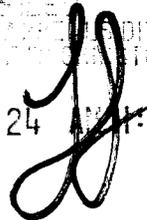


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No. 66033-1

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

**SNOQUALMIE POLICE
ASSOCIATION,**

Appellant,

vs.

CITY OF SNOQUALMIE,

Respondent.

**APPELLANT'S
REPLY BRIEF**

APPELLANT'S REPLY BRIEF

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1 **I. THE TRIAL COURT ERRED BY INTERPRETING THE**
2 **ARBITRATOR'S AWARD IN ACCORDANCE WITH WHAT IT**
3 **THOUGHT WAS THE APPROPRIATE REMEDY RATHER THAN**
4 **IMPLEMENTING THE ARBITRATOR'S AWARD AS WRITTEN.**

5 The parties, in their Collective Bargaining Agreement, agreed to be
6 subject to "final and binding" arbitration.¹ Court cases on labor
7 arbitrations indicate that, with few exceptions, "final and binding" truly
8 means "final and binding." The Award is to be enforced as written and is
9 not subject to revision in any subsequent court action. The rule in
10 Washington has been set forth as follows:

11 When reviewing an arbitration proceeding, an appellate
12 court does not reach the merits of the case. The common
13 law arbitration standard, applicable when judicial review is
14 sought outside of any statutory scheme or any provision in
15 the parties' agreement, requires this extremely limited
16 review. The doctrine of common law arbitration states that
17 the arbitrator is the final judge of both the facts and the law,
18 and "no review will lie for a mistake in either."²

19 As long as the arbitrator's award "draws its essence from the collective
20 bargaining agreement," and is not merely "his own brand of industrial
21 justice," the award is legitimate. Consistent with this policy, Washington
22 decisions allow arbitrators wide latitude in fashioning awards.³

23 ¹ CP 2, 4.

² *Clark County PUD v. Wilkinson*, 150 Wn. 2d 237, 245, 76 P3d. 248 (2003) (citations omitted).

³ *Local Union 1433, Int'l. Assn. of Firefighters v. Pasco*, 53 Wn. App. 547, 549-550 (1989) (citations omitted)(emphasis supplied).

1 Both the trial court and the City make the mistake of interpreting
2 Arbitrator Axon's award and arguing what makes the most sense **to them**,
3 rather than simply applying the award as written. The trial court's ruling
4 at the hearing on cross-motions for summary judgment reflects that it was
5 *interpreting* the award rather than restricting its decision to the arbitrator's
6 decision as written:

7 The Court, uh, appreciates, uh, again having, uh, time to
8 think about the arbitrator's ruling. **I, for the same reasons**
9 **probably, uh, each of you made whatever decision you**
10 **did, uh, I think it would have been helpful to know**
11 **what, uh, he was thinking, uh, at that time. We don't**
12 **know that. Uh, I'm not necessarily better at knowing**
13 **what somebody else thinks or means than anybody else.**
14 But, so we do have to rely on the language. This is a make-
15 whole situation. Giving that, uh, its uh, fair meaning as
16 well as the meaning of the language the Court is going to,
17 uh, say that there, he received officer wages from the point
18 of reinstatement. That is the effective date of, uh, his return
19 to duty. And I have a number of reasons. If you don't
20 mind my unpacking my thinking process just a little bit.
21 Um, the city had a couple of examples what if this, what if
22 that. My thinking is similar to that. If for example, um, uh,
23 uh, Sergeant Castle [sic], Officer Castle [sic] had taken a
job whether as an officer, you know, maybe he becomes a
security guy, maybe he opens a software company, if he
never goes back to work does that mean he gets no back
pay? Well, of course not. So I think, uh, words, uh, "upon
return to duty" have to mean when should he have been
returned to duty. If this had never happened, uh, that is if
there had not been improper dismissal, but rather the
appropriate sanction had been imposed, namely a 60 day,
um, suspension, he would have been returned to duty June
1st of 2007. **So I think the effective, uh, with the return**
to duty has to be the date contemplated in this, uh,
again, we determine the amount of back pay, but not

1 **the rate of back pay, uh, under a make-whole analysis.**
2 **So, that is the basis of my reasoning.** Again, each of you
3 had good arguments to argue that opposite that slight
4 change in language perhaps would have made everything
5 more clear, but maybe even your, you're wrinkling your
6 brows, is something?

7
8 Attorney O'Halloran: Well, I was just, I was just wanted to
9 clarify-is your ruling that then the back pay was properly
10 calculated at a police officer's rate?

11
12 The Court: That is correct.

13
14 Attorney O'Halloran: Thank you, your Honor. I just
15 wanted to clarify.

16
17 The Court: Because, again, effective with his return to duty
18 doesn't mean the first day that he goes back to work as an
19 officer, uh, rather what has the arbitrator ruled is his
20 effective return to duty which is the day after the, or the
21 day of the end of the suspension.⁴

22
23 The Court here is expressing its own "reasoning" or "interpretation" of the
award rather than applying the arbitrator's words as written. This is clear
error per *Wilkinson* and *Pasco*.

Arbitrator Axon's award, in pertinent part, states:

[R]einstate Grievant Kasel and to make him whole for all
wages and benefits lost minus the sixty (60) calendar day
suspension. Grievant Kasel **shall** be demoted from the
position of Sergeant to police officer effective with his
return to **duty**.⁵

⁴ RP 2-3 (*emphasis supplied*).

⁵ CP 132 (*emphasis supplied*).

1 To determine the ordinary meaning of undefined terms, courts may look to
2 standard English dictionaries. “If words have both a legal, technical
3 meaning and a plain, ordinary meaning, the ordinary meaning will prevail
4 unless it is clear that both parties intended the legal, technical meaning to
5 apply.”⁶ The online Merriam Webster Dictionary’s definition of “duty” is:
6 “**work** - the service required ... under specified conditions;” “engaged in
7 or responsible for an assigned task or duty.” The Dictionary’s definition
8 of “shall” is “will have to;” “used to express what is inevitable or seems
9 likely to happen **in the future;**” “used to express simple **futurity.**”⁷

10 Arbitrator Axon issued his decision on March 26, 2008. Kasel
11 returned to work at the Snoqualmie Police Department on April 9, 2008.
12 The City’s position, adopted by the trial court, was that Kasel returned to
13 duty on June 17, 2007, a date that was retroactive to the arbitrator’s award.
14 Had the arbitrator intended to make his award retroactive, he would not
15 have used the future tense to describe when he intended the “return to
16 duty” to take effect. The arbitrator could have, but did not, order that
17 Kasel be demoted retroactively. He specifically used the future tense to
18 describe when *he* intended the demotion to take effect. It is solely within
19 the arbitrator’s discretion to fashion the remedy, and it is not the court’s

21 ⁶ *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576 (1998).

22 ⁷ www.merriam-webster.com (*emphasis supplied*).

1 duty to re-interpret what it thinks should be the appropriate award.⁸
2 Because the trial court interpreted the arbitrator's award in accordance
3 with what *it* thought was the appropriate remedy, rather than simply
4 applying the award *as written*, the court erred, and its decision should be
5 reversed.

6 The City claims that the lower court properly applied the "plain
7 meaning" standard. Instead, the court, by its own terms only applied what
8 it believed to be the "fair meaning" of the Award.⁹

9 The City admits that the "plain meaning" test applies to arbitration
10 award interpretation. It then claims that its "calculated" back pay is a
11 proper application of the award.¹⁰ But its "calculated" back pay does not
12 involve a direct application of the literal plain words in Arbitrator Axon's
13 award. Instead, it involves the recreation of that award derived through a
14 legal and factual fiction.

15 As indicated, Arbitrator Axon ordered Kasel reinstated with full
16 back pay and a 60day suspension and further ordered that Kasel "shall" be
17 demoted "upon return to duty," language which the Association asserts
18 can only reference a future event. The City, by contrast, takes this
19 language and then posits a *theoretical* suspension period from April 18,

20 ⁸ *Wilkinson, supra; Pasco, supra*, n. 2 and 3.

21 ⁹ See RP 2.

22 ¹⁰ See City Brief at 2.

1 2007 to June 17, 2007. *Nowhere* in Axon’s award does this defined
2 suspension period occur. *It simply reflects the City’s unilateral*
3 *redefinition of the Axon award.*

4 Application of the plain meaning standard involves applying the
5 actual words taken from their ordinary usage. The City’s theoretical
6 suspension period is a redefinition of the actual words from the Award,
7 not a direct application.

8 Furthermore, it is an absurd application. The City’s interprets the
9 words “duty,” which means performance of *work*, to occur during a time
10 in which Kasel did not perform — indeed was barred from performing —
11 *any* work or duties. The idea that Kasel recommenced his “duties” on
12 June 17, 2007 is derived solely from the City’s unilateral recreation of fact
13 and exists nowhere else. It is not derived from the plain meaning of the
14 words in the Award and the trial court erred by applying a “fair meaning”
15 approach and interpreting the Award in a manner that adopted this
16 fictional recreation.

17 **II. IF THIS COURT FINDS THAT THE ARBITRATOR’S**
18 **AWARD IS AMBIGUOUS, IT SHOULD REMAND TO THE**
ARBITRATOR TO CLARIFY IT.

19 The Association has consistently maintained that the arbitrator’s
20 award clearly and unambiguously reinstated Kasel as a police officer
21 effective with his return to duty, i.e., his actual return to work with the
22

1 City of Snoqualmie Police Department on April 9, 2008. Axon's use of
2 the future tense, "shall be" and "effective with his return to duty," clearly
3 indicates an intent that the demotion would occur *after* the issuance of the
4 award on March 26, 2008. The City's and the trial Court's interpretation
5 make his retroactive demotion inconsistent with the arbitrator's award.
6 However, if this Court believes that the arbitrator's award is unclear or
7 ambiguous, then it should remand to Arbitrator Axon to clarify his award.

8 Under the common law doctrine of *functus officio*, an arbitrator
9 may not redetermine an arbitration award.¹¹

10 It is a fundamental common law principle that once an
11 arbitrator has made and published a final award his
12 authority is exhausted and he is *functus officio* and can do
13 nothing more in regard to the subject matter of the
14 arbitration... We also recognized, however, that this
15 principle is limited by three exceptions: It has been
16 recognized in common law arbitration that an arbitrator can
17 correct a mistake which is apparent on the face of his
18 award, complete an arbitration if the award is not complete,
19 and clarify an ambiguity in the award.¹²

20 This exception to the *functus officio* doctrine has also been explained as
21 follows:

22 Where the award, although seemingly complete, leaves
23 doubt whether the submission has been fully executed, an
ambiguity arises which the arbitrator is entitled to clarify.

20 ¹¹ *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731,
733-34 (9th Cir.), *cert. denied*, 459 U.S. 1071, 74 L.Ed. 2d 633, 103 S. Ct. 491 (1982).
21 *See also, IBP, Inc. v. Local 556 Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen &*
Helpers of Am., 132 Fed. App. 735, 737 (9th Cir. 2005).

22 ¹² *Id.* at 734, n.1.

1 The resolution of such an ambiguity is not within the policy
2 which forbids an arbitrator to redetermine an issue which
3 he has already decided, for there is no opportunity for
4 redetermination on the merits of what has already been
5 decided. Instead, the clarification of an ambiguity closely
6 resembles the correction of a mistake apparent on the face
7 of the award and the determination of an issue which the
8 arbitrators had failed to decide.¹³

9 If the appellate Court believes that the arbitrator's award is either
10 incomplete or ambiguous, then the appropriate remedy is to remand to the
11 arbitrator to complete his award rather than guessing at what the arbitrator
12 intended.¹⁴

13 In *Kaanapali Golf Management, Inc. v. Int'l Longshore and*
14 *Warehouse Union, Local 142*,¹⁵ a similar issue arose regarding what an
15 arbitrator intended when he ordered the "reinstatement" of the grievant,
16 because the grievant's formerly held position no longer existed. Quoting
17 the Ninth Circuit, the Court remanded to the arbitrator for clarification of
18 the award:

19 We share the view of the district court that the opinion
20 required clarification and interpretation. We also share the
21 view of the district court that this was a task to be first
22 performed by the arbitration committee and not the court,
23 and that the court properly remanded the matter to the
arbitration committee for such clarification.... where the

¹³ *Article: The Case For Retention Of Remedial Jurisdiction In Labor Arbitration Awards, John E. Dunsford, 31 Ga. L. Rev 201, 230-31.*

¹⁴ *McClatchy, supra; IBP, supra. See also LaVale Plaza, Inc. V. R. S. Noonan, Inc., 378 F.2d 569, 572 (3rd Cir. Pa. 1967).*

¹⁵ 2007 U.S. Dist. LEXIS 34245 (U.S. D.C. Hawaii, 2007).

1 parties have elected to submit their disputes to arbitration,
2 they should be completely resolved by arbitration, rather
3 than only partially resolved. In some cases, the carrying
out of this philosophy will require remanding the matter to
the arbitrators, and we think that this is such a case.¹⁶

4 If the Court determines that the arbitrator's award is ambiguous then the
5 appropriate action is to remand to the arbitrator for clarification of the
6 back pay remedy.

7 **III. THE ASSOCIATION IS NOT PROHIBITED FROM**
8 **ARGUING ITS MOTION FOR RECONSIDERATION NOR IS**
9 **THIS COURT PROHIBITED FROM REMANDING THIS**
10 **MATTER TO THE ARBITRATOR FOR CLARIFICATION.**

11 The City asserts that this Court is barred from considering whether
12 any ambiguity it might find should properly be considered first by
13 Arbitrator Axon. It claims that this issue is barred from this Court's
14 review, arguing a failure to preserve.

15 The City failed to cite the actual rule governing preservation issues
16 and thereby reached an erroneous conclusion. The preservation of issues
17 standard is defined in RAP 2.5:

18 (a) Errors Raised for First Time on Review. The
19 appellate court may refuse to review any claim of
20 error which was not raised in the trial court.
However, a party may raise the following claimed
errors for the first time in the appellate court: (1)
lack of trial court jurisdiction,(2) failure to establish
facts upon which relief can be granted, and (3)
manifest error affecting a constitutional right. A

21 ¹⁶ *Id.* (quoting *Hanford Atomic Metal Trades Council, AFL-CIO v. General Electric*
22 *Company*, 353 F.2d 302, 308 (9th Cir. 1965)).

1 party or the court may raise at any time the question
2 of appellate court jurisdiction. A party may present
3 a ground for affirming a trial court decision which
4 was not presented to the trial court if the record has
5 been sufficiently developed to fairly consider the
6 ground. A party may raise a claim of error which
7 was not raised by the party in the trial court if
8 another party on the same side of the case has raised
9 the claim of error in the trial court.

10 The rule *expressly* allows jurisdiction issues to be raised at any
11 time. The rule has *consistently* been interpreted to allow jurisdiction
12 issues to be raised at any time.¹⁷

13 The issues in this case involve the relative jurisdiction between
14 arbitrators and courts. If the meaning of the Award is plain, it is to be
15 applied and the matter resolved on that basis. If, on the other hand, the
16 Award is ambiguous, a question then arises as to *who* should resolve the
17 ambiguity — the arbitrator or a court. Questions of relative
18 arbitral/judicial authority *inherently* involve questions of jurisdiction.¹⁸

19 ¹⁷ See *In re Soriano*, 44 Wn. App. 420, 722 P.2d 132 (1986); *Mitchell v. Doe*, 41 Wn.
20 App. 846, 706 P.2d 1100 (1985) *Clallam County Deputy Sheriff's Guild v. Board of*
21 *Clallam County Comm'rs*, 92 Wn.2d 844, 601 P.2d 943 (1979).

22 ¹⁸ See *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401,
23 413-14, 924 P.2d 13 (1996)(courts have no authority to determine merits of a grievance
unless the particular grievance is clearly excluded from the labor contract); *Clark County*
PUD v. Wilkinson, 150 Wn. 2d 237, 245, 76 P.3d. 248 (2003) (court lacks authority to
delve into merits of final and binding law arbitration award); *Yakima County Law*
Enforcement Officer's Guild v. Yakima County, 133 Wn. App. 281, 135 P.2d 558 (2006)
(it is duty of arbitrator, not a court, to determine whether an grievance falls within the
scope of ambiguous contract language); *Chelan County v. Chelan County Deputy*
Sheriff's Association and Dale England, 2011 Wn. App. LEXIS 1272 (6/2/2011)(Court
of Appeals Division III 4/22/2010 slip op.) (duty of arbitrator, not court, to determine
whether side agreement is binding upon the parties).

1 The Association has argued, and continues to argue, that Arbitrator
2 Axon’s language is plain and that direct application of that language
3 requires no special interpretation. When the trial court erred by delving
4 into what she believed Axon meant, the Association properly raised the
5 issue of limitations on judicial jurisdiction to interpret ambiguous awards.
6 Because issues of arbitral/judicial jurisdiction can be raised at any time, it
7 is properly before this court.

8 Even if this issue was not properly preserved as a jurisdiction
9 question, it could still properly be presented in the Motion for
10 Reconsideration. New issues may be raised for the first time in a motion
11 for reconsideration, thereby preserving them for review, where they are
12 not dependent on new facts and are closely related to and part of the
13 original theory.¹⁹ “In a nonjury trial, an issue or theory not dependent
14 upon new facts may be raised for the first time through a motion for
15 reconsideration and thereby be preserved for appellate review.”²⁰

16 Here, the matter was before the Court on cross motions for
17 summary judgment, and there were absolutely no new facts that were
18 raised for the first time through the motion for reconsideration. Indeed,
19 the motion for reconsideration was made necessary by the Court’s oral

20
21 ¹⁹ *Nail v. Consol. Res. Health Care Fund I*, 155 Wn. App. 227, 232 (2010) (citing *Reitz v. Knight*, 62 Wn. App. 575, 581 n.4, 814 P.2d 1212 (1991)).

22 ²⁰ *Reitz v. Knight*, 62 Wn. App. 575, 581 (1991).

1 ruling on the motions in which it indicated that “it would have been
2 helpful to know” what the arbitrator was thinking and its interpretation of
3 what it thought was the “fair meaning” of the award. The trial court
4 obviously believed that the remedy portion of the award was ambiguous;
5 otherwise, it would not have commented that “it would have been helpful
6 to know” what the arbitrator was thinking. It is precisely because of the
7 Court’s expressed confusion regarding the meaning of the award that the
8 Association brought its motion for reconsideration. It could not have
9 known prior to the Court’s oral ruling that the Court would find the award
10 ambiguous but still rule on the motions. Once the Court made it clear that
11 it found the award ambiguous, the proper action was to remand to the
12 arbitrator for his clarification.

13 This Court provides *de novo* review of the court’s decision. If this
14 Court also finds the award ambiguous, it should remand to the arbitrator
15 for clarification.

16 **IV. IF THIS COURT AGREES THAT THE AWARD IS CLEAR**
17 **AND UNAMBIGUOUS, THEN IT SHOULD AWARD THE**
18 **ASSOCIATION DOUBLE DAMAGES AND 100% OF THE**
19 **ATTORNEY’S FEES.**

18 As set forth in depth in the Association’s opening brief, RCW
19 49.52.050 provides for double damages for wrongfully withheld wages.
20 The City has wrongfully withheld Kasel’s wages which are the differential
21 between the police officer’s rate and the sergeant’s rate between June 17,
22

1 2007 and April 9, 2008. As argued above and in the Association's
2 opening brief, hereby incorporated by reference, the City wrongfully and
3 willfully withheld Kasel's wages and thus is responsible for double
4 damages. The trial court erred when it denied the Association's motion
5 for double damages.

6 The trial court ruled against the Association on the issue of when
7 Kasel was reinstated as a police officer and whether the City owed Kasel
8 double damages. As a result of these two rulings against the Association,
9 the trial court reduced the Association's attorney fee award for the
10 underlying arbitration by 25%. However, as argued above and in the
11 Association's opening brief, the trial court erred on both of these issues in
12 its ruling. If this Court finds that the trial court erred with respect to the
13 remedy provided in the arbitrator's award, then it should order the City to
14 pay the remaining 25% of the Association's attorney fees.²¹

15 **V. THE COURT SHOULD ORDER THE CITY TO PAY THE**
16 **ASSOCIATION'S ATTORNEY'S FEES FOR THIS APPEAL.**

17 This action was made necessary to recover wages due to Mr.
18 Kasel. Pursuant to RCW 49.48.030, the Association is entitled to attorney
19 fees in a wage recovery case. The Association respectfully requests that,
20

21 ²¹ The City has paid 75% of the Association's attorney fees, per the trial court's order.
22

1 pursuant to RAP 18.1, the Court order the City to pay the Association's
2 attorney fees for this appeal.

3 **VI. CONCLUSION.**

4 For all of the reasons set forth in the Association's opening and
5 reply briefs, the Association urges this Court to find that the lower court
6 erred in granting the City's motion for summary judgment and denying the
7 Association's motion for summary judgment. The lower court erred by
8 reducing Kasel's back wages and then extended that error by using the
9 erroneously assumed diminished results to reduce the Association's
10 attorney fees by 25%. It also erred by not granting double damages for a
11 willful refusal to pay wages owed. This Court should reverse those
12 rulings and enter an award that complies with the arbitrator's intent.
13 Alternatively, if this Court finds that the arbitrator's ruling is ambiguous,
14 this Court should remand to the arbitrator for clarification.

15 **RESPECTFULLY SUBMITTED** this 24th day of June, 2011, at
16 Seattle, Washington.

17 CLINE & ASSOCIATES

18 
19 Reba Weiss, WSBA#12876

20 James M. Cline, WSBA #16244
21 Attorneys for Appellant
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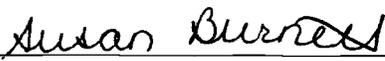
DECLARATION OF SERVICE

I, Susan Burnett, Legal Assistant at Cline & Associates,
acknowledge that on the below date, I served the foregoing Appellant's
Reply Brief and this Declaration of Service in the above-referenced matter
in the following manner to the entities below listed.

COURT OF APPEALS, Div. I	<input checked="" type="checkbox"/> Filing
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I certify and acknowledge under the laws of the State of
Washington that the foregoing is true.

DATED at Seattle, Washington, this 24th day of June, 2011.



Susan Burnett