

NO. 64108-5
COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

OAK HARBOR EDUCATION ASSOCIATION,

Appellant,

v.

OAK HARBOR SCHOOL DISTRICT,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case is primarily about a teacher, James R. Pruss (“Pruss”), who was discharged and who then chose to appeal his discharge through one of two review methods available to him. His choice now bars the Appellant, Oak Harbor Education Association (“OHEA”), from compelling arbitration.

Pruss, who had been employed as a teacher by the Oak Harbor School District (the “District”), was accused by a student of improper conduct. For this and other conduct, Pruss received notice of probable cause for his discharge. He appealed his discharge through a statutory hearing process provided under RCW 28A.405.300 *et seq.*, and he filed a grievance as provided under the collective bargaining agreement (“CBA”) between the District and OHEA. All parties agree that Pruss could not pursue both remedial avenues.¹

Although Pruss filed both a statutory appeal and a grievance, he elected to pursue his appeal of the discharge through the statutory process provided under RCW 28A.405.300 *et seq.* Seventeen days before his statutory hearing Pruss withdrew his statutory appeal. The District took the position that the withdrawal ended Pruss’s appeal under the statutory process, confirming his discharge.

Thereafter, OHEA, acting on behalf of Pruss, attempted to re-activate the grievance procedures and seek review of Pruss’s discharge through the

¹ CP 230; CP 450.

process provided under the CBA. When the District refused to submit the matter to arbitration, OHEA instituted the present action to compel arbitration. The District denied that arbitration was available.

On cross motions for summary judgment, the trial court found in favor of the District based on the doctrines of election of remedy and waiver of arbitration. The trial court properly dismissed OHEA's complaint on summary judgment in favor of the District. The trial court made no errors of law, and the District respectfully asks the Court of Appeals to affirm the trial court's decision.

II. STATEMENT OF THE CASE

A. Factual Background

James Pruss, a former teacher in the Oak Harbor School District, was accused by a student of touching her breast during gym class. CP 115. A second student who had witnessed Pruss's conduct alleged that Pruss attempted to threaten, harass, and intimidate her and her parent into not reporting Pruss's actions. CP 115. The District conducted an investigation, and the matter was referred to local police. CP 111-113. Criminal charges were filed against Pruss. CP 67.

1. Pruss Filed a Statutory Appeal

RCW 28A.405.300 *et seq.* governs the discharge or adverse change in contract status of certificated teachers. This is a mandatory statute, and the

superintendent of a public school district in the State of Washington is required to issue a notice of probable cause for discharge before a certificated teacher may be discharged. RCW 28A.405.300. Under this statute, the teacher “shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action.” RCW 28A.405.300.

If a certificated teacher receives a notice of probable cause for discharge and wishes to challenge the discharge action, the employee must file a request for a hearing within ten days. RCW 28A.405.300-.310. If the request for hearing is not filed, the employee is deemed discharged. RCW 28A.405.300.

On May 24, 2007, following investigation of the allegations that he had inappropriately touched a minor student and attempted to intimidate and harass a witness, the District’s superintendent issued to Pruss a notice of probable cause for discharge, as required by RCW 28A.405.300. CP 242, 248-250. On June 1 Pruss timely delivered a request for a hearing challenging the discharge pursuant to RCW 28A.405.300-.310. CP 251.²

2. *Pruss Also Filed a Grievance*

The CBA between the District and OHEA contains a grievance/arbitration provision under which a teacher may challenge certain adverse disciplinary actions by timely filing a grievance. CP 60-65. Under the CBA, Pruss had twenty days to file a grievance after notice of his discharge. CP

² A complete copy of the text of RCW 28A.405.300-.310 is included in the Appendix.

63. The CBA provides a series of steps through which a grievance progresses, culminating in arbitration. CP 64. On June 14, 2007, Pruss timely filed a grievance, asserting that the District terminated him contrary to the CBA. CP 118.

3. *Pruss Elected to Pursue the Statutory Process*

Having filed both a request for a statutory appeal and a grievance, Pruss then elected to pursue the statutory appeal process. As described below, James Gasper, the attorney who represents both Pruss and OHEA, moved forward with the statutory appeal, but did not seek arbitration until after the statutory appeal had been dismissed.

a. Actions Taken by Pruss to Pursue his Statutory Hearing under RCW 28A.405.300 et seq.

Soon after submitting his notice of appeal under RCW 28A.405.300, Pruss and the District engaged in the process outlined in RCW 28A.405.310. The statute provides an explicit, expedited timeline under which the appeal is to proceed. Within fifteen days following a request for hearing, the parties are required to appoint a hearing officer. RCW 28A.404.310(4). Within five days following the selection of the hearing officer, the hearing officer “shall schedule a prehearing conference to be held within such five day period” RCW 28A.405.310(5). Under the statute, the hearing officer has the power to preside over prehearing conferences, issue subpoenas, authorize depositions, and provide for additional discovery. *Id.*

The statute provides that the hearing officer shall set the commencement date of the hearing “to be within ten days following the date of the prehearing conference, unless the employee requests a continuance, in which event the hearing officer shall give due consideration to such request.” RCW 28A.405.310(6)(d). Within ten days following the hearing, the hearing officer must provide written findings of fact and conclusions of law “and final decision.” RCW 28A.405.310(7)(c). If a final decision is in favor of the employee, the employee shall be restored to employment and awarded attorneys fees. *Id.* A teacher may appeal an adverse decision of the hearing officer to the superior court. RCW 28A.405.340

In this case, the parties progressed through the above-outlined process until only seventeen days before the scheduled date for the hearing. Lawrence Ransom, counsel for the District, received a letter from Mr. Gasper on June 6, 2007, advising Mr. Ransom that Mr. Gasper would be representing Pruss and serving as his nominee for purposes of proceeding with the statutory hearing process under RCW 28A.405.300 and RCW 28A.405.310. CP 137, 146. Mr. Gasper and Mr. Ransom had a phone conversation shortly thereafter wherein they discussed the need to select a hearing officer pursuant to the requirements of RCW 28A.405.310. CP 137.

In a letter dated June 15, 2007, Mr. Gasper proposed possible hearing officers for the statutory hearing. CP 138, 147. By June 21 Mr. Gasper and

Mr. Ransom agreed to ask JoAnne Tompkins to serve as statutory hearing officer. CP 138. On June 22 Mr. Gasper and Mr. Ransom had a telephonic prehearing conference with Hearing Officer Tompkins. CP 138. A date for the hearing was selected (August 20 and 21), and a schedule for the briefing of a motion for summary judgment by the District was agreed upon. CP 138-139. Hearing Officer Tompkins issued a letter on June 22, 2007, confirming the hearing date and briefing schedule for the summary judgment motion. CP 149.

On June 29, 2007, Mr. Ransom received a letter from Mr. Gasper making an extensive discovery request under the statute, asking that the requested materials be produced within 14 days instead of the usual 30 days that would have been applicable under the rules of civil procedure. CP 139, 150-151. Mr. Gasper stated that he wanted the discovery requests available by July 13 so that he would be able to use them in preparing his response to the District's summary judgment motion scheduled to be filed with the Hearing Officer on July 6. CP 139, 150-151. In response to Mr. Gasper's discovery request, and to avoid delay of the hearing, Mr. Ransom and District officials spent a considerable amount of time gathering and reviewing documents to comply with Mr. Gasper's request for expedited production. CP 139-140. On July 13, Mr. Ransom contacted Mr. Gasper to inform him that the requested documents were ready. CP 140. Mr. Gasper did not have the documents picked up on July 13, but they were picked up on the morning of July 16. CP 140.

At the same time that it was making a considerable effort to comply with Mr. Gasper's request for expedited document production, the District also spent a considerable amount of time preparing its motion for summary judgment on some of the important issues raised in Pruss's discharge letter. The District's motion for summary judgment was filed with the Hearing Officer and served, according to the agreed schedule, on July 6. CP 139.

Mr. Gasper requested more time to respond to the District's motion for summary judgment, and counsel agreed to a slightly revised schedule for further briefing. CP 140. OHEA's opposition brief was to have been due July 20, but the deadline was changed by agreement to July 23. CP 140. The District had until July 31 to submit any reply brief. CP 140.

Pursuant to the revised schedule, Pruss prepared and submitted a brief in opposition to the District's motion for summary judgment. CP 141. The District prepared and submitted a reply brief in support of its summary judgment motion on July 31. CP 141. To the extent any issues remained following Hearing Officer Tompkins' decision on the District's motion for summary judgment, the hearing was to commence twenty days later. CP 141.

On July 31, Pruss submitted a request for a continuance of the August 20-21 hearing dates. CP 131. Pruss gave several reasons for requesting a continuance. He said that he wanted the hearing to take place after his criminal trial to allow for an "outcome-based re-assessment" and acquisition of

evidentiary materials arising out of the criminal case. CP 229. Pruss also asserted that his right to protection against self-incrimination would be compromised if the hearing took place before the criminal trial. CP 230.

Another reason Pruss gave to support his request for a continuance was the preservation of the possibility of pursuing the grievance procedure instead of the statutory appeal process:

Mr. Pruss' union filed a grievance challenging his termination under the teachers' collective bargaining agreement Under contract, Mr. Pruss has the right to pursue either remedial avenue, but not both. However, the right to select would become pointless if this case goes forward before the pre-arbitral steps of the grievance process are exhausted. If the union later decides to pursue Mr. Pruss' grievance through arbitration, these [statutory] proceedings would not go forward, but the statutory challenge would be withdrawn.

CP 230 (emphasis added).

On August 2, 2007, the District submitted a response opposing Pruss's request for continuance. CP 141. On August 3, while both the District's motion for summary judgment and Pruss's request for continuance were pending before Hearing Officer Tompkins, Mr. Gasper submitted a letter advising Hearing Officer Tompkins that Pruss was withdrawing his request for a statutory hearing. CP 142, 238.

On August 3 Hearing Officer Tompkins acknowledged Pruss's withdrawal of his statutory challenge to his discharge and dismissed the hearing. CP 86. The District incurred fees from the appointed hearing officer in the

amount of \$1,650 and also incurred attorney's fees and costs related to preparation for the statutory hearing and summary judgment in the amount of more than \$14,000. CP 244.

b. OHEA Attempts to Grieve Pruss's Discharge

During the preparation for the statutory hearing, OHEA and the District exchanged some correspondence related to the grievance, but no further action was taken.

On June 14, 2007, Pruss filed a Grievance Review Request Form. CP 118; CP 72. On June 20 Kate Phillips, the UniServ Representative for the Washington Education Association, e-mailed Dr. Richard Schulte, Superintendent for the District, stating that she had not heard from the District regarding the grievance filed by Pruss on June 14, 2007. CP 88. Ms. Phillips asked to extend the timeline for a grievance meeting. CP 88. On June 22 Superintendent Schulte responded to Ms. Phillips' e-mail as follows:

However, I want to make sure you are aware of the District's initial position regarding the grievance. We are not at all sure that Mr. Pruss is entitled to use the grievance proceeding to challenge his termination, particularly in light of the fact that his WEA attorney, Jim Gasper, is working with the District's attorney to move ahead with the required statutory hearing process. I think the statutory process probably preempts the grievance process, and we do not intend to waive that position.

CP 88. Ms. Phillips responded on June 22 by stating that she understood the District's position. CP 87.

Nothing further was exchanged between the District and Pruss or OHEA on the subject of the grievance, during which time Pruss aggressively pursued his statutory appeal as described above. In late July, Ms. Phillips inquired of Superintendent Schulte about the scheduling of a meeting to discuss the status of Pruss's discharge grievance. CP 244. Superintendent Schulte responded by stating that he was willing to meet, but the "district still maintains that a grievance is not appropriate on this matter since Pruss has selected the hearing process to challenge his dismissal." CP 245. On August 7, 2007, after Pruss had withdrawn his statutory hearing appeal, Superintendent Schulte sent a letter to Ms. Phillips regarding the grievance, stating that "It is the District's position that the issue raised in Jim Pruss's June 15 grievance is not grievable . . . [because] Mr. Pruss and the WEA (acting through the WEA attorney Jim Gasper) clearly elected to proceed under the required statutes, RCW 28A.405.300 and RCW 28A.405.310." CP 245.

On August 8 Ms. Phillips replied that the next step was to proceed with arbitration to determine whether or not this grievance was grievable. CP 253. On August 13 Superintendent Schulte responded that the District's position does not depend on an interpretation of the language of the collective bargaining agreement, and "it is not appropriate for an arbitrator to determine whether Mr. Pruss may now access the grievance procedure, having elected to pursue his

remedy under the statute up to the point where he was at risk of receiving an adverse decision.” CP 253.

The District received a second grievance from OHEA on August 21, 2007 (“Grievance II”), by which OHEA challenged the District’s rejection of Pruss’s first grievance challenging his termination (“Grievance I”). CP 255. On August 24 Superintendent Schulte sent an email to Peter Szalai, the president of OHEA, in which he stated the District’s position that Pruss does not have the right to use the grievance procedure as a means of challenging the District’s rejection of a previous grievance and informed Mr. Szalai that the District would not process Pruss’s second grievance. CP 311.

B. OHEA Files the Present Lawsuit Seeking to Compel Arbitration

On September 6, 2007, OHEA filed the present action in Island County Superior Court, seeking to compel arbitration of Pruss’s first grievance, which challenged his discharge (Grievance I). CP 312, 450-452. OHEA alleged in its complaint that the “collective bargaining agreement provides that a teacher may elect to challenge adverse employment actions by the District under either statute or through the contractual dispute resolution procedure.” CP 450. OHEA alleged that after Pruss withdrew his request for a statutory hearing, OHEA “then demanded that the grievance be processed through the Steps [provided in the CBA].” CP 451. OHEA alleged that by refusing to participate in the selection of an arbitrator to hear the dispute over the arbitrability of the

grievance, the District had breached the CBA. CP 452. OHEA asked the court for an order directing the District to participate in arbitration to determine the arbitrability of the disputed issue. CP 452.

On September 11, 2007, the District was advised that OHEA had filed a demand for arbitration with the American Arbitration Association, seeking arbitration of Pruss's second grievance (Grievance II), which challenged the District's rejection of Pruss's first grievance which, in turn, challenged Pruss's discharge. CP 331, 431. On October 23 the parties entered into a Stipulation Regarding Stay of Proceedings Before the American Arbitration Association, whereby Grievance II, pending before the American Arbitration Association, was stayed until resolution of the present action. CP 289-291. This stipulation is still in effect.

On May 20, 2009, OHEA and the District filed cross motions for summary judgment. Each party filed a responsive brief and a reply.³ OHEA argued that the CBA required all matters, substantive and procedural, to be submitted to the arbitrator for resolution, including the question of whether OHEA may proceed to arbitration on the substantive portion of Pruss's claim

³ CP 94-104 (OHEA Motion for Summary Judgment; Exhibits at CP. 105-135); 259-286 (District's Motion for Summary Judgment; accompanying Declarations and Exhibits at 307-433). CP 12-22 (District's Reply Brief in Support of Motion for Summary Judgment). CP 23-29 (OHEA's Reply to District's Response to OHEA's Motion for Summary Judgment). CP 30-44 (OHEA's Response to District's Motion for Summary Judgment). CP 45-57 (District's Brief In Opposition to OHEA's Motion for Summary Judgment). Accompanying declarations and exhibits are found at CP 58-91 (Affidavit of Kate Philips and exhibits) and CP 98-93 (Affidavit of James Gasper).

that he was terminated without cause. CP 94-104. Therefore, according to OHEA, Pruss's claim, as well as any affirmative defenses the District may assert, should be submitted to an arbitrator.

The District argued that Pruss elected to pursue the statutory hearing process by vigorously litigating the matter, engaging in extensive discovery, and participating in briefing a response to a dispositive motion, and then withdrew his request for hearing while the District's motion for summary judgment was pending. CP 267-273. These actions, the District argued, barred OHEA and Pruss from utilizing the grievance procedure under the doctrine of election of remedies, waiver of arbitration, equitable estoppel, res judicata, and priority of action. CP 267-284.

The District argued that the question of whether the matter was arbitrable did not need to be put to an arbitrator because it was not necessary to interpret the CBA to decide the question of arbitrability. Rather, arbitrability should be denied based on independent principals of law not dependent upon the language of the CBA. CP 47-49.

A hearing on the cross motions was held before the Honorable Allan R. Hancock on July 17, 2009. CP 11. In an oral ruling from the bench, Judge Hancock granted summary judgment in favor of the District and denied summary judgment to OHEA. CP 11; RP 13.

C. Trial Court Decision

Judge Hancock concluded that Pruss had elected the statutory remedy over the grievance procedure and OHEA was therefore barred from pursuing the grievance. RP 9. Judge Hancock also found that OHEA and Pruss had waived any right to arbitrate. RP 9. In his ruling, Judge Hancock dismissed OHEA's argument that the question of arbitrability had to be submitted to an arbitrator, concluding that independent principles of law, not the CBA, were controlling. RP 7. Judge Hancock concluded that because he had resolved the case based on the doctrines of election of remedies and waiver, it was unnecessary to reach the issues of priority of action, res judicata, and equitable estoppel, "though these doctrines may also preclude OHEA from obtaining the relief it is seeking." RP 13. This appeal followed. CP 4.

III. ARGUMENT

A. Standard of Review

A grant of summary judgment is reviewed *de novo*. *Lallas v. Skagit County*, 167 Wn.2d 861, 864 (2009). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* When reviewing an order of summary judgment, the court engages in the same inquiry as the trial court, considering the facts and all reasonable inferences from the facts in the light most favorable

to the nonmoving party. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002).

Here, there are no genuine issues of material fact and the District is entitled to judgment as a matter of law.

B. Summary of OHEA's Appeal and the District's Response

OHEA makes several arguments as to why Judge Hancock's decision should be reversed. Its arguments are without merit.

OHEA argues that the resolution of this case requires interpretation of the CBA and therefore is subject to arbitration and attempts to convince this Court that interpretation of the CBA is necessary by extensively quoting various provisions of the CBA. However, there is no need to read or interpret the CBA because all facts and law supporting the trial court's decision are independent of and do not rely upon the terms of the CBA. OHEA attempts to support this argument by discussing *Mt. Adams School Dist. v. Cook*, 150 Wn.2d 716, 81 P.3d 111 (2003) and *Yakima County Law Enforcement Officer Guild v. Yakima County*, 133 Wn. App. 281, 135 P.3d 558 (2006). OHEA asserts that Judge Hancock incorrectly distinguished these cases. However, both of these cases involve the interpretation of the terms of a collective bargaining agreement in order to assess the defendant's affirmative defenses, whereas this case can be resolved without reference to the CBA.

OHEA next argues that the doctrine of election of remedies does not apply to this case because the two remedial avenues are not inconsistent and repugnant. The OHEA argues that Pruss did not waive any right he may have had to arbitration because he filed a grievance and therefore preserved his right to pursue arbitration. OHEA also argues that it is a separate entity from Pruss with a separate right to pursue arbitration.

These arguments are without merit. First, when Pruss withdrew his statutory appeal, his discharge became final. Second, in two different pleadings OHEA and Pruss affirmatively asserted that Pruss could choose the grievance process or the statutory process, but not both⁴—this assertion is at odds with OHEA’s current argument that these proceedings are not repugnant and inconsistent. Third, Pruss and OHEA waived any right to arbitration because Pruss took actions that were inconsistent with an intent to arbitrate. Finally, Pruss’s acts are sufficient to bar OHEA from compelling arbitration because OHEA is acting on Pruss’s behalf in prosecuting his grievance.

OHEA did not address any of plaintiff’s arguments regarding res judicata, priority of action, or equitable estoppel. Even though the trial court did not specifically address the merits of these issues, Judge Hancock did hold that relief may be appropriate under one or more of these defenses. The District

⁴ CP 230; CP 450.

incorporates herein by this reference these defenses and asks the Court to, in the alternative, grant relief under one or more of these defenses.⁵

Another issue that is not addressed in OHEA's appeal brief is that under RCW 28A.405.300 Pruss is deemed discharged once he withdraws his statutory appeal. Because Pruss is discharged under the terms of the statute, he has no further recourse, including arbitration under the CBA. The mandatory structure of the statutory appeal process is important to this Court's consideration and the District addresses this issue directly below.

C. Under RCW 28A.405.300 Pruss is Deemed Discharged

The framework of RCW 28A.405.300, *et seq.* is mandatory for both the District and the teacher. *Petroni v. Board of Directors of Deer Park School District No. 414*, 127 Wn. App. 722, 728, 113 P.3d 10 (2005) ("RCW 28A.405.300 governs discharge or adverse change in contract status of certificated employees."). For example, if a District fails to provide proper or timely notice of discharge the teacher shall not be discharged for the causes stated in the original notice for the duration of his or her contract. RCW 28A.405.300; *Gierda v. Mt. Adams Sch. Dist. No. 209*, 126 Wn. App. 840, 110 P.3d 232 (2005) (court found insufficient probable cause notice under RCW 28A.405.300-.310 where district's termination letter failed to provide the 10-day notice or refer to any hearing rights).

⁵ See arguments in the District's Motion for Summary Judgment at CP 259-286.

If a teacher appeals his discharge and then later withdraws that appeal, it is axiomatic that the teacher is discharged and has no further rights to appeal his discharge. The statute provides that a teacher who does not file a statutory appeal may be discharged. RCW 28A.405.300 (if a teacher does not request a hearing within 10 days as provided in the statute, that teacher “may be discharged or otherwise adversely affected as provided in the notice served upon the employee.”) Further, the hearing officer is required under the statute to issue a “final decision,” and if the final decision is in favor of the employee, the employee “shall be restored” to his or her employment position. RCW 28A.405.310(7)(c). Thus, a reasonable interpretation of the statute continues this concept, such that upon a teacher’s voluntary withdrawal of his appeal, the teacher is discharged. *See also Roberge v. Hoquiam Sch. Dist. No. 28*, 5 Wn. App. 564, 567, 490 P.2d 121 (1971) (interpreting the previous version of the teacher discharge statute, RCW 28.58.450, the court held that a teacher’s voluntary resignation after receiving notice of probable cause acted as an effective waiver of his statutory appeal rights).

When Pruss withdrew his statutory appeal, he ended his right to pursue a statutory challenge—or any other challenge—resulting in a “final decision” of the validity of his discharge. Pruss’s withdrawal of his statutory challenge acts as a final decision on his discharge because it ended any and all claims he could have pursued through the statutory challenge framework. Because under the

statute there is a “final decision,” Pruss *is* discharged. His discharge forecloses any other proceedings, including any grievance/arbitration proceedings.

Because Pruss’s discharge became final under the statute, he is precluded from further appealing his discharge, including contesting his discharge through arbitration under the CBA.

D. The Election of Remedies Doctrine Applies and Bars OHEA from Compelling Arbitration

OHEA incorrectly argues that the three part test for election of remedies is not satisfied. The District contends that Judge Hancock correctly found that all three elements are satisfied.

1. *All Three Elements of the Doctrine of Election of Remedies are Satisfied*

An “election of remedies” is a legal doctrine that bars a litigant from pursuing a remedy inconsistent with another remedy already pursued. *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 112, 942 P.2d 968 (1997). When a party has two remedies, that party “may choose between them and select that one which he deems the best for him, but he must abide the result of his choice.” *State ex rel. Barb Restuarants v. Wash. St. Bd. Against Discrimination*, 73 Wn.2d 870, 879, 441 P.2d 526 (1968) (citation omitted).

Under Washington law, three elements must be satisfied before a party will be bound by an election: (1) two or more remedies must exist at the time of the election; (2) the remedies must be repugnant and inconsistent with each

other; and (3) the party to be bound must have chosen one of them. *Birchler*, 133 Wn.2d at 112. The doctrine is applied at the time the election is made and does not turn on the plaintiff's ultimate ability to recover double redress for the same wrong. *Id.*; *McKown v. Driver*, 54 Wn.2d 46, 55, 337 P.2d 1068 (1959). In this case, all three of the elements are present.

The first element is not contested and OHEA did not dispute this element before the trial court. Two remedies existed at the time of the election: a grievance process through the collective bargaining agreement and a statutory process under RCW 28A.405.300-.310.⁶

OHEA argues that the second element (the remedies are repugnant and inconsistent with each other) is not satisfied. Remedies are repugnant and inconsistent if they are not distinct and cumulative or if the pursuit of one necessarily involves or implies the negation of the other. *See Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971); *Labor Hall Ass'n, Inc. v. Daniels*, 24 Wn.2d 75, 84, 163 P.2d 75 (1945).

The statutory process and the arbitration process are repugnant and inconsistent because the assertions and considerations relevant to each remedy are mutually inconsistent rather than distinct and cumulative. OHEA already admitted as much when it twice previously asserted that only one procedure

⁶ For the purposes of summary judgment, the District assumed *arguendo* that both remedies were initially available. The District does not waive its right to assert a defense that Pruss and/or the OHEA were never entitled to relief under the grievance procedure in the CBA.

may be pursued. In its Request for Continuance, Pruss specifically stated that he “has the right to pursue either remedial avenue, but not both.” CP 230 (emphasis added). In its Complaint, OHEA specifically alleged that the “collective bargaining agreement provides that a teacher may elect to challenge adverse employment actions by the District under either statute or through the contractual dispute resolution process.” CP 450 (emphasis added).

Further, in *State ex rel. Barb Restaurants, Inc. v. Wash. State Bd. Against Discrimination*, 73 Wn.2d 870, 878-79, 441 P.2d 526 (1968), the court held that plaintiffs who tried to pursue parallel actions for the same claim were barred by their election of remedies. There, several waitresses were laid off for allegedly discriminatory purposes. *Id.* at 871. The union representing the waitresses filed a grievance and entered into arbitration with the employer under the “just cause” provision of the collective bargaining agreement. *Id.* at 872-73. When the arbitrator did not award full relief, the waitresses attempted to pursue an alternative statutory remedy. *Id.* The court held that the waitresses could not later pursue a remedy under a different avenue because they were “pursuing two parallel courses of civil action to accomplish a remedy for a single possible violation of civil rights, namely, the right to obtain and hold employment without discrimination” *Id.* “This right might be enforced either under the union contract or by civil action, but not by both.” *Id.* (emphasis added). Having been denied relief under

arbitration, the waitresses sought “the same results in this supplementary proceeding. This they were not entitled to do; they had made an ‘election of remedies’ and consequently were bound by that choice.” *Id.* at 879.

Likewise, in the present case, both parties agree that either remedial avenue could be pursued, but not both. As the court in *Barb Restaurants* quoted approvingly:

The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. The plaintiff having made his election it is final and irrevocable: the underlying basis of the rule being the maxim which forbids that one shall be twice vexed for one and the same cause. *Friederichsen v. Renard*, 247 U.S. 207, 62 L. Ed. 1075; *U.S. v. Oregon Lumber Co.*, 260 U.S. 290, 67 L. Ed. 261; 18 Am. Jur., Election of Remedies, Sec. 20; 28 C.J.S., Election of Remedies, Sec. 29. “Where he has two remedies, he may choose between them and select that one which he deems the best for him, but he must abide the result of his choice. This is not only legally but morally right.” *Baker v. Edwards*, 176 N. C. 229, 97 S. E. 16.

Id. at 878-79 (quoting from *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880 (1954)). To pursue two parallel proceedings to enforce the same right would be repugnant and inconsistent because both proceedings are meant to address the same remedy for the same wrong. Pruss, having made his election, is forever bound by that choice.

Also instructive is *Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971), where the court found no repugnancy or inconsistency between a suit based on constitutional grounds and a suit based on an

administrative variance procedure. There, the plaintiff sued the town of Woodway after the town adopted an ordinance restricting the number of dwellings which plaintiff could put on his lot. *Id.* The plaintiff brought a motion challenging the underlying constitutional validity of the ordinance. *Id.* at 48. The Town objected, arguing that the plaintiff must first apply for a variance. *Id.* The plaintiff argued that pursuit of a variance would constitute an election to treat the ordinance as valid, precluding a later assertion of invalidity. *Id.*

The Washington Supreme Court found that there was no “inherent repugnancy or inconsistency between a request for a variance and an attack on the zoning ordinance itself” because “distinct considerations pertain to each.” *Id.* “One seeking a variance admits only that the restrictive zoning ordinance exists and that its terms are applicable to him. He does not thereby concede the validity of the ordinance. Conversely, one who attacks the validity of a zoning ordinance cannot be held, ipso facto, to have admitted that the ordinance would not result in unwarranted and unnecessary hardship as applied to him.” *Id.* Thus, the “assertions and considerations relevant to each remedy are distinct and cumulative rather than mutually inconsistent.” *Id.* The plaintiff would not forego his right to attack the validity of the zoning ordinance by seeking a variance. *Id.* at 50.

The present case is distinguished from *Lange* because the assertions and considerations raised during an arbitration would not be distinct from the assertions and considerations raised during the statutory proceeding. Unlike in *Lange*, the same issues of fact and law would be presented under both appeal processes, and OHEA admitted—twice—that one or the other process may be sought, but not both. Thus, the pursuit of one caused Pruss to forgo the right to pursue the other.

Also unlike *Lange*, the proceedings in this case are mutually inconsistent because the statutory appeal and the arbitration could conceivably allow double redress for the same alleged wrong or inconsistent outcomes. For example, both fact finders could decide that Pruss was discharged without just or sufficient cause. If so, then Pruss could obtain a double recovery under one set of facts. Or, if the Hearing Officer decided Pruss was discharged for just cause, but the arbitrator decided Pruss was not discharged for just cause, then the District would be faced with inconsistent results. This result is “intolerable under the law.” RP 9.

The third element of the doctrine of election of remedies is also satisfied. Pruss made his election by choosing to pursue his statutory remedies. Pruss, over the course of two and a half months, actively engaged in the statutory process. Pruss’s attorney selected a hearing officer, participated in a telephonic prehearing conference with the hearing officer, entered into a briefing scheduled

for a motion for summary judgment, conducted extensive discovery on an expedited basis, submitted a brief in opposition to the District's motion for summary judgment, *then* sought a continuance of the statutory appeal and eventually withdrew the appeal seventeen days before the hearing. CP 136-151. It was not until after the statutory appeal was withdrawn that OHEA asked to proceed to arbitration. CP 253. This conduct shows that Pruss chose the statutory remedy, precluding his access to a second, inconsistent remedy.

All three elements of the election of remedies doctrine are met. Therefore, the Appellant's complaint to compel arbitration was properly dismissed by the trial court.

2. *A Judgment in the Statutory Hearing is Not Required*

OHEA argues that because Pruss did not pursue the statutory hearing to final judgment, there is no possibility of double recovery and therefore the doctrine does not apply. Amended Brief of Appellant, pp. 36-37. However, this argument fails to consider that an election is made at the beginning of the action, and the party that chose the remedy is bound by that election whether or not he completes the remedy he chose. *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 112 (1997) ("two or more remedies *exist at the time of the election*") (emphasis added). For example, when an executory contract for the sale of real estate is breached, a purchaser may have the option to institute an action for specific performance or for damages. *McKown v. Driver*, 54 Wn.2d

46, 55, 337 P.2d 1068 (1959). Once the option is exercised, the party is bound. *See id.* (“Applying the above rules of law to the facts in the instant proceeding, there were two or more remedies available to the McKowns at the time they commenced cause No. 6546; the remedies, although inconsistent, were pleaded in the alternative; the court’s choice became the McKowns’ choice. All the essential elements of election of remedies are here present, thus constituting a bar to the maintenance of the instant proceeding.”) (emphasis added).

Further, the application of the election of remedies doctrine does not turn on a plaintiff’s ultimate ability to recover. *See, e.g. McKown v. 54 Wn.2d at 56-57* (“It was only when their efforts in the collection of the money judgment forced the [initial defendant] into bankruptcy that they decided to turn their attention to the property [and sought] . . . delivery of [the] deed The respondents’ previous election of remedies in this regard constitutes a bar upon the court from granting the relief therein requested.”).

3. *No Prejudice is Required*

OHEA also argues that the doctrine of election of remedies is not met because the District has not shown, and the trial court did not find, prejudice. Prejudice is not a required element. Even if a showing of prejudice was required, the record shows that the District has suffered prejudice.

The District expended a significant sum (over \$15,000) in the statutory proceeding by responding to discovery requests and defending the statutory

action, including preparing a summary judgment motion. More funds would be expended if the arbitration were to proceed.

More significantly, if this case were to proceed to arbitration, the District will be severely prejudiced by the significant delay in conducting a hearing. The statutory process is mandatory for both the District and the teacher. *See Petroni*, 127 Wn. App. at 728; *Gierda*, 126 Wn. App. at 847-48. The Washington legislature provided an expedited hearing process under RCW 28A.405.300 *et seq.* because it recognized the necessity of providing a quick resolution for the school district, the students, and the teachers.

Under the required statutory process set forth in RCW 28A.405.310, the hearing must occur promptly. *See* RCW 28A.405.310(4)-(6)(d). The prompt hearing process allows the interested parties to gather and present evidence, including the testimony of witnesses, within a matter of a few weeks (or months if so requested) so that the evidence is fresh and so that both the teacher and the school district have final resolution of the termination decision in order to proceed with scheduling either a replacement teacher or reinstating the discharged teacher to his or her prior position. Particularly in a case where students will be witnesses, witnesses' memories fade and students move out of the area, imposing an even greater burden, and thus even greater prejudice, on the school district.

When Pruss terminated his statutory appeal, the hearing date was only 17 days away. The parties were prepared to present their witnesses and obtain a resolution. Pruss voluntarily chose to terminate these proceedings, without even waiting for Hearing Officer Tompkins to decide his request for a continuance. The resulting delay prejudices the District in any subsequent proceedings. Thus, even if prejudice is a requirement to find an election of remedies, there is significant evidence that the District has been prejudiced.

4. *The City of Kelso Decision Does Not Apply*

OHEA cites to *Civil Service Commission v. City of Kelso*, 137 Wn.2d 166, 969 P.2d 474 (1999) for support of two propositions. OHEA first argues that the *City of Kelso* ruling recognizes the validity of parallel, ascertainable, independent rights. Amended Brief of Appellant, at p. 32. OHEA also argues that the *City of Kelso* ruling suggests that the presence of two independent, simultaneous remedies in separate forums is not inherently repugnant. Amended Brief of Appellant, at p. 38.

OHEA is wrong on both counts, and the *City of Kelso* ruling is distinguishable from the present case. In *City of Kelso*, the City suspended Officer Stair from the Kelso Police Department. *Id.* at 169. Officer Stair requested an appeal from the Commission under the civil service process established via city ordinance, and on the same day Officer Stair and the Kelso Police Benefit Association (the Union) initiated a grievance procedure to

challenge the suspension pursuant to the collective bargaining agreement between the Union and the City. *Id.* While Officer Stair's grievance was proceeding through the required steps, the civil service process moved more rapidly. *Id.* A hearing was held under the City's civil service procedures, after which the Commissioner issued an order upholding and increasing the length of Officer Stair's suspension. *Id.*

Soon thereafter, Officer Stair and the City participated in arbitration to determine if the City had just cause to suspend Officer Stair under the terms of the collective bargaining agreement. *Id.* The City argued that the Commission's decision precluded relitigation of Officer Stair's suspension under a theory of res judicata. *Id.* The arbitrator disagreed, and ordered the City to reduce Officer Stair's suspension to a written reprimand. *Id.*

The Commission filed a complaint in superior court to declare the Commission's earlier order binding on all parties. *Id.* The superior court held that the Commission's decision had res judicata effect, and the Court of Appeals agreed. *Id.* at 170.

The Washington Supreme Court overturned the lower courts' rulings. The issue the court had to decide was whether the doctrine of res judicata barred review by the arbitrator of Officer Stair's disciplinary action after the Commission had already increased Officer Stair's suspension. *Id.* at 171.

After the Supreme Court analyzed the four elements of res judicata,⁷ the Court concluded that the Commission had not met its burden on one of the elements—that both causes of action be the same. *Id.* at 171. The Court reasoned that the causes of action were not the same because the civil service hearing and the arbitration involved the consideration of different evidence and adjudicated the infringement of different rights. *Id.* at 172.

City of Kelso is distinguishable for several reasons. First, the procedural facts of that case differ significantly. *City of Kelso* did not involve election of remedies or waiver of arbitration; rather, it involved a question of whether one element of res judicata was satisfied. There was never a concession that an election applied and the City went along with both proceedings well past the early stages. Further, there was no withdrawal by the plaintiff from one of the proceedings on the eve of the hearing. Last, all parties in this case agree that only one remedial avenue is available, not both. Because the core holding of *City of Kelso* is inapplicable and there are significant procedural differences, that decision does not apply to the issues in this case.

Second, the court in *City of Kelso* found that a plaintiff who maintains two *independent* actions that address *two different issues* is not barred under res judicata. The court did not hold, as Appellant suggests, that two actions on the

⁷ For res judicata to apply, a prior judgment must have a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. *Kelso*, 137 Wn.2d at 171.

exact same issue may be maintained simultaneously. In *City of Kelso*, the “causes of action” were not the same because the “evidence necessarily considered in applying each standard [in each forum] was not substantially the same.” *Id.* at 175. The Commission focused on whether Officer Stair had violated department regulations, whereas the arbitrator examined whether the punishment was appropriate in proportion to his offense. *Id.* Because the two causes of action included different standards and different evidence, the court found that they were not the “same cause” for res judicata purposes. *Id.*

In the present case, unlike *City of Kelso*, the statutory hearing and the grievance process would be adjudicating the same claim (whether the District had cause to terminate Pruss) and the identical evidence, arguments, and witnesses would be presented at both proceedings. Because the same claim would be tried in both forums, the *City of Kelso* is distinguishable.

The Washington Supreme Court did state in dicta that its holding allowed duplicative review of the underlying facts, which was inefficient. *Id.* at 176. However, the Court clarified that “where the two appeal processes are concerned with *different substantive rights*, this court will not impose an election of remedies clause where none was bargained for by the parties.” *Id.* at 177. In the case before this Court, there are not “different substantive rights” involved. Both the hearing officer and the arbitrator would determine whether the District had sufficient cause to discharge Pruss. *See also Barb Restaurants*,

supra, 73 Wn.2d at 877-79 (both arbitration under CBA and court proceeding dealt with same substantive rights).

Third, *City of Kelso* is distinguished from the present case because Pruss, unlike Officer Stair, did not pursue both appeals processes with equal fervor. In *City of Kelso*, there was no assertion by either side that election of remedies applied. In the present case, Pruss did not pursue the grievance with equal fervor and affirmatively pleaded that only one of the processes can be pursued. *Id.* at 171.

In sum, *City of Kelso* is distinguishable on a number of levels. First, the court was addressing a res judicata issue and found that the “same cause of action” element was not met. The present case involves an election of remedies whereby the Appellant is barred from proceeding due to Pruss’s pursuit of the statutory hearing process. Further, the two forums in *City of Kelso* were using different standards and were reviewing different evidence to make a determination on Officer Stair’s discipline. Here, the same substantive right (cause for discharge) is involved in both remedial avenues and the same evidence would be presented. Last, in *City of Kelso* there was no waiver at issue.

E. Pruss Waived Any Right to Arbitration

In addition to correctly applying the election of remedies doctrine, the trial court also correctly determined that OHEA and Pruss waived their right, if ever they had any, to arbitration.

It is well established that a party to an arbitration clause may waive its enforcement. *Finney v. Farmers Ins. Co. of Wash.*, 21 Wn. App. 601, 620, 586 P.2d 519 (1978). Waiver may be found when there is “conduct inconsistent with any other intention but to forego that right.” *Shoreline Sch. Dist. No. 412 v. Shoreline Ass’n of Educ. Office Employees*, 29 Wn. App. 956, 958, 631 P.2d 996, 639 P.2d 765 (1981).

A party may waive a right to arbitrate, even if it invokes that right to arbitrate at an early stage in the proceedings, by thereafter acting inconsistently with the intent to arbitrate. *See, e.g., Otis Housing Ass’n Inc. v. Ha*, 165 Wn.2d 582, 584, 201 P.3d 309 (2009). Factors courts will consider when addressing inconsistent conduct include whether a litigant has failed to assert its right to arbitrate at the commencement of the lawsuit, whether the litigant delayed its motion for a stay of the lawsuit, and whether the litigant participated in discovery. *Lake Washington Sch. Dist. v. Mobile Modules Northwest*, 28 Wn. App. 59, 61, 621 P.2d 791 (1990).

In *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008), the Court found that Mr. Ramsden waived his right to arbitrate because of the type of

conduct in which he engaged prior to asserting his right to arbitrate. When a complaint was filed against Mr. Ramsden, he “answered the complaint, engaged in extensive discovery, deposed witnesses, submitted and answered interrogatories, and prepared fully for trial.” *Id.* at 384. Further, “[t]hrough all of this, Ramsden did not propose a court order to stay the action to allow the parties to arbitrate.” *Id.* After three years of litigation, Mr. Ramsden proposed a court order to stay the action and allow the parties to arbitrate. *Id.*

“Waiver of an arbitration clause may be accomplished expressly or by implication.” *Lake Wash. Sch. Dist.*, 28 Wn. App. at 63. In the present case, Pruss’s actions imply a waiver of arbitration. Pruss instituted and pursued the statutory procedure. Pruss then engaged in extensive, expedited discovery and responded to the District’s dispositive motion. Hearing Officer Tompkins could have issued a decision on that dispositive motion at any time before the hearing, if it had not been for Pruss’s last minute withdrawal of his appeal. Pruss could have requested a stay of proceedings at the beginning of the statutory hearing. OHEA and Pruss were on notice within four days of the filing of the grievance that the District would take the position that Pruss’s pursuit of a remedy under the grievance process was barred. If Pruss disagreed with the District’s position, he could have requested a stay of proceedings to preserve his ability to utilize the grievance process. Instead, he spent two and a half months litigating his discharge through the statutory hearing process and waited until the eve of

Hearing Office Tompkins's decision on the District's summary judgment motion before submitting a request for a stay.

OHEA argues that the trial court incorrectly relied upon *Otis Housing* and *Ives v. Ramsden* to support a finding of waiver. As explained below, however, both cases are applicable and support a finding of waiver.

1. *Otis Housing Ass'n v. Ha* Supports the District's Position

In *Otis Housing Ass'n Inc. v. Ha*, 165 Wn.2d 582, 584, 201 P.3d 309 (2009), the Supreme Court held that plaintiff waived whatever rights to arbitrate it may have had by first litigating those issues in superior court. In *Otis Housing*, the Otis Housing Association ("the Association") rented a hotel from the Has under a contract that contained an option to purchase. *Id.* at 585. The contract also contained an arbitration clause. *Id.* The Association attempted to exercise its option, but no sale occurred before the option expired. *Id.* The Association stopped paying rent and the Has filed an unlawful detainer action. *Id.*

At the show cause hearing in the unlawful detainer action, the Association argued that it had exercised its option. *Id.* at 586. The trial court disagreed and issued a writ of restitution in favor of the Has. *Id.* Several days after the trial court issued its order, the Association sent a letter to the Has demanding arbitration under the contract. This was the first time arbitration was

raised. *Id.* The trial court denied the Association’s motion to compel arbitration. *Id.*

The Washington Supreme Court upheld the trial court, holding that the Association “waived arbitration by raising the option as a defense to the unlawful detainer action,” and arbitration may be waived by the parties where their conduct is inconsistent with any other intent. *Id.* at 587. The Court went on to elaborate:

Simply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate. OHA’s conduct of submitting its claim that it exercised its option as a defense to the unlawful detainer action was completely inconsistent with an intent to arbitrate. We hold that OHA did waive any claim it may have had to arbitrate by presenting the same issue—whether it had successfully exercised the option to purchase—before the unlawful detainer court. Having lost that issue, it may not later seek to relitigate the same issue in a different forum.

Id. at 588 (emphasis added). A party that chooses to litigate in one forum may not seek to arbitrate the same issue in a different forum. *Id.*; *see also Barb Restaurants, supra*, 73 Wn.2d at 878-79.

In the present case, Pruss’s conduct of submitting his claim to the statutory Hearing Officer was completely inconsistent with any intent to arbitrate. Pruss vigorously pursued his statutory hearing until the eve of a decision on his case. He withdrew his statutory appeal with the stated intention of relitigating the same issue in a different forum. As explained above, once Pruss withdrew his statutory appeal, he was deemed by statute to have been

discharged. The holding in *Otis Housing* applies here and Pruss, having litigated and been deemed discharged by virtue of the mandatory nature of RCW 28A.405.300 *et seq.*, cannot arbitrate the same issue again.

The fact that he voluntarily withdrew his appeal before the Hearing Officer does not change the fact that Pruss initiated and fully participated in the statutory hearing process instead of the grievance process. By selecting a hearing officer, seeking discovery, and engaging in motions practice before seeking a stay or withdrawal, Pruss showed an intent to move forward with the statutory process and not the grievance process. Pruss litigated his claim in the statutory hearing process, not the grievance process. His actions were “completely inconsistent with an intent to arbitrate.”

2. *Ives v. Ramsden* Supports the District’s Position

OHEA argues that *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008) does not support the District’s position. OHEA attempts to distinguish *Ives* from the present case by arguing that OHEA filed the grievance initially, while Mr. Ramsden waited three years before asserting the arbitration clause. Amended Brief of Appellant, at p. 40. This distinction is not determinative.

In *Ives*, the Court found that Mr. Ramsden waived his right to arbitrate when he sought to assert his right to arbitrate three years after initially engaging in litigation. Looking at the three years in *Ives*, OHEA argues that not enough time passed for Pruss’s acts to constitute a waiver. While, the time that passes

is a factor to consider, it is not determinative. For example, in *Otis*, very little time passed. *Otis*, 165 Wn.2d at 586 (plaintiff's waited only several days before seeking arbitration). Further, because the statutory proceeding under RCW 28A.405.300 *et seq.* is an accelerated proceeding, the parties in the present case were as far along procedurally as the parties in *Ives*. In the present case the parties had conducted discovery, exchanged dispositive pleadings, and were on the eve of trial, which is comparable to *Ives*.

Although Pruss and OHEA filed a grievance within the 20 day time limit provided in the CBA, this does not prevent application of the rule set forth in *Ives*. See, e.g., *Burton-Dixie Corp. v. Timothy McCarthy Constr. Co.*, 436 F.2d 405, 408-09 (5th Cir. 1971) (finding that a jury could reasonably conclude waiver of arbitration even though defendant raised arbitration as an affirmative defense in its answer when defendant failed to move for a stay and proceeded with judicial litigation). Even though a grievance was filed, Pruss prosecuted his statutory appeal, not his grievance, and he did not seek a stay until the eve of the statutory hearing. As the "plaintiff," this failure is even more pronounced than the failure of a defendant to assert arbitration (such as that in *Ives*).

F. The Court Does Not Need to Interpret the CBA and Therefore An Arbitrator Does Not Need to Decide Arbitrability

OHEA argues that the issues of election of remedies and waiver of arbitration should be submitted to an arbitrator because all questions of arbitrability are to be submitted to the arbitrator under the CBA.

This conclusion is incorrect because Pruss has already elected and pursued a statutory remedy and has thus relinquished any right he may have had to submit the question of arbitrability to an arbitrator. Further, Pruss, through conduct that is inconsistent with an intention to pursue arbitration, waived any right to arbitrate the present complaint. In order to determine whether Pruss elected a statutory remedy or waived arbitration, this Court need not look at the terms of the CBA. The Court may determine whether any right that Pruss may have had to arbitration has been barred under these independent principles of law without the aid of the CBA.

To support its position, OHEA relies upon *Mount Adams School District v. Cook*, 150 Wn.2d 716, 81 P.3d 111 (2003) and *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn. App. 281, 135 P.3d 558 (2006). However, these cases are distinguishable from the present case.

1. *Mount Adams School District v. Cook is Distinguishable from the Present Case*

One of the main points of contention is whether the trial court could decide the validity of the District's affirmative defenses without interpreting the CBA. OHEA's main argument is that, under *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 81 P.3d 111 (2003), the parties have "clearly and unmistakably" agreed to submit the present action to an arbitrator under the provisions of the CBA. *Mount Adams* is distinguishable from the present case.

In *Mount Adams*, the court considered whether a teacher, William Cook, had a right to arbitration under a collective bargaining agreement when his teaching contract was deemed invalid after he failed to timely renew his teaching certificate. *Id.* at 719. Mr. Cook's union filed a grievance on Mr. Cook's behalf alleging a violation of the CBA. *Id.* at 721. Mr. Cook's grievance proceeded through the first three steps of the agreement's grievance process, up to and including selection of an arbitrator. *Id.* Before arbitration could be held, the school district filed a complaint seeking an injunction prohibiting Mr. Cook and the union from attempting to enforce the contract through arbitration. *Id.* at 722.

The Washington Supreme Court found that Mr. Cook had a right to arbitration under the CBA. After discussing the U.S. Supreme Court's "*Steelworkers Trilogy*," the court adopted the rule that parties to a contract containing an arbitration clause may agree that an arbitrator shall decide the question of whether they agreed to arbitrate a dispute. *Id.* at 724. The Supreme Court found that, under the language of the parties' agreement, the parties had clearly and unmistakably agreed to allow an arbitrator to decide whether a grievance is arbitrable. *Id.*

In the present case, it may or may not be true that the language of the CBA evidences a clear and unmistakable intent to submit substantive and procedural issues to an arbitrator. However, it does not matter whether the

answer to that question is affirmative or negative because the Appellant is barred from even pursuing arbitration. In *Mount Adams*, the reason the Washington Supreme Court concluded the issue had to be presented to the arbitrator was because the court had to interpret the terms of the agreement in order to assess arbitrability. In this case, the issue does not have to be presented to the arbitrator because the Court need not interpret the terms of the CBA.

In *Mount Adams* the school district claimed that because Mr. Cook failed to renew his teaching certificate he was no longer an employee and thus not subject to the agreement. *Id.* at 720. Under the agreement, for a teacher to be covered by the agreement, he or she must be an “employee,” which was a term used in the agreement. *Id.* The school district argued that because Mr. Cook was not an employee (possessing no teaching certificate), and not covered by the agreement, Mr. Cook was not entitled to arbitration. *Id.* The Washington Supreme Court stated that while it “is at least arguably true, as the District contends, [that] Cook was not a member of the bargaining unit when the District terminated him, and thus Cook cannot receive a remedy under the collective bargaining agreement That determination, however, is an issue for substantive arbitration requiring an interpretation of the collective bargaining agreement in conjunction with Cook’s employment contract” *Id.* at 726.

The present case is different from *Mount Adams* because the Court need not interpret the terms of the CBA to address the District’s affirmative defenses.

None of the District's defenses turn on the definition of a term in the CBA. In order to evaluate whether Pruss waived his right to arbitration or elected a statutory remedy over arbitration, the Court will look to Pruss's and OHEA's actions taken after Pruss's discharge, not the actions leading up to his discharge. For example, the Court will look to whether Pruss's acts fulfilled the three-part election test, or whether he waived arbitration by acting inconsistently with an intent to arbitrate. Nothing contained in the CBA will help the Court decide these issues.

In *Mount Adams*, the court had to look at the agreement to determine whether Mr. Cook was an employee and was a member of the union at the time he was terminated. In order to assess the school district's defenses to arbitration, the court would have had to interpret the collective bargaining agreement, which was clearly a task assigned to an arbitrator under the agreement. In the present case, by contrast, the court does not need interpret the CBA to determine whether to apply election of remedies, waiver of arbitration, res judicata, priority of action, or equitable estoppel. This case is distinguishable from *Mount Adams*.

2. *Yakima County Law Enforcement Officers Guild v. Yakima County is Distinguishable*

OHEA's reliance on *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn. App. 281, 135 P.2d 558 (2006) is also misplaced. OHEA argues that the *Yakima County* court identified waiver, laches, and other

related defenses as appropriate for submission to, and review and disposition by, an arbitrator. Amended Brief of Appellant, pg. 30. However, the *Yakima County* court, like the *Mount Adams* court, had to interpret the collective bargaining agreement in order to assess the asserted affirmative defenses.

In *Yakima County*, Deputy Sheriff Jan Bartleson was discharged on “fit for duty” grounds. 133 Wn. App. at 283. Both Deputy Bartleson and the Yakima County Law Enforcement Guild (“Guild”) grieved the discharge under a collective bargaining agreement. *Id.* After the County declined to arbitrate, the Guild sued to compel arbitration. *Id.*

As a defense, the County asserted that the Guild’s grievance was time-barred because, under the agreement, an employee must file a grievance within 30 days of its occurrence or the employee has “waived all rights and remedies.” *Id.* at 287. The court held that whether or not the action was time-barred was a question for the arbitrator because the question required interpretation of the agreement. *Id.* at 288.

However, when these types of defenses do not require the interpretation of the collective bargaining agreement, the issues are for the court to decide. For example, in determining whether the defendant or plaintiff waived the right to arbitration under a collective bargaining agreement, courts will not look to the terms of the agreement but to the actions of the waiving party after a lawsuit is initiated. *See, e.g., Lake Wash. Sch. Dist. v. Mobile Modules NW*, 28 Wn.

App. 59, 64, 621 P.2d 791 (1980); *Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000).

The defenses raised in the present case by the District are distinguishable from those raised in *Yakima County* because they do not arise out of the CBA and can be answered without consideration of the merits of the dispute. The “waiver” asserted by the Guild in *Yakima County* originated from the language of the bargaining agreement. The “waiver” that is asserted by the District arises out of a principle of case law developed by the courts, which has no relationship to the terms of the CBA.

As Judge Hancock put it:

In both [*Mount Adams* and *Yakima County*], the issues had to do with the proper construction of the collective bargaining agreement itself and whether under the terms thereof the grievant had a right to arbitration. By contrast in the present case, the District’s defenses to OHEA’s contention that Mr. Pruss had the right to pursue arbitration under the collective bargaining agreement are not based on the collective bargaining agreement, but rather on independent principles of law.

RP 7.

In sum, *Mount Adams* and *Yakima Count* are distinguishable and OHEA is incorrect to rely upon them for support of its argument that this matter should be submitted to an arbitrator. In both cases, the court had to interpret the collective bargaining agreement in order to determine the validity of the defenses asserted. In this case, no interpretation of the CBA is needed.

Therefore, the trial court had the power to address the issues of election and waiver.

3. *The “Sole Method of Review” Language in the CBA Does Not Impact This Court’s Analysis*

OHEA also argues that while the District’s defenses may originate from independent principles of law, they impact the rights that are attendant to the CBA and are limited to an interpretation of the CBA terms.⁸ In this context, OHEA argues that the CBA contains a “Sole Method of Review” provision under Article 9.7 that controls.⁹

This argument is wrong because OHEA again assumes that the court must necessarily look to the CBA for resolution of the issue, which, as discussed in detail above, is not true. The District does not deny that, if this issue were before an arbitrator, the parties would engage in an argument about the interpretation, meaning and enforceability of Article 9.7. However, the Court need never consider this term of the CBA in order to evaluate the District’s defenses. This argument is a red herring whose sole purpose is an attempt to engage the court in an unnecessary analysis of the terms of the CBA.

OHEA also seems to be arguing that Article 9.7 shows that the CBA does not preclude the simultaneous use of both the statutory and the arbitration methods of review. However, OHEA pleaded the exact opposite in its

⁸ Amended Brief of Appellant, pp. 31, 33.

Complaint, where OHEA specifically alleged that the “collective bargaining agreement provides that a teacher may elect to challenge adverse employment actions by the District under either statute or through the contractual dispute resolution process.” CP 450 (emphasis added). This argument is without merit.

4. *The Educational Employment Relations Act Does Not Apply*

OHEA for the first time on appeal raises several arguments based on the Educational Employment Relations Act, RCW 41.59 *et seq.* (“EERA”). Issues and arguments that were not raised before the trial court will not be considered on appeal.¹⁰

Even if the court were to consider this statute, the court would find that it has no impact on the resolution of this case. First, OHEA cites to the EERA for the proposition that Washington has a strong public policy in favor of arbitration. While the District does not deny this broad proposition of law, it must be noted that equally compelling public policy exists in favor of timely resolution of teacher discharge cases through RCW 28A.405.300 *et seq.* In that statute, the Washington legislature has provided for a mandatory, expedited

⁹ The OHEA failed to raise this argument before the trial court, and is thus precluded from raising it here.

¹⁰ On review of an order granting a motion for summary judgment, the appellate court must “consider only evidence and issues called to the attention of the trial court.” RAP 9.12. While an appellate court may affirm the trial court’s order on any basis that the record supports, but a party cannot raise an issue not presented to the trial court when appealing an order granting summary judgment. *Home Depot USA, Inc. v. Dep’t of Revenue*, 151 Wn. App. 909, 925, 215 P.3d 222 (2009); *1519-1525 Lakeview Blvd. Condo Ass’n v. Apartment Sales Corp.*, 101 Wn. App. 923, 932, 6 P.3d 74 (2000) (declining to consider an argument not presented to the trial court).

review process. If the District fails to follow the notice provisions in the statute, the teacher cannot be discharged. RCW 28A.405.300 (“In the event any such notice or opportunity for hearing is not timely given such employee shall not be discharged”). Likewise, if the teacher fails to request a hearing, the teacher is deemed to be discharged. RCW 28A.405.300. The procedures for a review hearing are set in the statute to occur within a matter of weeks. RCW 28A.405.310. Through this statute, the legislature has shown a strong preference for a quick resolution of a discharge through the mandatory statutory process so that all parties may move forward with the business of a public school.

OHEA also argues that the EERA trumps RCW 28A.405.300 and .310 and that the statute somehow compels arbitration of this matter. Amended Brief of Appellant, pg. 31 n.12. This argument is incorrect on its face. Citing RCW 41.59.910, OHEA claims that the EERA “creates supremacy over rights arising under the EERA and those within other statutes that may conflict.” Amended Brief of Appellant, p. 31. RCW 41.59.910 does not support this contention because the statute actually states that the EERA supercedes old statutory law; it does not contain any provisions creating “supremacy” over the teacher discharge statute.

OHEA also cites *Peninsula School Dist. v. Peninsula School Employees Ass'n*, 130 Wn.2d 401, 407-08, 924 P.3d 13 (1996) to support its claim that the EERA creates supremacy. However, the court in *Peninsula* was addressing an entirely different statute, the Public Employees Collective Bargaining Act, RCW 41.56, not the Educational Employment Relations Act, RCW 41.59. *Peninsula* is inapplicable.

In sum, the EERA does not control the Court's decision. Even if the court were to consider this argument (raised for the first time on appeal), its analysis should not be altered by this statute.

G. OHEA and Pruss Should be Treated the Same for Purposes of this Action

OHEA argues that there is a distinction between OHEA and Pruss, and Pruss's actions in pursuing the statutory hearing process do not affect OHEA's right to pursue a grievance. OHEA is incorrect because OHEA is acting on behalf of Pruss in appealing Pruss's discharge and should be treated as the same for the purposes of this action—Pruss is the real party in action. OHEA and Pruss are in privity and the actions of one are imparted to the other.

Washington courts have readily recognized privity in similar situations. For example, in analyzing whether the parties are the same for the purposes of collateral estoppel, one court found that the parties were the same where an employee's union was representing the employee's interests and the same attorney represented both the union and the employee. *Christensen v. Grant*

County Hosp., 152 Wn.2d 299, 309 n.5, 96 P.3d 957 (2004). In *Christensen*, an employee's union filed a complaint with the Public Employment Relations Commission. *Id.* at 303. The union sought, on the employee's behalf, reinstatement, backpay, and compensatory damages, among other things. *Id.* At the hearing, the union and the employee were represented by the union's lawyer. *Id.* The hearing examiner found in favor of the employer. *Id.* at 304. A few months later, the employee filed suit in superior court alleging that the employer discharged him in retaliation for his participation in union activities. The employer moved for summary judgment, arguing that collateral estoppel barred relitigation of the employee's discharge. *Id.* In order for collateral estoppel to apply, the party against whom it is asserted must be a party to, or in privity with a party to, the earlier proceeding. *Id.* at 307. The court found that the employee and his union were treated the same for collateral estoppel purposes. *Id.* at 317.

In another collateral estoppel case, the court found privity where an employee's union arbitrated a grievance on behalf of the employee. *Robinson v. Hamed*, 62 Wn. App. 92, 100, 813 P.2d 171 (1991) In *Robinson*, the employee was prevented by collateral estoppel from asserting issues that were already arbitrated by his union on his behalf. *Id.* ("Having invoked the arbitration proceeding to vindicate his rights, he cannot now claim that he was not in privity with his union and bound by the results."); *see also Barb Restaurants*,

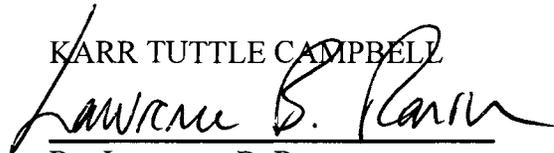
supra, 73 Wn.2d at 876 (employees were barred from asserting discrimination claims in civil proceeding when union had earlier represented them in making a claim for termination without just cause under the CBA).

Similar to *Robinson* and *Christensen*, even though OHEA is pursuing arbitration, Pruss is in privity with OHEA. The same attorney, Mr. Gasper, represents both parties. The ultimate issue being pursued by OHEA is the same issue that was pursued by Pruss: whether there was sufficient cause for Pruss's discharge. OHEA is pursuing this issue on behalf of Pruss because Pruss is the real party in interest. Therefore, Pruss's actions preclude OHEA from proceeding to arbitration on Pruss's discharge.

IV. CONCLUSION

The trial court's order of summary judgment should be affirmed. Judge Hancock correctly determined that OHEA is barred by the doctrines of election of remedies and waiver. OHEA's appeal should be denied.

Respectfully submitted this 18th day of March, 2010.

KARR TUTTLE CAMPBELL


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APPENDIX

RCW 28A.405.300—Adverse change in contract status of certificated employee—
Determination of probable cause—Notice—Opportunity for hearing.

In the event it is determined that there is probable cause or causes for a teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with the school district, hereinafter referred to as "employee", to be discharged or otherwise adversely affected in his or her contract status, such employee shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action. Such determinations of probable cause for certificated employees, other than the superintendent, shall be made by the superintendent. Such notices shall be served upon that employee personally, or by certified or registered mail, or by leaving a copy of the notice at the house of his or her usual abode with some person of suitable age and discretion then resident therein. Every such employee so notified, at his or her request made in writing and filed with the president, chair of the board or secretary of the board of directors of the district within ten days after receiving such notice, shall be granted opportunity for a hearing pursuant to RCW 28A.405.310 to determine whether or not there is sufficient cause or causes for his or her discharge or other adverse action against his or her contract status.

In the event any such notice or opportunity for hearing is not timely given, or in the event cause for discharge or other adverse action is not established by a preponderance of the evidence at the hearing, such employee shall not be discharged or otherwise adversely affected in his or her contract status for the causes stated in the original notice for the duration of his or her contract.

If such employee does not request a hearing as provided herein, such employee may be discharged or otherwise adversely affected as provided in the notice served upon the employee.

Transfer to a subordinate certificated position as that procedure is set forth in RCW 28A.405.230 shall not be construed as a discharge or other adverse action against contract status for the purposes of this section.

RCW 28A.405.310—Adverse change in contract status of certificated employee, including nonrenewal of contract—Hearings—Procedure.

(1) Any employee receiving a notice of probable cause for discharge or adverse effect in contract status pursuant to RCW 28A.405.300, or any employee, with the exception of provisional employees as defined in RCW 28A.405.220, receiving a notice of probable cause for nonrenewal of contract pursuant to RCW 28A.405.210, shall be granted the opportunity for a hearing pursuant to this section.

(2) In any request for a hearing pursuant to RCW 28A.405.300 or 28A.405.210, the employee may request either an open or closed hearing. The hearing shall be open or closed as requested by the employee, but if the employee fails to make such a request, the hearing officer may determine whether the hearing shall be open or closed.

(3) The employee may engage counsel who shall be entitled to represent the employee at the prehearing conference held pursuant to subsection (5) of this section and at all subsequent proceedings pursuant to this section. At the hearing provided for by this section, the employee may produce such witnesses as he or she may desire.

(4) In the event that an employee requests a hearing pursuant to RCW 28A.405.300 or 28A.405.210, a hearing officer shall be appointed in the following manner: Within fifteen days following the receipt of any such request the board of directors of the district or its designee and the employee or employee's designee shall each appoint one nominee. The two nominees shall jointly appoint a hearing officer who shall be a member in good standing of the Washington state bar association or a person adhering to the arbitration standards established by the public employment relations commission and listed on its current roster of arbitrators. Should said nominees fail to agree as to who should be appointed as the hearing officer, either the board of directors or the employee, upon appropriate notice to the other party, may apply to the presiding judge of the superior court for the county in which the district is located for the appointment of such hearing officer, whereupon such presiding judge shall have the duty to appoint a hearing officer who shall, in the judgment of such presiding judge, be qualified to fairly and impartially discharge his or her duties. Nothing herein shall preclude the board of directors and the employee from stipulating as to the identity of the hearing officer in which event the foregoing procedures for the selection of the hearing officer shall be inapplicable. The district shall pay all fees and expenses of any hearing officer selected pursuant to this subsection.

(5) Within five days following the selection of a hearing officer pursuant to subsection (4) of this section, the hearing officer shall schedule a prehearing conference to be held within such five day period, unless the board of directors and employee agree on another date convenient with the hearing officer. The employee shall be given written notice of the date, time, and place of such prehearing

conference at least three days prior to the date established for such conference.

(6) The hearing officer shall preside at any prehearing conference scheduled pursuant to subsection (5) of this section and in connection therewith shall:

(a) Issue such subpoenas or subpoenas duces tecum as either party may request at that time or thereafter; and

(b) Authorize the taking of prehearing depositions at the request of either party at that time or thereafter; and

(c) Provide for such additional methods of discovery as may be authorized by the civil rules applicable in the superior courts of the state of Washington; and

(d) Establish the date for the commencement of the hearing, to be within ten days following the date of the prehearing conference, unless the employee requests a continuance, in which event the hearing officer shall give due consideration to such request.

(7) The hearing officer shall preside at any hearing and in connection therewith shall:

(a) Make rulings as to the admissibility of evidence pursuant to the rules of evidence applicable in the superior court of the state of Washington.

(b) Make other appropriate rulings of law and procedure.

(c) Within ten days following the conclusion of the hearing transmit in writing to the board and to the employee, findings of fact and conclusions of law and final decision. If the final decision is in favor of the employee, the employee shall be restored to his or her employment position and shall be awarded reasonable attorneys' fees.

(8) Any final decision by the hearing officer to nonrenew the employment contract of the employee, or to discharge the employee, or to take other action adverse to the employee's contract status, as the case may be, shall be based solely upon the cause or causes specified in the notice of probable cause to the employee and shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action.

(9) All subpoenas and prehearing discovery orders shall be enforceable by and subject to the contempt and other equity powers of the superior court of the county in which the school district is located upon petition of any aggrieved party.

(10) A complete record shall be made of the hearing and all orders and rulings of the hearing officer and school board.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the attached Brief of Respondent upon the person named below, or his or her authorized agent, by PDF attached to an e-mail and by U.S. mail:

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Dated at Seattle, Washington this 18th day of March, 2010.


Sandy Watkins