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Potlatch Educ. Ass'n v. Potlatch School Dist. No. 285 Respondent's Brief Dckt. 35606

IN THE SUPREME COURT FOR THE STATE OF IDAHO

POTLATCH EDUCATION ASSOCIATION and DOUG RICHARDS,

Plaintiffs/Appellants,

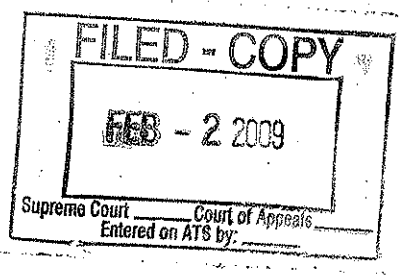
vs.

POTLATCH SCHOOL DISTRICT NO. 285, and BOARD OF TRUSTEES, POTLATCH SCHOOL DISTRICT NO. 285,

Defendants/Respondents.

Supreme Court Docket No. 35606

Latah DC Docket No. CV 2007-1151



RESPONDENTS' BRIEF

Appeal from the District Court of the Second Judicial District

State of Idaho, County of Latah

Honorable John R. Stegner, presiding

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Course of Proceedings Below 1

C. Statement of the Facts 1

II. RESTATED AND ADDITIONAL ISSUES ON APPEAL 6

III. ATTORNEYS FEES ON APPEAL 6

IV. ARGUMENT 6

A. Standard of Review for an Appeal from a Grant of Summary Judgment 6

B. The Language of the Professional Leave Clause Gives the School District Discretion to Determine What Constitutes Professional Development, and the School District Acted Reasonably in Denying Mr. Richards Professional Leave. 7

C. The Rule of *Contra Preferentem* is not Appropriate in this Case Because the Language of the Professional Leave Clause was Negotiated by Both Parties to the Master Agreement. 15

D. If the "Professional Development" Language in the Professional Leave Clause is Ambiguous, the Interpretation of the District Court and the School District Should Not be Disturbed on Appeal. 23

1. Judge Stegner's interpretation of the Professional Leave clause is supported by substantial and competent evidence, and should not be overturned on appeal. 24

2. Because the School District's decision was discretionary, it should not be disturbed on appeal. 27

E. The School District is Entitled to Attorney Fees on Appeal Because the PEA's Argument is Unreasonable 29

V. CONCLUSION 31

TABLE OF CASES AND AUTHORITIES

Cases

Bair v. Barron, 97 Idaho 26 (1975) 12
Big Butte Ranch v. Grasmick, 91 Idaho 6 (1966) 15, 16
Blackmon v. Zufelt, 108 Idaho 469 (Idaho Ct. App. 1985) 25
Boel v. Stewart Title Guar. Co., 137 Idaho 9 (2002) 24
Bowler v. Board of Trustees, 101 Idaho 537 (1980) 28
Brown v. First Federal Savings and Loan Association, 154 Mont. 79, 460 P.2d 97 (1969) 10, 11
Cheney v. Jemmett, 107 Idaho 829 (1984) 10, 11
Circle C Ranch Co. v. Jayo, 104 Idaho 353 (1983) 25
Daugharty v. Post Falls Highway Dist., 134 Idaho 731 (2000) 26
Daw v. Sch. Dist. 91 Bd. of Trs., 136 Idaho 806 (2001) 30
DBSI Signature Place, LLC v. BL Greensboro, L.P., 2006 U.S. Dist. LEXIS 86367 (D. Idaho Nov. 28, 2006) 19, 20
Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc., 107 Idaho 286 (Idaho Ct. App. 1984) 25
Epperson v. Ark., 393 U.S. 97 (1968) 29
Estate of Strever v. Cline, 278 Mont. 165 (Mont. 1996) 11
Fountain Powerboat Indus. v. Reliance Ins. Co., 119 F. Supp. 2d 552 (E.D.N.C. 2000 19
Funk v. Funk, 102 Idaho 521 (1981) 9, 10, 11
In re HWC Liquidating Co., 1999 WL 33631231 (W.D.N.C. 1999) 20
J.R. Simplot Co. v. Bosen, 144 Idaho 611 (2006) 15, 20
Joyner v. Adams, 87 N.C. App. 570 (N.C. Ct. App. 1987) 17, 18
Kolp v. Board of Trustees, 102 Idaho 320 (1981) 27
Kromrei v. AID Ins. Co., 110 Idaho 549 (1986) 7
Lettunich v. Key Bank Nat'l Ass'n, 141 Idaho 362 (2005) 6
Loomis v. Hailey, 119 Idaho 434 (1991) 25
Melichar v. State Farm Fire and Cas. Co., 143 Idaho 716 (2007) 24
Meredith Corp. v. Design & Lithography Center, Inc., 101 Idaho 391, 614 P.2d 414 (1980) ... 10
Morgan v. Firestone Tire & Rubber Co., 68 Idaho 506 (1948) 15, 16
Mut. of Enumclaw v. Box, 127 Idaho 851 (1995) 6, 24
O'Boskey v. First Fed. Sav. & Loan Ass'n, 112 Idaho 1002 (1987) 30
Prince v. Elm Investment Co., 649 P.2d 820 (Utah 1982) 10, 11
Riverside Dev. Co. v. Ritchie, 103 Idaho 515 (1982) 25
Robinson v. Joint Sch. Dist., 100 Idaho 263 (1979) 27
Rogers v. Gooding Pub. Joint Sch. Dist. No. 231 (in Re Rogers), 135 Idaho 480 (2001) 28
Sacred Heart Med. Ctr. v. Boundary County, 138 Idaho 534 (2003) 30
Shawver v. Huckleberry Estates, L.L.C., 140 Idaho 354 (2004) 7, 24
Spence v. Omnibus Industries, 44 Cal. App. 3d 970 (Cal. App. 4th Dist. 1975) 17
Stafford v. Klosterman, 134 Idaho 205 (2000) 7
State v. Barnett, 133 Idaho 231 (1999) 7
Stout v. Westover, 106 Idaho 533 (1984) 25
W.P. Harlin Construction Co. v. Utah State Road Commission, 19 Utah 2d 364, 431 P.2d 792 (1967) 10
Werry v. Phillips Petroleum Co., 97 Idaho 130 (1975) 15, 16
William G. Vandever & Co. v. Black, 645 P.2d 637 (Utah 1982) 10
Wolske Bros. v. Hudspeth Sawmill Co., 116 Idaho 714 (Idaho Ct. App. 1989) 30

Statutes

I.C. § 12-117 ..... 6, 29
I.C. § 12-121 ..... 6, 29, 30
I.C. § 33-512(4) 28
I.C. § 6-903(b) 28

Rules

I.A.R. 35(d) 1
I.R.C.P. 56(c) 6

Other Authorities

Restat. 2d of Contracts, § 206 ..... 16, 17

I. STATEMENT OF THE CASE

A. Nature of the Case

Potlatch School District No. 285 and Board of Trustees, Potlatch School District No, 285 (hereinafter collectively referred to as "School District", pursuant to ***I.A.R.*** 35(d)) agree with the general ideas put forth in the Opening Brief by Potlatch Education Association and Doug Richard (hereinafter collectively referred to as "PEA", pursuant to ***I.A.R.*** 35(d)), though they would state them differently. The nature of this case is a contract dispute between School District and PEA regarding whether the School District Master Agreement gives the School District discretion to determine whether to allow an employee to take a professional leave day.

B. Course of Proceedings Below

The School District does not disagree with the PEA's statement regarding the Course of Proceedings Below, *see* ***Appellants' Opening Brief***, pp. 1 – 3, and does not add anything to the PEA's statement.

C. Statement of the Facts

The School District disagrees with certain material facts as stated by the PEA, as stated below. Other material facts also necessary for consideration are presented below.

1. The PEA argues that "[t]he PEA and the School District eventually agreed to the School District's Professional Leave proposal." ***Appellants' Opening Brief***, p. 4. The School District disputes this contention. The Affidavit of Brian

Potter contains a "side-by-side comparison of the School Board's and the PEA's respective proposals concerning Professional Leave (with the School Board's proposals in the left column and the PEA's proposals in the right column)." *See* ***R. Vol. I***, pp. 82, 86 – 87. This side-by-side comparison reads as follows:

10.5 Professional Leave. Attendance at educational meetings or visiting other schools is permitted at full pay if such absence is approved by the Superintendent. If any teacher wishes to be absent from duty for a brief period to attend a professional meeting or workshop, to visit schools, or otherwise pursue professional development, a written request for approval of such absence should be signed by the principal and filed in the superintendent's office at least ten (10) working days prior to the first day of anticipated absence. Professional leave is not to exceed two (2) days per year and is noncumulative.	5.6 Professional Leave Attendance at educational meetings or visiting other schools is permitted at full pay if such absence is approved by the principal. If any supervisor, principal, teacher, or other employee wishes to be absent from duty for a brief period to attend a professional meeting, to visit schools, or for any personal reason which is not an unavoidable emergency, a written request for approval of such absence should be signed by the principal and filed in the superintendent's office at least two (2) days prior to the first day of anticipated absence.

R. Vol. I, p. 87. The Professional Leave provision incorporated into the Master Agreement reads:

> 10.5 Professional Leave Attendance at educational meetings or visiting other schools is permitted at full pay if such absence is approved by the Principal. If any certificated personnel wishes to be absent from duty for a brief period to attend a professional meeting, to visit schools, or otherwise pursue professional development, a written request for approval of such absence should be signed by the Principal and filed in the Superintendent's office at least two (2) days prior to the first day of anticipated absence. Professional leave is not to exceed two (2) days per year and is non-cumulative. The Principal may make exceptions on the number of days allowed when necessary.

R. Vol. II, pp. 185 – 86. When compared with the versions proposed by the School District and by the PEA, the final version is an amalgamation of verbiage proposed

by both entities, as well as some new language. Thus it is unfair for the PEA to argue that both sides "eventually agreed to the School District's" proposed language for the Professional Leave provision.

2. The PEA argues that "The School District's sole reason for denying Richards professional leave and/or refusing to reclassify the personal leave to professional leave was based on its belief that Richards' defense of his Master's final project did not constitute professional leave under the terms of the Master Agreement." ***Appellants' Opening Brief***, p. 6. This is not an entirely accurate statement. More accurately, that was the only *stated* reason why the School District denied Mr. Richards professional leave. *See* ***R. Vol. I***, pp. 108, 110. The School District also argued that Mr. Richards was not entitled to additional professional leave because he had already used up more than two professional leave days for the year. ***R. Vol. I***, pp. 137 – 39. However, the District Court later ruled that the School District had waived this argument, as the School District had not given it as a reason to deny professional leave during any of the grievance process. ***Tr. Vol. I***, p. 32, ll. 4 – 13. Regardless, it is incorrect for the PEA to state the "sole reason" Mr. Richards was denied professional leave was any one particular reason.

3. Along the same lines as above, the PEA states that Mr. Richards "requested a total of two (2) professional leave days for absences that he believed qualified for professional leave purposes, one of which was to defend his Master's final project." ***Appellants' Opening Brief***, p. 6. While this alleged fact is not

necessarily relevant to the decision of this case[1], it is nonetheless a factual issue. In its Response to the PEA's Motion for Summary Judgment, the School District has pointed to numerous other times during the school year in question in which Mr. Richards was granted professional leave, both before and after the incident in question. *See* ***R. Vol. II***, pp. 217, 219 – 20, 222, and 229. The School District accepts that this is a disputed issue of fact.[2]

4. Mr. Richards was hired as a music teacher, and his teaching contract specifically indicates that he was assigned as an "Elementary/Secondary Music Teacher." ***R. Vol. I***, p. 71.

5. The School District does not argue that Mr. Richards was defending his master's degree on or about May 3, 2007. ***Appellants' Opening Brief***, pp. 5 – 6. However, the type of master's degree is important. It is relevant to note that Mr. Richards' master's degree was not a general "Master's Degree in Education" as contended by the PEA, ***Appellant's Opening Brief***, p. 5, but was more specifically a master's degree in education administration. ***R. Vol. I***, p. 110.

6. Certificated teachers typically have 190-day contracts. ***Tr. Vol. I***, p. 27, ll. 24 – 25; ***R. Vol. II***, p. 197. The Master Agreement contains provision for a minimum of 24 days of various types of leave that must be given to certificated personnel if requested. ***R. Vol. I***, p. 133. This includes 11 days of mandatory sick

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[1] The School District makes this argument on the basis that Judge Stegner ruled that the School District had essentially waived its right to bring this argument.

[2] Judge Stegner did not address this issue as he considered the School District's arguments related to it as waived.

leave, ***R. Vol. II***, p. 183, three (3) days of mandatory family leave, ***R. Vol. II***, p. 185, three (3) days of mandatory funeral leave, ***R. Vol. II***, p. 185, four (4) days of personal leave, ***R. Vol. II***, p. 185, and three (3) days of association leave, ***R. Vol. II***, pp. 187 – 88. This calculation of 24 mandatory leave days does not include the unlimited number of paid leave days to serve on jury duty. ***R. Vol. II***, p. 187. Each of these types of leave is non-discretionary, stating that the School District "shall" grant such leave if requested. *See* ***R. Vol. II***, pp. 183, 185, 187 – 88 (Master Agreement §§ 10.1, 10.3, 10.4, and 10.7). The only type of leave discussed in the Master Agreement which does not contain language mandating that the School District provide such leave if requested is professional leave. ***R. Vol. I***, pp. 185 – 86.

7. The PEA left out an essential fact which will aid this Court in understanding the District Court's ruling. District Judge John R. Stegner, from whose ruling this appeal is taken, was integrally involved in the negotiation process regarding the Master Agreement between the School District and the PEA. ***Tr. Vol. I***, p. 6, ll. 2 – 20; p. 13, ll. 11 – 15. Judge Stegner stated "Well, having spent four days in trying to help the District and the Education Association hammer out the agreement, I don't think I've ever seen an as arms-length agreement as that which I tried to help hammer out." ***Tr. Vol. I***, p. 13, ll. 11 – 15. Judge Stegner was intimately familiar with the Master Agreement, the background negotiations, and the intent of the parties. Therefore, he was in a uniquely qualified position to make the ruling that he made.

II. RESTATED AND ADDITIONAL ISSUES ON APPEAL

The School District believes that the issues on appeal may be simply stated as follows:

(a) Did the School District, through its principals and administrators, have discretion in determining whether to grant Mr. Richards' request for professional leave?

(b) If so, did the School District act within the bounds of its discretion?

III. ATTORNEYS FEES ON APPEAL

The School District requests that they be awarded attorney fees on appeal pursuant to ***I.C.*** §§ 12-121 and 12-117.

IV. ARGUMENT

A. Standard of Review for an Appeal from a Grant of Summary Judgment.

"On an appeal from an order granting summary judgment, this Court's standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment." ***Lettunich v. Key Bank Nat'l Ass'n***, 141 Idaho 362, 366 (2005). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***I.R.C.P.*** 56(c).

"When questions of law are presented, this Court exercises free review and is not bound by findings of the district court, but is free to draw its own conclusions from the evidence presented." ***Mut. of Enumclaw v. Box***, 127 Idaho 851, 852 (1995). "The interpretation of a contract's meaning and legal effect are

questions of law to be decided by the Court if the terms of the contract are clear and unambiguous." ***State v. Barnett***, 133 Idaho 231, 234 (1999). "The fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits." ***Shawver v. Huckleberry Estates, L.L.C.***, 140 Idaho 354, 360 (2004) (citing ***Kromrei v. AID Ins. Co.***, 110 Idaho 549, 551 (1986), and ***Stafford v. Klosterman***, 134 Idaho 205, 207 (2000)).

B. The Language of the Professional Leave Clause Gives the School District Discretion to Determine What Constitutes Professional Development, and the School District Acted Reasonably in Denying Mr. Richards Professional Leave.

The PEA contends that Judge Stegner erred on numerous grounds in not granting summary judgment to the PEA. However, Judge Stegner's determination that the School District was entitled to Summary Judgment was based on a very simple legal construct: the Professional Leave provision gives the School District discretion to determine whether to grant professional leave, and the School District did not act unreasonably in denying Mr. Richards' request for professional leave. In Judge Stegner's own words:

> . . . I think by the use of the word "if," the parties agree that some discretion would be afforded the District. Then, I think it's incumbent upon me to try to identify the parameters of that discretion.
>
> Mr. Julian referred to arbitrary and capricious. I think that's clearly something that is a direction they cannot go. I think general

contract provisions would require good faith and fair dealing within the parameters of the interpretations of this agreement.

So, the District has discretion. The parameters are arbitrary and capricious and good faith and fair dealing. And then the question is *does a master's in administration for a teacher of music fall within* professional development.

While I thought before when I read the agreement, I thought that the Education Assocation and Mr. Richards would win. I think that after having had a chance to review the information and have the facts laid out before me, while your initial point may be that it was, Mr. Rumel, that it may be short-sighted on the part of the District, I don't think they have violated the contract. So, I am granting summary judgment on behalf of the District as far as this particular issue is concerned.

. . .

Well, were this a master's in pedagogy, music pedagogy, music performance, anything that I would consider to be within the ambit of Mr. Richards' responsibilities, I don't think there would be any doubt that that would – that this decision would be different than it is today. Were there some suggestion that the District were cultivating Mr. Richards for an administrative position, or if somebody had said to him we'd like you to pursue administration because we need administrators, I think the facts would be different. . . .

. . .

. . . I think the District has an obligation to identify some problem in providing it, i.e, [sic] it came too quickly, or there aren't any subs that are available to provide leave on this particular occasion, those I think would be legitimate bases for the District to deny the request. Beyond that, I don't know what else would.

And I think there has to be – I think arbitrary and capricious are – it cannot be arbitrary and capricious. It can't be a violation of good faith and fair dealing. And as I – I mean, I think you hit the nail on the head at the outset. It may be short-sighted, but whether that's within the discretion is another question.

Tr. Vol. I, p. 32, l. 13 – p. 33, l. 13; p. 34, ll. 2 – 12; p. 34, l. 23 – p. 35, l. 10.

Judge Stegner makes it clear that he believes that the School District has discretion in determining whether to grant professional leave. This is in accord with the

language of the Master Agreement, which states "Attendance at educational meetings or visiting other schools is permitted at full pay *if such absence is approved by the Principal*." ***R. Vol. II***, p. 185 (Master Agreement § 10.5). There is nothing in the Master Agreement which would contradict the plain language of this statement, which is that professional leave is available only if it is approved by the Principal. Further, this language is different from every other type of leave discussed in the Master Agreement, all of which state that the leave "shall" be granted. *See* § I.C.6., *supra*. Thus, Judge Stegner properly recognized that there was discretion.

The next issue he discussed was whether the School District acted within the bounds of that discretion. Judge Stegner determined that there were some limits on that discretion, and that it was not unlimited. ***Tr. Vol. I***, p. 32, l. 24 – p. 33, l. 3. The Idaho Courts have recognized that, in some circumstances, a contract provision which gives a party seemingly unlimited discretion to accept or deny a particular act by another party may be inherently limited. In ***Funk v. Funk***, 102 Idaho 521 (1981), a lessee sought the consent of the lessor to sublease farm land. ***Funk v. Funk***, 102 Idaho 521, 522 (1981). The lease stated that the lessee could sublease the property if they obtained consent of the lessor. ***Funk***, 102 Idaho at 522. The lessor declined to give consent unless the lease terms were substantially rewritten. ***Funk***, 102 Idaho at 522. This Court held that under the circumstances, though the language of the contract did not specifically state, "the consent of a

lessor may not be *unreasonably* withheld." ***Funk***, 102 Idaho at 524 (emphasis added).

A similar result was reached in ***Cheney v. Jemmett***, 107 Idaho 829 (1984), another case which involved a property contract dispute. In that case, the contract stated that "[the] Purchasers agree that they will not assign this agreement, nor any interest herein or in the property hereby agreed to be sold and purchased, without first obtaining the written consent of Sellers." ***Cheney***, 107 Idaho at 830. Regarding this clause, this Court stated "In our view, the interpretation of a non-assignment clause conditioned on the consent of the seller as in the present case, necessarily implies that the seller will act reasonably and in good faith in exercising his right of approval." ***Cheney***, 107 Idaho at 832. The Court further cited to other cases holding similarly:

> The Utah Supreme Court cogently expressed our views in this regard. "Where a contract provides that the matter of approval of performance is reserved to a party, he must 'act fairly and in good faith in exercising that right. He has no right to withhold arbitrarily his approval; there must be a reasonable justification for doing so.'" ***Prince v. Elm Investment Co.***, 649 P.2d 820, 825 (Utah 1982); (quoting ***William G. Vandever & Co. v. Black***, 645 P.2d 637, 639 (Utah 1982)); *see also* ***W.P. Harlin Construction Co. v. Utah State Road Commission***, 19 Utah 2d 364, 431 P.2d 792 (1967). Additionally, the Supreme Court of Montana has stated that "[when] a matter in a contract is left to the determination of one party alone, that party's determination is conclusive *if he acts in good faith.*" ***Brown v. First Federal Savings and Loan Association***, 154 Mont. 79, 460 P.2d 97, 100 (1969) (emphasis added); cf. ***Meredith Corp. v. Design & Lithography Center, Inc.***, 101 Idaho 391, 614 P.2d 414 (1980) (satisfaction requirement determined by reasonable person standard).

Cheney, 107 Idaho at 832 – 33 (emphasis in the original).

Both ***Funk*** and ***Cheney*** involve property contract disputes surrounding the right of assignment. It is not clear whether this Court intended this line of precedent to extended to non-assignment contract issues. The language cited in ***Cheney***, though, is broad enough to include all contractual issues, and not just those involving rights of assignment.[3] Thus, the issue is twofold: first, if Judge Stegner was incorrect, and there is no requirement that the School District act in good faith or be reasonable in exercising discretion, then Judge Stegner's ruling was still proper. He recognized that the School District exercised its discretion, which the Master Agreement clearly allows the School District power to do. Therefore, the School District cannot be wrong, regardless of what decision it made, so long as it exercised discretion.

Second, if this Court determines that the School District is bound by a standard of "reasonableness" in the exercise of its discretion, then the issue was still appropriately decided by Judge Stegner. The facts show that Mr. Richards' teaching contract shows that his assignment was as an "Elementary/Secondary Music Teacher". ***R. Vol. I***, p. 71. In contrast, Mr. Richards' Masters' Degree was in Educational Administration. ***R. Vol. I***, p. 110.[4] The PEA makes a great deal of

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[3] It should be noted that ***Prince v. Elm Inv. Co.***, 649 P.2d 820 (Utah 1982) also involves a property issue, but not the right of assignment. The issue in ***Prince*** is under what circumstances a party can reject a right of first refusal. ***Prince***, 649 p.2d at 821. ***Brown v. First Fed. Sav. & Loan Ass'n***, 460 P.2d 97 (Mont. 1969) (overruled on other grounds, ***Estate of Strever v. Cline***, 278 Mont. 165, 178 (Mont. 1996)) also involves property issues, but the contract in question was a mortgage loan. ***Brown***, 460 P.2d at 98.

[4] As an aside, the School District finds delicious irony in this fact. Mr. Richards is presumably getting his Masters Degree in Educational Administration to become a principal or superintendent. Under the PEA's theory of this case, the teacher has the discretion to determine whether a professional leave day must be granted. If Mr. Richards were to become an administrator, by this

arguing that a Master's Degree in Education is professional development. ***Appellants' Opening Brief***, pp. 12 – 14. The PEA supports this by pointing to various dictionary definitions and other portions of the Master Agreement. In looking at the Master Agreement, the PEA points out that the master's degree would have an affect on Mr. Richards' salary, and therefore constitutes professional development. ***Appellants' Opening Brief***, p. 13. However, neither the salary schedule nor the salary requirements refer to the Professional Leave provision. They also do not specify what sort of credits will affect salary, but only state when such credits will be counted. ***R. Vol. I***, 106. Thus, once the temporal hurdle is overcome, any credits toward any degree will count for salary advancement. Further, the rule cited by the PEA is "words used in one sense in one part of the contract are deemed to have been used in the same sense in another part of the same instrument." ***Bair v. Barron***, 97 Idaho 26, 30 (1975). In this case, the PEA is trying to compare "professional development" in the professional leave clause with "professional growth" in the salary provisions. ***Appellants' Opening Brief***, p. 13. There is no indication that these two phrases were intended to be construed together, as they are not the same wording.

With regard to the dictionary definitions cited by the PEA, the School District cannot argue that the definitions do not say what they say. But by the same token it is not clear that the definitions are in any way helpful. The PEA's definition of

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lawsuit he would effectively have removed from himself the discretion clearly granted to School District administration by the terms of the Professional Leave provisions. At a minimum, this goes to show that it was not unreasonable for the School District to determine that a Masters' Degree in educational administration does not qualify as professional development.

"professional" ("an occupation or vocation requiring training in the liberal arts or the sciences and advanced study in a specialized field," ***Appellants' Opening Brief***, p. 13) is very broad. Under this definition, a teacher is a professional. So are an astronomer, a doctor, a priest, a lawyer, an orchestra conductor, an architect, and a cabinet maker. If Mr. Richards chose to develop ("to aid in the growth of," ***Appellants' Opening Brief***, p. 13) as an astronomer, doctor, priest, lawyer, etc., does that mean under the PEA's interpretation, he must be given time off to develop his profession? Certainly this is not required or contemplated by the Professional Leave provisions. So where is the boundary of what defines professional development (as that term is undefined)? The language of the Professional Leave agreement itself gives some idea of the limits of what constitutes professional development: "Attendance at educational meetings or visiting other schools . . . to attend a professional meeting, to visit schools . . ." ***R. Vol. II***, p. 185. This language appears to indicate that the boundaries of professional development are related to the position the employee already has.

While the definitional boundaries surrounding the term "professional development" are vague, what keeps this provision from becoming fatally vague is that the ultimate decision is given to the Principal to determine whether professional leave will be granted. This person must therefore implicitly also have the authority to determine what constitutes professional development.

In this case, Mr. Richards received a note informing him that the Principal did not consider defending a Masters' Degree in educational administration professional

development, as it was not related to Mr. Richards' duties as a music teacher. ***R. Vol. I***, p. 73. After filing a grievance, the School District further notified Mr. Richards that getting his master's degree did not qualify as professional development. ***R. Vol. I***, pp. 108 and 110. These are not unreasonable conclusions. As Judge Stegner notes, "[w]ere there some suggestion that the District were cultivating Mr. Richards for an administrative position, or if somebody had said to him we'd like you to pursue administration because we need administrators, I think the facts would be different." ***Tr. Vol. I***, p. 34, ll. 7 – 12. While a master's degree might affect Mr. Richards' salary, the School District clearly recognized that a master's degree in education administration was not designed to help Mr. Richards continue as a music teacher. A music teacher would not get a masters in education administration to continue working as a music teacher; the goal can only be to become a principal or superintendent. While a school district administrator and a music teacher may be professions within the same general area, they are not the same profession. Therefore, it was reasonable for the School District to determine that Mr. Richards use of time constituted personal time. It is no different than a lawyer attempting to become a judge; both professions are in the same field, but being a judge has very little to do with the lawyer's current case load. Making the switch (and going through the training for such switch) is a personal effort.

The Professional Leave provision gives the School District discretion in determining whether to grant professional leave, and inherently to decide what constitutes professional development. The School District exercised that discretion,

and certainly within the bounds of reason. Therefore, there is no cause for this Court to determine that the School District has breached Mr. Richards' contract, or the contract with the PEA.

C. The Rule of *Contra Preferentem* is not Appropriate in this Case Because the Language of the Professional Leave Clause was Negotiated by Both Parties to the Master Agreement.

The PEA makes a contract interpretation argument, which under the circumstances of this case, is not merited. The PEA relies on the rule of *contra proferentem*[5], which holds that "that a contract should be construed most strongly against the party preparing it or employing the words concerning which doubt arises." ***J.R. Simplot Co. v. Bosen***, 144 Idaho 611, 616 (2006). There are numerous Idaho cases which rely on this rule. *See* ***Big Butte Ranch v. Grasmick***, 91 Idaho 6, 9 (1966); ***Werry v. Phillips Petroleum Co.***, 97 Idaho 130, 136 (1975); ***Morgan v. Firestone Tire & Rubber Co.***, 68 Idaho 506, 519 (1948). However, in each of these cases, the Supreme Court notes in essential factor that is uniformly present: one party unilaterally provided the language at issue, without the input of the other party. *See* ***J.R. Simplot Co. v. Bosen***, 144 Idaho 611, 615 – 16 (2006) ("Bosen filled out and signed the Commercial Sales Agreement. . . Bosen signed as the Applicant without designating that he was signing in a representative capacity. . . The court also stated that any ambiguity created by the manner in which Bosen filled out and signed the Commercial Sales Agreement should be construed against

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[5] "Against the party who proffers or puts forward a thing." ***Black's Law Dictionary***, Rev. Fourth Ed., "contra proferentem".

him."); ***Big Butte Ranch v. Grasmick***, 91 Idaho 6, 9 (1966) ("The evidence left no doubt that appellant, Big Butte Ranch, through its attorney Ranquist, selected the language in its material parts. Ranquist, acting for aplant [sic], actually drafted the contract at his office in Salt Lake City and forwarded it to respondent for approval."); ***Werry v. Phillips Petroleum Co.***, 97 Idaho 130, 136 (1975) ("[T]he entire contract was written by appellant; the basic agreement was a form provided by Phillips and the subsequent letters were written by a Phillips employee. Phillips was the party selecting the language which was used."); ***Morgan v. Firestone Tire & Rubber Co.***, 68 Idaho 506, 519 (1948) ("The contract was on one of respondent's printed forms, prepared by it and containing its language.").

The rule of *contra proferentem* is not applicable to every contract. The Restatement Second of Contracts provides some insight. The Restatement rules state "In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." ***Restat. 2d of Contracts***, § 206. This language is in conformity with the Idaho cases cited above. However, the comments give the rationale for the rule, which indicates that it isn't always applicable:

> a. Rationale. . . . The rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position, but it is not limited to such cases. It is in strictness a rule of legal effect, sometimes called construction, as well as interpretation: *its operation depends on the positions of the parties as they appear in litigation*, and sometimes the result is hard to distinguish from a denial of effect to an unconscionable clause.

Restat. 2d of Contracts, § 206 (comment a). This rationale indicates that the point of this rule is to, as it were, even the playing field between parties of different bargaining strength. As one Court stated,

> Since the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change that language, any ambiguity in the contract is resolved against the draftsman and questions of doubtful interpretation will be construed in favor of the subscribing party.

Spence v. Omnibus Industries, 44 Cal. App. 3d 970, 974 (Cal. App. 4th Dist. 1975).

Logic would dictate that where the parties are of equal bargaining strength, then this rule of construction is unnecessary. There are numerous cases which hold to this proposition. In ***Joyner v. Adams***, 87 N.C. App. 570 (N.C. Ct. App. 1987), the appellate court remanded the case to the trial court for certain findings of fact. ***Joyner v. Adams***, 87 N.C. App. 570, 576 (N.C. Ct. App. 1987). On remand the appellate court gave this advice:

> In remanding, we necessarily find that the trial court erred in awarding judgment for plaintiff based on the rule that ambiguity in contract terms must be construed most strongly against the party which drafted the contract. The rule is essentially one of legal effect, of "construction" rather than "interpretation," since it can scarcely be said to be designed to ascertain the meanings attached by the parties. The rule's application rests on a public policy theory that the party who chose the word is more likely to have provided more carefully for the protection of his own interests, is more likely to have had reason to know of uncertainties, and may have even left the meaning deliberately obscure. Consequently, the rule is usually applied in cases involving an adhesion contract or where one party is in a stronger bargaining position, although it is not necessarily limited to those situations. In this case, where the parties were at arm's length and were equally sophisticated, we believe the rule was improvidently invoked.

> Before this rule of construction should be applied, the record should affirmatively show that "the form of expression in words was actually chosen by one [party] rather than by the other." The only evidence admitted regarding who drafted the 1975 amendment is Mr. Joyner's testimony that no one in his law firm had anything to do with it. Even assuming this is sufficient to support an inference that defendant or his agent wrote the provision, it does not establish that defendant can be charged with having chosen its language.
>
> The record reveals that both parties are experienced in the real estate business and that they bargained from essentially equal positions of power. The record also shows the parties engaged in a fairly protracted negotiation process, with the provision in question undergoing particular scrutiny. Nothing in the record shows that it was defendant, rather than plaintiff, who "drafted" the provision. Instead, it appears that the language was assented to by parties who had both the knowledge to understand its import and the bargaining power to alter it. Therefore, the policy behind the rule is not served in its application here and the trial court erred in using the rule to award judgment for plaintiff.

Joyner v. Adams, 87 N.C. App. 570, 576 – 77 (N.C. Ct. App. 1987) (internal citations omitted). The appellate court clearly held that the rule put forward by the PEA is not applicable where both parties contributed to the language of the contract.

Other courts have held similarly. In an Idaho Federal District Court case, the judge found as follows:

> At the time of the May 9, 2006 ruling on Plaintiff's first Motion for Summary Judgment, there was evidence and information in the record explaining that the Contract was "prepared by [Defendants'] attorney and counsel for [Plaintiff]," that is, it was "negotiated between the two attorneys," involved "many drafts," and "took a long time." In addition, Defendants had noted in their summary judgment response papers that "[a]lthough the Earnest Money Contract was initially prepared by counsel for the Greensboro Defendants, the parties exchanged at least nine (9) separate drafts of the [Contract] prior to its execution." Thus, the Court did not apply the principle that

> ambiguities should be construed against the party who drafted the instrument because the record demonstrated that both parties and their counsel actively participated in negotiations leading to drafting of the final version of the Contract.
>
> Even if Greensboro had chosen the language in Section 9.4(e) without any input or negotiation with Plaintiff's counsel, the rule Plaintiff relies on (known as the rule of contra proferentum [sic]) is usually applied in cases involving an adhesion contract or where one party is in a stronger bargaining position, although it is not necessarily limited to those situations.

DBSI Signature Place, LLC v. BL Greensboro, L.P., 2006 U.S. Dist. LEXIS 86367, *9 – *10 (D. Idaho Nov. 28, 2006) (internal citations omitted).[6]

Other cases have held similarly. "[W]hen the parties to the insurance agreement are sophisticated and jointly negotiate the policy, there is no need to construe ambiguities against the insurance company. The intent of construction against the insurer arises from concern over the lack of bargaining power between the insurance company and the insured." ***Fountain Powerboat Indus. v. Reliance Ins. Co.***, 119 F. Supp. 2d 552, 555 (E.D.N.C. 2000). Another case has stated "[w]hile it may be true as a general rule that ambiguities are construed against the drafter, there are a number of reasons why that principle should not apply," including when the contracting parties are sophisticated, commercial entities who negotiated on equal footing and the language at issue was accepted without negotiation or comment. ***In re HWC Liquidating Co.***, 1999 WL 33631231, *5

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[6] The Court in ***DBSI Signature Place, LLC***, later determined that summary judgment was not appropriate in this case, as there was an issue of fact as to whether both parties contributed to a particular provision, or whether one party created it unilaterally. ***DBSI Signature Place, LLC***, 2006 U.S. Dist. Lexis 86367 at *14. In this case, the facts show that the Professional Leave clause was clearly negotiated by both parties.

(W.D.N.C. 1999) (cited in ***DBSI Signature Place, LLC***, 2006 U.S. Dist. LEXIS 86367 at *14).

While there does not appear to be an Idaho state court case holding that the rule of *contra proferentem* does not apply in every contract case, there is similarly no Idaho case holding that it must be applied. Each of the Idaho cases cited above shows that one party unilaterally provided the language at issue. In this case, the facts show that this was not what occurred. As noted above, both the School District and the PEA provided proposed language for the Professional Leave clause. *See* ***R. Vol. I***, p. 87. The enacted language of the Professional Leave clause is neither solely the language proposed by the PEA or solely the language proposed by the School District, but is an amalgam of the two, and in fact, contains language that was not originally proposed by either party. As Judge Stegner said, "I don't think I've ever seen an as arms-length agreement as that which I tried to help hammer out." ***Tr. Vol. I***, p. 13, ll. 13 – 15. Under these circumstances, it is not necessary to apply the rule of *contra preferentem*.

It should be noted that the rule applies "Where there is doubtful language in a contract." ***J.R. Simplot Co. v. Bosen***, 144 Idaho 611, 616 (2006). The PEA contends that the doubtful language is the term "pursue professional development". ***Appellants' Opening Brief***, pp. 12 – 13. The PEA spends significant amounts of time discussing how when Mr. Richards was defending his Master's Degree final project, he was pursuing "professional development". ***Appellants' Opening Brief***, pp. 12 – 15. However, one particular comment in the PEA's brief

compels the School District to conclude that the true language at issue is not "professional development". The PEA states "For all of these reasons, the Professional Leave provisions of the Master Agreement unambiguously *required* the School District to approve Richards' request to use a professional leave day. . . ." ***Appellants' Opening Brief***, pp. 13 – 14 (emphasis added). The issue then is not whether Mr. Richards' master's degree project constitutes professional development, but whether there is any *discretion*. The PEA would have this Court conclude (as it attempted to do with the District Court), that when professional leave is requested, it must be granted. As noted by the PEA very early in these proceedings,

> While leave approvals must come from the principal concerning teacher absences, nowhere in the language of the Master Agreement concerning professional leave does it suggest that the administration (principal, superintendent or board) has the sole right to determine what professional development is. The professional himself/herself clearly should be left to make that determination within reason of the teaching profession [sic] and the limitation of two days [sic] if they have not already been afforded professional development opportunities.

R. Vol. I, p. 111. Thus, the troublesome language is not "professional development", but is "if such absence is approved by the Principal." ***R. Vol. I***, p. 185 (Master Agreement § 10.5). Oddly, though both the School District and the PEA both suggested a version of this language, the actual language contained in the Professional Leave provision is the language *proposed by the PEA*. *Compare* ***R. Vol. I***, p. 87 *with* ***R. Vol. II***, pp. 185 – 86. Thus, if the PEA is so adamant that the rule of *contra preferentem* be applied, then in reality it should be applied against the

PEA. The facts show that if the PEA did not want any discretion on the part of the School District, they should not have suggested the language that gave the principal the discretion to determine whether professional leave will be allowed. They should have required that the Professional Leave provision contain the same mandatory language as every other leave provision in the Master Agreement. Or in the alternative, the PEA should have demanded the inclusion of language that spelled out the limits of the principal's discretion, or give the discretion to the certificated personnel requesting professional leave. Because they did not, the Court will either dictate that the School District has unlimited discretion, or in the alternative (as described above), a reasonableness standard is implied into the Professional Leave clause. In either case, the School District should prevail.

This case is not about what the PEA would like the Court to believe it is about. It is not about whether the School District improperly denied Mr. Richards' request to take a professional leave day. Quite the opposite, the PEA is realizing that the Professional Leave provision to which they agreed is not mandatory, which they clearly want it to be. Now they are trying to convince this Court that the Professional Leave clause is mandatory, and that the School District must automatically grant professional leave when requested. Further, the PEA would have this Court conclude that the employee and not the School District has the discretion to determine what is and what is not professional leave. However, the language on that point is extraordinarily clear, and is certainly not ambiguous. "Attendance at educational meetings or visiting other schools is permitted at full

pay *if such absence is approved by the Principal*." ***R. Vol. I***, p. 185 (emphasis added). The language could not be any clearer.

The PEA argues that Judge Stegner rewrote the Professional Leave provisions of the Master Agreement to the benefit of the School District. ***Appellants' Opening Brief***, p. 15. This, however, is exactly what the PEA was (and is) trying to do; they want the Professional Leave provision to be read as giving the employee the discretion, making professional leave mandatory. This is inappropriate. Just as Judge Stegner read the language of the Professional Leave provision interpreted its straightforward language[7], the School District requests that this Court similarly apply the straightforward language of the Professional Leave provision. If the rule of *contra proferentem* applies, it should be applied against the PEA, who provided the discretionary language. The School District reasonably acted within its discretion. As Judge Stegner noted, though one may not agree with the School District's determination, ***Tr. Vol. I***, p. 35, ll. 8 – 10, it is clearly not an unreasonable conclusion.

D. If the "Professional Development" Language in the Professional Leave Clause is Ambiguous, the Interpretation of the District Court and the School District Should Not be Disturbed on Appeal.

If this Court agrees with the PEA that the language at issue in the Professional Leave clause is the "professional development" language, then it would appear, at a minimum, that the language is ambiguous, because it is

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[7] Admittedly, Judge Stegner implied a reasonableness standard into the discretion of the School District. However, as discussed above, there are a number of cases holding that this may be allowable.

reasonably susceptible to conflicting interpretations. *See* ***Melichar v. State Farm Fire and Cas. Co.***, 143 Idaho 716, 720 (2007). Both the School District and the PEA contend that this language is unambiguous. ***Appellants' Opening Brief***, p. 14.

However, clearly, both the School District and the PEA have come to different conclusions regarding whether Mr. Richards' master's degree in educational administration falls within the ambit of "professional development". There is significant caselaw holding that the interpretation of an ambiguous contract should not be disturbed on appeal if there is substantial and competent evidence to support the interpretation. Similarly, this Court has held numerous times that the discretionary decisions of a school board should not be second guessed by the courts. Each of these issues is discussed below.

1. Judge Stegner's interpretation of the Professional Leave clause is supported by substantial and competent evidence, and should not be overturned on appeal.

"If a contract is found ambiguous, its interpretation is a question of fact." ***Shawver v. Huckleberry Estates, L.L.C.***, 140 Idaho 354, 361 (2004). "The question of whether a contract is ambiguous is itself a question of law." ***Boel v. Stewart Title Guar. Co.***, 137 Idaho 9, 13 (2002). As questions of law are reviewed de novo on appeal, *see* ***Mut. of Enumclaw v. Box***, 127 Idaho 851, 852 (1995), this Court must determine whether the contract itself was ambiguous. If the contract is ambiguous, then Judge Stegner's findings regarding whether the term "professional development" includes Mr. Richards' master's degree in educational administration is a question of fact. Factual findings will not be disturbed on appeal if they are

supported by substantial and competent, though conflicting, evidence. *See* ***Circle C Ranch Co. v. Jayo***, 104 Idaho 353, 355 (1983); ***Stout v. Westover***, 106 Idaho 533, 534 (1984); ***Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.***, 107 Idaho 286, 290 (Idaho Ct. App. 1984) (the appellate court is "constrained to uphold the district judge's findings of fact unless they are clearly erroneous."). Further, the summary judgment standard changes where there will be a nonjury trial:

> When an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.

Loomis v. Hailey, 119 Idaho 434, 437 (1991). *See also* ***Riverside Dev. Co. v. Ritchie***, 103 Idaho 515, 519 (1982); ***Blackmon v. Zufelt***, 108 Idaho 469, 470 (Idaho Ct. App. 1985). As the PEA notes, the demand for a jury trial was withdrawn, and this issue was to be a bench trial. ***Appellants' Opening Brief***, p. 2. Therefore, Judge Stegner was allowed to draw what he believed were to be the most reasonable inferences from the facts presented.

As discussed above, the School District believes that there is substantial and competent evidence to support the interpretation that Mr. Richards' master's degree in educational administration does not qualify as "professional development". Specifically, there are the inherent limits in the language of the Professional Leave clause itself that give guidance to this interpretation. Professional leave is specifically intended to be used for certificated personnel to

attend "educational meetings" or to "visit[] other schools". ***R. Vol. II***, p. 185. The Professional Leave clause also allows for professional leave "to attend a professional meeting, to visit schools, or otherwise pursue professional development." ***R. Vol. II***, p. 186. These limitations are directly related to the performance of a teacher's current duties, as opposed to their future career. "Educational meetings," "visiting other schools," and "professional meetings" do not in any way relate to a music teacher's desire to become an administrator. A contract must be read as a whole. ***Daugharty v. Post Falls Highway Dist.***, 134 Idaho 731, 735 (2000). Therefore, it makes little sense for the PEA to argue that three of the restrictions listed in the Professional Leave clause relate specifically to the teacher's current duties, and that the fourth limit ("professional development") is open ended, and can include anything related to possible future careers, whether in or out of the same field. The "professional development" limitation should be read with the same intention as the other limitations: namely, professional development means development related to the teacher's current duties.

Judge Stegner clearly understood this. He indicated that were Mr. Richards' master's degree in "pedagogy, music pedagogy, music performance, anything that I would consider to be within the ambit of Mr. Richards' responsibilities, I don't think there would be any doubt that that would – that this decision would be different that it is today." ***Tr. Vol. I***, p. 34, ll. 3 – 7. As Judge Stegner had a significant amount of involvement in the drafting of the Master Agreement, he certainly was in the best position to make this determination. Further, because this matter was

going to be a bench trial, Judge Stegner was allowed to look at the issues and was free to arrive at the most probable inferences from the evidence. Given this freedom, Judge Stegner made a determination regarding how the "professional development" language should be interpreted.

If this Court concludes that there was an ambiguity in the Professional Leave clause, it should not reverse Judge Stegner's decision. There is competent and substantial evidence to support the conclusion that Mr. Richards' master's degree does not constitute professional development, and therefore professional leave was not available.

2. Because the School District's decision was discretionary, it should not be disturbed on appeal.

As discussed above, the Professional Leave clause gives the School District the discretion to determine whether to grant professional leave to certificated employees. The record shows that the School District's interpretation, throughout the grievance process to the present, has been that Mr. Richards' master's degree in educational administration does not qualify as professional development. *See* ***R. Vol. I***, pp. 73, 108, 110, and 112 – 13. This decision was an exercise of discretion by the School District.

The Idaho Supreme Court has stated numerous times that discretionary decisions by a school board should not be overturned by the courts absent arbitrary or capricious conduct. *See* ***Robinson v. Joint Sch. Dist.***, 100 Idaho 263, 265 (1979) (citing language that the discretionary conduct of a school board should not be reviewed absent allegations of arbitrary or capricious conduct); ***Kolp v. Board of***

Trustees, 102 Idaho 320, 322 – 23 (1981) (holding that in mandamus actions relating to teacher terminations, "If discretionary, mandamus will not lie unless it clearly appears that the board has acted arbitrarily, unjustly and in abuse of discretion and there is not available other plain, speedy and adequate remedy in the ordinary course of law"); ***Bowler v. Board of Trustees***, 101 Idaho 537, 540 (1980) (stating that the Court was not aware of any statute "providing for judicial appellate review from decisions of the board of trustees of a school district"); ***Rogers v. Gooding Pub. Joint Sch. Dist. No. 231 (in Re Rogers)***, 135 Idaho 480, 483 (2001) (discipline of students is a discretionary issue, into which courts should only reluctantly involve themselves). This is a logical conclusion. School boards are in a unique situation: they must defend their students from injury from without and within,[8] they must defend and support their teachers[9], and at the same time, they are frequently sued by both. In dealing with these conflicting interests (and many, many others), school boards have relatively little statutory guidance regarding how to proceed, and frequently are without adequate funding to meet their obligations. Thus, school districts are left to their own devices to determine how to move forward without being sued.

This puts school boards and school districts in a situation where they are uniquely qualified to determine how they will proceed, because the best answer is not always immediately clear. However, in discretionary situations, school districts

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[8] *See, e.g.,* ***Idaho Code*** § 33-512(4).

[9] *See, e.g.,* ***Idaho Code*** § 6-903(b).

are not required to come up with the *best* answer, but are only required to come up with a *reasonable* answer. That is what occurred in this case. The School District determined that the Professional Leave clause gives the School District discretion to determine when to grant professional leave. The School District employees determined that Mr. Richards' should take personal leave to defend his master's degree, and the Board agreed. This may or may not be the absolute *best* decision, but it is certainly a reasonable one. Therefore, in such a discretionary situation, it would be improper for this Court to overturn the School District's decision absent evidence of arbitrary or capricious conduct. As the United States Supreme Court has stated,

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Epperson v. Ark., 393 U.S. 97, 104 (1968). As the PEA hasn't put forward evidence of arbitrary or capricious conduct, the School District requests that this Court affirm the District Court's decision.

E. The School District is Entitled to Attorney Fees on Appeal Because the PEA's Argument is Unreasonable.

There are two statutes under which attorney fees may be awarded. ***I.C.*** § 12-121 states "In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties." ***I.C.*** § 12-117 states

> Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

This Court has applied both of these statutes to cases involving governmental entities. *See* ***Sacred Heart Med. Ctr. v. Boundary County***, 138 Idaho 534, 537 (2003).

With regard to ***I.C.*** § 12-121, an award under this statute is appropriate "if the appellate court finds that the appeal was brought or pursued unreasonably or without foundation." ***Wolske Bros. v. Hudspeth Sawmill Co.***, 116 Idaho 714, 716 (Idaho Ct. App. 1989). Such an award can be made if "the appellant has made no substantial showing that the lower court misapplied the law." ***Id***. Where a party makes an argument that at first reads reasonably, but then on later inspection is discovered to be based on unreasonable grounds, an award of attorney fees against that party is appropriate. *See* ***O'Boskey v. First Fed. Sav. & Loan Ass'n***, 112 Idaho 1002, 1010 (1987). With regard to ***I.C.*** § 12-117, the statute clearly spells out that attorney fees may be awarded if "the party against whom the judgment is rendered acted without a reasonable basis in fact or law." *See also* ***Daw v. Sch. Dist. 91 Bd. of Trs.***, 136 Idaho 806, 808 (2001) (holding that an unreasonable statutory interpretation was grounds for awarding attorney fees).

In this case, the PEA's argument (based on the rule of *contra proferentem*) seems logical, but on further inspection, it is clear that the rule is inapplicable. In

bringing this appeal, the PEA makes the same argument that it made in front of Judge Stegner, namely that the language at issue was unilaterally provided by the School District. *Compare* ***Appellants Opening Brief***, pp. 11 – 15, *with* ***R. Vol. I***, pp. 59 – 62. This is clearly not the case. Both parties negotiated the language of the Professional Leave provision. There is no evidence that Judge Stegner misapplied the law. Therefore, the PEA's argument is unreasonable, and the School District requests that attorney fees be granted on appeal.

V. CONCLUSION

The PEA and the School District negotiated for a long period of time to work out the language of the Master Agreement. It is not unreasonable to assume that neither party was completely satisfied with the language. However, both parties agreed to it, including the language of the Professional Leave clause. Unlike every other type of leave in the Master Agreement, the Professional Leave clause clearly gives the School District discretion whether to grant professional leave. With regard to Mr. Richards' request to take profession leave to defend his master's degree in educational administration, the School District determined that this was outside the scope of his employment duties, and therefore was more appropriately categorized as a personal day. The PEA now seeks to rewrite the Professional Leave clause to take away the discretion from the School District, and make professional leave just as mandatory as every other type of leave. The District Court recognized that the School District had discretion, and further recognized that the School District's decision was reasonable. There is no evidence to contradict this conclusion.

Therefore, summary judgment was appropriately granted to the School District. The School District requests that this Court will so find.

RESPECTFULLY SUBMITTED this 2nd day of February, 2009.

ANDERSON, JULIAN & HULL LLP

By _____
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Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of February, 2009, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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