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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

By \_\_\_\_\_ **No. 315223-III**

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**STEVENS, CLAY & MANIX P.S.**

**COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION NO. III**

**SPOKANE SCHOOL DISTRICT NO. 81,  
a Washington state municipal corporation**

**Respondent**

**-vs-**

**SPOKANE EDUCATION ASSOCIATION,  
a Washington state unincorporated labor organization**

**Appellant**

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**REPLY BRIEF OF APPELLANT**

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**1. SEA has met the requirements of RAP 10.3(a):**

RAP 10.3(g) requires that reviewable errors be identified in a formal assignment of error, or be “clearly disclosed in the associated issue pertaining thereto.” SEA has satisfied that requirement.

In *State v. Olson*, 74 Wash. App. 126, 872 P.2d 64 (Div. 1 1994), the court determined that an issue will not be reviewed on appeal only if the appellant failed to raise the issue in its brief, *and* also failed to present any oral argument on the issue or provide any legal citation. As such, the appellate courts possess a great deal of discretion in determining whether to review an assignment of error. The court in *Olson* reasoned that:

in a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue. *Id.*

The court made a similar determination in *Viereck v. Fibreboard Corp.*, 81 Wash. App. 579, 915 P.2d 581 (Div. 1 1996). Division 1 of the Court of Appeals chose to proceed with an appeal over respondent’s arguments despite the fact that no formal

assignments of error were made. The court reasoned that the essence of the appellant's argument was clear and that it was clear in the respondent's brief that respondent understood the issues being raised. The court in *Viereck* noted that RAP 1.2(a) calls for a liberal interpretation of the rules of appellate procedure "to promote justice and facilitate the decision of cases on the merits." It was also noted that "cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands..." *Id*, quoting *State v. Olson*, 126 Wash.2d 315, 321. See also *Heaverlo v. Keico Industries, Inc.*, 80 Wash. App. 724, 911 P.2d 406 (Div. 3 1996) (appeal would be granted despite lack of formal assignments of error when it is clear that respondent understands and responds to proposed errors); *Zueger v. Public Hosp. Dist. No. 2 of Snohomish County*, 57 Wash. App. 584, 789 P.2d 326, 327 n. 2 (Div. 1 1990) (appeal would be heard under RAP 10.3(g) despite lack of formal assignments of error being presented because RAP 1.2(a) calls for a liberal interpretation of the rules and allows review on the substantive issue to promote justice).

Respondent takes issue with the fact that no specific assignment of error was indicated as to Finding/Conclusion II.A (whether the trial court properly decided arbitrability) or Finding/Conclusion II.B.2 (the SEA's own characterization of the grievance.) But these issues were raised in the opening brief, specifically in argument "A1" on page 15, and "A2" on page 19. Additionally, Appellant responded to these issues on page 19 and 24 of their response brief. As such, pursuant to Washington law, the issues are appealable and should be heard by the appellate court.

**2. Limitations of arbitration of grievances:**

Washington courts have long held that if there is any question about whether a grievance is arbitrable, the favored resolution is arbitration. *General Teamsters Local No. 231 v. Whatcom County*, Washington, 38 Wn. App. 715, 720 (1984); *Council of County and City Employees v. Spokane County*, 32 Wn. App. 422, 424-425 (1982). Contrary to the assertion of the District, all matters should be determined to be grievable unless specifically excluded from the CBA. The District attempts to show by narrow exclusion that nonrenewal issue trumps arbitration of

any other grievable issues. That is not what the CBA states. In fact, the limitations that address the nonarbitrability of nonrenewal should be construed as restrictive and an exception to the rule that grievances should be arbitrated. The CBA is presumed to arbitrate all grievances unless expressly precluded. Article VII, Section 6(E) of the CBA states as much: “The parties to this agreement agree to submit to arbitration **any** grievance which has not been resolved through the use of the above enumerated grievance steps and procedures. **(CP 111)**. (Emphasis added).

The problem with the District’s analysis in this matter is that they are using the blanket nonrenewal limitation as a way to avoid arbitration of all grievances. Put in a different perspective for the court, if the nonrenewal had not been issued, would the matters listed in the grievance by SEA be subject to the CBA and arbitration? SEA believes the resounding answer would be yes.

The District mistakenly has taken the approach that the right to grieve an issue is limited under the CBA. In fact, the District prior to reciting the definition of a grievance under the CBA, Article VII, Section 1(A), inserts the prefatory word “only” as

if there is a limited definition. (District's Brief, p. 7). The nonarbitrability of nonrenewal is the exception or limitation, to the general right to have grievances arbitrated. The right to grieve an issue and have that matter arbitrated is the normal practice under the CBA.

**3. The District was aware of the possibility of a grievance months before the nonrenewal was issued:**

The District alleges at page 10 of its brief that it had no idea a grievance was in the works on behalf of Easterling when it issued a Notice of Nonrenewal. This position is disingenuous as the District was aware of union involvement in this matter as early as February 3, 2012 by union representative Mike Boyer. **(CP 264).**

**4. The grievances with the exception of the procedural issues are independent of the nonrenewal issue:**

The District asserts SEA's claim of retaliation can only solely be due to the issue of the nonrenewal and that is not arbitrable. The retaliatory actions again are not related to the nonrenewability, but to the specific acts of supervisors/principal directed toward Ms. Easterling. Those retaliatory actions were directed toward Ms. Easterling because she asserted her CBA rights to bereavement

leave and expressed concerns about the failure of the principal to follow the requirement of the federally mandated 504 program.

**(CP 252-254).** The specific acts by the supervisor which constituted retaliatory acts were: 1) harassing emails, instead of face-to-face interactions, directed to Ms. Easterling, which emails contained factual inaccurate statements; 2) requiring the teacher to carry a walkie-talkie even to use the restroom, which was never a previous requirement; 3) condemnation for taking a student for a walk to deescalate behavior; 4) requiring permission slips when none were required before; 5) requiring removal of items from the school premises that had been received as the result of a donation drive; and 6) requiring Ms. Easterling to man the dunk tank at a school carnival. **(CP 254).** Those are all instances of retaliation and separately grievable matters pursuant to the CBA. **(CP 90, 96).**

The District is attempting to relate all complaints contained in the grievance to the nonrenewal even though the basis for those complaints/grievances commenced in October of 2010, well before nonrenewal became an issue. **(CP 252).** The notice nonrenewing Ms. Easterling's employment was not received until May 11, 2012.

SEA's claim of lack of progressive discipline, i.e., failure of the principal to provide any written admonition or complaints about Ms. Easterling's teaching abilities or behavior is separate and distinct from the issue of nonrenewal. That issue is clearly a grievance under Article V, Section 22(A) of the CBA **(CP 90)** as it is "an alleged violation of a specific term of this agreement" pursuant to Article VII, Section 1(A) of the CBA. **(CP 109)**.

The District in its brief, at page 14, characterizes these issues as "numerous alleged tales of woe that are nothing other than transparent attempts to address the merits of the underlying grievance and to improperly prejudice the court." These are specific grievable items separate and distinct from any nonrenewal and deserve to be arbitrated under the agreement. There is no transparency involved whatsoever. Simply, the District does not want the arbitrator to address the merits of the underlying grievance, i.e., issues other than the nonrenewal.

The District acknowledges that there is reference in the amended grievance of SEA's claim that the principal failed to follow the 504 accommodation requirements and retaliated against Ms. Easterling. (Page 15, District's Brief). They then try

to dismiss that separate grievance by stating that the grievance itself does not contain the factual allegation that Ms. Easterling expressed this concern to her principal. A grievance is not required to indicate every specific factual situation that occurred to support the grievance. This issue of Ms. Easterling confronting the principal with the failure to follow 504 concerns was not disputed at the time of trial. Again, a simple declaration by the principal indicating the fact that she was following 504 recommendations would have addressed the issue, but no such declaration was filed at the trial court. The details of a number of contacts between Ms. Easterling and the principal about concerns with the 504 program are documented in the trial record. **(CP 253-254).**

**5. The District should not be allowed to add facts to the record for the first time on appeal:**

The grievances did not address the dunk tank issue because it occurred after the grievances were filed, however it is relevant and should be subject to review by an arbitrator as evidence of retaliatory activities. This elaborate tale of woe, i.e., the dunk tank incident, was a significant concern to the PERC. PERC acknowledged the dunk tank activity was not related to the

termination or nonrenewal. PERC could not address that issue because it was outside their jurisdiction. **(CP 334)**. The dunk tank incident is clearly indicated as part of the record at **CP 255**. The District had ample time to respond to the statement but refused and/or failed to do so at trial. Consequently the statement that the principal assigned the teacher to the dunk tank is an undisputed statement of fact in the record. The District, without any authority or factual basis whatsoever, inserted a footnote (#4) at page 15 of its brief, for the first time addressing this issue. Those alleged facts in the footnote were never contained in the trial court record and should be stricken in their entirety. The District had every opportunity to provide a declaration from the principal at the time of trial refuting Ms. Easterling's declaration but declined to do so.

It is clear that when addressing issues on appeal that they must be based upon facts accurately taken from the trial court record. Any misstatement of facts and/or attempts to add information to the record for the first time on appeal which were not a part of the original court record should be stricken.

*Matthias v. Lehn & Fink Prod. Corp.*, 70 Wn.2d 541, 424 P.2d 284

(1967). In this case, the District has misrepresented the facts and attempted to add facts to the record which clearly do not exist.

The District again inaccurately states the record at page 15 of its brief, quoting Mr. Boyer for some alleged statements he made concerning retaliation issues. Nowhere in the record does it indicate that Mr. Boyer personally stated he didn't have "proof" of the allegations of retaliation or that he had a "supposition" and was confident he could get proof. The District cites the Declaration of Jeffries-Simons at **CP 322** for that proposition and there are no such quotes contained in that reference.

**6. It is irrelevant to the grievance issue whether Ms. Easterling resigned or was nonrenewed:**

This case centers on the provisions of the collective bargaining agreement and its enforcement as to both the SEA and the District. The practice of whether a teacher subject to nonrenewal is allowed to resign or be issued a notice of nonrenewal is irrelevant to this case. As a practical matter, whether a nonrenewal or resignation occurs, the District itself acknowledges there is no significant difference. See, *Petroni v. Deer Park School District*, 127 Wn. App. 727, 113 P.3d 10 (2005) and footnote 13 of the District's response brief at page 42.

**7. The District certainly participated in the arbitration process:**

The District alleges that all along it objected to arbitration of the grievance, but at the same time still was involved in the process of selection of an arbitrator. Simply stated, their actions were not consistent with their alleged intent. Nowhere in the record does it indicate that the District informed the American Arbitration Association that the matter submitted was not arbitrable. The first formal notice of the District's position that the matter was not arbitrable was the filing of the petition for injunction and restraining order. The District cites the Second Supplemental Declaration of Paul Clay (**CP 316**) but nowhere in that declaration does he indicate that he notified AAA that the matter was not subject to arbitration.

**8. Who decides arbitrability?**

The District has misstated the position of SEA throughout its brief. SEA's position is that the language of the CBA determines whether a matter is arbitrable or not. This was expressly stated in *North Beach Ed. Assn. V. North Beach School District No. 64*, 31 Wn. App. 77, 639 P.2d 821 (1982). Of course the courts determined in that case whether the matter was

arbitrable but only after reviewing the CBA. Just like in the present case, the court in *North Beach* was asked even though some grievances may not be arbitrable, are the remaining grievances subject to arbitration if the CBA so provides?

The *North Beach* case clearly states that a CBA by its own language can determine whether a matter is arbitrable. The court in *North Beach* was merely enforcing the terms of the CBA, which is what SEA is requesting be done here. *North Beach* stands for the very proposition that SEA is pursuing, that even though there may be certain matters that are not grievable under the CBA, that does not preclude having an arbitrator hear other grievances that are subject to arbitration under the CBA.

**9. The issue of procedural discrepancies in this case are subject to arbitration:**

The court does not have the authority to determine the merits of a grievance. That is left to the arbitrator under the CBA. *General Teamsters Local 231 v. Whatcom County, supra*. The main argument throughout this litigation by SEA is that the fact that although a nonrenewal may not be arbitrable under the CBA that does not prevent proceeding with the grievances related to other specific issues, including but not limited to progressive discipline,

violation of FMLA, procedural discrepancies, and retaliation by a supervisor. As indicated previously, all of these grievance issues are factually based on actions or inactions by Ms. Easterling's supervisors and are separate and distinct from the limited issue of nonrenewal.

The District at page 22 of its responsive brief argues that alleged procedural violations of the CBA are not arbitrable. It also argues that the sole issue before this court is whether a nonrenewal of a teacher is arbitrable under the CBA. That is not the issue that SEA is alleging. SEA is alleging that other grievance issues, independent of the nonrenewal, are subject to arbitration under the CBA by the grievant. SEA is not asking the court to decide whether the issue of a nonrenewal of a teacher is arbitrable, the SEA is asking the court to follow the CBA which allows any grievances to be arbitrated **(CP 111)** unless specifically prohibited.

The District has acknowledged in its own responsive brief that grievances involving procedural discrepancies of the nonrenewal of a teacher such as here are subject to arbitration. The District's brief, at page 6, in referencing the CBA and its

interpretation of Article VII, Section 3 thereof (**CP 109-110**) states: “This means that the nonrenewal of provisional employees is not even grievable (let alone subject to arbitration) unless it pertains to procedural discrepancies.” The SEA has alleged in its grievance procedural violations in the nonrenewal which clearly are arbitrable under Article VII, Section 3(B). (**CP 109**).

**10. The CBA allows arbitration of grievances for progressive discipline, retaliatory acts and/or FMLA violations:**

The District takes the position that if not every fact supporting the grievance is alleged in the grievance itself then the grievance is defective. That is not the case. Grievances are supposed to be liberally construed and it is within the province of the arbitrator under the CBA to determine if the facts supporting the grievance have been properly alleged. *Local Union No. 77, International Brotherhood of Electrical Workers v. Public Utility District No. 1, Grays Harbor County*, 40 Wn. App. 61, 696 P.2d 1264 (1985).

The progressive discipline argument is made clear by the fact that the no attempts to address the alleged problems were given to Ms. Easterling and therefore she had no ability to correct

whatever deficiencies the supervisor may have believed existed. The right to progressive discipline is clearly stated in the CBA at Article IV, Section 22. **(CP 90)**. Progressive discipline is not based upon the issuance of the nonrenewal letter. It is based upon the failure of the supervisor to comply with the CBA and interact with the teacher in providing appropriate notices, reprimands, or whatever may be necessary so that the teacher is aware of the deficiencies. None of this occurred in this case.

The Family Leave issue involved the supervisor failing to properly inform Ms. Easterling of her rights under that act. Ms. Easterling could have used that leave to address illnesses of her daughter. The principal should have informed and granted Ms. Easterling of these rights. Failure to do so was a violation of the CBA. Article V, Sections 4 and 5. **(CP 96)**.

The record of interaction between the principal and the teacher, Ms. Easterling, is full of reprisal and retaliatory actions by the principal in response to Ms. Easterling taking her allowed bereavement for her aunt and expressing her concerns about the school's failure to follow 504 mandates. Those actions are separate and distinct from the nonrenewal. Retaliatory actions

such as these are grievable under the CBA preamble **(CP 37)** which among other things requires the parties engage in open, honest and appropriate communications. Also, the progressive discipline provisions under Article IV, Section 22, of the CBA are supposed to be followed to avoid retaliation. **(CP 90)**.

**11. Failure to address Ms. Easterling's grievances would violate the purpose of the CBA:**

The purposes of the CBA are cited in its preamble. Those purposes are consistent with favoring a grievance procedure to address disputes between the parties. The District argues that the preamble should not be considered in determining whether the matter should be grieved and cites *Baton Rouge Oil and Chemical Workers Union v. Exxon Mobile Corp.*, 289 F.3d 373 (5<sup>th</sup> Cir. 2002) as the premise for that fact. The *Baton Rouge* case, however, held that the preamble should not be used to explicitly conflict with an express provision of the CBA. The preamble cited by SEA in its opening brief supports the proposition that issues regarding interpretation of this agreement or specific violations of the agreement shall constitute grievances and should be arbitrated. **(CP 109)**. The preamble in fact enforces that idea that grievances

should be resolved through an alternate dispute resolution such as arbitration.

**12. The District's use of the *Selah* arbitration case:**

The District, both at trial and this appeal, has cited a *Selah* Education Association arbitration decision which occurred in 2009. That arbitration proceeding should have no precedential value in this case. The CBA in the *Selah* case and the present matter are different. The District has argued *ad nauseam* that only courts have the authority to determine arbitrability.

However, the *Selah* matter stands for the proposition that in fact an arbitrator under a CBA can determine whether a matter is arbitrable.

**13. The trial court in determining whether injunctive relief should be used failed to consider the effect of such a blanket restraint on other valid grievances:**

The trial court went through the analysis of whether the requirements of injunctive relief had been met by the District. Unfortunately, the trial court did not consider the ramifications to SEA if an injunction was granted. The court failed to take into consideration how a blanket injunction would affect all issues raised in the grievances filed by SEA in this matter, unrelated to

the nonrenewal of Ms. Easterling's position. The trial court narrowly looked to the issue of whether the CBA allowed arbitration of the nonrenewal of a teacher, but refused to consider other issues in the grievance that should have been subject to arbitration. The District failed to meet its burden to show that issues of progressive discipline, FMLA, retaliatory actions, and procedural discrepancies occurring in the nonrenewal were not subject to arbitration. The court merely issued a blanket order prohibiting the grievance from going forward entirely, which violated SEA's right to have its grievances arbitrated as required under the CBA.

**14. The issuance of a nonrenewal notice to avoid all other appropriate grievances constitutes bad faith under the CBA:**

The District's response brief supports SEA's position in this regard. The District is basically stating that whether valid grievances under the CBA exist or not, those grievances simply can be disregarded by the issuance of a nonrenewal, ending the matter. All of the facts, with the exception of the dunk tank incident, which support Ms. Easterling's grievance occurred prior to the issuance of the nonrenewal notice. The one very limited

issue of nonrenewal should not trump arbitration of all other valid grievances under the CBA. This is exactly the proposition the *North Beach* case stands for. Nowhere in the CBA does it indicate that lack of arbitrability of the nonrenewal of a teacher precludes arbitration of other matters grievable under the CBA. In fact, the denial of arbitration for nonrenewal is a specific limitation and not a general denial of arbitrability.

### **CONCLUSION**

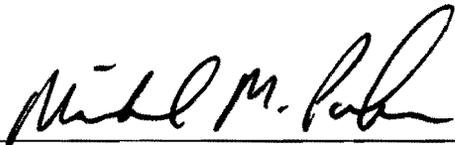
It is clear that there are a number of issues raised in the grievances filed by SEA other than nonrenewal. Even if the issue of nonrenewal is precluded from arbitration, that does not mean all other viable grievances independent of the nonrenewal should be discarded as well. The purpose of the CBA and the grievance procedure is to address issues and situations where parties feel they may not have been treated fairly. The CBA should and does allow a forum through the grievance procedure for employees who have been retaliated against, not properly informed of FMLA rights, denied the right of progressive discipline, and subject to procedural discrepancies, to have those issues addressed. The District is attempting to brush those valid grievance issues aside

by simply terminating Ms. Easterling. The District's position that issuing a nonrenewal voids all other grievable issues simply was not the intent of the CBA. To agree with the District's position would render arbitration of grievances under the CBA illusory.

Dated this 12<sup>th</sup> day of September, 2013.

Respectfully submitted:

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