

IN THE COURT OF APPEALS FOR THE STATE OF OREGON

**JAMES SCHERZINGER and
PORTLAND SCHOOL DISTRICT
1J,**

Petitioners-Respondents,

vs.

**The PORTLAND CUSTODIANS
CIVIL SERVICE BOARD,**

Respondent,

and

**TAMARA MCWILLIAMS, HENRY
SHAMBRY and 90 CIVIL SERVICE
CUSTODIANS,**

Intervenors-Appellants.

**STATE ex rel TAMARA
MCWILLIAMS, HENRY SHAMBRY
and 90 CIVIL SERVICE
CUSTODIANS,**

Plaintiffs-Appellants,

**PORTLAND PUBLIC SCHOOLS
DISTRICT 1J, MULTNOMAH
COUNTY, OREGON, PORTLAND
BOARD OF EDUCATION, MARC
ABRAMS, LOLENZO POE, SUE
HAGMEIER, DERRY A. JACKSON,
SR., DEBBIE GOLDBERG
MENASHE, JULIE BRIM
EDWARDS, KARLA WENZEL, and
JAMES SCHERZINGER,**

Defendants-Respondents.

**Multnomah Count Case No. 0208-
08154**

CA A120712 (Control)

**SUPPLEMENTAL BRIEF ON
REMAND**

Multnomah County No. 0210-09876

CA No A120713

August 20006

**PORTLAND SCHOOL DISTRICT
NO. 1J,
Plaintiff-Respondent, Respondent on
Review,**

vs.

**THE PORTLAND CUSTODIANS
CIVIL SERVICE BOARD,**

Defendant,

and

**DONALD W. STRONG, DAVID P.
VECSI, LYNDA M. ANDERSON,
MARY J. ANDERSON, ROBERT L.
ANDERSON, STEVEN R. ARMONY,
GLENN E. ARMSTRONG, WAYNE
L. ARNESON, DANIEL ARNOLD,
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K. BEATTY, PATRICK S.
BECKMEYER, WILLIAM P.
BLACKMON, DANIEL E.
BLANCHARD, EDWARD J. BORNE,
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C. BRANDON, SHAWN H. BRIGGS,
JOHN W. BROOKS, SARAH E.
BROPHY, ERIC A. BROWN, JOHN
W. BRYANT, HUGH A. BURGETT,
WILLIAM L. CAMP, PARLOR G.
CAMPBELL, RICHARD R.
CARLSON, ROBERT H. CARRON,
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CLASSEN, ROBERT J. CLAUSEN,
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PHYLLIS J. DEAN, KENNETH D.
DEWEESE, RICHARD P. DOBAS,
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**Multnomah County Circuit Court No.
0302 01196**

CA A122865

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RONALD J. FAHEY, GARY FERNS,
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ELLIOTT R. FOSNOT, MICHELLE
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JEFFERY W. FURLOW, JAMES L.
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MICHAEL T. WEBB, MICHAEL A.
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DAVID F. WILLIAM, JAMES M.
WILLIAMS, MAJOR S. WILLIS,
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**L. WITHERSPOON, WILLIAM R.
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KENNETH A. YAMBRA, MASON L.
YOUNG, TIMOTHY G. YOUNG,**

**Defendants-Appellants,
Petitioners on Review**

RESPONDENTS' SUPPLEMENTAL BRIEF ON REMAND

**Appeal of the Judgment of the Circuit Court, Multnomah County, The Honorable
Janise R. Wilson, Presiding**

**Appeal of the Judgment of the Circuit Court, Multnomah County, The Honorable
Jerome E. LaBarre, Presiding**

PANEL: Brewer, Chief Judge, Landau and Armstrong, Judges

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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Introduction.....	1
Background: Undisputed Facts and Procedural Posture.....	1
Summary of Argument.....	2
Now What?.....	3

Table of Authorities

Oregon Revised Statutes

ORS 242.6201, 2

Custodian Civil Service Law - ORS 242.310 to 242.640 and 242.990 (1)2, 3

Dictionary

Webster's Third New International Dictionary (2002)2

Introduction

Contrary to the first sentence of Portland Public Schools' opening brief, three cases have been consolidated pursuant to this Court's July 5, 2006 Order. Those three cases are the cases identified on the cover of this brief.

These three cases present one, simple issue. Did Portland Public Schools dismiss its custodians? The answer to that one, simple question is, yes.

Because Portland Public Schools dismissed its custodians without cause, Portland Public Schools violated ORS 242.620 which reads, in pertinent part, "No employee in the classified civil service who has been permanently appointed, shall be dismissed except for cause."

Background: Undisputed Facts and Procedural Posture

In 2002 Portland Public Schools dismissed each and every custodian then employed, except for the few custodians fortunate enough to retire before the ax fell on their necks. The custodians and their union, Service Employees International Union 140 ("SEIU 140") used every avenue at their disposal to try to retain their jobs.

The one governmental body specially designed to determine if a custodian's dismissal was lawful, the Custodians Civil Service Board, heard the custodians' case and determined that the custodians' dismissal was

without cause. The Custodians Civil Service Board's command to Portland Public Schools to retain the custodians fell on deaf or contemptuous ears.

Finally, after years of litigation, the Oregon Supreme Court held that the Custodian Civil Service Law - ORS 242.310 to 242.640 and 242.990 (1) has not been repealed or made inoperative. These three cases have been returned to the Court of Appeals for reconsideration in light of the Supreme Court's holding.

Summary of Argument

ORS 242.620 prohibits Portland Public Schools from dismissing custodians "except for cause." The term, "dismiss," is not defined by statute. As "dismiss" is a term commonly used and commonly understood, we look to Webster's Third New International Dictionary (2002) for guidance as to its meaning. There, at page 652, it is defined to mean: "to send or remove from employment, enrollment, position, or office." In 2002, Portland Public Schools told each and every one of its custodians to leave his or her employment, position, and office¹. Portland Public Schools dismissed its custodians.

¹ When Portland Public Schools told its custodians to leave, Portland Public Schools gave the custodians no reason to believe Portland Public Schools would ever voluntarily allow the custodians to return to work as custodians. Any suggestion that Portland Public Schools "laid off" the custodians is laughable in light of the definition of "lay off," to wit – "to cease to employ (a worker) usu. Temporarily because of slack in production and

Now What?

Since the Custodian Civil Service Law - ORS 242.310 to 242.640 and 242.990 (1) has not been repealed or made inoperative, Portland Public Schools' dismissal, without cause, of its custodians was illegal. The cases now before the Court of Appeals should be returned to the Circuit Court with simple instructions. The Circuit Court should be commanded to determine the amount of damages suffered by each custodian and to award those damages to each custodian.

Dated this 31st day of August 2006.

JAMES E. LEUENBERGER PC

James E. Leuenberger
OSB 89154
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Certificate of Service

I mailed two true copies of this brief to Miller Nash LLP, 111 SW 5th Ave Ste 2400, Portland, OR 97204; Mark E. Griffin, Griffin & McCandlish, 215 SW Washington St #202, Portland OR 97204; and William D. Brandt, William D. Brandt PC, 1820 Commercial St SE, Salem OR 97302. If this is a service copy, it is a true copy of the original filed with the court.

without prejudice to the worker – usu. distinguished from *fire*.” Webster’s Third New International Dictionary 1281 (2002).