

NO. 84243-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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FEDERAL WAY SCHOOL DISTRICT

Respondent,

vs.

DAVID VINSON,

Petitioner

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**PETITIONER'S ANSWER TO BRIEF OF AMICUS WEA**

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The Brief of Amicus WEA clearly demonstrates that the Court of Appeals' decision in *Federal Way School District No 210 v. Vinson* is erroneous. The choice before this Court is whether it will restate the formulations of "sufficient cause" previously set forth in *Hoagland*<sup>1</sup> and *Clarke*<sup>2</sup>, or whether the Court will modify or substantially clarify its definition of "sufficient cause." In light of the ambiguities and uncertainties that have arisen in recent cases, this Court should at the very least clarify the application of the sufficient cause standard.

This Court's most recent discussion of sufficient cause in the context of a teacher discharge case was set forth in 1986 in *Clarke v. Shoreline School District No. 412*:

[S]ufficient cause for discharge exists as a matter of law where the deficiency is unremediable and (1) materially and substantially affects performance, or (2) lacks any positive aspect or legitimate professional purpose.

*Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 113-14, 720 P.2d 793 (1986). As Amicus WEA suggests, the second prong of *Clarke* is so broad and vague that the test has become meaningless. This Court should clarify this point. This Court should further clarify the meaning of the language "as a matter of law." This Court should also explain the

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<sup>1</sup> *Hoagland v. Mount Vernon School Dist. No. 320*, 95 Wash.2d 424, 623 P.2d 1156 (1981).

<sup>2</sup> *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 720 P.2d 793 (1986).

circumstances under which one or the other *Clarke* test applies. What follows is an analysis of these points and a suggested resolution.

**A. The second Clarke test**

The second *Clarke* test provides no clarity or guidance to school districts and teachers. The rule also fails to provide the level of protection intended by the due process statute, RCW 28A.405.300. In fact, there is no misconduct, no matter how trifling, that could not meet the requirements of the second *Clarke* test. In *Hoagland*, this Court quoted *Wojt v. Chimacum School Dist.* 49, 9 Wn. App. 857, 862, 516 P.2d 1099 (1973):

Where a teacher is discharged ... the consequences are severe. Chances of other employment in the profession are diminished, if not eliminated. Much time, effort, and money has been expended by the teacher in obtaining the requisite credentials. It would be manifestly unfair to allow a discharge for a teaching or classroom deficiency which is reasonably correctable.

*Hoagland*, 95 Wn.2d at 430. It is equally unfair to apply a standard that is so broad and ill defined that even lawful conduct would constitute sufficient cause under the test.

The second *Clarke* test is broadened under *Vinson* in that a school district will have sufficient cause to discharge if a teacher's conduct "lacks any positive educational aspect or legitimate professional purpose." *Vinson*, at 229, (citing *Clarke v. Shoreline School Dist. No. 412*, 106 Wn.2d 102, 114, 720 P.2d 793, 800 (1986)). The allegations of

misconduct in this case have nothing to do with any “educational aspect.” Therefore the test is reduced to just the second clause, and can now be read that a district has sufficient cause to discharge a teacher if the teacher’s conduct serves no “legitimate professional purpose.” This test is ambiguous and could be applied to any circumstance such that it provides virtually no protection to teachers from improvident discharge. As an example, if the *Vinson* test was applied to the *Hoagland* facts, the teacher would have been discharged as a matter of law because possessing stolen property or being a convicted felon serves no legitimate professional purpose.

But the *Vinson* court reduces the *Clarke* test further to just this:

We hold that, under the second *Clarke* test, lying during the course of an official investigation of professional misconduct *lacks any professional purpose* and is sufficient cause for termination as a matter of law

*Federal Way School Dist. 210 v. Vinson*, 154 Wn. App. at 230 (emphasis added). In other words, the *Vinson* court is dropping an additional word from the second *Clarke* test. The type of conduct covered by the test is now without limit. How this simplistic statement relates to this Court’s prior holdings or is in any way suggested by the “sufficient” cause standard dictated by the due process statute is impossible to discern.

This radical departure from prior formulations of sufficient cause is not suggested by the legislature in RCW 28A.405.300. The statute passed by the legislature asks the school district to ascertain whether there is “probable” cause to take adverse action. The hearing officer is left to decide whether there is “sufficient” cause. The word “sufficient” certainly implies that there will be a weighing of whether there is enough cause or causes. The statute would have omitted the term “sufficient” altogether if the hearing officer were not empowered to determine whether the causes listed by the district are sufficient to warrant the adverse action. Stated another way, the statute does not simply state that a hearing officer should determine whether there is a cause or any cause. The statute requires there to be sufficient, or enough cause.

The standard proposed by the *Vinson* court is akin to claiming that a teacher should be discharged for “immoral” conduct alone. As this Court in *Gaylord v. Tacoma School District No. 10* stated:

'Immorality' as a ground of teacher discharge would be unconstitutionally vague if not coupled with resulting actual or prospective adverse performance as a teacher. *Denton v. South Kitsap School District No. 402*, 10 Wn. App. 69, 516 P.2d 1080 (1973). The basic statute permitting discharge for 'sufficient cause' (RCW 28A.58.100(1)) has been construed to require the cause must adversely affect the teacher's performance before it can be invoked as a ground for discharge. *Gaylord v. Tacoma School District No. 10, supra*. It follows the term 'immorality' is not to be construed in its abstract sense apart from its effect upon teaching efficiency or fitness to teach. In its abstract sense the term is not

and perhaps cannot be comprehensively defined although it can be illustrated.

*Gaylord v. Tacoma School Dist. No. 10*, 88 Wn.2d 286, 290-291, 559 P.2d 1340, 1342 - 1343 (1977). The *Vinson* court employs the terms “lacks any professional purpose“ as a basis for discharge, even where the hearing officer found that the conduct had no adverse impact on the teacher’s performance. See Hearing Officer Decision, page 14, lines 15-17 The terms employed by the *Vinson* court are not defined by any regulation or statute and really have been used, as the Amicus points out, as a tag line. Amicus Brief at 9-11. The terms are so vague and overly broad that the terms encompass almost all behavior.

Misconduct by its nature serves no professional purpose. It is misconduct. But Washington is not an “at will” state with respect to teachers. The legislature enacted RCW 28A.405.300 to provide teachers with some level of due process and protection from improvident or arbitrary discharges. The legislature purposefully employed the term “sufficient” cause, meaning, as this Court has noted on numerous occasions, something more than just a determination of whether the alleged conduct took place. Rather, the case law suggests that there must be a nexus between the misconduct and teaching effectiveness or job performance. Such a construction takes into account the concept of

“sufficient” or enough cause. The *Vinson* court creates a strict liability standard where if the conduct alleged by the district happened, and the district views that conduct as cause for discharge, then the conduct is sufficient cause for discharge; no matter how political or improvident such a discharge might be. The legislature did not create a strict liability standard in which all discretion is vested in the district. Rather, it deliberately created a statute that is intended to protect teachers from improvident discharge by empowering a hearing officer to weigh the sufficiency of cause.

**B. “As a matter of law.”**

This Balkanization of the *Clarke* standard is made worse by the *Vinson* court’s misapplication of the “as a matter of law” language first enunciated by this Court in *Mott v. Endicott School Dist. No. 308*, 105 Wn.2d 199, 203, 713 P.2d 98, 100 (1986). *Mott* cites *Hoagland* for the proposition that teachers can be discharged “as a matter of law.”<sup>3</sup> However, *Hoagland* does not stand for that proposition. Rather *Hoagland* states:

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<sup>3</sup> “We also observed therein that, in some instances, teacher misconduct can be so egregious that the sufficient cause determination can be made as a matter of law.”  
*Mott v. Endicott School Dist. No. 308*, 105 Wn.2d at 203.

In most cases, because the statutes do not stipulate certain conduct as per se grounds for dismissal, it will be a question of fact whether the complained of acts constitute sufficient cause.

*Hoagland*, 95 Wn.2d at 428.

*Hoagland* did not intend to enumerate some set of acts that would, if alleged and proven, always be grounds for dismissal “as a matter of law.” *Hoagland* simply restates the well-known summary judgment principle that even issues that are matters of fact may be decided “as a matter of law” at summary judgment when the evidence is such that no reasonable fact-finder could find for the non-moving party. This is so because *Hoagland* was a summary judgment case. It was decided under an appeals process, set forth in former RCW 29A.58.515, that permitted the teacher to go directly to the superior court to adjudicate his case on the merits. This would not be permissible under the statutory scheme now in place at RCW 28A.405.300.

In *Hoagland*, the teacher had appealed to superior court, the district had moved for summary judgment, and the superior court had granted the school district’s motion. Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Seaman v. Karr*, 114 Wn. App. 665, 678,

59 P.3d 701, 707 (2002)(emphasis added). *The Hoagland* Court disagreed and held that summary judgment was not appropriate and remanded the case to the superior court for further proceedings. In the process of doing that, the *Hoagland* court articulated the well-known 8-factor test to guide the trial court's evaluation of the facts. *Hoagland*, 95 Wash.2d at 429-30, 623 P.2d 1156.

In summary, *Hoagland* stands for the rule that discharge as a matter of law is available when a statute authorizes it, *see e.g.* RCW 28A.405.475, or where, at summary judgment, the evidence is such that no reasonable fact-finder could find for the teacher. In all other circumstances, whether the conduct constitutes sufficient cause will be a question of fact for the fact-finder. The *Hoagland* formulation by this Court is consistent with the statutory requirement that a hearing officer determines whether there is sufficient cause for discharge.

Even if *Hoagland* did actually create a new standard, as the Amicus Brief contends, the discharge of a teacher "as a matter of law" has always been reserved for instances of "egregious" conduct, usually associated with sexual or physical abuse of children. See Amicus Brief at 13. This can also be harmonized with *Clarke* wherein this Court noted that *Clarke* was found to pose a hazard to students. Thus, the rule by this Court is that a teacher can be discharged "as a matter of law" only when

the behavior is egregious in nature and involves abuse or a hazard to children. Instead, it now has become a routine matter for the appellate courts to make determinations “as a matter of law” as to all conduct.

As with the *Vinson* court’s formulation of “lacks any professional purpose,” the “as a matter of law” language is a meaningless phrase in the context of teacher discharge cases. *Hoagland* states there are few statutes that exist that create a per se basis for discharge. In *Vinson* the court cites no law or statute authorizing its conclusion that Vinson may be discharged as a matter of law. Rather the *Vinson* court creates a “law” based upon its re-review of the case. Both the hearing officer and the superior court found in favor of Vinson. So it can hardly be argued that no rational trier of fact could conclude differently than the *Vinson* court, and thus as a matter of law.

The Court, at the very least, should preserve its previous standard and clarify that only the most “egregious” misconduct can be determined “as a matter of law.” The term “egregious” should be limited to student safety, by protecting children from predators or teachers that pose a physical hazard of some sort. Amicus Brief at 13; see also *Clarke* at 117, *Hoagland* at 429, and *Mott* at 203. As it now stands, the “egregious” requirement has been ignored by the lower courts, and it is easy to see that the definition of “egregious” could easily transform over time as well to

encompass a great deal of conduct. The term egregious then, without further definition, could become the legal equivalent of “obscene.”

The better approach is to simply clarify that the *Hoagland* factors must always be applied. This Court should clarify that application of the *Hoagland* factors is required in every case to demonstrate the nexus between the conduct and the teacher’s fitness to teach. No court or hearing officer will conclude that sexually exploitative conduct is acceptable under any formulation. See *Potter v. Kalama Public School District No. 402*, 31 Wn.App. 838, 644 P.2d 1229 (Div 2 1982). Therefore, requiring the courts to apply the *Hoagland* factors with both the first and second *Clarke* tests creates no barrier to protecting children. Instead, clarifying *Hoagland* in this manner serves to protect teachers from improvident and possibly unconstitutional dismissals.

This rule is consistent with the legislative formulation that the hearing officer alone determines sufficient cause. Indeed, the “as a matter of law” language is unnecessary. The legislature saw fit to entrust hearing officers with the role of determining sufficient cause. The *Vinson* court should not superimpose its views over the statutory scheme created by our legislature.

RCW 28A.405.300 is a statute giving the hearing officer the power to decide whether a school district has sufficient cause to discharge or

adversely affect a teacher. The appellate courts should not create rules that permit courts to divest the hearing officer of that power, and instead impose judicially created laws and rules to define the term “sufficient” whose meaning is obvious. The *Vinson* opinion finally turns completely away from the due process statute created to protect the rights of teachers and instead creates a meaningless standard that affords teachers virtually no protection from improvident dismissal. This court should clarify the second *Clarke* test both as to its actual meaning and to the application of the “as a matter of law” language.

**C. The distinction between conduct, status and workplace deficiency**

Confusion has also arisen over the years about when and how the tests from *Clarke* and *Hoagland* should be applied. The *Vinson* court actually opined, without explanation, that it was an error of law for the hearing officer to apply the *Hoagland* factors. *Vinson* at 231. An arcane interpretation of the *Clarke* and *Hoagland* tests has arisen, under which whether the *Hoagland* factors apply depends on hyper-technical determinations about the misconduct alleged: Is the alleged misconduct in the workplace, or outside the work location? Does the conduct take place during work hours or after work hours during the teacher’s private life?

Does the allegation involve the so called status of the teacher? In *Clarke*, this Court explained:

At this juncture, two observations must be made. First, not all eight [*Hoagland*] factors will be applicable in every teacher discharge case. Second, these factors are not necessarily applicable when the cause for dismissal is the teacher's improper *performance of his duties*. (citation omitted) They were designed to ensure that "when a teacher's *status or conduct* outside his profession is the basis for his dismissal, that cause is related to his performance of his duties as a teacher." (citation omitted). Nevertheless, these factors are helpful in determining whether a teacher's effectiveness is impaired by his classroom deficiencies.

*Clarke*, 106 Wn.2d at 114-115 (emphasis added). The *Clarke* court then went on to apply the *Hoagland* factors to the teacher's classroom performance. *Id.* at 116. From this language the court in *Ruchert v. Freeman School Dist.*, 106 Wn. App. 203, 213, 22 P.3d 841, 847 (2001) struggled to harmonize all of the cases and came up with the following unhelpful formulation:

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. Consequently, we conclude that in *status or conduct* cases, the jury must be instructed on the applicable *Clarke* tests and the applicable *Hoagland* factors so that the jury can determine whether the cause

for discharge is related to the individual's ability to perform his or her job as a school employee.

*Ruchert v. Freeman School Dist.*, 106 Wn. App. at 213 (emphasis added).

The Amicus makes a persuasive case for why this formulation is less than helpful. The various distinctions are unnecessary. Remediability relates to work place deficient practices pursuant to RCW 28A.405.100. In *Wojt v. Chimacum School Dist. No. 49*, 9 Wn. App. 857, 862, 516 P.2d 1099, 1103 (1973), the court stated:

It necessarily follows that conduct, practices, or methods which can fairly be characterized as Remediable teaching deficiencies fall within the purview of the statute, and cannot constitute 'sufficient cause' for discharge unless its notice and probationary procedures are complied with.

*Wojt v. Chimacum School Dist. No. 49*, 9 Wn. App. 857, 862, 516 P.2d 1099 (1973). Where RCW 28A.405.100 does apply, then the case must proceed under that statute. Where a teacher has not been afforded probation and an opportunity to improve, sufficient cause cannot exist. *Id.*

In all other instances the courts should apply the relevant *Hoagland* factors. The court in *Ruchert* performed a similar analysis of the cases and concluded that, "*Wright* and *Hoagland* establish that when the *Clarke* rule is applied to conduct or prior status, the relevant *Hoagland* factors must be examined to establish job-relatedness." *Ruchert*, 106 Wn. App. 203, 216-217.

The distinctions about conduct, status and job relatedness should not alter the analysis of sufficient cause. If the basis for discharge involves remediable work place deficiencies, then RCW 28A.405.100 and RCW 28A.405.220 apply and analysis should be under those statutes. Discharge under the second *Clarke* test should be reserved only for egregious behavior involving sexual or physical abuse of children and should still involve application of the *Hoagland* factors. In all other instances the sufficient cause standard should apply without regard to the type of conduct involved. This means the relevant *Hoagland* factors should be applied to all allegations of misconduct, together with the first *Clarke* test.

Many types of conduct will be hybrid situations that do not involve strictly work place performance issues. In *Ruchert* for example both parties argued different theories about whether the conduct was “job related.” The school argued that because the off school grounds allegations involved students, the conduct was job related. The employee argued that the behavior was after school, did not take place on school property and was unrelated to work. Job relatedness is a distinction without a difference. In cases that involve misconduct other than abuse or remediable teaching deficiencies under RCW 28A.405.100, the sufficient cause standard should be the same. The question is whether the conduct

found by the trier of fact is a sufficient basis for discharge. As this Court stated about application of the *Hoagland* factors:

We, too, believe that a teacher should not be dismissed without a showing of the presence of these factors. They are obviously relevant to any determination of teaching effectiveness, the touchstone for all dismissals. Moreover, a consideration of them may avert an improvident dismissal and its consequences.

*Hoagland*, 95 Wn. 2d at 430. *Hoagland* surveyed other states, and also examined discipline against lawyers as a method of defining sufficient cause. *Hoagland* at 429.

In other jurisdictions, the focus is also on the ability and fitness of the employee to discharge the duties of his or her position, and the legislative purpose to protect the public against incompetent teachers and administrators, to assure proper educational qualifications, and to maintain high standards of performance. See *Tudor v. University Civil Service Merit Board*, 131 Ill.App.2d 907, 910, 267 N.E.2d 341, 343-44 (1971); *Beebee v. Haslett Public Schools*, 406 Mich. 224, 278 N.W.2d 37 (1979); *New Mexico State Board of Education v. Stoudt*, 91 N.M. 183, 186, 571 P.2d 1186, 1189 (1977); *Powell v. Board of Trustees*, 550 P.2d 1112, 1119 (Wyo. 1976); *Briggs v. Board of Directors of Hinton Community School Dist.* 282 N.W.2d 740, 742 (Iowa, 1979)

In other words there should still be a nexus between the conduct alleged and the employee's ability or fitness to perform his/her job.

Without such a nexus the sufficient cause standard becomes too ill defined and subjective. Without some objective standard requiring a nexus, then, as happened in this case, three different decisions could be reached in the same case by different courts. This lack of certainty only makes more difficult the parties' task of analyzing and then resolving cases without resorting to every appellate level of the court system. The legislature did not envision that each teacher discharge case would be taken through the appellate courts on each occasion.

This Court should clarify its prior decision and provide a more concrete, objective sufficient cause standard. The system now employed has become so indefinite that it no longer provides meaningful and certain guidance for the hearing officers and the lower courts. Application of the *Hoagland* factors in every instance resolves any potential statutory or constitutional defect. It allows for consistent application of law to facts. It also provides the level of protection enacted by the state legislature in RCW 28A.405.300.

**D. Supplemental authority regarding the District's right of review**

The Petitioner wishes to bring two additional authorities to the attention of the court with respect to the District's right of review in this case. The first authority is RCW 28A.405.340. This statute provides that "either party" may appeal from a decision of the superior court after

review of the hearing officer's decision. RCW 28A.405.340. This suggests that the legislature consciously chose what level of appeal was available to the school districts. It specifically did not provide for an appeal to the superior court.

The second supplemental authority is this Court's recent case of *City of Seattle v. Holifield*, 240 P.3d 1162, 1168 -1169 (Wash. 2010). In that case, this court held that:

for purposes of RCW 7.16.040, an inferior tribunal, board or officer, exercising judicial functions, acts illegally when that tribunal, board, or officer (1) has committed an obvious error that would render further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court.

*City of Seattle v. Holifield*, 240 P.3d at 1168 -1169. Under this standard the District has no right of review in the superior court in this case. The court of appeals in *Vinson* merely concluded that the decision was an "error of law." Both the court of appeals and the superior court employed the wrong standard in granting the writ.

**E. The Petitioner is entitled to fees**

The Petitioner is entitled to attorneys fees pursuant to RCW 28A.405.310 and RCW 28A.405.350. If the Petitioner prevails, he seeks an award of attorneys fees for all appellate work performed.

### Conclusion

This Court should clarify the sufficient cause standard under RCW 28A.405.300 and explain that in every instance the Hoagland factors should be applied. This Court should further clarify the second Clarke test, and also its use of the as a matter of law language in its prior holdings.

DATED this the 17<sup>th</sup> day of January, 2011 at Auburn, Washington

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## CERTIFICATE OF SERVICE

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

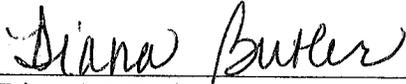
1. I am employed by the law offices of Van Sieten, Stocks & Firkins.

2. On January 18, 2011, I caused to be served a true and correct copy of the Petitioner's Answer to Brief of Amicus WEA on the following via ABC Legal Messenger:

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DATED this 18<sup>th</sup> day of January, 2011 at Auburn, Washington.

  
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Diana M. Butler