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Case No. 80602-1

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SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals, Division II, No. 32714-7-II)

CHERYL DELYRIA and JUDY KOCH,

Respondents,

v.

STATE OF WASHINGTON, WASHINGTON
SCHOOL FOR THE BLIND,

Petitioners.

APPELLANTS' RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

The State seeks review of this case which it admits merely presents a “straight-forward issue of statutory construction.” Under RAP 13, this court has set out the factors for granting review. Review is not appropriate here because none of those factors are present. Specifically, (1) the Court of Appeals’ decision is wholly consistent, both internally and with the decisions of this Court and the Court of Appeals. The decision is well reasoned and is a “straight-forward” application of elementary rules of statutory interpretation; (2) there is not a significant question of law under the Constitution of the State of Washington, rather this case interprets the pay parity statute (RCW 72.40.028) which has an exceedingly narrow application. The Court of Appeals’ decision in no way implicates constitutional issues; and (3) the petition does not involve an issue of substantial public interest that needs to be determined by the Supreme Court. Rather the interest of the Plaintiffs in this case, while important, by no means extends beyond this group of state school teachers or to the public at large. The statute at issue only applies to less than a hundred teachers statewide. Therefore, review is not necessary and is not appropriate.

II. THE COURT OF APPEALS' DECISION COMES DOWN TO SIMPLE GRAMMAR

The State seeks review on one issue - it argues under RCW 72.40.028 (the "Pay Parity Statute") the State must pay Washington State School for the Blind ("WSSB") teachers salary equivalent to Vancouver School District ("VSD") teachers only that salary which is adjusted based upon background and experience. According to the State,

"While the Vancouver School District makes TRI payments without regard to the teacher's education and experience, the clear statutory language and legislative history of RCW 72.40.028 indicate that supplemental compensation for teachers at the State School must be based on the salaries of certificated employees 'of similar background and experience.' That could only refer to the base salary in the appropriations act."

Petition for Review, p. 6-7.

The State makes an error of elementary grammar. The subject passage is as follows:

"[s]alaries of all certificated employees shall be set so as to conform to and be contemporary with salaries paid to other certificated employees of similar background and experience in the school district in which the program or facility is located."
RCW 72.40.028.

The phrase "employees of similar background and experience" is *not* a limitation on the type of salary that requires parity, rather it is a simple prepositional phrase which modifies the noun "employees." As

such, that phrase establishes which employees must be in parity with each other – WSSB employees with a certain background and experience must have pay parity with those VSD employees of similar background and experience. The phrase does not limit the type of salary that similarly situated employees receive. This is exactly what the Court of Appeals held:

We begin by noting that under the plain language of RCW 72.40.028, the phrase 'similar background and experience' modifies 'certificated employees.' The most natural and grammatically correct reading of the statute leads to the conclusion that the statute applies to those school and district employees who have similar background and experience. Reading the plain and unambiguous statute alone would lead us to conclude that Delyria and Koch are entitled to salaries comparable to those of district employees.

Savlesky v. Washington School for the Deaf, 136 P.2d 152 (Div. 2 2006).¹

Because the statute is plain and unambiguous, and because the State's reading of the statute is clearly incorrect, the Court of Appeals' decision is correct.

¹The Court of Appeals also relied on the last antecedent rule of statutory construction. "That rule provides that qualifying words and phrases refer to the language immediately preceding the qualifier, unless a contrary intention appears in the statute. *In re Estate of Kurtzman*, 65 Wash.2d 260, 264, 396 P.2d 786 (1964). Because 'certificated employees' immediately precedes the phrase 'similar background and experience,' the last antecedent rule supports concluding that the phrase modifies 'certificated employees'." *Savlesky*, fn 8.

III. THERE IS NO SUBSTANTIAL PUBLIC INTEREST

Once again, this case is of exceedingly narrow application. The statute at issue applies only to the two state-run schools - the School for the Deaf and the School for the Blind. In all, likely less than 100 current teachers' salaries are at issue. Yet, the State claims that this case presents an issue of "substantial public interest." The alleged public interests at issue are that: (1) the Court of Appeals' decision results in a general statute controlling over a specific statute, and (2) the underpayment of wages found by the Court has not yet been funded by the legislature. Neither of these arguments presents an issue of "substantial public interest."

In regard to the State's claim that the general controls over the specific, the State appears to argue that by giving effect to the pay parity statute, somehow RCW 72.40.110 becomes ineffective. This is simply not true. RCW 72.40.110 is another straightforward statute which states that: "Employees' hours of labor shall follow all state merit rules as they pertain to various work classifications and current collective bargaining agreements." Thus, this statute says that these schools must pay teachers in accord with the schools' contractual obligations. Under the pay parity

statute, the schools must pay consistently with the surrounding school district and cannot agree to pay anything less than that. There is no evidence that in enacting RCW 72.40.110 the legislature sought to allow districts to agree in a contract to pay less than required under the pay parity statute. An analogous argument is that the operation of RCW 72.40.110 would allow wage payments less than minimum wage. In both cases, there are statutes which establish minimum wage payments that serve as a floor, which the schools can agree to exceed. Certainly, in requiring the State to live up to its statutory and contractual obligations, there is no earthshattering inconsistency in the Court of Appeals' application of these statutes.

Finally, the fact that the legislature has underpaid its employees does not make this a case of particular public importance. The same can be said of any wage action against a public entity. Yes, the State has underpaid wages – that, of course, is the point. But not every statutory violation by the State merits this Court's review.

IV. THE COURT OF APPEALS' ANALYSIS OF LEGISLATION IS CONSISTENT WITH THIS COURT'S AND OTHER COURT OF APPEALS CASES

The only cases that the State argues are inconsistent with the Court

of Appeals decision are cases of statutory construction. It is these “inconsistencies” that form a key basis for its request for review. However, a reading of the Court’s decision shows that its analysis is neither novel nor unfounded. Rather, the legislative history entirely supports its decision.

The State points to the following passage:

The School argues that the legislature did not intend the School's employees to receive TRI payments because when the legislature enacted former RCW 72.05.140, FN9, the pay parity statute, in 1980, it had not yet enacted legislation authorizing TRI payments. Thus, the School argues that “[t]he [l]egislature simply could not have contemplated RCW 72.05.140 to include supplemental TRI payments as additional salary.” Resp't's Br. at 10.

We disagree. We presume the legislature considered its prior enactments when enacting new legislation. *State v. Roth*, 78 Wash.2d 711, 715, 479 P.2d 55 (1971); *State v. Pub. Util. Dist. No. 1*, 91 Wash.2d 378, 383, 588 P.2d 1146 (1979). If the legislature wanted to exclude the application of RCW 28A.400.200(4) from the pay parity requirement in the former RCW 72.05.140, it could have done so. That the legislature did not amend the pay parity requirement when it enacted the TRI provision demonstrates its intent not to render the two statutes mutually exclusive. Moreover, the legislature enacted the pay parity statute, RCW 72.40.028, before the TRI authorization statute, RCW 28A.400.200. Had the legislature intended to exclude employees at the school and other state institutions from receiving TRI payments, the statute would specify that exclusion. Because the pay parity statute existed at the time of the new enactment, we presume that the legislature knew that all salary increases made available to district employees must likewise be available to school employees. Clearly, TRI payments may qualify as “salary” for the purposes of the pay parity statute.

Essentially, the standard base salary for teachers and TRI payments are indistinguishable to the extent that both are “fixed compensation paid regularly.” Webster's Third New Intern'l Dictionary at 2003 (2002).

Savlesky v. Washington School for the Deaf, 136 P.2d 152 (Div. 2 2006)

According to the State, this passage reflects a requirement that there be a “negative exclusion” by the legislature. According to the State, this passage creates a requirement that every statute carry with it a phrase indicating that it does not limit other statutes. This is absurd and gives lie to just how far afield the State’s argument will travel. The Court of Appeals’ analysis is very simple:

(1) Courts presume legislatures considered prior enactments when enacting a statute. *State v. Roth*, 78 Wash.2d 711, 715, 479 P.2d 55 (1971); *State v. Pub. Util. Dist. No. 1*, 91 Wash.2d 378, 383, 588 P.2d 1146 (1979).

(2) Here, the pay parity statute has been in effect since 1980;

(3) In 1985, when the legislature allowed districts to offer TRI payments, the legislature could have specifically excluded TRI from “salary” under the pay parity statute;

(4) Because it did not exclude TRI payments from the pay parity statute, the pay parity statute operates to maintain pay parity between the

state schools and the district teachers, regardless of how that district salary is funded.

Rather than a “negative exclusion” and the doomsday predicted by the State, all that the Court states is that when the legislature allowed increases in district teachers’ pay, it is presumed to know that pay parity requires the state schools follow suit. If it did not want that to occur, it could have easily indicated as much. It did not, and as a result, the plain and unambiguous statutory language controls.

V. THERE IS NO “SEPARATION OF POWERS” ISSUE

The State’s final argument may be its most tenuous. Without citation, the State claims that the Court’s holding that the state schools are in violation of the law impinges on the legislature’s power to appropriate funds. Of course, the court has merely interpreted the legislature’s own statutes and found that the legislature does in fact require pay parity. Rather than impinging on legislative power, the Court gives effect to and enforces the clear legislative proscription. The fact that the executive department or the legislative appropriations have been inconsistent with statute does not mean the courts are interfering with the legislative prerogative by requiring adherence to the law.

VI. NO DOUBLE RECOVERY

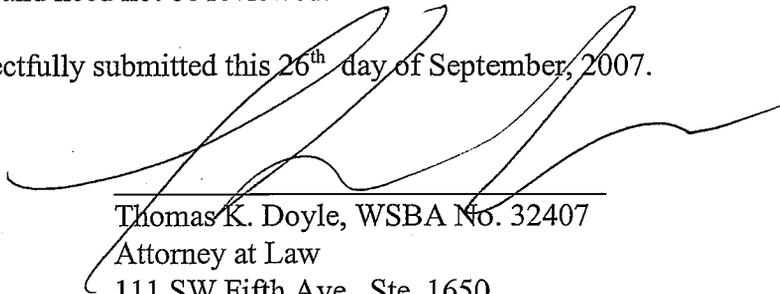
Finally, the State obliquely raises the specter of “double dipping,” i.e., teachers receiving double pay. This case was resolved on summary judgment. The trial court will have every opportunity to ensure that to the extent these teachers have already been paid a TRI salary equivalent, they will not obtain a double recovery. This case established that the state schools do have that obligation to pay an equivalent salary. The next phase of the litigation will determine if such payments were made.

VII. CONCLUSION

In sum, the State raises no issues that merit review by this court. At its heart, this is a run-of-the-mill statutory interpretation case. The court of appeals interpreted the applicable statute entirely consistently with this Court’s decisions, the decisions of the appeals courts, and common maxims of statutory construction. Far from earth-shattering, this decision simply gives effect to a simple statute. State school teachers must be paid the same salary as teachers in the district in which the state school is located. Salary includes money paid under supplemental contracts by

districts. Thus, state school teachers must be paid a TRI equivalent. That decision was correct and need not be reviewed.

Respectfully submitted this 26th day of September, 2007.



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CERTIFICATE OF SERVICE

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I hereby certify that I served the foregoing APPELLANTS' ROBERT R. CARPENTER

RESPONSE TO PETITION FOR REVIEW upon the following person at _____
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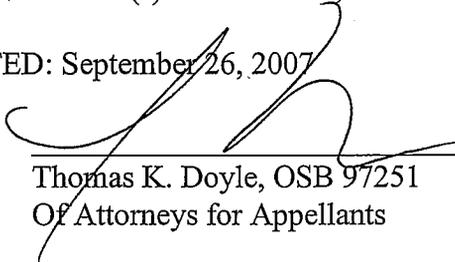
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Attorneys for Appellees

- by mailing a true copy in a sealed, first-class postage-paid envelope, addressed to the attorney(s) listed above, and deposited with the United States Postal Service at Portland, Oregon, on the date set forth below.
- by hand delivering a copy thereof to the attorney(s) listed above, on the date set forth below.
- by sending via overnight courier a copy thereof in a sealed, postage-paid envelope, addressed to the attorney(s) listed above, on the date set forth below.
- by faxing a copy thereof to the attorney(s) at the fax number(s) shown above, on the date set forth below.

DATED: September 26, 2007



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