No. 84243-4

J.M. JOHNSON, J. (dissenting)—The paramount duty of the State is to make ample provision for the education of all children. Wash. Const. art. IX, § 1. The implementation of this duty falls to local school districts, which must protect students as well as provide for their education. Consequently, school districts must take action when teachers mistreat students or otherwise fail in their duties.[1] Such action may include discharge from employment.

Mr. David Vinson, a former teacher in the Federal Way School District (District), mistreated a student and failed to meet his duties as a teacher. He called a former student profane and derogatory names in a public place, specifically a restaurant frequented by other students. He then lied about the incident and related matters during the course of the official District

[1] Teachers have the duty "to endeavor to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism [and] to teach them to avoid . . . profanity and falsehood . . . ." RCW 28A.405.030. This has been a constant in our educational system since territorial days. Code of 1881, § 3203.

investigation. Beyond this, Mr. Vinson has three previous cases of misconduct and has already been disciplined by the District for the malicious harassment of a staff member. Today, this court's majority makes it more difficult to discharge teachers and certificated employees than the legislature intended, even where clear cause for discharge exists. While I must acknowledge Mr. Vinson's long history as a teacher, this does not excuse Mr. Vinson's misconduct or lying about it during an official investigation. Nor does it justify the majority's decision to refuse the District a hearing to appeal the hearing officer's decision to allow Mr. Vinson to return to the classroom. The hearing officer's decision that Mr. Vinson's misconduct was not sufficient cause to discharge him was clear error of law and should be reviewable in the courts. Because teachers must be held to a higher standard than the hearing examiner or majority allows, I respectfully dissent.

Facts

This case contains relatively few facts necessary to the legal analysis of whether the District has cause to discharge Mr. Vinson and whether the District may appeal the hearing officer's decision to the contrary. On May 1, 2007, Mr. Vinson encountered a former student at a Taco Time restaurant in

Federal Way. Mr. Vinson publicly called this student profane and derogatory names at the restaurant, which was frequented by other students. The District investigated the incident.[2] Mr. Vinson lied about the incident and related matters during the course of the investigation. Mr. Vinson also sent a "harassing email"[3] to one of the employees who participated in the investigation.

The District notified Mr. Vinson that it had probable cause for his discharge pursuant to RCW 28A.405.300. The District stated that the grounds described above "separately and collectively constitute[] sufficient cause for your discharge from District employment."[4] The letter also highlighted three letters of reprimand Mr. Vinson had received for three prior incidents of misconduct: (1) A letter of reprimand for "inappropriate cheeking of students"[5] in 2005, (2) a letter of reprimand for failure to provide legally

[2] The investigation was conducted by the same District investigator who had conducted an investigation of a 2005 claim against Mr. Vinson for malicious harassment, and who had dismissed a claim by Mr. Vinson of sexual harassment by staff at Thomas Jefferson High School. The staff have been disciplined by the District for other instances of misconduct. *See* Hr'g Officer's Certification of R., Ex. D. The student Mr. Vinson encountered at Taco Time was involved in the 2005 investigation.

[3] Clerk's Papers at 27.

[4] *Id.*

required accommodations for a child with a disability in 2005, and for insubordination,[6] and (3) a letter of reprimand for "malicious harassment" of another staff member at Thomas Jefferson High School, for which he was removed from a coaching position and involuntarily transferred to Federal Way High School in 2005. *Id.*

Procedural History

Mr. Vinson requested a hearing to contest the District's grounds for termination. After a closed hearing, the hearing officer concluded the District did not have sufficient cause to justify termination of Mr. Vinson's employment. The hearing officer excused Mr. Vinson's lying during the course of the investigation because Vinson "suggested plausible reasons for his failure to cooperate, based largely on his feelings that he could not and would not receive a fair and impartial investigation by [the District]." Hr'g Officer Decision and Finding of Fact at 5, ¶ 21.

The hearing officer also dismissed the gravity of Mr. Vinson's use of profane and derogatory names directed at a former student in a local

[5] *Id.* "Cheeking" is the pinching of a student's cheek.

[6] *See id.*

restaurant. The hearing officer reasoned that the targeted individual was no longer a student and noted that she had disparaged Mr. Vinson when she was a student. Purporting to apply the *Clarke*[7] and *Hoagland*[8] tests, the hearing officer determined that there were extenuating circumstances that excused Mr. Vinson's conduct and found no nexus between his conduct and his performance as teacher sufficient to give the District cause to terminate Mr. Vinson. *Id.* at 13, 16.

The District sought review in King County Superior Court via RCW 7.16.040, the statutory writ of certiorari. The writ was denied. *Federal Way Sch. Dist. No. 210 v. Vinson*, No. 08-2-05374-1 (King County Super. Ct., Wash. May 15, 2008). The District appealed. The Court of Appeals initially dismissed the appeal as moot, as Mr. Vinson had found employment at a different school, no longer sought reinstatement at Federal Way High School, and had waived his right to recover attorney fees. Resp't's Mot. to Dismiss as Moot at 2.

Shortly after the Court of Appeals dismissed the appeal as moot,

[7] *Clarke v. Shoreline Sch. Dist. No. 412,* 106 Wn.2d 102, 113-14, 720 P.2d 793 (1986).

[8] *Hoagland v. Mount Vernon Sch. Dist. No. 320*, 95 Wn.2d 424, 623 P.2d 1156 (1981).

however, Mr. Vinson served the District with a claim for damages alleging wrongful discharge and violation of chapter 49.60 RCW.[9] The District then filed for reconsideration of the Court of Appeals' decision dismissing the appeal as moot, which was granted. *Fed. Way Sch. Dist. No. 210 v. Vinson*, 154 Wn. App. 220, 225 P.3d 379 (2010). The Court of Appeals held that the trial court had abused its discretion in refusing to grant the statutory writ of certiorari and held that there was sufficient cause to discharge Mr. Vinson. *Id.* at 234. Mr. Vinson appealed to this court. We granted review. *Fed. Way Sch. Dist. No. 210 v. Vinson*, 168 Wn.2d 1039, 233 P.3d 889 (2010).

Analysis

The majority's holding is legally incorrect. A school district has (and must have) an appeal from a hearing officer's decision reversing discharge for cause. Additionally, the statutory writ of certiorari in RCW 7.16.040 is not equivalent to the appeal granted to teachers in RCW 28A.405.320-.350. Thus, it is unnecessary to hold that the statutory writ is not available to the District in order to reconcile RCW 7.16.040 with RCW 28A.405.320. The majority makes it more difficult to discharge certificated school employees

[9] Resp't's Answer to Appellant's Mot. for Recons. at 2; Appellant's Mot. for Recons. at 2.

than the legislature intended, allowing hearing officers, rather than school officials, to decide when cause for discharge exists.

School districts are subject to the "general laws" codified in the Revised Code of Washington because they are undoubtedly "municipal corporations or quasi-municipal corporations." *Am. Fed'n of Teachers, Yakima Local 1485 v. Yakima Sch. Dist. No. 7*, 74 Wn.2d 865, 868, 447 P.2d 593 (1968); *see also* Wash. Const. art. XI, § 10 ("Corporations for municipal purposes . . . shall be subject to and controlled by general laws."). Statutes relating to the same subject "are to be read together as constituting a unified whole, to the end that a harmonious total statutory scheme evolves which maintains the integrity of the respective statutes." *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974). Here, RCW 28A.405.320-.350 and RCW 7.16.040 relate to the same subject: the right of parties to appeal a hearing officer's decision. As such, they must be read together.

RCW 28A.405.320 expressly provides certificated employees an appeal from a hearing officer's decision as a matter of right. It does not expressly prohibit a school district's appeal. This is evident from the plain language of the statute.[1] Contrary to the majority's conclusion, this does not

mean that a school district cannot seek review via the long preexisting statutory writ of certiorari. RCW 7.16.040 states:

> A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

The majority concludes that the statutory writ of certiorari is unavailable to the District because the statutory writ allows for review of only clear errors of law. Majority at 15. According to the majority, this makes the statutory writ equivalent to an appeal as a matter of right, which it says school districts do not have under RCW 28A.405.320. Because the majority finds these two legislatively granted mechanisms of appeal to be equivalent, it

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[1] RCW 28A.405.320 provides:

> Any teacher, principal, supervisor, superintendent, or other certificated employee, desiring to appeal from any action or failure to act upon the part of a school board relating to the discharge or other action adversely affecting his or her contract status, or failure to renew that employee's contract for the next ensuing term, within thirty days after his or her receipt of such decision or order, may serve upon the chair of the school board and file with the clerk of the superior court in the county in which the school district is located a notice of appeal which shall set forth also in a clear and concise manner the errors complained of.

holds that the District is entitled to neither. In other words, if the legislature did not intend to give school districts the right to appeal under RCW 28.405.320, the legislature could not have intended school districts to have an appeal using the long-standing statutory writ of certiorari.

The majority's logic rests on a false premise. As we recently affirmed in *City of Seattle v. Holifield*, 170 Wn.2d 230, 240 P.3d 1162 (2010), the statutory writ of certiorari does not issue "only to correct mere errors of law." *Id.* at 245. In order to invoke the statutory writ, therefore, the District must show something more than error of law by the hearing officer. Here, the District has shown far more than an error of law by the hearing officer and is entitled to the statutory writ of certiorari. The hearing examiner "acted illegally." *Id.* at 241.

We review a superior court's decision to grant a writ of review de novo. *Commanda v. Cary*, 143 Wn.2d 651, 654, 23 P.3d 1086 (2001). The statutory writ of review shall issue when an inferior tribunal has "(1) exceeded its authority *or* acted illegally and (2) no appeal nor any plain, speedy, and adequate remedy at law exists." *Holifield*, 170 Wn.2d at 240. Here, the second prong is satisfied because RCW 28A.405.320 does not

expressly provide the District with a right to appeal. The question is whether the hearing officer "acted illegally" under the first prong.

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." *Id.* at 244-45. *Holifield* did not restrict this definition to review interlocutory decisions. *See id.* at 245 (deriving formula from RAP 13.5(b) *and* RAP 2.3(b)).

The second condition is clearly applicable here. The hearing officer committed error by excusing Mr. Vinson's inexcusable conduct in a public place and later lying during the official investigation. In *Clarke*, we held that sufficient cause for a teacher's discharge exists as a matter of law where the teacher's deficiency is "[ir]remediable *and* (1) materially and substantially affects the teacher's performance *or* (2) lacks any positive educational aspect or legitimate professional purpose." *Clarke*, 106 Wn.2d at 113-14 (emphasis

added) (citations omitted). The *Hoagland* test provides guidelines to assess whether the deficiency materially and substantially affects the teacher's performance.[11]

Mr. Vinson's conduct, however, is not a "teaching deficiency" that can be remedied. It is unacceptable behavior that lacks any positive educational aspect or legitimate professional purpose. *Clarke*, 106 Wn.2d at 113-14; *see also Mott v. Endicott Sch. Dist. No. 308*, 105 Wn.2d 199, 713 P.2d 98 (1986). In a case like this, the *Clarke* test is satisfied without consideration of whether Mr. Vinson's conduct materially and substantially affects his performance. It is only necessary to look to the nature of the conduct and determine whether it was acceptable for a teacher in the context in which it was performed.[12]

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[11] These guidelines are "(1) the age and maturity of the students; (2) the likelihood the teacher's conduct will have adversely affected students or other teachers; (3) the degree of the anticipated adversity; (4) the proximity or remoteness in time of the conduct; (5) the extenuating or aggravating circumstances surrounding the conduct; (6) the likelihood that the conduct may be repeated; (7) the motives underlying the conduct; and (8) whether the conduct will have a chilling effect on the rights of the teachers involved or of other teachers." *Hoagland*, 95 Wn.2d at 429-30.

[12] Even so, it is difficult to believe that Mr. Vinson's conduct has *not* materially and substantially affected Mr. Vinson's performance as a teacher, given the public nature of his rant at a former student and the protracted nature of this dispute, in part because of Vinson's falsehoods. *See Hoagland*, 95 Wn.2d at 428.

The hearing officer committed probable error by excusing Mr. Vinson's inexcusable conduct and concluding the District did not have sufficient cause to discharge Mr. Vinson. Additionally, not being able to discharge a teacher for cause substantially alters the status quo (if it does not, then the state of our educational system is sad indeed). The second factor of the *Holifield* test applies. The trial court should have granted the District's petition for review via the statutory writ of certiorari.[13] The Court of Appeals' decision should be affirmed.

Conclusion

The District has cause to discharge Mr. Vinson. Mr. Vinson called a former student profane and derogatory names in a public restaurant frequented by students near the school. He then lied about the incident during the course of an official school district investigation. The majority's decision to refuse the District an appeal in this case is legally incorrect and flatly inconsistent with the duty our constitution imposes on the school districts of our state to remove teachers who mistreat students and fail to meet their

[13] I agree with the majority's conclusion that the constitutional writ of certiorari is also available to the District but question whether the scope of review is necessarily limited to whether the hearing officer's actions were "arbitrary, capricious, or illegal" in a case involving article IX of our state constitution.

duties. I dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR: