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2010 OCT 14 11:23 AM  
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NO. 65037-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL  
286,

Appellant,

v.

PORT OF SEATTLE,

Respondent.

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**REPLY BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

For its reply to the Port of Seattle's response to its Brief of Appellant, the International Union of Operating Engineers, Local 286 relies on its opening brief and argument below.

## **II. ARGUMENT**

### **A. THE WASHINGTON SUPREME COURT DECISION *KITSAP COUNTY* AND UNITED STATES SUPREME COURT PRECEDENT REQUIRE THE COURT TO REINSTATE ARBITRATOR VIVENZIO'S AWARD.**

#### **1. No Explicit, Well-Defined Public Policy Prohibits The Port From Implementing Arbitrator Vivenzio's Award.**

Contrary to the Port's argument, the controlling Supreme Court decision *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 219 P.3d 675 (2009), decisively requires that Arbitrator Vivenzio's award be reinstated by this Court. *Kitsap County* holds that an arbitration decision, such as Arbitrator Vivenzio's, can only be vacated if it violates "an 'explicit,' 'well defined,' and 'dominant' public policy, not simply 'general considerations of supposed public interests.'" 167 Wn.2d at 435, citing *Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000)(quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of*

*United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983)).

Specifically, the United States Supreme Court case *Eastern Associated Coal Corp.*, cited in *Kitsap County*, provides:

The Court has made clear that any such public policy must be “explicit,” “well defined,” and “dominant.” *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983). It must be “ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’” *Ibid.* (quoting *Muschany v. United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 89 L.Ed. 744 (1945)); accord, *Misco, supra*, at 43, 108 S.Ct. 364. And, of course, the question to be answered is not whether Smith's drug use itself violates public policy, but whether the agreement to reinstate him does so. **To put the question more specifically, does a contractual agreement to reinstate Smith with specified conditions...run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests? See *Misco, supra*, at 43, 108 S.Ct. 364.**

*Eastern*, 531 U.S. at 62-63 (emphasis added).

Based on the above reasoning, the *Eastern* Court found that numerous Department of Transportation regulations requiring drug testing and sanctioning drivers who test positive for illegal drugs did not amount to an “explicit, well-defined public policy” necessary for the Court to vacate an arbitrator’s decision to reinstate a driver who failed two drug tests. *Eastern*, 531 U.S. at 64-65. The Court noted that “[n]either the Act

nor the regulations forbid an employer to reinstate in a safety-sensitive position an employee who fails a random drug test once or twice,” and that “[t]he award violates no specific provision of any law or regulation.” *Eastern*, 531 U.S. at 65, 66.

Relying on *Eastern*, the Court in *Kitsap County* likewise held statutes that prohibited police officers from making false statements did not amount to public policy sufficient to vacate an award reinstating a dishonest police officer as “these statutes do not provide an explicit, well-defined, and dominant public policy prohibiting the reinstatement of any officer found to violate these statutes.” 167 Wn.2d at 436-37.

Similarly, the Port’s proffered public policy – Title VII of the Civil Rights Act of 1964 and state anti-discrimination laws – amount to “general considerations of supposed public interests,” not the “explicit, well-defined” public policy required to vacate the arbitration award. These laws condemn racial discrimination in employment, just as the DOT regulations in *Eastern* condemn drivers’ illegal drug use, and criminal statutes in *Kitsap County* condemn false statements by police officers. However, just as in *Eastern* and *Kitsap County*, Arbitrator Vivencio’s award does not violate a specific provision of any law or regulation.

Just as in *Eastern* and *Kitsap County*, the question to be answered is not whether Mr. Cann’s misconduct violates public policy, regardless of

whether such an act is careless behavior, as Arbitrator Vivenzio found, or, for the sake of argument, even racial harassment as alleged by the Port. Rather, the question to be answered is whether the agreement to reinstate Mr. Cann after a 20-day suspension does so. As neither anti-discrimination laws nor accompanying regulations forbid an employer from reinstating, with a 20-day suspension, an employee who engages in such behavior, the award does not violate public policy and must be upheld.

**2. Anti-Discrimination Laws Do Not Contain An Affirmative Duty That Establishes An Explicit Public Policy That Vacates the Arbitration Award.**

While anti-discrimination laws provide general considerations of public interest, they do not amount to an “affirmative duty” that required the Port to terminate Mr. Cann or suspend him for one year, which was the discipline erroneously imposed by the lower court. Presumably, the “affirmative duty” language referenced by the Port arises from a Minnesota Court of Appeals case mentioned in *Kitsap County*. The Minnesota case is cited as an example of an explicit, well-defined public policy of an “affirmative duty” to prevent police officer sexual harassment, created from numerous criminal statutes and a regulation revoking an officer’s license for engaging in criminal sexual harassment. *Kitsap County*, 167 Wn.2d at 437, citing *City of Brooklyn Center v. Law*

*Enforcement Labor Services, Inc.*, 635 N.W.2d 236, 242-44 (Minn. App. 2001). The Minnesota court relied on this explicit public policy to vacate an award reinstating a police officer that the arbitrator found engaged in numerous stalking and sexual harassment crimes. *Id.*<sup>1</sup>

In the present case, not only did the Arbitrator find that Mr. Cann's single incident of misconduct was not racial harassment, in addition, there is no state regulation or statute that authorizes the revocation of a license or effectively requires termination or suspension of a person's employment for an extended period of time as a result of him or her having been accused, or even found guilty, of racial harassment. Regardless of the Port's duties under anti-discrimination laws, there is simply no statute or regulation that prohibits the implementation of Arbitrator Vivenzio's award.

Indeed, there is no explicit policy that "specifically militates against the relief ordered by the arbitrator" as required to overturn the

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<sup>1</sup> The cases from other jurisdictions cited by the Port in support of its position are similarly inapposite. For example, the Connecticut case *State v. AFSCME Council 4*, 252 Conn. 467, 469-70, 747 A.2d 480 (2000), involved a Department of Corrections grievant who had also been arrested and found guilty of a criminal statute for the misconduct at issue. Moreover, the Nebraska case *Nebraska v. Henderson*, 277 Neb. 240, 263, 762 N.W.2d 1, 17 (2009), failed to consider whether a policy explicitly prohibited the grievant's reinstatement itself, and was narrowly limited to the negative "public perception" of a police officer who belonged to the Ku Klux Klan.

arbitrator's decision. *Virginia Mason Hospital v. Washington State Nurses' Ass'n*, 511 F.3d 908, 916 (9<sup>th</sup> Cir. 2007). No statute or regulation requires the imposition of greater discipline than the 20-day suspension of Mr. Cann, as set forth in the arbitration decision; therefore, Arbitrator Vivenzio's award must be reinstated.

**B. THIS COURT SHOULD REINSTATE ARBITRATOR VIVENZIO'S AWARD AS THE SUPERIOR COURT HAD NO AUTHORITY TO ALTER THE ARBITRATOR'S REMEDY.**

**1. The Proper Judicial Approach To A Labor Arbitration Award Is To Refuse To Review The Merits.**

The superior court impermissibly delved into the merits of Arbitrator Vivenzio's award by disregarding his judgment and finding that the 20-day suspension remedy was insufficient to punish Mr. Cann for his misconduct. The Port attempts to validate this error by arguing that the remedy in Arbitrator Vivenzio's award was not strong enough to provide "a deterrent effect." However, as explained in the seminal United States Supreme Court case *United Steelworkers v. Enterprise Wheel And Car Corp.*,

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards...

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.

363 U.S. 593, 596-597, 80 S.Ct. 1358, 1360-61, 4 L.Ed.2d 1424 (1960).

As emphasized again in *United Paperworkers Int'l Union v.*

*Misco, Inc.*,

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

**[W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect.** If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined.

[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

484 U.S. 29, 37-38, 108 S.Ct. 364, 370-71, 98 L.Ed.2d 286

(1987)(emphasis added); *See also Eastern*, 531 U.S. at 65, 121 S.Ct. at

468 (“basic background labor law principles...caution against interference

with labor-management agreements about appropriate employee discipline.”).

Washington follows federal precedent, as stated by the Court in *Clark County Public Utility Dist. v. Int’l Bhd. Of Electrical Workers, Local 125*,

[W]e look to federal case law for guidance. The parties are bound by their consent to have the arbitrator fashion an appropriate remedy. Courts will not overturn the arbitrator's remedy when it is drawn from the essence of the collective bargaining agreement. *United Steelworkers of Am.*, 363 U.S. 593 at 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424; *see Amalgamated Transit Union Local No. 1498 v. Jefferson Partners*, 229 F.3d 1198, 1200 (8th Cir.2000) (upholding arbitrator's award because the employer was “bound by its consent to have the arbitrator fashion an appropriate remedy”); *see also Mogge v. Dist. 8, Int’l Ass’n. of Machinists*, 454 F.2d 510, 513 (7th Cir.1971) (upholding back pay past the expiration of the collective bargaining agreement in part because parties had stipulated to the arbitrator's authority to fashion a remedy).

150 Wn.2d 237, 249, 76 P.3d 248 (2003)(arbitrator remedy awarding grievants positions outside the bargaining unit upheld by Court as the arbitrator acted with her authority); *see also Kitsap County*, 167 Wn.2d at 440 (“The arbitrator's decision to disallow back pay and require LaFrance to pass fitness-for-duty exams prior to returning is part of his determination of the proper remedy and does not exceed his scope of authority.”).

The Port and Union contracted to have disputes settled by an arbitrator and specifically agreed to have Arbitrator Vivenzio resolve Mr. Cann's grievance. There is no dispute that the standard collective bargaining agreement language, negotiated by the parties, contemplated that Arbitrator Vivenzio was to determine the remedy for any contract violation he found. Thus, only his opinion as to remedy is relevant, and the superior court erred in not accepting his reasoned judgment that a 20-day suspension was appropriate in Mr. Cann's case.

The Port argues that Arbitrator Vivenzio's remedy was not harsh enough, yet it is not the Port's opinion, nor the superior court's opinion, nor the opinion of any other court analyzing other arbitration awards, that matters. The parties contracted for Arbitrator Vivenzio to settle the dispute and he acted within the scope of his authority under the contract. Therefore, this Court should overturn the superior court's decision and reinstate Arbitrator Vivenzio's award.

**2. The Court Does Not Review A Labor Arbitration Award As An Appellate Court Would a Review a Decision Of A Lower Court.**

The Court should similarly disregard the Port's argument that the superior court's imposition of a one-year suspension remedy is acceptable, since courts "increase or decrease" awards all the time. This argument ignores the entire body of labor law, as evidenced by the case the Port

cites in support of its position, a personal injury case where the Court allowed additional interest on the verdict amount awarded to the injured plaintiff. This case is clearly inapplicable, as it involved a lower court's verdict at trial and no arbitration finding of any kind. *Kiesseling v. Northwest Greyhound Lines*, 38 Wn.2d 289, 297, 229 P.2d 335 (1951).

“Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.” *Misco, Inc.*, 484 U.S. at 38, 108 S.Ct at 370. This standard not only supports the strong policy favoring finality through alternative dispute resolution, but also recognizes that it is not the court, but the arbitrator that is best able to interpret collective bargaining agreements:

The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level-disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

*United Steelworkers v. Enterprise*, 484 U.S. at 596.

It is Arbitrator Vivenzio who was chosen by the parties to settle the grievance, who had the specialized knowledge of the industry, and who heard the facts of the case at hearing. It is his reasoned arbitration award

that the Court must follow. As such, the superior court's remedy should be overturned and Arbitrator Vivenzio's award be reinstated.

**C. OVERWHELMING PUBLIC POLICY CONCERNS FAVORING THE FINALITY OF LABOR ARBITRATION AWARDS OUTWEIGH ANY GENERAL CONSIDERATION OF PUBLIC INTERESTS IN THIS CASE.**

The overriding consideration in each and every one of the labor cases cited by the parties to this dispute is the importance of binding and final arbitration in the labor-management relationship. As provided by the Washington Supreme Court in *Clark County*,

[W]e note that the procedural posture of this case underscores the importance of an extremely limited standard of review because it highlights the importance of supporting the finality of bargained for, binding arbitration. When parties voluntarily submit to binding arbitration, they generally believe that they are trading their right to appeal an arbitration award for a relatively speedy and inexpensive resolution to their dispute.

150 Wn.2d at 247. Citing *Clark County*, the *Kitsap County* Court further explained the key public policy considerations involved in disturbing arbitration awards:

Reviewing an arbitration decision for mistakes of law or fact would call into question the finality of arbitration decisions and undermine alternative dispute resolution. Further, a more extensive review of arbitration decisions would weaken the value of bargained for, binding arbitration and could damage the freedom of contract.

167 Wn.2d at 434-35 (citations omitted).

It is well settled that while general considerations of public interests may exist in policies such as the anti-discrimination laws proposed by the Port, the courts repeatedly and consistently find that the overwhelming public policy of settling labor disputes by arbitration demands arbitration awards be upheld. When upholding an arbitration decision such as Arbitrator Vivenzio's, the Court not only recognizes the importance of final, consistent settlement of disputes between the Port and Union, but also enforces the finality of every labor arbitration decision in Washington State.

**D. LOCAL 286 SHOULD BE AWARDED ATTORNEY FEES FOR THE LEGAL WORK PERFORMED BY IN-HOUSE COUNSEL.**

Attorney fee awards under RCW 49.48.030 are recoverable whenever a judgment is obtained for any type of compensation due by reason of employment, including backpay. *Gaglidari v. Denny's Restaurants*, 117 Wn.2d 426, 449, 815 P.2d 1362 (1991). In awarding reasonable attorney fees, the court applies the lodestar approach, and documentation must inform the court of the number of hours worked, the type of work performed and the category of attorney who performed the work. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193, 203 (1983). It need not be exhaustive or in minute detail. *Id.* The lodestar method relies on the court's independent judgment as to what

represents a reasonable amount for attorney fees, and does not require a breakdown of time spent on each task. *State v. Weston*, 66 Wn.App. 140, 148-49, 831 P.2d 771, 776 (1992).

The superior court's denial of the attorney fees of Local 286 in-house counsel Terry Roberts was unreasonable, as Mr. Roberts provided a detailed declaration describing hours worked, the type of work performed and his status as an attorney practicing labor and employment law for 27 years. Moreover, Local 286's fee request was conservative, and did not request fees for numerous hours of conferences that would have been billable. Therefore, the Court should order the superior court to issue a reasonable attorney fee award concerning Mr. Roberts' fees.

### **III. CONCLUSION**

For the above reasons as well as those in Appellant's initial brief, Local 286 respectfully requests that this Court reverse the superior court's orders as to which error has been assigned and remand for further proceedings consistent with this Court's findings.

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RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of October, 2010.



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of October, 2010, I caused the original and one copy of the foregoing Reply Brief of Appellant to be delivered via legal messenger to:

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