54).

d. Hearing Officer Concluded Post-Termination Conduct Was Not a Proper Basis for Termination.

The hearing officer found that Ms. Taylor's two (2) separate violations of District directives to not communicate about this case were not properly before the Hearing Officer and would not be addressed. (CP 2249:34). The hearing officer stated that the December 10, 2009, violation was not included in the Amended Notice of Probable Cause. (CP 2249). The hearing officer acknowledged that the more recent Taylor violation post-dated the Amended Notice of Probable Cause and could not have been included. (CP 2249:34).

2. Findings of Facts and Conclusions of Law Issued by the Hearing Officer and Admissions Made by Taylor Regarding Taylor's Conduct.

a. Taylor Counseled or Mentored Minor Student Fernando Valencia Outside of Her Teaching Capacity and Training.⁴

⁴ It should be noted that the record shows that Michele Taylor exchanged uncommonly large amount of text messages with minor male student Fernando Valencia. From April 24, 2009, to June 8, 2009, (a 45-day period) there were over 1,000 text message exchanged between minor male student Fernando Valencia and Michele Taylor. (Sup. Ct. 001308 – 1479). Ms. Taylor texted all other adult friends during the period of October 2008, through June 2009, (a 9 month period) only 287 times, an average of one (1) text per day. (Sup Ct. 001308 – 1479).

The hearing officer found that Taylor attempted to counsel or mentor Fernando Valencia on sensitive subjects. **(CP 2257-59)**. The hearing officer acknowledged that the subject matters within Taylor's attempts at counseling were "more severe than her training or experience equipped her" for and that "[i]t would have been prudent for [Taylor] to have reported Student A's personal issues to a counselor" **(CP 2258)**.

Ms. Taylor admits that she has no training or degree in counseling. **(Sup. Ct. 001254/1521:18-1522:2)**. Ms. Taylor describes that from mid-May to the end of May, student Fernando Valencia seemed unstable, that he wasn't handling the stress in his life very well, that he thought he was a terrible person, that he didn't like being home with his family, that he seemed more down or depressed, and that he was just falling apart. **(Sup. Ct. 001223/1388:3-14); (Sup. Ct. 001254-001255/1522:9-1523:4)**. Ms. Taylor admits that she did not report her above observations of student Fernando Valencia's demeanor to his mother, family, any district administrator, principal, counselor, or any other person trained to address such issues. **(Sup. Ct. 001223/1389:20-1390:18); (Sup. Ct. 001224/1391:2-22)**.

In spite of Taylor's admission of no training or degree in counseling and being of the opinion student Fernando Valencia seemed unstable, Ms. Taylor admits that she discussed, counseled / mentored student Fernando

Valencia regarding the below sensitive matters: (1) his personal family life and the death of his father. This includes discussions with Fernando regarding his relationship with his mother. **(Sup. Ct. 001221-222/1382:23-1383:18, 1384:20-1385:18); (Sup. Ct. 001224/1393:18-1394:6); (Sup. Ct. 001254/1520:1-15); (Sup. Ct. 001255-256/1525:13-1527:9); (Sup. Ct. 001258/1536:11-15);** (2) his personal relationship with a female, student Tracy Martin. **(Sup. Ct. 001219/1372:8-1374:20); (Sup. Ct. 001253-254/1518:23-25, 1520:9-19); (Sup. Ct. 001288/71:15-19);** and (3) a murder he witnessed in Mexico involving relatives of his family. **(Sup. Ct. 001224/1393:23-1394:9); (Sup. Ct. 001255/1526:5-9).**

Ms. Taylor further admits discussing with student Fernando Valencia the following sensitive matters: (1) the death of Ms. Taylor's child. **(Sup. Ct. 001221/1379:9-19);** (2) the death of Ms. Taylor's stepbrother. **(Sup. Ct. 001221/1379:9-19);** and (3) Ms. Taylor kissing another man, not her husband, at a Seattle bachelorette party in May of 2009. **(Sup. Ct. 001237/1451:21-1452:3); (Sup. Ct. 1256/1530:7-10).**

Ms. Taylor admits inviting student Fernando Valencia to her home for dinner. **(Sup. Ct. 001232/1423:2-14; Sup. Ct. 001237/1453:13-16; Sup. Ct. 001256/1529:12-15).**

b. Taylor Provided Medication to Minor Student Jeremy Standfill.

In her Findings of Fact, the hearing officer found that Taylor violated school policy in providing ibuprofen to student Jeremy Standfill on one (1) occasion. **(CP 2258)**. The hearing officer further found that Taylor violated East Valley School District's medication policy. **(CP 2259)**. Ms. Taylor specifically admits receiving prior training identifying that it is inappropriate to provide medication / drugs to students. **(CP 1617:8-CP 1618:16)**.

Ms. Taylor admits that on two (2) separate occasions she was alone in her office with student Jeremy Standfill. The first occasion was to provide medication to student Jeremy Standfill for a headache. **(Sup. Ct. 001244-245/1482:12-1484:2); (Sup. Ct. 001261/1548:25-1549:4); (Sup. Ct. 001263/1558:9-24)**. Ms. Taylor admits providing a minor student, Jeremy Standfill, with pain medication. **(Sup. Ct. 001293-294/93:16-96:22)**.

c. Finding of Fact that Taylor Did Not Send the Sexually Suggestive Photo.

The hearing officer stated that it is not in dispute that it would be inappropriate for a teacher to send the June 6th photo from the bachelorette party to a student. **(CP 2250; CP 2258)**. In her Findings of Fact, the hearing officer found that the photo sent to student Fernando Valencia on June 6th was sent from Ms. Taylor's cell phone. **(CP 2258)**.

Ms. Taylor testified under oath in her criminal trial, that on June 6, 2009, she made a phone call to student Fernando Valencia. **(Sup. Ct.**

001230/1415:10-1416:3). The phone records establish the call was made at 9:51 p.m. (**Sup. Ct. 001422**). Ms. Taylor testified in her deposition that she had the phone in her exclusive possession for a period of approximately 15-20 minutes surrounding the phone call to Fernando Valencia. (**Sup. Ct. 001278/31:13-18**). Four (4) minutes after Ms. Taylor made the phone call to Fernando, the sexually suggestive photograph was sent to Fernando Valencia. (**Sup Ct. 001308-1479**); (**Sup. Ct. 001790**). Ms. Taylor's mother, Victoria Lamar, denies sending the inappropriate photo to Fernando Valencia. (**CP 1761:22-CP1764:2**).

Despite the above uncontroverted facts, the hearing officer found that the evidence did not establish that Ms. Taylor was responsible for sending said photograph to student Fernando Valencia. (**CP 2258**).

d. Finding of Fact that Taylor Did Not Violate District Training or Policies Regarding Teacher / Student Relationships.

It is uncontroverted that Ms. Taylor received prior training involving appropriate contacts with students and/or inappropriate conduct by school personnel.⁵ Specifically, Ms. Taylor received prior training on August 25,

⁵ The training on "Inappropriate Behavior for School Personnel" specifically identified the following conduct as inappropriate behavior: "Fostering a relationship outside of school activities," "Acting as a confidant or 'mentor'," "Meeting a student alone or isolating a student," "Fostering a relationship outside of school activities," "Having secluded contact with a student," "Counseling students on personal issues," and "Providing or recommending drugs, vitamins, or supplements to athletes." (**Sup. Ct. 001810 – 812**).

2008, identifying that: (1) It is inappropriate behavior for school personnel to act as a confidant or mentor to a student; (2) It is inappropriate to counsel a student on personal issues; and (3) it is inappropriate to discuss personal issues with students.

Despite the above uncontroverted evidence of prior training, the hearing officer found that Ms. Taylor attempted to counsel student Fernando Valencia. (CP 2257); (CP 2259). Ms. Taylor admits counseling/mentoring student Fernando Valencia and discussing personal issues with him. (CP 1635:25–CP 1636:2).

In her Findings of Fact, the hearing officer found that Ms. Taylor did not violate clearly-established policy and training regarding counseling, mentoring, or discussing personal issues with students. (CP 2259).

e. Finding of Fact that a Wrongful Intent is Required for an Action to be a Valid Violation of District Training and Policies.

District training and expectations for teachers does not require an element of intent for an action to be a valid violation of district training and policies. (Sup. Ct. 001796-1826).

In her Findings of Fact, the hearing officer found that Ms. Taylor did not text and have telephone conversations with student Fernando Valencia on sensitive subjects with the intent of soliciting a romantic or sexual

relationship with Fernando Valencia. (CP 2257). The hearing officer found that Ms. Taylor did not invite student Fernando Valencia over to the Taylor home for dinner with the family for any other intent than to have dinner with the family. (CP 2258). The hearing officer found that Ms. Taylor's decision to not report Fernando Valencia's personal issues to a counselor were not for "inappropriate reasons." (CP 2258).

The hearing officer found that Ms. Taylor told student Fernando Valencia that she had kissed someone who was not her husband. (CP 2258). However, the hearing officer found that Ms. Taylor did not disclose this information in an attempt to foster a romantic or sexual relationship with Fernando Valencia. (CP 2258).

3. Findings of Facts and Conclusions of Law Not Issued by the Hearing Officer But Uncontroverted and Supported by Substantial Evidence.

It is East Valley School District's position that there is substantial evidence in the record that supports additional relevant Findings of Facts and Conclusions of Law that were not addressed by the hearing officer, illustrating that there was not a careful deliberation of the facts and circumstances surrounding this matter - rendering the decision arbitrary and capricious. A totality of the below instances reveal that the District was not granted a constitutionally required fair hearing.

a. No Finding of Fact that Taylor Violated District Directives to Not Communicate About this Case / Was Insubordinate.

When Ms. Taylor was placed on administrative leave, she was given a directive not to communicate regarding this case. The pertinent directives in the letter dated June 10, 2009, are identified below:

1. You are hereby directed to not talk with anyone concerning this matter other than your union representative, your attorney, mental health counselor or doctor, law enforcement conducting an investigation, your clergyperson, and district representative conducting any school district investigation. Talking includes any form of communication, including telephonic, electronic, blogging and texting communication. Should you need to discuss this matter with anyone other than those listed in this paragraph, you must obtain prior written consent from me to do so. **(Sup. Ct. 001196 –198)** (emphasis added).

In December of 2009, Ms. Taylor communicated regarding this case by e-mail requesting “negative character” information on the students. **(Sup. Ct. 001195)**. Ms. Taylor testified she was requesting “dirt” on Fernando Valencia and Jeremy Standfill within this e-mail. **(Sup. Ct. 001262-263/1554:14-1555:7)**. Ms. Taylor admitted violating the June 2009, directive. **(Sup. Ct. 001262/1553:18-1554:13)**.

Upon the District learning of this e-mail, Superintendent John Schieche sent another letter of directive to Ms. Taylor reminding her not to further communicate regarding this matter, and that such communication

would be violations of the original directive and the directive of December 22, 2009. (**Sup. Ct. 001196-198**).

Three (3) weeks prior to the statutory hearing, Ms. Taylor again communicated by e-mail on September 9, 2010, to several individuals regarding the subject matter of this case. (**Sup. Ct. 001998-999**). At least one (1) of the addressees on that e-mail was to East Valley School District teacher, and witness at the statutory hearing – Craig Hyatt. Ms. Taylor admitted sending the September 9, 2010, e-mail. (**CP 2110:13-CP 2111:23**).

It is uncontroverted that Ms Taylor violated District directives to not communicate about this case. Ms. Taylor admitted that she violated the District's directive to not discuss this case with anyone on two (2) separate occasions. (**CP 1675:16-CP 1677:16**); (**CP 2110:13-CP 2111:23**). There was no Findings of Fact that Taylor on two (2) separate occasions was insubordinate and violated the District's directive to not discuss this case with anyone.

b. No Finding of Fact that Taylor Lied at the Statutory Hearing.

At the statutory hearing, Ms. Taylor was asked if she violated the District's directive to not discuss this case with anyone subsequent to her first admitted violation. (**CP 1676:20-CP 1677:11**). Taylor responded that she had not. (**CP 1677:12-21**). The District then presented evidence on the

record that Taylor had sent an e-mail discussing this case in violation of the directive. (CP 2110:13-CP 2111:23). Taylor then changed her prior testimony and admitted sending the subsequent e-mail. (CP 2110:13-CP 2111:23). The above presentation of evidence occurred in the presence of the hearing officer.

There was no Findings of Fact that Taylor was untruthful during the statutory hearing regarding her compliance with District directives.

c. No Finding of Fact that Taylor Changed Her Testimony Previously Provided Under Oath at Her Criminal Trial.

Taylor admitted changing her under oath criminal trial testimony regarding the control/use of her cell phone at the time the inappropriate photo was sent to Fernando Valencia. (Sup. Ct. 001278/31:19-32:10). There was no Findings of Fact that Taylor admitted providing false information under oath in her criminal trial testimony, and/or during the statutory hearing.

d. No Finding of Fact that Taylor Lied to Minor Student Fernando Valencia.

Ms. Taylor admits that she discussed with student Fernando Valencia being unfaithful to her husband at a bachelorette party in Seattle, Washington. (Sup. Ct. 001237/1451:21-1452:3); (Sup. Ct. 001256/1530:7-10). Ms. Taylor admitted that she lied to Fernando Valencia about apologizing to her husband for her infidelity at the Seattle party. (Sup. Ct. 001289-001290/77:14 -78:13). Taylor admits this lie was provided as a

form of Taylor's "mentoring" to Fernando. (CP 1647:2-13). There was no Findings of Fact that Taylor admitted lying to student Fernando.

e. No Finding of Fact Regarding Taylor's Credibility or Propensity for Truthfulness.

Taylor admitted to lying to Fernando Valencia. (Sup. Ct. 001289/76:1-77:19). Taylor admitted violating District directives on two (2) separate occasions. (CP 1675:16-CP 1677:16); (CP 2110:13-CP2111:23). Taylor was shown to have been untruthful at the statutory hearing. (Sup. Ct. 001289-001290/77:14-78:13); (Sup. Ct. 001289/76:1-77:19). Taylor admitted violating her previously invoked right to a closed statutory hearing. (CP 2108:19 – CP 2113:10). Taylor changed her testimony previously provided under oath at her criminal trial regarding the use/control of her cell phone. (Sup. Ct. 001278/31:19-32:10). However, there was no Findings of Fact regarding Taylor's lack of credibility or propensity for truthfulness, where substantial evidence supported such a finding.

C. Procedural Status.

1. Superior Court Review.

On November 30, 2010, East Valley School District No. 90 filed with the Yakima County Superior Court its Petition for Writ of Review pursuant to RCW 7.16.040. Oral arguments regarding the jurisdictional issue raised by Ms. Taylor were heard on February 18, 2011. The superior court found that a

school district does not have the right to appeal a disciplinary hearing under RCW 28A.405.310 through RCW 7.16.040, and dismissed the matter for lack of subject matter jurisdiction. Based upon the court's Memorandum Decision, Ms. Taylor presented an Order dismissing East Valley School District's Writ of Review and Entry of Final Judgment which was entered on March 1, 2011. **(CP 2315-CP 2316)**. This appeal followed.

2. Court of Appeals Review.

On June 9, 2011, East Valley School District filed its Opening Brief. On August 26, 2011, the Honorable Commissioner Joyce McCown stayed the appeal pending completion of the Washington Supreme Court case Federal Way School District No. 210 v. Vinson, Supreme Court Cause No. 84243-4. On November 30, 2011, the stay was lifted as a result of the mandate in Vinson being issued. On January 5, 2012, East Valley School District filed its Motion to Amend Opening Brief. On January 10, 2012, the Honorable Commissioner McCown granted East Valley School District's Motion to Amend. This amended opening brief follows.

II. ARGUMENT

A. Summary of Argument.

The trial court erred in dismissing East Valley School District No. 90's request for a Writ of Review. The District was deprived of its fundamental right to be free from actions which are arbitrary, capricious, or

contrary to law / illegal. The Court of Appeals should review the entire record and reverse Hearing Officer Nelson's decision as the decision was arbitrary, capricious, or contrary to law / illegal. The entire record establishes that the District was not provided a fundamentally fair hearing required by the Constitution. The Court of Appeals should render a decision finding sufficient cause for discharge of Ms. Taylor.

B. The Trial Court Erred in Dismissing East Valley School District No. 90's Request for a Writ of Review.

The courts, including the superior court, have power, under article 4, sections 1 and 6 of our state constitution, to review by writ of certiorari judicial and nonjudicial actions of an administrative agency. Leschi Improvement Council v. State Highway Comm'n, 84 Wn.2d 271, 278, 525 P.2d 774 (1974); State ex rel. Cosmopolis Consol. School Dist. 99 v. Bruno, 59 Wn.2d 366, 368-69, 367 P.2d 995 (1962). This constitutional power of review cannot be abridged by the legislature. State ex rel. Cosmopolis Consol. School Dist. 99 v. Bruno, *supra* at 369; King County v. Washington State Bd. of Tax Appeals, 28 Wn. App. 230, 237, 622 P.2d 898, 901-02 (1981).

The trial court dismissing East Valley School District's request for review went contrary to our state's constitution, those specific powers vested into Washington courts, and the decision in Vinson, *supra*.

1. A Hearing Officer’s Decision Issued Under RCW 28A.405 et seq. is Reviewable Under a Constitutional Writ of Review.

A constitutional writ is available to a school district as a means to seek relief from a hearing officer’s decision issued under RCW 28A.405 *et seq.* Federal Way School District No. 210 v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011). The Washington State Constitution recognizes the right to seek discretionary review of an administrative agency decision under the court’s inherent constitutional power. CONST. art. IV, §§ 4, 6. “A constitutional right to judicial review still exists notwithstanding the district’s inability to appeal [under a statutory writ of certiorari].” Vinson, 172 Wn.2d at 758 (citing CONST. art. IV, § 6; Williams v. Seattle Sch. Dist. No. 1, 97 Wn.2d 215, 643 P.2d 426 (1982)).

East Valley School District is entitled to a constitutional writ of review pursuant to our state’s constitution. Failure to grant such review is in error.

2. The School District’s Pleadings Were Sufficient to Raise Inherent Power of Review.

Taylor may incorrectly assert that the District is not entitled to a constitutional writ because the District did not request such review. This scenario has already been squarely ruled on in Vinson to the benefit of the District. The Supreme Court of Washington has affirmatively held that a constitutional writ is available to a school district even when the district

does not specifically request review under the court's constitutional authority. Vinson, 172 Wn.2d at 768-69 (citing CONST. art. IV, § 4, Bridle Trails Cmty. Club v. City of Bellevue, 45 Wn. App. 248, 724 P.2d 1110 (1986)). "Appellants' petition for certiorari did not specifically request review under the court's inherent powers. However, the pleadings were sufficient to raise the issue of the court's inherent power to review." Bridle Trails, 45 Wn. App. at 254.

East Valley School District has alleged facts that would establish the lower tribunals' decision was arbitrary, capricious, or contrary to law / illegal – the standard of review under a constitutional writ of review. As a result, the trial court should have and this Court should accept review under a constitutional writ. Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 694, 658 P.2d 648 (1983).

To be consistent with Vinson, and the affirmative power within our state courts, this Court should grant a constitutional writ of review to East Valley School District No. 90.

C. The Court of Appeals Should Review the Entire Record and Render a Decision Finding Sufficient Cause for Discharge of Michele Taylor.

A review of the entire record is required to determine whether the challenged decision or act was arbitrary and capricious or contrary to law / illegal – the standard under a constitutional writ of review. See Vinson,

172 Wn.2d 756; Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 658 P.2d 648 (1983). If such a violation is found, review should be granted and the court may proceed to dispose of the case on its merits. State ex rel. Hood v. State Personnel Bd., 82 Wn.2d 396, 511 P.2d 52 (1973).

As previously identified in Commissioner's Ruling No. 29757-8-III within this matter, 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, the Court of Appeals can, and should in accordance with Vinson, 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, the Court should render a decision finding that East Valley School District No. 90 had sufficient cause to discharge Ms. Taylor from employment for the reasons set out below.

D. The Hearing Officer's Decision was Arbitrary, Capricious, or Contrary to Law / Illegal, thus Entitling the School District to Constitutional Writ Relief and a Finding of Sufficient Cause for Discharge.

1. The Standard Under a Constitutional Writ of Review.

The scope of review under a constitutional writ is whether the hearing officer's actions were arbitrary, capricious, or contrary to law / illegal, thus violating a claimant's fundamental right to be free from such action. Vinson, 172 Wn.2d at 769 (citing Foster v. King County, 83 Wn. App. 339, 346, 921 P.2d 552 (1996); Bridle Trails, 45 Wn. App. at 252, 724 P.2d 1110; Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wn.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 Wn.2d 288, 292, 949 P.2d 370 (1998).

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.

An illegal / contrary to law act, in the context of administrative agency 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.

There is a fundamental right to have an agency 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 at 694 (internal citations omitted)

(emphasis added).

2. The Hearing Officer Acted Outside Her Statutory Authority by Failing to Use the Proper Sufficient Cause Standard Required Under RCW 28A.405.310 and Respective Case Law.

The 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.

a. The Hearing Officer Failed to Use the Clarke Test or the Hoagland Factors.

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 health and 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.

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.”⁶ Vinson, 172 Wn.2d 772.

In the case before this Court, the hearing officer did not apply 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.

The hearing officer acted outside of her authority (contrary to law / illegally) by failing to use the proper sufficient cause standard required under RCW 28A.405.310 and respective case law. 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.

**b. The Hearing Officer Improperly Considered
“Remediation.”**

**1. 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”

⁶ Evidence was presented showing the negative effect this matter had on both male students involved, showing Ms. Taylors’ 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.

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.

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, much of which generally 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 was required by case law to make findings and conclusions regarding whether the conduct found by the hearing officer “(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). Rather than apply Hoagland factors to determine if

the conduct undermined the teacher's effectiveness, 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 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, and contrary to law / illegally.

2. 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. 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 East Valley School District No. 90 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). East Valley School District No. 90 is not established for retraining unqualified teachers. Students should not be the pawns or guinea pigs of a misguided or unqualified teacher.

3. 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.

a. Improper Evidentiary Ruling Regarding Rumor Evidence.

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.

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 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). In addition, such hearsay testimony is inherently untrustworthy. There is simply an unaccounted for string of hearsay upon hearsay. This specific rumor testimony had already previously been shown to be unreliable by Cord Brown's testimony switching just

moments before he testified under oath at the criminal trial. (**Sup. Ct. 002902/1337:8–1338:10**).

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 District, and is a reversible error under our constitution as it fundamentally prevented the District from receiving a fair hearing. Vinson, 172 Wn.2d at 769.

b. Improper Evidentiary Ruling Regarding Post-Probable Cause Notice Conduct.

The hearing officer acted outside of her statutory authority under RCW 28A.405.310 in her application of the rules of evidence by excluding post-probable cause notice conduct as a proper basis for termination of Taylor’s employment. Weems, supra at 777. Clarke, supra.

There is no place for a teacher being dishonest in a work setting. Weems, supra at 777. The same rings true for being dishonest during the course of a statutory hearing under RCW 28A.405.310 – there is no place for it. Dishonesty and lying to one’s employer – a form of insubordination – is grounds for a teacher’s discharge. See, e.g., Weems, 109 Wn. App. at 777 (finding that falsification of student records was sufficient cause for

discharge because the conduct served no educational or legitimate professional purpose).

In this case, the hearing officer found that Ms. Taylor's admitted two (2) separate violations of District directives to not communicate about this case were not properly before the hearing officer and would not be addressed. (CP 2249). The hearing officer stated that the December 10, 2009, violation was not included in the Amended Notice of Probable Cause. (CP 2249). This assertion by the hearing officer is incorrect. The District included Taylor's December 10, 2009, directive violation within the Amended Notice of Probable Cause.⁷ The violation was properly before the hearing officer, as set forth in the amended notice, and simply was not considered as post-notice conduct.

The hearing officer acknowledges that the more recent Taylor violation post-dated the Amended Notice of Probable Cause and could not have been included. (CP 2249). The hearing officer failed to address this violation as post-probable cause notice conduct as a basis for termination.

Taylor's admitted insubordination and violations of District directives were properly before the hearing officer and were not addressed

⁷ "You admit violating my directive not to contact or communicate with anyone regarding this case pending the investigation. The violation of the directive was an email you sent on December 10, 2009 requesting negative information regarding Jeremy Standfill and Fernando Valencia." (Sup. Ct. 001203).

as a basis for discharge. The hearing officer's failure to consider such post-probable cause notice conduct as a proper basis for termination of Taylor's employment was arbitrary, capricious, and contrary to law / illegal and should be reversed.

4. The Hearing Officer Acted Arbitrarily and Capriciously by Making Findings of Facts and Conclusions of Law Regarding Taylor's Conduct that Support Discharge But Then Rendered a Final Decision That There Was Not Sufficient Cause for Discharge.

The 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 the her decisions that do not. Vinson, 172 Wn.2d at 769; Pierce County Sheriff, 98 Wn.2d at 694. A careful deliberation of the facts and circumstances surrounding the action is required for a matter to NOT be found arbitrary and capricious. See Vinson, supra. It is the District's position that the hearing officer DID NOT engaged in a careful deliberation of this matter nor did the hearing officer honor the District's fundamental right to a fair hearing.

The below Findings of Fact and Conclusions of Law were issued within the Opinion and Award of the hearing officer which support discharge of Taylor.

a. Taylor Counseled or Mentored Minor Student Fernando Valencia.

It is undisputed that Ms. Taylor received prior training involving appropriate contacts with students and/or inappropriate conduct by school personnel.⁸ Specifically, Ms. Taylor received prior training on August 25, 2008, identifying that: (1) It is inappropriate behavior for school personnel to act as a confidant or mentor to a student; (2) It is inappropriate to counsel a student on personal issues; and (3) it is inappropriate to discuss personal issues with students.

In her Findings of Fact, the hearing officer found that Taylor text and telephoned Fernando Valencia on sensitive subjects, likely in an effort to counsel him. (CP 2257) (emphasis added).⁹ Ms. Taylor admits that she discussed, counseled / mentored student Fernando Valencia regarding personal / sensitive matters. **(See Statement of the Case pp. 9-10).**

⁸ The training on “Inappropriate Behavior for School Personnel” specifically identified the following conduct as inappropriate behavior: “Fostering a relationship outside of school activities,” “Acting as a confidant or ‘mentor’,” “Meeting a student alone or isolating a student,” “Fostering a relationship outside of school activities,” “Having secluded contact with a student,” “Counseling students on personal issues,” and “Providing or recommending drugs, vitamins, or supplements to athletes.” **(Sup. Ct. 001810 – 812).**

⁹ It should be noted that the record shows that Michele Taylor exchanged uncommonly large amount of text messages with minor male student Fernando Valencia. From April 24, 2009, to June 8, 2009, (a 45-day period) there were over 1,000 text message exchanged between minor male student Fernando Valencia and Michele Taylor. **(Sup. Ct. 001308 – 1479).** Ms. Taylor texted all other adult friends during the period of October 2008, through June 2009, (a 9 month period) only 287 times, an average of one (1) text per day. **(Sup Ct. 001308 – 1479).**

District training and expectations specifically establish that a teacher is NOT to counsel or mentor a student. Despite the above Findings of Facts and admissions, the hearing officer found that Ms. Taylor did not violate such District directives and / or expectations. Such a determination by the hearing officer shows that a careful deliberation of the facts and circumstances did not take place, rendering the final decision of the hearing officer arbitrary and capricious.

Blatantly and continually violating District directives and training is sufficient cause for termination as a matter of law. See Simmons v. Vancouver Sch. Dist., 41 Wn. App 365, 704 P.2d 648 (1985).

**b. Taylor Provided Medication to Minor Student
Jeremy Standfill.**

Ms. Taylor received prior District training identifying that it is inappropriate to provide medication / drugs to a student. **(Statement of the Case p. 11)**. The hearing officer found that Ms. Taylor violated school policy in providing ibuprofen to Jeremy Standfill. **(CP 2258)**. Ms. Taylor admitted providing medication to Jeremy Standfill while alone in her office with him and just minutes before his mother would be present. **(Sup. Ct. 001244-245/1482:12-1284:2)**. Despite the above conclusions and admissions, the hearing officer found that Ms. Taylor's violation of school policy was a remediable violation. **(CP 2258)**.

The hearing officer failed to consider Ms. Taylor's constant pattern of violating and disregarding District policy. How does a school district "remediate" conduct that is in such blatant disregard for a student's safety and welfare? Not only was Ms. Taylor's conduct directly contrary to a known directive prohibiting that specific action, but teacher's are not to administer medication to students for the simple reason that a teacher is not familiar with the student's medical background and potential reactions to certain medications. Furthermore, had Ms. Taylor simply waited a few minutes Jeremy's mother would have been present to provide him the medication herself. (CP 1618:1-1619:16).

Providing medication to a student is conduct that is in blatant disregarding for the health, safety, and welfare of the students - violating the common thread of concern running through many Washington cases on this topic. Simmons, 41 Wn. App. at 377; Potter, 31 Wn. App. at 841; Pryse, 30 Wn. App. at 24; Clarke, 106 Wn.2d at 114.

5. The Hearing Officer Acted Arbitrarily and Capriciously by Making Findings of Facts and Conclusions of Law Not Supported by Substantial Evidence and by Failing to Make Findings of Facts and Conclusions of Law That Were Supported by Substantial Evidence.

As previously stated, a careful deliberation of the facts and circumstances surrounding the action is required for a matter to NOT be found arbitrary and capricious. See Vinson, 172 Wn.2d 769 – 70. It is the

District's position that the hearing officer did not engaged in a careful deliberation of this matter as the hearing officer *made* several Findings of Facts and Conclusions of Law that were not supported by substantial evidence and *failed to make* Findings of Facts and Conclusions of Law that were supported by substantial evidence. The totality of the areas identified below clearly illustrates that the District was not provided a fundamentally fair hearing as required by the Constitution.

a. Finding of Fact that Taylor Did Not Send the Sexually Suggestive Photo.

It is uncontested that a sexually suggestive picture was sent to minor student Fernando Valencia from Ms. Taylor's cell phone on June 6, 2009. **(CP 2258)**. A phone call from Ms. Taylor's phone was made to Fernando Valencia from Ms. Taylor's phone immediately prior to the picture being sent to Fernando. **(Sup. Ct. 001308-1479); (Sup. Ct. 001789-1790)**. Ms. Taylor testified *under oath* in her criminal trial, that on June 6, 2009, she was in a vehicle, traveling to Suzie's Saloon, when she made the phone call, to minor student Fernando Valencia. **(Sup. Ct. 001230/1415:10-1416:3)**. The phone records establish that this call was made at 9:51 p.m. **(Sup. Ct. 001422)**.

Ms. Taylor testified in her deposition that she had the phone in her possession from the time she got into the vehicle until she arrived at Suzie's

Saloon, a period of approximately 15-20 minutes. **(Sup. Ct. 001278/31:13-18)**. Four (4) minutes after Ms. Taylor made the phone call to Fernando, the sexually suggestive photograph was sent to Fernando Valencia. **(Sup Ct. 001308-1479); (Sup. Ct. 001790)**. Per Taylor's testimony, this would put the cell phone in Ms. Taylor's hands only at the time the photo was sent to Fernando. The hearing officer arbitrarily gave no weight to Ms. Taylor's sworn testimony given in the criminal hearing and in her deposition.

The only other evidence regarding who could have sent the inappropriate photo to Fernando, other than Ms. Taylor, was evidence surrounding Ms. Taylor's mother – Victoria Lamar. Mrs. Lamar testified that she was not involved in sending the inappropriate photo to Fernando. **(CP 1761:22-CP 1764:2)**.

By the hearing officer's own statement, the photo was inappropriate. Ms. Taylor testified to having exclusive control of the phone at the time the photo was sent and her mother denied being involved in sending the photo to Fernando. Reasonable minds could only reach one conclusion – Ms. Taylor sent the inappropriate photo to Fernando. The hearing officer's decision to the contrary illustrates that a careful deliberation of the facts was not had rendering the decision arbitrary and capricious. A teacher sending the photo in question to a minor student from a bachelorette party is sexually exploitive

conduct and, as such, is sufficient cause for discharge as a matter of law.

Vinson, supra at 773-64.

b. Finding of Fact that Taylor Did Not Violate District Training or Policies.

It is uncontested that Ms. Taylor received prior training involving appropriate student teacher relationships, appropriate contacts with students, and/or inappropriate conduct by school personnel. **(See Argument, p. 37)**. In her Findings of Fact, the hearing officer found that Taylor counseled Fernando. **(CP 2257)**. Ms. Taylor admits that she counseled / mentored student Fernando Valencia regarding several personal matters. **(Statement of the Case p. 10)**. The Amended Notice of Probable Cause identified counseling / mentoring as a reason supporting discharge of Ms. Taylor.

Despite the above uncontroverted established facts and admissions, the hearing officer found that Ms. Taylor did not violate policies and training regarding counseling, mentoring, or discussing personal issues with students. **(CP 2259)**. Such a decision illustrates that a careful deliberation of the facts was not had rendering the decision arbitrary and capricious. Explicitly and repeatedly violating District training and policies is flagrant misconduct equally sufficient cause for termination of employment as a matter of law.

Vinson, supra at 773-74.

c. No Finding of Fact that Taylor Violated District Directives.

Ms. Taylor admitted that she violated the District's directives to not discuss this case with anyone on two (2) separate occasions. **(Statement of the Case p. 15-16).**

Coupled with Ms. Taylor's admitted violation of District training and policies, Ms. Taylor's admitted violation of district directives continues to show a blatant disregarding for the District's instructions. The hearing officer's failure to issue a finding of fact on this matter is arbitrary and capricious and illustrates a lack of careful deliberation on the matter. Ms. Taylor's explicit and repeated violation of District instructions is flagrant misconduct, and insubordination, equaling sufficient cause for termination of employment as a matter of law. Vinson, *supra* at 773-74; Simmons, 41 Wn. App at 379.

d. No Finding of Fact that Taylor Violated Her Closed Hearing Request.

Ms. Taylor admitted that she requested a closed statutory hearing but yet still discussed the case by e-mail subsequent to her request for a closed hearing. **(CP 2108:19–CP 2113:10).**

The evidence put on by the District, and admitted to by Ms. Taylor, shows a consistent trait of insubordination and failure to follow District policies, training, directives and the statutory requirement under RCW 28A.405.310 that upon request, the hearing is to be closed.

The procedural safeguard of a closed hearing is, at a minimum, to protect the integrity of the investigation by limiting gossip within the community and / or work place. Requiring the District to strictly comply with this requirement but failing to even acknowledge Taylor's lack of compliance is arbitrary and capricious. Compliance with the closed hearing request is essential to allow the parties a fundamentally fair hearing. Taylor's violation of such strips the District of that right.

There was no Findings of Fact that Taylor violated her own request for a statutory closed hearing, illustrating a lack of careful deliberation by leaving out relevant Findings of Facts illustrating dishonesty and insubordination. See Federal Way Sch. Dist., 154 Wn. App. at 230; Simmons, 41 Wn. App. at 379.

e. No Finding of Fact that Taylor Lied Regarding Violating the District Directive.

During the course of the statutory hearing, Ms. Taylor specifically denied that she communicated to anyone else subsequent to the December 22, 2009, directive from Mr. Schieche. **(Statement of the Case p. 16)**. Contrary to Taylor's testimony, Taylor *had* communicated by e-mail on September 9, 2010, to several individuals regarding the subject matter of this case. **(Sup. Ct. 001999)**. At least one (1) of the addressees of that e-mail was East Valley School District teacher Craig Hyatt. **(CP 1867:16-CP**

1868:3). When confronted with the e-mail during the statutory hearing Taylor then changed her prior testimony and admitted sending the e-mail. **(CP 2110:13-CP2111:23).** Ms. Taylor was untruthful right in front of the hearing officer, yet no finding was made.

There is no place for a teacher being dishonest in a work setting. Weems, supra at 777. A hearing officer can find that, as a matter of law, dishonest conduct lacks any positive education aspect of legitimate educational purpose. See Id.; Clarke, supra. The hearing officer's failure to find, or even address, that Ms. Taylor lied at the statutory hearing illustrates a lack of careful deliberation by leaving out a relevant Finding of Fact as dishonesty is an independent basis for discharge.

f. No Finding of Fact that Taylor Changed Her Testimony Previously Provided Under Oath at Her Criminal Trial.

As previously discussed, the evidence is uncontroverted that Ms. Taylor called Fernando Valencia at 9:51 p.m. on June 6, 2009, and that four (4) minutes later, a sexually suggestive photograph was sent on Ms. Taylor's phone to Fernando Valencia. **(Sup. Ct. 001422-441).** Ms. Taylor first testified, under oath at her criminal trial and during her deposition, that she had the phone in her exclusive possession for a period of 15-20 minutes after making the phone call to Fernando. **(Sup. Ct. 001277/26:21 - 001278/30:16).** Again, this would put the cell phone in Ms. Taylor's hands

at the time the photo was sent to Fernando. Later, in deposition testimony, Ms. Taylor changed her story to not having exclusive control of the phone. **(Sup. Ct. 001277:21-Sup. Ct. 001278:2).**

Ms. Taylor admitted changing her under oath criminal trial testimony regarding the control / use of her cell phone at the time the inappropriate photo was sent to Fernando Valencia. **(Sup. Ct. 001278/32:3-10).** There was no Findings of Fact that Taylor admitted providing false information *under oath*. Failure to do so is arbitrary and capricious and illustrates a lack of careful deliberation by leaving out a relevant Finding of Fact as dishonesty is an independent basis for discharge. See Weems, supra.; Clarke, supra.

g. No Finding of Fact that Taylor Lied to Minor Student Fernando Valencia.

Ms. Taylor admitted that she lied to Fernando Valencia about apologizing to her husband for her infidelity as a form of Taylor's "mentoring" to Fernando. **(Sup. Ct. 001289-0001290/77:14-78:13); (CP 1647:2-13).**

When addressing this topic, the hearing officer simply found that Ms. Taylor "exceeded Student A's capacity to process complex emotional material in disclosing to Student A that she had kissed someone who was not her husband." **(CP 2258).** Such a statement is pure speculation by the hearing officer. There was no Findings of Fact that Taylor lied to student

Fernando Valencia. The hearing officer completely by-passed the uncontroverted fact that Ms. Taylor was *once again* shown to be untruthful. This lack of finding is arbitrary and capricious and illustrates a lack of careful deliberation on the facts and circumstances surrounding this action.

h. No Finding of Fact Regarding Taylor's Credibility, Propensity for Truthfulness, or Blatant Disregard of Process.

As identified above, Ms. Taylor showed a constant pattern of lack of credibility: Ms. Taylor admitted to lying to Fernando Valencia; Taylor admitted violating District directives on two (2) separate occasions; Taylor was shown to have been untruthful at the statutory hearing; Taylor admitted violating her request for a closed hearing; and Taylor changed her testimony previously provided *under oath* at her criminal trial.

(Statement of the Case p. 15-17).

In spite of the overwhelming evidence that Taylor lied on more than one occasion, there was no Findings of Fact regarding Taylor's credibility, propensity for truthfulness, or disregarding of process. Rather, Ms. Taylor's versions of events were believed without question.

The hearing officer's failure to make the above findings illustrates a lack of careful deliberation and consideration for the facts and once again leaves out relevant Findings of Fact as dishonesty is an independent basis for discharge. See Weems, supra.; Clarke, supra.

i. Finding of Fact that Wrongful Intent is Required for an Action to be a Valid Violation of District Training and Policies is Arbitrary and Capricious.

The hearing officer found that Ms. Taylor's text and telephone conversations with student Fernando Valencia on sensitive subjects were not with the *intent* to solicit a romantic or sexual relationship with Fernando Valencia. (CP 2257). The hearing officer found that Ms. Taylor did not invite student Fernando Valencia over to the Taylor home for dinner with the family for any other *intent* than to have dinner with the family. (CP 2258). The hearing officer found that it would have been "prudent" for Ms. Taylor to have reported Fernando Valencia's personal issues to a counselor; However, the hearing officer found that Ms. Taylor's decision to not report these issues were not for "inappropriate reasons." (CP 2258). The hearing officer found that Ms. Taylor told student Fernando Valencia that she had kissed someone who was not her husband; However, the hearing officer found that Ms. Taylor did not disclose this information with the *intent* to foster a romantic or sexual relationship with Fernando Valencia. (CP 2258).

The District's policies and trainings DO NOT provide that violations will only be considered valid if they are committed with the *intent* of being inappropriate, romantic, or for sexual reasons. The District's policies and trainings can be violated *regardless* of intentions. Reasonable minds could not differ that Taylor violated district training and

policies. Regardless of intent, Taylor's conduct showed a continuous blatant disregarding for district instruction.

The determination by the hearing officer that a specific element of intent is required before a violation of District trainings and expectations is deemed valid is arbitrary and capricious, illustrating a lack of careful deliberation of the facts and should be reversed. The hearing officer simply inserted her own personal brand of justice, and did not consider the effect such conduct had on the students involved.

Regardless of intention, explicitly violating District training and policies is flagrant misconduct establishing sufficient cause for termination of employment as a matter of law. Vinson, supra at 773-74.

The totality of the areas identified above clearly illustrates that the District was not provided a fundamentally fair hearing as required by the Constitution.

E. Reversal of Hearing Officer's Decision Prevents Attorney's Fees Award.

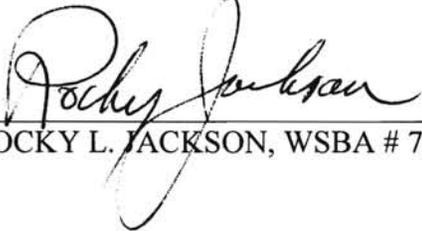
"If the final decision is in favor of the employee, the employee . . . shall be awarded reasonable attorneys' fees." RCW 28A.405.310(7)(c). Should the Court reverse the hearing officer's decision and conclude that the District established sufficient cause to discharge Ms. Taylor, the "final

decision” will not be in favor of Ms. Taylor. The Court should then reverse the hearing officer’s award for attorneys’ fees to Ms. Taylor.

III. CONCLUSION

For the reasons stated above, this Court should find that the trial court erred in dismissing East Valley School Districts’ request for a Writ of Review. 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 Ms. Taylor should be terminated for sufficient cause, and that Ms. Taylor should not be awarded reasonable attorney’s fees and costs.

Respectfully submitted this 3RD day of February, 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 3rd day of February, 2012, I served true copies of *Petitioner's Amended Opening Brief* to the following parties as identified below:

Original and One copy via U.S. Mail:

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

One Copy via Email and U.S. Mail:

Mr. Joseph W. Evans
Law Offices of Joseph W. Evans
PO Box 519
Bremerton, WA 98337-0124

Email: joe@jwevanslaw.com

Dated in Yakima, Washington, this 3rd day of February, 2012.



Natalie K. Bennett