

No. 84243-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FEDERAL WAY SCHOOL DISTRICT NO. 201,

Respondent,

and

DAVID VINSON,

Petitioner.

BRIEF OF *AMICUS CURIAE*
WASHINGTON EDUCATION ASSOCIATION

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I. INTRODUCTION

This case involves the test for sufficient cause to discharge a teacher under RCE 28A.405.300 *et seq.* It also involves the question as to whether a school district has the right to seek judicial review of a hearing officer's determination that sufficient cause does not exist, when the legislature has expressly withheld such a right to districts.

The test for sufficient cause, which has been created by our courts over the past 25 to 30 years, involves a confusing number of inquiries and factors. Moreover, the circumstances under which some or all of the factors may or must be applied is not at all clear. Because of the confusion regarding the test for sufficient cause, because the *Vinson* court misapplied the test as currently formulated, and because a school district is not entitled to appeal a hearing officer's decision, the Supreme Court should grant the Petition for Review to address these issues.

II. INTEREST OF AMICUS CURIAE

The Washington Education Association, the state's largest public employee labor organization, represents over 80,000 education employees in our State. As such, the Washington Education Association has a strong interest in the issues presented to the Supreme Court for review: the proper test for sufficient cause to discharge a teacher under RCW 28A.405.300 *et seq.*; whether a school district may seek review of a

statutory hearing officer's ruling pursuant to RCW 7.16.040; and the proper standard of review, assuming a statutory writ of review is available.

For the reasons set forth below, the Washington Education Association respectfully requests that the Supreme Court grant Petitioner's Petition for Review.

The Washington Education Association joins in the Statement of the Case presented by Petitioner David Vinson.

III. ARGUMENT

A. The test for sufficient cause under RCW 28A.405.300 *et seq.* should be clarified following *Vinson*.

1. Test for Sufficient Cause

RCW 28A.405.300 and .310 set forth the procedures that a school district must follow to discharge a teacher as well as the appeal rights afforded such a teacher. Under these statutes, a district must establish by a preponderance of the evidence sufficient cause for the discharge. Because "sufficient cause" is not defined by statute, our Courts have construed the phrase to give it meaning. The primary question is "whether the teacher has so materially breached his promise to teach so as to excuse the district in its promise to employ." *Clarke v. Shoreline School District No. 412*, 106 Wn.2d 102, 113, 720 P.2d 793 (1986) (internal citations omitted). At the heart of the inquiry is the teacher's effectiveness, the "touchstone for

all dismissals.” *Hoagland v. Mount Vernon School District No. 320*, 95 Wn.2d 424, 430, 623 P.2d 1156 (1981).

To help determine whether a teacher’s effectiveness has been so impaired as to justify discharge, the following factors may be considered: (1) the age and maturity of the students; (2) the likelihood the teacher’s conduct will have adversely affected students or other teachers; (3) the degree of the anticipated adversity; (4) the proximity or remoteness in time of the conduct; (5) the extenuating or aggravating circumstances surrounding the conduct; (6) the likelihood that the conduct may be repeated; (7) the motives underlying the conduct; and (8) whether the conduct will have a chilling effect on the rights of the teachers involved or other teachers. *Hoagland*, 95 Wn.2d at 429-30.

Over the years, following *Hoagland* and other case law, the following definition of sufficient cause developed: “Sufficient cause for a teacher’s discharge exists as a matter of law where the teacher’s deficiency is unremediable and (1) materially and substantially affects the teacher’s performance, or (2) lacks any positive educational aspect or legitimate professional purpose.” *Clarke v. Shoreline School District No. 412*, 106 Wn.2d 102, 113-14, 720 P.2d 793 (1986), citing *Hoagland v. Mount Vernon School District No. 320*, 95 Wn.2d 424, 428, 623 P.2d 1156 (1981); *Mott v. Endicott School District No. 308*, 105 Wn.2d 199, 203,

713 P.2d 98 (1986); *Pryse v. Yakima School District No. 7*, 30 Wn. App. 16, 24, 632 P.2d 60, *review denied*, 96 Wn.2d 1011 (1981); and *Potter v. Kalama Public School District No. 402*, 31 Wn. App. 838, 842, 644 P.2d 1229 (1982).

2. Two Clarke Tests and Requirement of Remediability

Thus, as formulated by the Supreme Court, there are two basic tests for whether a teacher may be discharged. Both the first *Clarke* test (whether the teacher's deficiency materially and substantially affects the teacher's performance) and the second *Clarke* test (whether the teacher's deficiency lacks any positive educational aspect or legitimate professional purpose) require that the teacher's deficiency be unremediable. *Id.*

However, these two *Clarke* tests were subsequently modified by the Division I of the Court of Appeals in *Sauter v. Mt. Vernon School District*, 109 Wn. App. 767, 776, 37 P.3d 354 (1990). There, the Court held that the Supreme Court had improperly inserted the conjunction "or" into its formulation of the test for sufficient cause with the result that the remediability prong applied to both *Clarke* tests. *Sauter*, 109 Wn. App. at 130-31. Despite the test's plain language, the *Sauter* Court concluded that the Supreme Court did not in fact intend such a result and held that "the test should read that sufficient cause exists as a matter of law where the teacher's deficiency is unremediable and materially and substantially

affects performance *or* where the teacher's conduct lacks any positive educational aspect or legitimate professional purpose." *Sauter*, 109 Wn. App. at 131 (emphasis in original). Division III of the Court of Appeals has adopted the *Sauter* reformulation of the second *Clarke* test. *Wright v. Mead School Dist. No. 354*, 87 Wn. App. 624, 630, 944 P.2d 1 (1997).

In altering the *Clarke* tests, the *Sauter* Court relied on Division III's opinion in *Potter* and Division II's decision in *Pryse*. In those cases, the courts addressed whether the teachers' conduct constituted sufficient cause under the second *Clarke* test (conduct having no positive educational aspect or legitimate professional purpose). In *Pryse*, the teacher made sexually suggestive remarks to and had improper physical contact with female students. Likewise, in *Potter*, the elementary school teacher repeatedly had inappropriate physical contact with his young female students. In each case, the courts held that because the inappropriate physical contact with students lacked any positive educational aspect or legitimate professional purpose, there was no need to determine whether the conduct was remediable. *Pryse*, 30 Wn. App. at 23-24; *Potter*, 31 Wn. App. at 841-42.

However, the holdings of *Pryse* and *Potter* are not as broad as the *Sauter* court indicates. In *Pryse*, the court characterized the conduct as "sexually exploitive" and stated that such conduct "is inherently harmful

to the student-teacher relationship and impacts the teacher's efficiency.” *Pryse*, 30 Wn. App. at 24. Given the egregious nature of the conduct, the court concluded that the teacher could be discharged, without first following progressive discipline or other remedial measures. *Pryse*, 30 Wn. App. at 25. In *Potter*, the district had imposed progressive discipline, first warning the teacher against inappropriate touching his female students. The teacher persisted in engaging in the improper behavior, though, indicating that the conduct was not in fact remedial. *Potter*, 31 Wn. App. at 841. Further, the specific question of remediability addressed by the *Potter* court was limited to whether the teacher could be discharged without the district first placing him on probation as required by former RCW 28A.67.065 (now codified at 28A.405.100). Citing to *Pryse*—even though that case did not discuss RCW 28A.67.065—the *Potter* court stated that the evaluation and probation statute “is not concerned with conduct which does not have any positive educational aspect or legitimate professional purpose.” *Potter*, 31 Wn. App. at 842.

By eliminating the remediability prong to the second *Clarke* test, the courts of appeals have eliminated the significant protections previously afforded to teachers by the sufficient cause standard. Under the *Sauter* test, any misconduct will be grounds for discharge because, by definition,

misconduct is behavior that “lacks any positive educational aspect or legitimate professional purpose”.

3. Interplay Between Two *Clarke* Tests and *Hoagland* Factors

In addition to the question of remediability, there is further confusion under the case law regarding the circumstances under which a court is to apply either or both of the *Clarke* tests and when the *Hoagland* factors apply.

Typically, the first *Clarke* test is used when the alleged deficiency is related to a teacher’s job performance and the second test is used when the deficiency relates to conduct outside of the classroom. *See, e.g., Clarke*, 106 Wn.2d 102 (where the first *Clarke* test was applied to determine whether the teacher’s disability affected his teaching performance); and *Pryse*, 30 Wn. App. 16 (where the second *Clarke* test was applied to determine that the teacher’s inappropriate physical contact with students lacked any positive educational aspect or legitimate professional purpose). However, our courts have expressly held that the second *Clarke* test may also apply when the cause for dismissal is a teacher’s job performance. *See, e.g., Ruchert v. Freeman School District*, 106 Wn. App. 203, 213, 22 P.2d 841 (2001).

Adding to the confusion is the question of when the *Hoagland* factors must be considered. Although these factors were first announced

in a case involving the possession of stolen property by a teacher, which is unquestionably misconduct outside of the classroom, they are not limited to such cases. As acknowledged by the Supreme Court in *Clarke*, “not all eight factors will be applicable in every teacher discharge case”. *Clarke* 106 Wn.2d at 114. Further, the *Hoagland* factors “are not necessarily applicable when the cause for dismissal is the teacher’s improper performance of his duties” as opposed to misconduct outside of the classroom. *Clarke*, 106 Wn.2d at 114. “Nevertheless,” concluded the Court, “these factors are helpful in determining whether a teacher’s effectiveness is impaired by his classroom deficiencies.” *Clarke*, 106 Wn.2d at 115. Clearly, then, the *Hoagland* factors may apply regardless of whether the teaching deficiency is related to the teacher’s performance or conduct outside of the profession.

In an effort to clarify when the two *Clarke* tests and the *Hoagland* factors should be applied, Division III of the Court of Appeals explained:

We conclude that different standards apply based on whether the cause for dismissal relates to the employee’s job performance or whether the discharge is based on the employee’s status or conduct outside these duties. When the cause for dismissal is based on the employee’s job performance, either one or both of the *Clarke* tests may apply. But application of these tests may or may not require consideration of some or all of the *Hoagland* factors. In contrast, when a school district employee’s status or conduct outside his or her job duties is the basis

for discharge, the *Hoagland* factors must be considered along with the second *Clarke* test.

Ruchert, 106 Wn. App. at 213. Thus, the only definitive rule appears to be that whenever the basis for discharge is conduct outside the teacher's professional duties, then the *Hoagland* factors "must" be applied. *Id.* In all other circumstances, some or all of the *Hoagland* factors "may" apply since the factors help to determine impairment to a teacher's effectiveness. *Id.* Likewise, the application of either or both of the *Clarke* tests is discretionary when the teacher's job performance is the basis for the discharge. *Id.*

4. Application of Test in *Vinson*

Here, Mr. Vinson was discharged for dishonesty during the course of an official investigation into allegations of other misconduct. This "deficiency" is, therefore, related to Mr. Vinson's performance of his official duties, not misconduct occurring outside of the work place. Indeed, the Court of Appeals characterized the misconduct as occurring "at work, on work time, and in violation of his duties as a district employee". *Vinson*, 154 Wn. App. at 230.

Under the test as summarized by *Ruchert* above, either or both of the *Clarke* tests may apply since the cause for dismissal was based on Mr. Vinson's job performance. The application of some or all of the

Hoagland factors under these circumstances is likewise discretionary. Nonetheless, the Court of Appeals applied only the second *Clarke* test with no explanation as to why the first *Clarke* test would not apply. Similarly, the court summarily determined that the *Hoagland* factors should not be considered. Under its formulation of the test for sufficient cause, the Court held that it was error for the hearing officer to conclude that the district had not met its burden to establish sufficient cause for Mr. Vinson's discharge. *Vinson*, 154 Wn. App. at 231.

The *Vinson* Court offered no explanation as to how it could possibly be reversible error for the hearing officer to apply some or all of the *Hoagland* factors—such as Mr. Vinson's motives for being dishonest as well as other extenuating circumstances surrounding his dishonesty during the investigation—given that those factors are discretionary. *Clarke*, 106 Wn.2d at 114-15. The current test for sufficient cause expressly states that the *Hoagland* factors may be applied at the hearing officer's discretion to determine whether a teacher's job-related deficiency has been impaired his or her performance. *Clarke*, 106 Wn.2d at 114-15; *Ruchert*, 106 Wn. App. at 213. Yet, the *Vinson* court inexplicably held it was reversible error for the hearing officer here to have done so: "Because the misconduct here took place at work, on work time, and in violation of his duties as a district employee to cooperate with the

investigation of other alleged misconduct, the admitted dishonesty during the investigation does not require the application of the *Hoagland* factors.” *Vinson*, 154 Wn. App. at 230.

The Supreme Court should accept review to either confirm that application of the *Hoagland* factors is discretionary where the misconduct relates to a teacher’s job performance or to otherwise clarify what has become an exceedingly confusing test of sufficient cause.

B. School districts are not entitled to seek judicial review of an adverse ruling by a statutory hearing officer by means of a statutory writ or review.

The procedures challenging the proposed discharge of a teacher are set forth in RCW 28A.405.300 *et seq.* Under these statutes, a teacher has the right to a statutory hearing before a hearing officer who is charged with determining whether there is “sufficient cause” for the discharge. RCW 28A.405.310(8). Only the employee, not the school district, is entitled to appeal an adverse ruling by the hearing officer to the superior court. RCW 28A.405.320 - .350; *Kelso School District No. 453 v. Howell*, 27 Wn. App. 698, 700, 621 P.2d 162 (1980).

Despite this clear and unambiguous statute that permits only an employee to appeal, our courts have held that a school district may seek judicial review of a hearing officer’s decision under a statutory writ of review. *Kelso School District*, 27 Wn. App. 698; *Coupeville School*

District No. 204 v. Vivian, 36 Wn. App. 728, 677 P.2d 192 (1984) (relying solely on *Kelso* for ruling that a district may seek judicial review through a statutory writ under RCW 7.16.040). These cases were wrongly decided and should be overruled by the Supreme Court.

In *Kelso*, the Court relied on prior case law addressing the rights of parties to seek statutory writs of review. None of these cases involved a statutory scheme such as the one at issue here where the legislature had expressly granted the right of appeal to only one party. See, e.g., *Standow v. City of Spokane*, 88 Wn.2d 624, 564 P.2d 1145 (1977); *Andrew v. King County*, 21 Wn. App. 566, 573-74, 586 P.2d 509 (1978); *King County v. Carter*, 21 Wn. App. 681, 586 P.2d 904 (1978); and *Browne v. Gear*, 21 Wash. 147, 57 P. 359 (1899). As such, these cases do not support the proposition for which they were cited by the court in *Kelso*, namely, that a school district is entitled to judicial review of an adverse decision by a hearing officer when the legislature has specifically withheld such a right.

But as the *Vinson* dissent points out, the Supreme Court has addressed such a case. In *State ex rel. Bates v. Board of Industrial Insurance Appeals*, 51 Wn.2d 125, 316 P.2d 467 (1957), the Department of Labor and Industries (“Department”) sought judicial review of a decision by the Board of Industrial Insurance Appeals (“Board”) allowing an injured worker’s claim. *Bates*, 51 Wn.2d at 126. The trial court

granted a statutory writ of review, even though the Industrial Insurance Act provided no right of appeal to the Department. *Bates*, 51 Wn.2d at 130, citing *Department of Labor & Industries v. Cook*, 44 Wn.2d 671, 269 P.2d 962 (1954) (holding that under RCW 51.52.110, the Department has no right of review of Board decisions). On review, the Supreme Court held that a statutory writ of review was not available to the Department, explaining:

Since the legislature saw fit...to withhold from the department any right to appeal from the decisions of the board, it follows that, in the absence of some legislative expression indicating a contrary intention, the superior court had no jurisdiction to entertain and grant an application for certiorari which would, in effect, permit the department to do precisely what the legislature has said it may not do, to wit, obtain a review of the board's decision by the superior court. The superior court's authority to grant certiorari in such a case as this is not presumed, but must be specifically reserved to it in the workmen's compensation act, which abolished "all jurisdiction of the courts of the state over such causes," *except as therein provided*. There being no such reservation of certiorari jurisdiction in the act, the superior court had none in this case.

Bates, 51 Wn.2d at 131-32 (emphasis in original).

The same analysis applies here. In RCW 28A.405.300 *et seq.*, the legislature specifically granted authority to a teacher to appeal an adverse ruling by a hearing officer and withheld such authority from school districts. The courts should not permit the districts to do what the

legislature has said they may not do, but that is precisely what happened in *Kelso* and *Vivian* when the courts held that the districts could use a statutory writ of review to appeal an adverse ruling by the hearing officer. These decisions conflict with the Supreme Court precedent of *Bates*. They were wrongly decided and they should be overruled.

The fact that both *Kelso* and *Vivian* were decided nearly 30 years ago should not preclude the Supreme Court from taking action now to overrule them. Until *Vinson*, there had not been a published appellate decision addressing this issue since 1984 when *Vivian* was decided. Moreover, the specific issue of whether a district has the right to judicial review of a hearing officer's decision under RCW 7.16.040 has never been presented to the Supreme Court until now. Neither party sought review of the *Kelso* decision. And in *Vivian*, the issue on appeal was not the district's right to seek a statutory writ of review, but whether the district's petition was timely. After the Court of Appeals issued its ruling, the Supreme Court denied *Vivian*'s petition for *certiorari*. However, it cannot be inferred from such denial that the Supreme Court approved the district's use of the statutory writ since the district's right to seek the writ was not at issue before the lower courts.

C. The Vinson Court Misapplied the Standard of Review under RCW 7.16.040 and .120.

When deciding whether to issue a discretionary writ of review under RCW 7.16.040, the court must determine:

(1) Whether the body or officer had jurisdiction of the subject matter of the determination under review;

(2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination;

(3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator;

(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination; and

(5) If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence thereof, rendered in an action in a court, triable by a jury, as would be set aside by the court, as against the weight of evidence.

RCW 7.16.120. Thus, "the decision of the hearing officer may not be set aside unless the officer is found to have violated constitutional principles, exceeded his statutory jurisdiction, or committed clear error of law, or his decision is found to be arbitrary and capricious." *Kelso*, 27 Wn. App. at 701, citing *Andrew v. King County*, 21 Wn. App. 566, 573-74, 586 P.2d 509 (1978).

Pursuant to RCW 7.16.120, factual findings are reviewed under the competent and substantial evidence standard. *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); *Andrew*, 21 Wn. App. at 575. “This review is deferential and requires the court to view the evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed” below. *Sunderland*, 127 Wn.2d at 788. Issues of law are reviewed de novo. *Id.* In the context of a teacher discharge case, whether sufficient cause exists involves mixed questions of fact and law. *Clarke*, 106 Wn.2d at 110. When an appellate court reviews mixed questions of law and fact, it makes a de novo review of the law while giving deference to the hearing officer’s factual determinations. *Id.*

A superior court’s decision to issue or deny a statutory writ of review is reviewed for abuse of discretion. The court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In *Vinson*, the Court of Appeals concluded that the trial court abused its discretion in denying the writ to the District because as a matter of law, dishonesty during the course of an official investigation constitutes sufficient cause for discharge. However, in reaching this conclusion, the

court did not review the hearing officer's findings of fact to determine whether, "based on the entire record, the [lower tribunal's] decision was arbitrary or capricious". *Andrew v. King County*, 21 Wn. App. 566, 575, 586 P.2d 509 (1978) (stating that to determine the competency and sufficiency of the evidence as required by RCW 7.16.120(4) and (5), courts must determine whether the lower tribunal's action was arbitrary or capricious). Indeed, the court failed to give deference to the hearing officer's findings that one of the witnesses lacked credibility and that Mr. Vinson had good reasons for not cooperating with the district's investigator given his prior experience with the investigator and his belief that the investigator would not be impartial. Although the court acknowledged these explicit findings, it nonetheless concluded that Mr. Vinson's concern regarding the investigator's impartiality "may or may not have been founded." *Vinson*, 154 Wn. App. at 230.

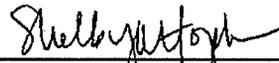
Thus, instead of determining the law and applying it to the facts found by the hearing officer as it was required to do, the *Vinson* court simply asked whether there had been an "error of law" on the issue of sufficient cause. *Vinson*, 154 Wn. App. at 228. The court answered this question in the affirmative, in part because the hearing officer applied the *Hoagland* factors to Mr. Vinson's dishonesty. But as discussed above, the application of the *Hoagland* factors is discretionary where the basis for the

discharge is a teacher's job performance. Clearly, a hearing officer's exercise of that discretion cannot constitute an error of law.

IV. CONCLUSION

For the reasons stated herein, Amicus Curiae respectfully requests that the Supreme Court grant the Petition for Review.

Respectfully submitted this 26th day of April, 2010.



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