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NO. 84243-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FEDERAL WAY SCHOOL DISTRICT

Respondent,

vs.

DAVID VINSON,

Petitioner.

APPEAL FROM KING COUNTY SUPERIOR COURT NO. 08-2-05374-1 KNT
COURT OF APPEALS NO. 61752-4-I (DIVISION I)

**PETITIONER'S ANSWER TO AMICUS CURIAE BRIEF OF THE
WASHINGTON EDUCATION ASSOCIATION**

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 ORIGINAL

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I. INTRODUCTION

The amicus brief of the Washington Education Association clearly outlines how and where the decision in *Vinson* departs from and confuses existing precedent and applies an incorrect standard of review. These errors harm teachers by applying to all teachers a draconian rule created for sex offenders; failing to articulate a coherent standard for the hearing officer's determinations (thus leading to unpredictable outcomes and creating an incentive for District forum-shopping by appeal); and depriving teachers of the statutory right to have a hearing officer review the facts in context and make determinations of sufficient cause for discharge. For these reasons and the others articulated, the Supreme Court should grant review.

II. ARGUMENT

A. In *Vinson*, a bright line rule created for teachers who present a danger to students has been broadened to apply to all teacher conduct.

In *Clarke*, the Supreme Court summarized Washington's common law of teacher discharge as follows:

Read together, the general rule emanating from Washington case law is this: 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. *Pryse*, 30 Wn. App. 16, 24, 632 P.2d 60 (1981); *Potter*, 31 Wn. App. 838, 842, 644 P.2d 1229 (1982). In such

cases, the teacher is deemed to have materially breached his promise to teach, and can be discharged without compliance with the probation procedures of RCW 28A.67.065.

Clarke v. Shoreline Sch. Dist. No. 412, 106 Wn.2d 102, 113-114, 720 P.2d 793 (1986) (emphasis in original, some citations omitted). Normally, the *Clarke* rule is reproduced without the citations. However, to understand the second element of the second prong of the *Clarke* rule—the provision that a teacher’s conduct is grounds for immediate discharge as a matter of law when the teacher’s conduct “lacks any positive educational aspect or legitimate professional purpose”—it is critical to consider where that portion of the *Clarke* rule came from.

Clarke’s rule providing for discharge as a matter of law originated in the cases cited: *Pryse v. Yakima School District No. 7*, and *Potter v. Kalama Public School District No. 402*. Both of these cases involved teachers who sexually harassed and physically assaulted students. In *Pryse*, a high school teacher had, among other things:

Remarked that female students “would be given an ‘A’ grade if they took a ride with [Pryse] to the ‘boonies’ in [his] ‘love machine’ automobile, and that [he] would grade them there.

“[M]ade statements to the effect that girls had been getting exercise between the sheets.”

“[M]ade improper physical contact with female assistants. Specifically, [Pryse] grabbed or slapped at least one assistant on the buttocks. [Pryse] hugged girls against their will. [Pryse] placed [his] hand on one assistant’s bare knee, causing her to remove [his] hand and cover her knee with her

dress.”

Pryse, 20 Wn. App. at 18. Two of Pryse’s students had dropped his class “because they could not stand the sexual remarks” he made to them. *Id.*

At Pryse’s discharge hearing, six students testified that Pryse had similarly harassed them. *Id.* at 19. The hearing officer concluded that Pryse’s conduct was sufficient cause for discharge because it substantially affected his performance as a teacher. *Id.* The appeals court agreed, stating that “[s]uch conduct with minor students is inherently harmful to the student-teacher relationship.” *Id.* at 24. The court further concluded that remedial discipline under the District’s collective bargaining agreement was not required because the charges were serious enough, and the conduct harmful enough, to invoke a contract provision allowing the District to omit interim disciplinary steps. *Id.* at 25.

In *Potter*, an elementary school teacher was discharged for caressing and blowing kisses to female students, lifting one girl’s dress, and telling the students not to tell anyone. *Potter*, 31 Wn. App. at 839. Potter had been warned after the first incident, and placed on probation after the second incident. *Id.* He was fired after the third. *Id.* Potter appealed and had a hearing before a hearing officer, at which seven girls testified that he had repeatedly rubbed or caressed their legs. *Id.* at 840. The hearing officer concluded Potter’s conduct was sufficient cause for discharge, and the superior court affirmed that decision. *Id.* The appeals court, noting that “impairment of teaching performance” is required for

sufficient cause under *Hoagland*, weighed the eight *Hoagland* factors. *Id.* at 841 (citing *Hoagland v. Mount Vernon School Dist.* 320, 95 Wn.2d 424, 623 P.2d 1156 (1981)). Potter argued that because he was being discharged for in-classroom conduct, statutory provisions requiring a written plan of improvement had to be met. *Id.* The court disagreed, noting that the statute dealt with ongoing evaluation of classroom teaching performance, not the kind of misconduct of which Potter was accused. *Id.* at 842.

The last part of the *Clarke* rule originated in cases where courts were attempting to uphold speedy discharge of plainly dangerous sex offenders who had repeatedly touched and humiliated students. The *Pryse* and *Potter* courts created the “lacks any positive educational aspect or legitimate professional purpose” category as a means of avoiding otherwise-mandatory probationary periods for such individuals. What the Federal Way School District here sought, and what the *Vinson* court granted, was that this rule be expanded and applied routinely to any behavior a school district deems to “lack any positive educational aspect or legitimate professional purpose.” This case presents a specific example of a general situation that has long troubled civil libertarians: draconian rules put in place to deal with sex offenders are later used to diminish rights for all. The rule from *Pryse* and *Potter* was created because courts did not want to expose children to sex offenders in the classroom while giving sex offenders an opportunity to remediate. Its application should be

limited to that context.

B. Division 1 applied the incorrect standard of review, arrogating to the appellate court contextual value judgments that are the province of the hearing officer.

In overriding the hearing officer's determination that the *Hoagland* factors should apply to Mr. Vinson's behavior, the *Vinson* court also applied the incorrect standard of review. The Washington Education Association amicus brief points out how extensively the *Vinson* court ignored the hearing officer's determinations on specific facts such as witness credibility. However, the *Vinson* court also committed error by reviewing the hearing officer's determination that Mr. Vinson's behavior did not "lack any positive educational aspect or legitimate professional purpose" as a matter of law subject to de novo review, when under binding Washington precedent, it is a question of fact.

Under *Clarke* and other binding Washington precedent, findings of fact are subject to the deferential "clearly erroneous" standard of review under which they must be upheld unless they are not supported by substantial evidence in the record. These findings are not limited to determining whether the conduct happened, but also encompass contextual evaluations of the behavior, such as whether teaching practices or methods were deficient, whether conduct affected teaching efficacy, and whether conduct was harmful to students. *Clarke*, 106 Wn.2d at 110-11; *Pryse*, 30 Wn. App. at 23-24. In *Clarke*, the Supreme Court held that the hearing officer's determination of "[w]hether a teacher actually engaged in certain

conduct *or was deficient in his practices or methods* clearly is a factual question.” *Id.* at 110 (emphasis added). In *Clarke*, the hearing officer agreed with the District that Clarke constituted a hazard to his students, and the *Clarke* court treated this conclusion as one of fact subject to deference, not one of law subject to de novo review. *Id.* at 111. Thus, under *Clarke*, judgments about the value, danger, or worth of the teacher’s acts are questions of fact to be determined by the hearing officer, and are subject to deferential review. *Pryse* followed a similar procedure, reviewing the hearing officer’s conclusions about teaching efficacy as a question of fact, not a matter of law. *Pryse*, 30 Wn. App. at 23-24. Under *Clarke* and *Pryse*, those kinds of contextual value judgments about a teacher’s behavior are factual conclusions that a subsequent court cannot override unless the hearing officer’s determination was clearly erroneous under the deferential standard applied to questions of fact.

The conclusion that a teacher’s behavior did or did not “lack any positive educational aspect or legitimate professional purpose” is likewise a question of fact best judged by the hearing officer from the evidence and testimony before him. Here, the hearing officer declined the District’s invitation to conclude that Mr. Vinson’s behavior “lacked any positive educational aspect or legitimate professional purpose” and apply the second *Clarke* prong. Instead, the hearing officer used the *Hoagland* factors to determine that, in context, Mr. Vinson’s behavior did not meet that threshold. It was the hearing officer’s prerogative to make that factual

determination, and that factual determination is subject to review only under the “clearly erroneous” standard.

To decide otherwise, as the *Vinson* court did, would be to undermine the hearing officer’s statutory role and impair the employment rights of Washington teachers. RCW 28A.405.310 provides that the hearing officer shall weigh the evidence and make findings of fact. To instead compel the hearing officer to accept the school district’s judgments about teacher behavior, or to make those findings of fact subject to de novo review rather than deferential review, violates RCW 28A.405.310 and takes away the right to an independent hearing officer review that the legislature granted in 1975. *See Pryse*, 30 Wn. App. at 20-21 (discussing 1975 changes to teacher discharge statutes and institution of independent hearing officer).

C. *Vinson* fails to articulate any coherent standard by which the hearing officer is to determine what conduct lacks any positive educational aspect or legitimate professional purpose, thereby gutting the hearing officer’s role and creating an incentive for Districts to forum-shop up the appellate ladder.

Vinson holds that it is error for a hearing officer to apply the *Hoagland* factors when the teacher’s conduct lacks any positive educational aspect or legitimate professional purpose, and implicitly holds that this conclusion is subject to de novo review by every court up the appellate chain, but articulates no standard for when such a conclusion should be drawn. This creates three problems. First, it means there is no clarity in the precedent such that both teachers and school districts know

ahead of time what law will be applied to their actions. Second, by instituting de novo review for what should properly be a question of fact, it creates an incentive for both teachers and Districts to forum-shop from appeals court to appeals court until they get a favorable result. Third, it deprives the hearing officer of the ability, mandated by statute, to make determinations in teacher discharge cases.

The Washington Education Association amicus brief makes clear exactly how incoherent the *Vinson* court's conclusion was—although under *Clarke* and the other precedent the *Hoagland* factors “may or may not” be applied as the decisionmaker sees fit, the *Vinson* court nonetheless concluded that it was error of law for the hearing officer to exercise that discretion and apply the factors. As a matter of policy, what this means for teachers and districts is that it has now become impossible to know in advance what test will be applied, when, by whom, and where the appeals will stop. Either this decision means it is always abuse of discretion to apply the *Hoagland* factors when the District claims the conduct lacks any positive educational aspect or legitimate professional purpose, in which case the teacher is deprived of his statutory right to have sufficient cause weighed by the hearing officer; or it means that any higher court disagreeing with a hearing officer may override the hearing officer's determination by deciding that the case before it was one in which the *Hoagland* factors should not have been applied; or it means that the *Vinson* court had some means of determining whether the conduct truly

lacked any positive educational aspect or legitimate professional purpose, but has chosen not to share that method.

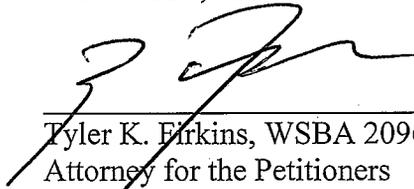
The *Vinson* decision articulates no coherent, replicable rule to guide courts or officers in this situation. Combined with the determination that the District may appeal by writ, what this does is create a tremendous incentive for Districts to appeal whenever a hearing officer applies the *Hoagland* factors.

III. CONCLUSION

Review should be accepted in this case because under RAP 13.4(b), considerations 1, 2, and 4 apply.

DATED this the 17th day of May, 2010

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CERTIFICATE OF SERVICE

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

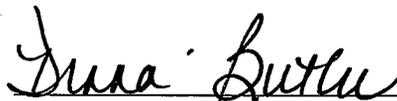
1. I am employed by the law offices of Van Siclén, Stocks & Firkins.

2. On May 17, 2010, I caused to be served a true and correct copy of the Petitioner's Answer to Amicus Curiae Brief on the following via ABC Legal Messenger:

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