

NO. 34321-5-II

COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

KITSAP COUNTY DEPUTY SHERIFFS' GUILD, and
DEPUTY BRIAN LA FRANCE and JANE DOE LA
FRANCE, and the marital community composed thereof,

Appellants/Cross-Respondents

vs.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondents/Cross-Appellants,

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

RESPONDENT/CROSS-APPELLANT KITSAP COUNTY'S
AND KITSAP COUNTY SHERIFF'S OPENING BRIEF

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INTRODUCTION

An arbitrator exceeded his authority and jurisdiction when, after finding by clear, cogent, and convincing evidence that a former deputy sheriff was guilty of more than a few episodes of untruthfulness, the arbitrator reinstated the deputy's employment because the *employer* failed to prove by clear, convincing, and cogent evidence that the deputy was not disabled when his employment was terminated. The Kitsap County Sheriff is the cross-appellant herein and seeks review of the trial court's decision denying a petition for constitutional writ of certiorari for review and reversal of the Arbitrator's Decision and Award in the Matter of an Arbitration between Kitsap County Deputy Sheriffs Guild and Kitsap County (Brian LaFrance Termination; 75 L 390 00293 02). CP 1575-1578.

Kitsap County is the respondent to the appeal filed by Kitsap County Deputy Sheriffs Guild and Brian LaFrance. The Guild's appeal seeks to modify the arbitrator's Decision and Award as to the conditions of the deputy's reinstatement and payment of back wages and benefits. If the Court agrees that the arbitrator exceeded his authority and jurisdiction in reinstating the deputy, then the appeal filed by the Kitsap County Deputy Sheriffs Guild becomes moot.

This brief is organized with the Sheriff's cross-appeal appearing first, followed by the County's response to the Guild's and LaFrance's appeal. The Sheriff will submit a reply to Appellants' response to the Sheriff's cross-appeal.

ASSIGNMENT OF ERROR ON CROSS-APPEAL

The trial court erred by dismissing the Sheriff's petition for constitutional writ of certiorari and reversal of an arbitrator's decision and award. The arbitrator exceeded his jurisdiction and authority under the applicable contract by: (1) requiring reinstatement of Deputy LaFrance's employment after concluding by clear, cogent, and convincing evidence that LaFrance was guilty of more than a few episodes of untruthfulness; and (2) shifting the well-established law as to the burden of proof, requiring the employer to prove by clear, cogent, and convincing evidence that LaFrance was disabled, and concluding that the penalty, termination for untruthfulness, was not appropriate for a deputy who was disabled.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR ON CROSS-APPEAL

Issue No. 1. Did the arbitrator offend public policy and thereby exceed his jurisdiction and authority under the contract when he required the Sheriff to reinstate Deputy LaFrance's employment after concluding

by clear, cogent, and convincing evidence that LaFrance was guilty of untruthfulness?

Issue No. 2. Did the arbitrator exceed his jurisdiction and authority under the contract when he shifted the well-established law as to the burden of proving a disability, required the employer to prove by clear, cogent, and convincing evidence that Deputy LaFrance was disabled, and concluded that the penalty, termination for untruthfulness, was not appropriate for a deputy who was disabled?

STATEMENT OF THE CASE ON CROSS-APPEAL

A. The Arbitrator's Decision and Award.

The Kitsap County Sheriff (Sheriff), Kitsap County (County), and the Kitsap County Deputy Sheriffs Guild (Guild) are parties to a collective bargaining agreement covering deputy sheriffs employed in the Sheriff's Office. CP 1137, 1141-1206.¹ Brian LaFrance (LaFrance) was a Kitsap County Deputy Sheriff and a member of the Guild. CP 1137. On November 29, 2001, LaFrance's employment with the Sheriff was terminated for untruthfulness, incompetence, and failure to follow orders. Id. LaFrance and the Guild grieved his termination. Id.

¹ The Court will note that the collective bargaining agreement expired December 31, 2002. The parties executed successor agreements; however, the 2000-2002 contract is the one applicable during the arbitration, before the trial court, and in this appeal. CP 1137.

The grievance was submitted to arbitration as provided by the collective bargaining agreement, and a hearing was conducted in 2004. CP 1208. On July 17, 2004, the Arbitrator's Decision and Award in the Matter of an Arbitration between Kitsap County Deputy Sheriffs Guild and Kitsap County (Brian LaFrance Termination; 75 L 390 00293 02) was issued (Decision and Award). CP 1208-1254. In his Decision and Award, the Arbitrator placed the burden on the employer to establish by clear, cogent, and convincing evidence that there was just cause for terminating LaFrance's employment. CP 1243-1244. Among other things, the Arbitrator found and concluded that the Sheriff had established that LaFrance was guilty of the misconduct for which he was discharged, including that LaFrance was "guilty of much more than a few isolated episodes of untruthfulness." CP 1245-1247. Those episodes of untruthfulness are of particular concern because LaFrance's untruthfulness and lack of candor occurred during the performance of his official duties.²

The episodes of untruthfulness were not about trivial or minor matters. LaFrance's misrepresentations were about matters integral to the

² The Arbitrator held that the County proved by clear, cogent, and convincing evidence "that Deputy LaFrance was guilty as charged." CP 1246. The employer's termination describing the specific charges of misconduct was not made part of the record before the trial court; however, it was part of the record before the Arbitrator. The record before the trial court summarizes the misconduct. Arbitrator's Decision and Award, CP 1213-1233; Affidavit of Dennis Bonneville, CP 965-969.

performance of his duties as a law enforcement officer. LaFrance lied to his supervisors about the location of case files and reports, and the status of cases, reports, and warrants. CP 966-969, 1223-1224, 1227-1233. LaFrance told his Field Training Officer that files in the trunk of his patrol vehicle were personal materials. They were not. They were case files belonging to the Sheriff's Office. CP 967, 1224-1225, 1231. He told investigators that a deputy prosecuting attorney told him to hold off filing a case because of a pending civil action, which LaFrance knew to be untrue. CP 967. LaFrance also lied when he told his supervisor that he had returned his Glock 23 to Inventory Control. Sheriff's Office personnel found it in an unlocked drawer in LaFrance's office. CP 968, 1223, 1231.

During a search of LaFrance's patrol vehicle, a sergeant observed a dark colored soft case in the trunk. CP 967, 1224-1226. The soft case contained several CD-ROMs and floppy disks. Id. LaFrance told the sergeant that the disks were personal items and utility disks dealing with old DOS commands. LaFrance stated that he would not allow the sergeant to examine or remove the items from the truck of LaFrance's patrol car. Some of the disks were marked "KCSO" and "SPD Vice." CP 967, 1225-1226. When it became apparent that the sergeant was going to examine the disks and CD-ROMs, LaFrance stated that there was a possibility that

the disks and CD-ROMs could contain pornographic images relating to the work he had been doing in detectives investigating pornography. The disks and CD-ROMs were later viewed and found to contain pornographic images, including child pornography images. Child pornography is contraband and must be stored securely in the property room. CP 968, 1218-1219. LaFrance's change of story was a willful attempt by Deputy LaFrance to deceive investigators searching his patrol vehicle.

When LaFrance was reassigned to patrol, he was ordered to separate himself from any further investigations involving detective cases and to return all evidence, cases and property to detectives immediately. Later he was observed downloading files from the County server onto a squad room computer. When asked what he was doing, he lied, telling a sergeant that he was simply transferring a repository of notes that were primarily phone lists, copies of email, and articles. Later, investigators discovered that LaFrance had actually downloaded pornographic images, including child pornography, onto the squad room computer for no investigative reason. CP 968, 1232.

Despite the arbitrator's conclusion that the County had proved by clear, cogent, and convincing evidence that LaFrance was guilty of misconduct as charged (CP 1246), the Arbitrator concluded that the County failed to prove that the penalty, termination, was

appropriate for an employee who was disabled. CP 1252. To reach this conclusion, the Arbitrator shifted the well-established burden of proof and required the *employer* to establish by clear, cogent, and convincing evidence that LaFrance was not disabled at the time of the discharge. CP 1250, n. 74. The Arbitrator concluded that LaFrance was mentally unfit for duty at the time of his discharge and the termination should be modified because LaFrance was disabled. The disciplinary discharge was reduced to three final written warnings. CP 1253.

The Arbitrator awarded reinstatement of LaFrance's employment. CP 1253. However, because LaFrance "was (and possibly still is)" disabled, LaFrance's return to work was conditioned upon him submitting to and passing psychological and physical fitness-for-duty exams. *Id.* In finding that LaFrance was disabled at the time of his discharge, the Arbitrator did not award LaFrance back pay, but he could recover benefits that a disabled officer in good standing could have accessed as of the date of his discharge. *Id.* The County moved for reconsideration of the Arbitrator's Decision and Award, which was denied. CP 611, 707-708, 712-713.

B. Post-Arbitration Efforts to Determine LaFrance's Fitness for Duty.

After the Arbitrator denied the County's request for reconsideration, the parties agreed to explore settlement, agreeing to "hold in abeyance any actions to enforce or seek review of [Arbitrator's] arbitration award." CP 611, 707-708, 714. The parties engaged in settlement negotiations on and off between September and December 2004. CP 611, 708, 714, 719.

In October 2004, the County also began to implement the Arbitrator's Decision and Award. CP 611, 708, 715-718. In compliance with the remedy awarded, LaFrance's employment was reinstated and he was told that he would be returned to full duty upon passing independent psychological and physical fitness-for-duty examinations. CP 611, 708, 715-718, 725. In October 2004, the Guild requested a delay in scheduling the examinations to allow LaFrance to apply for disability retirement. CP 611, 708, 717-718.

On December 17, 2004, the Deputy Sheriffs' Guild filed a lawsuit against the County in Pierce County Superior Court claiming that the County had failed to implement the Arbitrator's Decision and Award and had defamed LaFrance by failing to remove

documents referencing his termination from his personnel file. CP 1-84.

In January 2005, the County moved to dismiss the lawsuit. CP 186-198. The County's motion for dismissal was heard in March 2005 together with a motion by the Guild to file a second amended complaint. CP 246-248, 375-378. The County's motion to dismiss was denied. CP 371-372, 378. The Guild's motion to file a second amended complaint was granted. CP 373-374. On March 15, 2005, the Guild filed a Second Amended Complaint for Breach of Contract and to Enforce Arbitration Award and for Relief under the State Wage Acts and FLSA and the County filed an answer. CP 379-394.

While the County and Guild were litigating the action pending in the Pierce County Superior Court, the Sheriff's Office continued its attempts to comply with the Arbitrator's Decision and Award. LaFrance had not responded to letters from the Sheriff's Office requesting LaFrance's dates of availability for the fitness-for-duty examinations. CP 611, 727-728. The Guild continued to object to the examinations, despite the Arbitrator's Decision and Award making it a condition of his return to full duty. CP 611, 719-726, 729-730. The Guild objected to and LaFrance failed to attend a

physical examination scheduled for February 15, 2005, and a psychological examination scheduled for February 23, 2005. CP 611, 731-735, 736-738, 743-744.

Eventually, LaFrance submitted to physical and mental fitness for duty examinations. The Sheriff's Office was informed on March 23, 2005, that LaFrance was physically able to return to duty, and learned that LaFrance was mentally fit to return to duty on April 6, 2005. CP 612.

LaFrance was notified on April 7, 2005 that he was to return to duty on April 11, 2005. He did so, and was assigned to a field-training officer for retraining. CP 612.

C. The Sheriff Files a Petition for Review of the Arbitrator's Decision and Award.

On the same day that it informed LaFrance that he was being returned to duty, the Sheriff's Office notified the Kitsap County Prosecuting Attorney's Office that LaFrance was being returned to duty as a deputy sheriff. CP 612, 1472. Three days later, the Prosecuting Attorney notified Sheriff's Office that it was reviewing the Arbitrator's Decision and Award, the findings that LaFrance was untruthful, and its

obligations under *Brady v. Maryland*.³ CP 612. Based on the Prosecutor's opinion of his obligations under *Brady v. Maryland*, the Sheriff's Office concluded that LaFrance's record of untruthfulness made him unfit for duty as a deputy sheriff. CP 612, 1472.

On July 25, 2005, the Sheriff placed LaFrance on administrative leave. CP 612-613, 1472. That same day, the County filed a motion to stay the action pending in Pierce County Superior Court, and the Sheriff filed a Petition for Writ of Review or in the Alternative a Constitutional Writ of Certiorari with the Kitsap County Superior Court. CP 596-598, 612, 1078-1086, 1472. The Affidavits of Kitsap County Prosecuting Attorney Russell D. Hauge (CP 1026-1077), Kitsap County Sheriff Steve Boyer (CP 971-1025), Undersheriff Dennis Bonneville (CP 964-970), Chief of Patrol Gary Simpson (CP 954-963), Chief Deputy Prosecutor Jeffery Jahns (CP 951-953), and Senior Deputy Prosecutor Randall Avery Sutton (CP 900-950) were filed in support of the Petition.

The Sheriff filed a motion to show cause for issuance of the petition for writ of certiorari. CP 856-883. While that motion was pending the Guild filed a motion to change venue of the petition to Pierce County. CP 837-845. On September 23, 2005, the trial court heard argument on both motions. CP 667. The trial court denied the Guild's

³ 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

motion for change of venue was denied. CP 705-706. The Sheriff's motion for issuance of the petition was reserved by the court for further consideration. CP 667.

While the motion for issuance of the petition for writ of certiorari was still under consideration, the Guild filed a motion for reconsideration of the trial court's order denying change of venue. CP 695-704. The motion for reconsideration was granted. CP 668-670. Venue of the Sheriff's petition for constitutional writ of certiorari was transferred to the action pending in Pierce County Superior Court. CP 664-1088. At the time the petition was transferred, no decision had been rendered by the Kitsap County Superior Court on the Sheriff's motion to show cause for issuance of the Petition. CP 667.

After the Sheriff's petition was transferred to the Pierce County action, the County filed a motion to assert the petition for constitutional writ of certiorari as a counterclaim and name the Sheriff as an additional party. CP 599-605. The County's motion was granted by the Pierce County trial court on November 18, 2005. CP 1301-1302.

On November 17, 2005, the County filed a motion for summary judgment seeking dismissal of all claims asserted in the Guild's second amended complaint. CP 1119-1135. The Guild and LaFrance filed a joint cross-motion for summary judgment against the County. CP 1454-1469.

On December 15, 2005, the trial court heard the County's motion for summary judgment, the Guild's and LaFrance's joint cross-motion for summary judgment, and the Sheriff's petition for constitutional writ of certiorari. CP 1565. The trial court granted the County's motion for summary judgment dismissing all claims asserted in the Guild's Second Amended Complaint. CP 1560-1563; RP 29-31. The court denied the Guild's and LaFrance's joint cross-motion for summary judgment. CP 1563; RP 31.

The trial court also dismissed the Sheriff's petition for constitutional writ of certiorari. CP 1586-1587. The trial court's denial of the motion to show cause and dismissal of the petition for writ of certiorari is the basis for the Sheriff's cross appeal. CP 1576-1577. The trial court abused its discretion and failed to give due consideration to the grounds for the petition for writ of certiorari. The reasons the trial court gave for denying the petition are untenable:

THE COURT: The writ that you have sought, as I understand the County's position, it seems to be that in any case where credibility is challenged or a witness that is subject to mandatory arbitration is found to be untruthful in any respect, that it's the County's position that the collective bargaining agreement is void to the extent of being the sole remedy of the parties and the Court should step in and grant a writ to not honor the terms of a collective bargaining agreement.

The agreement calls for mandatory and binding arbitration. I am going to deny your request for a writ.

Credibility decisions were made by the arbitrator under the terms of the collective bargaining agreement, and it's not the position that this Court should be interfering with the decision-making process that the parties negotiated and contracted to complete.

RP 31.

The trial court erred. The Sheriff's petition did not challenge the credibility determinations made by the Arbitrator or claim that the sole remedy for any finding of untruthfulness is to void the collective bargaining agreement. As will be seen in the briefing that follows, the grounds for the petition are that the Arbitrator exceeded his authority and jurisdiction under the parties' contract. He did this by offending public policy when he reinstated Deputy LaFrance's employment after finding by clear, cogent, and convincing evidence that LaFrance was guilty of more than a few episodes of untruthfulness in the performance of his public duties. The Arbitrator also exceeded his jurisdiction and authority when he upturned years of well-settled state, federal, and labor law precedent and required the Sheriff to prove the negative (by clear, cogent, and convincing evidence): that LaFrance was not disabled. The Arbitrator exceeded his authority and jurisdiction in deciding that LaFrance's disability excused his untruthfulness.

LEGAL AUTHORITY

A. Standards for Issuance of Constitutional Writ of Review.

“Under article IV, section 6 (amendment 87) [of the Washington Constitution], a superior court possesses the power to review arbitrary decisions by issuing constitutional writs of certiorari.” *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 845, 991 P.2d 1161 (2000) (citing *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998)). “The purpose of such a writ is ‘to enable a court of review to determine whether the proceedings below were within the lower tribunal’s jurisdiction and authority.’” *Wilkinson*, 139 Wn.2d at 845-46, 991 P.2d 1161 (quoting *Saldin*, 134 Wn.2d at 292, 949 P.2d 370). “Thus, a court will accept review only if the petitioner can allege facts that, if verified, establish the lower tribunal’s decision was arbitrary and capricious or illegal.” *Wilkinson*, 139 Wn.2d at 846, 991 P.2d 1161 (citing *Saldin*, 134 Wn.2d at 292, 949 P.2d 370). “But this form of review lies entirely within the trial court’s discretion.” *Wilkinson*, 139 Wn.2d at 846, 991 P.2d 1161. If the superior court refuses to grant a writ, it must have tenable reasons for doing so. *Wilkinson*, 139 Wn.2d at 846 n. 5 (citing *Bridle Trails Comm’ty Club v City of Bellevue*, 45 Wn.App. 248, 252, 724 P.2d 1110 (1986)).

Review of an arbitration decision under a constitutional writ of certiorari is limited to whether the arbitrator acted illegally by exceeding his or her authority under the contract. “The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal’s jurisdiction and authority.” *Clark County Public Utility Dist. No. 1 v. International Broth. of Elec. Workers*, 150 Wn.2d 237, 245, 76 P.3d 248 (2003), quoting *Saldin Sec., Inc. v. Snohomish County*, *supra*, 134 Wn.2d at 292, 949 P.2d 370.

“When reviewing an arbitration proceeding, an appellate court does not reach the merits of the case.” *Clark County Public Utility Dist. No. 1 v. International Broth. of Elec. Workers*, 150 Wn.2d at 245, 76 P.3d 248. “The common law arbitration standard, applicable when judicial review is sought outside of any statutory scheme or any provision in the parties’ agreement, requires this extremely limited review.” *Id.* (citing *DSHS v. State Personnel Board*, 61 Wn.App. 778, 783-84, 812 P.2d 500 (1991)).

B. The Arbitrator Exceeded His Jurisdiction and Authority in Reinstating LaFrance as a Deputy Sheriff After Finding by Clear, Cogent, and Convincing Evidence that LaFrance Was Guilty of Untruthfulness.

The Arbitrator acted without authority and jurisdiction when he ordered the Sheriff to reinstate LaFrance's employment as a deputy sheriff after concluding, by clear and convincing evidence, that LaFrance was guilty of more than a few episodes of untruthfulness. It offends public policy to retain a deputy sheriff after the deputy is found guilty of untruthfulness in the performance of his public duties. "Courts generally do not enforce contracts that are contrary to public policy." *Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet*, 132 Wn.App. 903, 910, 134 P.3d 1188 (2006); citing *Danzig v. Danzig*, 79 Wn.App. 612, 616, 904 P.2d 312; and *Marshall v. Higginson*, 62 Wn.App. 212, 217-18, 813 P.2d 1275 (1991) (refusing to enforce a contract between an attorney and a former client on public policy grounds). "The test of whether a contractual provision violates public policy is 'whether the contract as made has a "tendency to evil," to be against the public good, or to be injurious to the public.' " *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 126, 118 P.3d 322 (2005), quoting *Thayer v. Thompson*, 36 Wn.App. 794, 796, 677 P.2d 787 (1984) (quoting *Golberg v. Sanglier*, 27

Wn.App. 179, 191, 616 P.2d 1239 (1980), *rev'd on other grounds*, 96 Wn.2d 874, 639 P.2d 1347 (1982)).

To require a Sheriff to continue to employ LaFrance as a deputy sheriff is against the public good and is injurious to the public. As public officers, deputy sheriffs are required by law to be truthful during the performance of their public duties. RCW 42.20.040 states: “Every public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor.” The Arbitrator found, by clear and convincing evidence, that LaFrance made false and/or misleading statements during an official investigation by the Sheriff’s Office.⁴

The public has an important interest in its law enforcement officers to give frank and honest replies to questions relevant to his fitness to hold public office. RCW 9A.76.175 states “[a] person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor.” “Material statement” means a written or oral

⁴ LaFrance made false and misleading statements to conceal his possession of files and records of the Sheriff’s Office, to conceal his possession of tapes containing child pornography, and to conceal his transfer of files containing child pornography. It is a class C felony to willfully and unlawfully remove or conceal public records. RCW 40.16.010. It is also a class C felony to knowingly possess, duplicate, disseminate, or exchange visual or printed matter depicting a minor engaged in sexually explicit conduct. RCW 9.68A.050; RCW 9.68A.070.

statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.” *Id.* Again, the Arbitrator found that LaFrance made false or misleading statements to Sergeants and Lieutenants conducting an official investigation.

When LaFrance lied during the disciplinary investigation, LaFrance also may have violated RCW 9A.76.020 which provides that “[a] person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.” LaFrance’s untruthfulness was intended to conceal his actions from investigating officers, and such concealment was intended to obstruct Sergeants and Lieutenants charged with investigating LaFrance’s misconduct.

When LaFrance lied to officers in order to prevent them from recovering files and records belonging to the Sheriff’s office, LaFrance probably engaged in official misconduct. RCW 9A.80.010 states: “(1) A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege: (a) He intentionally commits an unauthorized act under color of law; or (b) He intentionally refrains from performing a duty imposed upon him by law. (2) Official misconduct is a gross misdemeanor.”

These laws support a conclusion that it offends public policy to employ law enforcement officers who have a record of untruthfulness in the performance of their public duties. Reinstatement of an untruthful deputy sheriff corrodes the public's confidence in its police force. Untruthful officers should not be entrusted with the formidable authority that deputy sheriffs are granted under chapter 36.28 RCW.

To Kitsap County Sheriff Steve Boyer, retaining a deputy who was untruthful in the performance of his public duties is untenable. He states:

Under chapter 36.28 RCW, my statutory duties obligate me, and deputies appointed by me, to arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons who are guilty of public offenses. My deputies and I must make complaint of all violations of the criminal law that come to our knowledge within Kitsap County, appear before a judge and give evidence to support probable cause for issuance of a search warrant, and when subpoenaed attend sessions of courts and give testimony as to our knowledge of a crime.

As elected Sheriff, I make an oath that I will faithfully perform the duties of my office. I am responsible for the misconduct of all deputies who I appoint. I can be held liable for damages to an aggrieved party for the misconduct of my deputies, including damages for negligent retention and negligent supervision of deputies.

I must be able to retain total confidence in the veracity of my deputies. A deputy's reputation for truth and veracity must be above reproach. Kitsap County Sheriff Policy and Procedures demand that deputies shall not act or behave privately or officially in such a manner as to bring discredit upon himself or the Office of the Sheriff.

. . . LaFrance swore and affirmed that he would perform his duties truly, faithfully and impartially.

. . . I believe that RCW 42.20.040 applies to deputy sheriffs:
"Every public officer who shall knowingly make *any* false or

misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor.” (Emphasis added). I believe LaFrance violated this statute when he made untruthful and misleading statements to officers conducting an official investigation of his misconduct.

I believe that RCW 9A.76.020(1) applies to deputies during a Official investigation: “A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs *any* law enforcement officer in the discharge of his or her official powers or duties.” (Emphasis added). I believe LaFrance violated this statute when he was untruthful to officers during their official investigation of his misconduct.

The failure of a deputy to provide truthful statements during an official investigation impairs the Sheriff’s Office’s ability to properly and fully investigate Office regulations. Such a failure impugns the integrity of the investigation and the Sheriff’s Office and adversely affects our ability to provide services to the community.

The public has an important interest, and indeed expects, its law enforcement officers to give frank and honest replies to questions relevant to their fitness to hold public office. LaFrance’s untruthfulness to law enforcement officers and his violation of his official oath means he is no longer fit for office as a KCSO Sheriff deputy.

CP 971-974.

Chief of Patrol Gary Simpson agrees that LaFrance’s record of untruthfulness makes him unfit to perform the duties of deputy sheriff:

The statutory duties of the Sheriff and his/her deputy sheriffs include the duty to make complaint of all violations of the criminal law, which shall come to their knowledge within the confines of Kitsap County. This is done by the preparation of an Investigation/Incident report or a Certificate of Probable Cause, or both. The incident report and Certificate and Probable cause are signed and dated by each deputy under penalty of perjury: “I CERTIFY OR DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF

WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.”

A statutory obligation of a deputy sheriff is to appear before a judge, either in person or telephonically, and swear under oath as to the facts and circumstances that may justify the issuance of a search warrant. In addition, deputies must respond to a subpoena to testify in court concerning that deputy's knowledge of evidence in connection with a crime.

Thus, it is an essential function of a deputy sheriff to testify truthfully.

In addition, it is essential that a deputy have a reputation for truthfulness, because much of the work of a deputy is performed alone, independently of other deputies. Each deputy is assigned a patrol car. During the course of typical day on patrol, a deputy receives and responds to a variety of calls for service (911 calls) and conducts investigations working alone. In the event the parties involved in a call for service are not immediately in conflict or in separate locations, it is likely that a deputy will investigate these calls by himself/herself. . . The essential duties of a deputy require him or her to work independently of other deputies.

Calls for service (911 calls) or incidents requiring law enforcement response, which are considered to present potentially dangerous circumstances, would generally necessitate an initial response by multiple officers. When multiple officers respond to an incident, each officer takes a role in controlling and investigating parts of the incident. For example, a domestic dispute, warrant arrest, assaults, or other calls when opposing parties are involved would usually necessitate two or more officers to respond. Yet even when multiple officers respond, each officer will independently investigate portions of the case, and then together determine an appropriate disposition or actions to be taken as a result of a collaborative investigation. Each deputy investigating a separate part of the incident will prepare supportive paperwork and a declaration concerning the information, statements and/or evidence collected.

Even when multiple officers are dispatched to an incident, one officer may be relied upon to conduct an investigation. For instance, officers working within an area where a burglary has occurred or is occurring may be dispatched to the scene. The scene, such as a residence, outbuildings, and the surrounding area,

will be searched. Once the matter is determined to be safe, one officer may conduct the investigation, allowing other officers to return to or handle other 911 calls.

. . . Evidence obtained and documented by a lone deputy is relied upon in determining whether a search warrant is issued, whether probable cause exists to charge a crime, and whether a defendant is guilty beyond a reasonable doubt. The Sheriff's Office, the Prosecuting Attorney's Office, a judge, the Court, and ultimately a jury will rely on the evidence obtained and documented by a lone deputy. The Sheriff's Office, the Prosecuting Attorney's Office, a judge, the Court, and a jury will rely on the credibility of that lone deputy. If any deputy has a reputation for untruthfulness, or has been found to be untruthful by an arbitrator or through a judicial process, then the evidence compiled by that deputy, the observations reported by that deputy, and the actions of that deputy will be suspect and subject to impeachment.

Because LaFrance has been found to be untruthful, he is unfit and unable to perform the essential functions of a deputy sheriff.

CP 954-958.

It also offends public policy to retain a deputy who is unfit to be a witness in criminal proceedings. Kitsap County Prosecutor Russell D. Hauge is not likely to charge a criminal case in which LaFrance is likely to be a material witness. Prosecutor Hauge states:

In fulfilling the obligations of my office, I exercise discretion to file criminal charges against a person accused of violating state criminal laws. As a matter of policy, my deputies and I will only charge a crime or crimes that accurately reflect the defendant's criminal conduct, taking into account reasonably foreseeable defenses, and for which we expect to be able to produce at trial proof beyond a reasonable doubt. Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a conviction by a reasonable and objective fact finder.

A decision to file charges includes, among other things, evaluating whether evidence will be admissible at trial, and the credibility, or lack thereof, of witnesses. An evaluation of the testimony of a witness includes whether the witness has reasons to testify truthfully or to deceive. A witness's past history of untruthfulness is always part our consideration in the charging decision. If a witness has recovered a crucial piece of evidence and there is evidence of that witness's past untruthfulness, then a decision may be made not to charge.

I have reviewed and considered the Arbitrator's Decision and Award In the Matter of an Arbitration Between Kitsap County Deputy Sheriff's Guild and Kitsap County (Brian LaFrance Termination; 75 L 390 00293 02) dated July 17, 2004 . . . The arbitrator applied the clear and convincing evidence standard as the burden of proof in the case. Decision and Award, pp. 36-37. The arbitrator found by clear and convincing evidence that Brian LaFrance lied three times to a Sergeant about the existence of work-related materials in the trunk of LaFrance's patrol car and on floppy disks and CD-ROMS in LaFrance's possession, and also lied about the status of several case files. Decision and Award, pp. 17-18, 21. The arbitrator found that the Sheriff's investigation of LaFrance's untruthful conduct "was thorough and comprehensive". Decision and Award, p. 39. The arbitrator concluded that LaFrance "was guilty of much more than a few isolated episodes of untruthfulness." Decision and Award, p. 40.

Based on the findings and conclusions of the arbitrator, in my opinion if LaFrance is a witness in any criminal proceeding, be it pretrial or at trial, my deputies and I will be legally and ethically obligated to disclose LaFrance's history of untruthfulness to criminal defense counsel.

In addition, because LaFrance's history of untruthfulness may be material to a judge's decision to issue a search warrant, my deputies and I will be legally and ethically obligated to disclose LaFrance's history of untruthfulness to a judge when requesting a search warrant. For example, if LaFrance seeks a warrant to search a trunk of a suspect's vehicle, it may be material for the judge to know that in the past, LaFrance lied to a Sergeant about the contents of his vehicle trunk. As with any civilian witness, a judge will likely weigh the truthfulness of the information provided by LaFrance and may refuse to issue a search warrant based on LaFrance's testimony.

LaFrance's past history of untruthfulness is likely to affect the credibility of his testimony: as to probable cause to conduct a search, as to the location of evidence at a crime scene, as to statements made by a suspect or witness to LaFrance, as to LaFrance's own reported behavior, and as to his own reported observations. In any criminal proceeding where LaFrance will be a witness, our office will be required to spend up to a day of trial in an attempt to establish LaFrance's credibility as a witness beyond a reasonable doubt. Considering LaFrance's established and recorded history of untruthfulness, it is highly likely that a jury may refuse to accept any evidence offered by LaFrance and thereby refuse to convict the defendant.

With the above considerations in mind, it is unlikely that our office can or will use him as a single affiant for a search warrant. If a search warrant is issued in a situation where LaFrance is the lone affiant, a criminal defendant will probably seek to suppress evidence gained by reason of that search warrant, and it is highly possible that such evidence will be suppressed.

With the above considerations in mind, if LaFrance is the only law enforcement witness in a criminal proceeding, it is unlikely that the case will be charged. While I cannot say that my office will never charge a defendant if LaFrance's testimony is required, it will be an extraordinary case where we would.

. . . My representations herein include a consideration of the high costs of taking a criminal case to trial. Those costs include costs to the public, the victim, the witnesses, and the judicial system. As Prosecuting Attorney, I have a statutory and ethical obligation to improve the administration of criminal justice, and not to unnecessarily burden the administration of criminal justice.

CP 1026-1029.

Chief Deputy Prosecutor Jeffery Jahns agrees that the Kitsap County Prosecutor's Office will be required to disclose LaFrance's history of untruthfulness and doing so will likely lead to acquittal of a criminal defendant:

RPC 3.8(a) requires a prosecutor to refrain from prosecuting a charge known to not be supported by probable cause, i.e. that the prosecutor lacks a belief in the truth of the charge.

RPC 3.9(d) requires prosecutors to make timely disclosure of all evidence or information known to negate guilt or mitigate the offense. RPC 3.9(d) directly relates to the duties on a prosecutor required by the due process clause as outlined by the seminal case of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny.

CrR 4.7(a)(3) and CrRLJ 4.7(a)(3) have similarly codified the *Brady* requirements by court rule. Disclosure of *Brady* material is required under the due process clause regardless of whether the defense requests the information.

Many cases have discussed the prosecution's duty to disclose under *Brady*. See QUEST FOR JUSTICE at 186-193 for pertinent cases to Washington practice. Perhaps the most telling and scathing recent case involving prosecutorial misconduct resulting in the reversal of a death penalty case due to the prosecution's *Brady* violations is *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002), *cert. denied*, 537 U.S. 942, 123 S.Ct. 341, 154 L.Ed.2d 249 (2002). Essentially, when the prosecution violates *Brady* by failing to disclose required information, the prosecution is held to have unlawfully suppressed evidence in violation of the due process clause. *Benn* re-emphasizes the long-standing *Brady* rule that *Brady* material includes impeachment evidence.

I have reviewed and considered the Arbitrator's Decision and Award In the Matter of an Arbitration Between Kitsap County Deputy Sheriff's Guild and Kitsap County (Brian LaFrance Termination; 75 L 390 00293 02) dated July 17, 2004. With the above considerations in mind, in my opinion in every criminal case involving LaFrance, the Kitsap County Prosecutor's Office will be required to disclose LaFrance's history of untruthfulness.

In addition, each and every time that a request is made to a judge for a search warrant, the Prosecutor's Office will be required to disclose LaFrance's history of untruthfulness.

The defense certainly will be able to impeach LaFrance with his untruthful character. I cannot imagine the typical juror giving much if any weight to an officer known for lying. And in any case involving only LaFrance's testimony to prove the elements of the

crime, a defense denial citing LaFrance's untruthful nature will most certainly result in an acquittal.⁵

CP 951-953.

To Kitsap County Sheriff Steve Boyer, LaFrance's inability to testify in criminal matters makes LaFrance unfit to serve as a deputy sheriff.

Sheriff Boyer explains:

I have reviewed the Affidavits of Russell D. Hauge, Jeffery J. Jahns, and Randall A. Sutton. The Prosecutor has informed me that it is unlikely that his Office will charge a case if LaFrance is the only law enforcement witness in a criminal proceeding and it is unlikely that the Prosecutor's Office will rely on LaFrance as an affiant for a search warrant. Thus, LaFrance is unable to perform the essential duties of a deputy sheriff and, therefore, he is unfit for duty as a deputy sheriff. LaFrance's involvement in any case in which he is involved will be tainted by his reputation for untruthfulness.

LaFrance's history of untruthfulness is not a correctable situation. No amount of training will eliminate the history of his dishonesty.

If a search warrant is not issued or a suspect not charged because of LaFrance's reputation for untruthfulness, then persons who commit crimes may go unpunished. More importantly, the community may be subject to the risk of additional criminal conduct at the hands of persons who go uncharged or not convicted as a consequence of LaFrance's reputation for untruthfulness. Deputy sheriffs hold tremendous power and authority in our society. Deputy sheriffs are authorized to use force and, under certain conditions, deprive citizens of their life, liberties, and/or property. Courts and judges must rely on the testimony of deputy sheriffs. Trust in the integrity and veracity of deputy sheriffs is critical to fulfilling legal and moral obligations to the public.

⁵ Senior Deputy Prosecuting Attorney Randall Avery Sutton confirms Prosecutor Hauge's and Chief Deputy Prosecutor Jahn's opinions that in the event that LaFrance is a witness in any criminal proceeding, be it pretrial or at trial, the Prosecutor's Office will be legally and ethically obligated to disclose LaFrance's history of untruthfulness to criminal defense counsel. CP 900-902.

CP 974 - 975.

The testimonials of Sheriff Boyer, Prosecutor Hauge, Chief of Patrol Simpson, Chief Deputy Prosecutor Jahns, and Senior Deputy Prosecutor Sutton provide compelling reasons for concluding that the Arbitrator acted against public policy when he ordered the reinstatement of LaFrance. Courts should not permit an arbitrator to order a party to engage in an action that offends public policy. Deference to an arbitration award does not require a court to turn a blind eye to an arbitration decision that violates the law.

C. The Arbitrator Acted Outside His Authority and Jurisdiction When He Shifted the Well Established Burden of Proof.

1. The Decision and Award Contravenes State and Federal Law and Under the Parties' Contract, and is Invalid.

Besides offending public policy, the Decision and Award exceeds the Arbitrator's jurisdiction and authority under the collective bargaining agreement. The Arbitrator takes his authority from the parties' contract. "[A]n arbitrator's award is illegal if it exceeds the authority granted to the arbitrator by the parties' contract . . ." *Clark County Public Utility Dist. No. 1 v. International Broth. of Elec. Workers, supra*, 150 Wn.2d at 248, 76 P.3d 248. The contract between the Sheriff and the Guild provides:

“Authority of the Arbitrator. The arbitrator shall be authorized to rule and issue a decision in writing on the issue presented for arbitration, such decision shall be final and binding on the parties. The arbitrator shall rule only on the basis of the information presented in the hearing before him/her and shall refuse to receive any information after the hearing except when there is mutual agreement, and in the presence of both parties. *The arbitrator shall have no power to render a decision that will add to, subtract from, or alter, change or modify the terms of this Agreement, and the arbitrator’s power shall be limited to interpretation and application of the express terms of this Agreement. . . .*

CP 96. (Emphasis added.)

When interpreting and applying the express terms of the parties’ contract, the Arbitrator must apply the laws of the State of Washington or federal law. The contract states:

“Any provision of this Agreement which contravenes any State or federal law is invalid.”

CP 99.

When he shifted the well-established burden of proof and required the employer to prove by clear, cogent, and convincing evidence that LaFrance was not disabled, the Arbitrator altered the parties’ agreement so that it contravenes state and federal disabilities laws. The Arbitrator reached well beyond his authority and jurisdiction to conclude that LaFrance was disabled and his disability mitigated his untruthfulness. The arbitrator’s overreaching leaps off the page of the Decision and Award:

At the hearing the Guild called Antone Pryor, Ph.D., a psychologist, to testify concerning LaFrance’s mental health

conditions and how they may have caused his misconduct. Dr. Pryor, who is not a medical doctor, testified as to Deputy LaFrance's mental and physical impairments at the time of his discharge. The County on cross-examination demonstrated that Dr. Pryor did not receive a referral for Deputy LaFrance until June 2003, and that the only medical records Dr. Pryor reviewed were from the years 1983, 1986, and 1993 through 1995. Further, Dr. Pryor admitted that he knows of no treatment or evaluation of LaFrance between 1995 and 2001 when LaFrance was in Detectives and admitted that he did not review any documentation in connection with LaFrance's termination. The only information that Dr. Pryor relied on in his diagnosis was LaFrance's "subjective experience."

The parties agree that in early 2002, when the arbitration was first rescheduled, Deputy LaFrance had a heart attack that required surgery and the insertion of a stent in one of his arteries. This heart attack occurred almost eighteen months after Deputy LaFrance's suspension. The Employer correctly argues that disability laws do not support the Guild's request that the Arbitrator rescind the discipline as an accommodation for a health condition occurring well after the acts of misconduct themselves, and that if LaFrance wanted the County to take his health into consideration in responding to his misconduct, it was incumbent on LaFrance to disclose the health problems and seek accommodation. . . There is no duty on an employer to attempt to discover health conditions that are not obvious. However, one must examine the facts in this case to determine whether the Employer knew or should have known of the employee's disabilities.⁷⁴

Footnote 74: It should be noted that the normal burden of proof is inverted in this matter due to the nature of labor arbitrations. The employer has the burden to show by clear and convincing evidence that a reasonable employer would not have known of the employee's alleged disabilities. Had the burden been reversed my findings would have been different.

. . . The County argues that an employee has a duty to request an accommodation and does not have the luxury of waiting to get fired and then requesting a second chance due to their undisclosed disability. Normally I would agree with the County and the cases its attorneys cited. However, I believe that the case at hand is

distinguishable from cases cited by the Employer since those dealt with employees who knew of their own disabilities. I believe that the evidence as a whole indicates that Deputy LaFrance had no idea of the medical problems he was suffering from until well after his termination. In the instant case we have a disability that should have been apparent to his co-workers, yet due to the nature of the condition(s) is undetectable to the afflicted individual. The Employer has failed to show by clear and convincing evidence that the penalty was appropriate for an employee who was clearly suffering from serious health problems.

CP 1249-1252.

As the arbitrator himself professed, if the normal burden of proof is applied to the question whether LaFrance was disabled at the time of his discharge, LaFrance's termination would have been sustained. When he shifted the normal burden of proof, required the Sheriff to prove the negative that LaFrance was not disabled, and required the Sheriff to prove the negative by clear, cogent, and convincing evidence, the arbitrator altered the parties' contract. In choosing arbitration as a forum for resolving their disputes, the parties presume that arbitrators will apply the law and respect precedent. Notions of fundamental fairness require nothing less.⁶

⁶ LaFrance was represented by his union throughout the investigation of misconduct, at the pre-disciplinary interviews, and pre-termination and post-termination hearings. CP 1228-1229, 1233. Neither the Guild nor LaFrance raised concerns about LaFrance's alleged unfitness for duty until they requested a continuance of the arbitration hearing because LaFrance had a heart attack, which was well after he was discharged. CP 1250.

As shown by the state, federal, and labor arbitration cases discussed below, shifting the burden of proof in this case is more than just an anomaly. If not corrected the misapplication of the burden of proof as to affirmative defenses will have far-reaching consequences, certainly well beyond this case. The misapplication of the burden of proof to an employee's disability claims shakes to the core well-established, time honored precedent in labor arbitration and state and federal disability laws. If not corrected, clear, strong, consistent and enforceable standards will be lost. If not corrected, the consequences of the Arbitrator's decision will forever change the bargaining and contractual relationship between these parties. In particular, the County will be forced to pursue fitness-for-duty examinations any time an employee engages in misconduct that could possibly be attributable to an alleged disability.

2. Reversing the Normal Burden of Proof Violates Well-Established Disability Laws and is Contrary to Public Policy.

Placing the burden on the employer to disprove that it knew or should have known of the employee's disability and need for accommodation is contrary to established disability laws and public policy. Employees and their physicians are in a better position to know whether a disability exists and whether an accommodation is needed. Recognizing this, disability laws and court decisions interpreting those

laws place the burden on the employee to prove that the employer knew about the employee's disability and need for accommodation. *McClarty v. Totem Electric*, ___ Wn.2d ___, ___ P.3d ___, (No. 75024-6, July 6, 2006) ("To provide a single definition of 'disability' that can be applied consistently throughout the WLAD, we adopt the definition of disability set forth in the federal ADA. We hold that a plaintiff bringing suit under the WLAD establishes that he has a disability if he has (1) a physical or mental impairment that substantially limits one or more of his major life activities, (2) a record of such an impairment, or (3) is regarded as having such an impairment.") *See also Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 578, 119 S.Ct. 2162, 2175 (1999) (a plaintiff claiming a cause of action under the Americans with Disabilities Act bears the burden of proving, inter alia, that he is a qualified individual with a disability); *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564, 568 (2004) ("[Employee/plaintiff] bears the burden of proving, by a preponderance of the evidence, that his disability "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome"), *citing Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Snead v. Metro. Property & Cas. Ins. Co.*, 237 F.3d 1080, 1093 (9th Cir. 2001) (holding that the traditional framework for analyzing discrimination cases under

Title VII applies in cases involving disability discrimination under the Americans with Disabilities Act).

The Americans with Disabilities Act (ADA) actually *prohibits* an employer from making inquiries about an employee's disability unless the inquiry is job-related and consistent with business necessity:

PROHIBITED EXAMINATIONS AND INQUIRIES. - A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. §12112(d)(4)(A).

The employer has the burden of proving that a medical examination or inquiry is job-related and consistent with business necessity. *Fredenburg v. Contra Costa County Dept. of Health Services*, 172 F.3d 1176, 1182 (9th Cir. 1999) (a nondisabled employee may sue under the ADA for medical testing violations; the employer must prove that the examination or inquiry is job-related and consistent with business necessity).

The employer's burden of proving business necessity is a high one. "The 'business necessity' standard is quite high, and 'is not (to be) confused with mere expediency'. Such a necessity must 'substantially promote' the business' needs." *Cripe v. City of San Jose*, 261 F.3d 877,

890 (9th Cir. 2001), citing *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621-22 (9th Cir. 1982). In *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999) the court held that “for an employer’s request for an exam to be upheld there must be *significant evidence* that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.” (Emphasis added).

“The ADA’s requirement that an IME be consistent with business necessity is an objective one . . . That is, even a ‘good faith’ mandatory medical examination by an employer may nevertheless give rise to liability if the court determines that the examination was unwarranted.” *Tice v. Centre Area Transp. Authority*, 247 F.3d 506, 518 (3rd Cir. 2001), citing *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 193 (3rd Cir. 1999) (explaining that there is no “reasonable mistake” defense to a claim of discrimination on the basis of disability where the “mistake” is premised on a generalized misunderstanding of the effects of the plaintiff’s disability).

The Second Circuit Court of Appeals has stated that to establish business necessity the employer should “demonstrate that a medical examination or inquiry is necessary to determine (1) whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee’s capacity to perform his or her duties (such as frequent absences or a known

disability that had previously affected the employee's work) or (2) whether an employee's absence or request for an absence is due to legitimate medical reasons, when the employer has reason to suspect abuse of an attendance policy." *Conroy v. New York State Dept. of Correctional Services*, 333 F.3d 88, 98 (2nd Cir. 2003).

With this high threshold in mind, compare LaFrance's allegedly "erratic and unusual" behavior to cases where the employer's inquiries were found to be consistent with "business necessity": *Tice v. Centre Area Transp. Authority*, 247 F.3d 506 (3d Cir. 2001) (Transportation authority's requirement that employee who had injured his back submit to independent medical examination (IME) before returning to his position as bus driver was "consistent with business necessity"); *Porter v. United States Alumoweld Co.*, 125 F.3d 243, 246 (4th Cir. 1997) (finding consistency with business necessity when employer required a medical exam from employee, whose job required lifting, when employee sought to return from a leave of absence following back surgery for a work-related injury); *Riechmann v. Cutler-Hammer, Inc.*, 183 F. Supp.2d 1292, 1299 (D. Kan. 2001) (finding that evidence supported jury's finding that after plaintiff had suffered stroke and now requested transfer to a more strenuous position within the company, requiring extensive questionnaire from employee's doctor served business necessity); *Rodriguez v. Loctite*

Puerto Rico, Inc., 967 F. Supp. 653, 661 (D.P.R. 1997) (finding no ADA violation when employer required an independent examination after plaintiff requested a two-month leave of absence). In each of the cases, the employer's inquiries were based on an objectively apparent, even obvious, disability with a clear connection to the employee's job.

In 2000 and 2001, "significant evidence" did not exist that LaFrance was suffering from a disability. The record before the arbitrator shows that there were no objective reasons to doubt LaFrance's mental or physical capacity to perform his duties, such as frequent absences. The Arbitrator himself recognized that the evidence was subjective. CP 1250. LaFrance was transferred to Patrol on December 15, 2001. Clearly, the act of transferring LaFrance to Patrol shows that the County did not have cause to inquire whether LaFrance was mentally or physically capable of performing his job as a deputy sheriff. Most likely, if the County had required Deputy LaFrance to submit to a fitness for duty examination in 2000 or 2001, LaFrance, the Guild, or both would have claimed that the inquiry was an invasion of LaFrance's privacy and violated the ADA.

If, on the one hand, the employer has the burden of proving in labor arbitrations that the employee was not disabled or did not need an accommodation, then the employer will make unnecessary and potentially unlawful medical inquiries and examinations. The increased inquiries and

examinations will increase the risk of invading employees' privacy. More employees will file lawsuits for violations of disability laws. More grievances will be filed for violations of the anti-discrimination clauses in collective bargaining agreements. In addition, employees and grievants could profit by their intentional withholding of necessary information to permit employers to assess the existence of a disability and need for accommodation.

For all the reasons discussed in the foregoing, the Arbitrator overreached his jurisdiction and authority in placing the burden on the County to prove the negative by clear, cogent, and convincing evidence: that LaFrance was not disabled, that he did not require an accommodation, and that the County did not know that he was disabled and needed accommodation. This is an impossible burden. An employer will rarely, if ever, meet such a burden. Placing such a burden on the employer is contrary to established law and policy. The Arbitrator's decision should be set aside.

3. It is Manifestly Unreasonable to Require the Employer to Investigate Whether a Mental or Physical Condition is the Cause of an Employee's Misconduct.

Considering the substantial limitations on employers' ability to inquire whether an employee is suffering from a disability, it is manifestly unreasonable to require the County to investigate whether a mental or

physical condition is the cause of an employee's misconduct. Washington courts hold that "the employer has no duty to investigate by questioning any employee suspected of a disability." *Wurzbach v. City of Tacoma*, 104 Wn.App. 894 900, 17 P. 3d 707 (2001), citing *Goodman v. Boeing*, 127 Wn.2d at 409.

Similarly, federal courts interpreting the ADA hold that employers do not have to initiate the interactive process unless the employer knows of the existence of a disability and that the disability prevents the employee from requesting accommodation. In *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001), the employee never asked the employer for an accommodation, and the employee admitted that she never believed she needed rehabilitation while working for Lucky Stores. The Ninth Circuit concluded that under these facts, Lucky Stores was under no affirmative obligation to provide an accommodation for the employee. The Court distinguished its holding in *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) that the interactive process for finding a reasonable accommodation may be triggered by the employer's recognition of the need for such an accommodation, even if the employee does not specifically make the request. *Lucky Stores*, at 1188. The court explained that "the exception to the general rule that an employee must make an initial request applies, however, only when the employer '(1)

knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.”
Id., quoting *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000) (emphasis added).

The facts and claims made in *Stola v. Joint Industry Bd.*, 889 F. Supp. 133 (S.D.N.Y. 1995) are strikingly similar to the case here, and the federal court’s analysis underscores the inappropriateness of requiring employers to speculate as to a medical explanation for an employee’s misconduct. The evidence in *Stola* indicated that the employee was “a troublesome, sometimes insubordinate employee”, who at times had difficulty comprehending what was required of him and who also had engaged in threatening and menacing behavior on several occasions. The employee claimed that the behavior complained of, if it occurred, was the product of a general anxiety disorder. He contended that he was able to perform the essential functions of his job with reasonable accommodation for his disability, specifically psychotherapy and medication. He admitted that he was unaware of his own condition during the period prior to his termination and that he therefore did not inform the employer of it or seek reasonable accommodation. Despite these admissions, the employee

contended that the employer was “on notice of a disability involving a mental disorder through [his] conduct.” *Stola v. Joint Industry Bd.*, 889 F.Supp. at 134-135. The district court held that:

“[i]t manifestly would be unreasonable in such circumstances to hold the [employer] responsible for failing to determine--in the absence of any such suggestion from plaintiff or the physician whose note he submitted to it-- whether that behavior was the product of a mental disorder.

Id., at 136 (S.D.N.Y. 1995), *citing Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) (“‘poor judgment, irresponsible behavior and poor impulse control’ do not amount to a mental condition that Congress intended to be considered an impairment” under the ADA).

The Arbitrator found that LaFrance was “guilty of both misconduct and incompetence” and “was guilty of much more than a few isolated episodes of untruthfulness.” CP 1246-1247. Like decisions in *Stola* and *Daley*, it would be manifestly unreasonable to hold the County responsible for failing to determine that LaFrance’s incompetence, insubordination, and untruthfulness were the result of a mental impairment. How is the County in a better position to know that LaFrance was disabled than LaFrance or the Guild, who never raised it? As noted by the Arbitrator, LaFrance, the Guild Attorney, Guild President, and Guild Representative were present during the investigatory interviews and *Loudermill* hearing. CP 1228-1229. No claims were made either by LaFrance or the Guild that

LaFrance was suffering from a disability *until more than eight months after his termination and 21 months after he was placed on administrative leave to investigate his misconduct*. Who better than LaFrance and his own representatives to raise the issue of disability as a defense or mitigating circumstance? The Guild and LaFrance did not raise the issue for the simple reason that LaFrance was not disabled.⁷

Untruthfulness, incompetence, and insubordination are not themselves symptoms of illness, yet the Arbitrator's decision goes so far as to make an employer liable for failing to inquire whether there is a medical reason underlying such misconduct. The effect of the Arbitrator's decision will require the employer not only to diagnose an employee's symptoms, but also be liable for firing an individual on the basis of any action or characteristic that would not exist but for the disability. The standard created by the Arbitrator's decision will create an erroneous sphere of potential liability.

4. Under Well-Established Labor Law, LaFrance and the Guild Had the Burden of Establishing LaFrance's Disability.

⁷ The Arbitrator found that the Sheriff proved LaFrance was not disabled under the preponderance of the evidence standard. However, the Sheriff was unable to meet the higher, clear, cogent, convincing standard. CP 1252.

Even under well-established labor law, the burden of proving affirmative defenses or mitigating factors in this case is on the Guild.

It is universally accepted by arbitrators that the employer has the obligation to establish by sufficient evidence that the employee was guilty of some wrongdoing. Once such a prima facie case has been established, the burden shifts to the union to demonstrate an affirmative defense of mitigating circumstances or other unusual situations that would not justify discharge. In other words, once the employer sustains its burden to prove some misconduct by the employee, the burden shifts to the union if it seeks to persuade the arbitrator that the penalty is unreasonable or overly severe. Once the employer has convinced the arbitrator that some penalty is justified, the penalty should not be reduced unless the arbitrator is persuaded that, under all of the circumstances of the case, the penalty is excessive.

In re Manchester Plastics, FMCS Case No. 96/23832-3, 110 LA 169 (Knott, 1997).

In the hearing and post-hearing briefing, the Guild argued that LaFrance was disabled and required accommodation, and the County knew or should have known this. These are affirmative defenses aimed at excusing LaFrance's misconduct. The County does not have to disprove affirmative defenses or mitigating factors put forth by the Guild.

Integram-St. Louis Seating, FMCS Case No. 990518/11374-7, 113 LA 693 (Marino, 1999) ("In urging that Grievant's February 15, 1999, absence should have been excused, the Union asserts only that the absence

at issue should have been regarded as an FMLA covered event. Such a claim constitutes an affirmative defense by which Grievant seeks to excuse his admitted absenteeism. In accord with time honored arbitral precedent, the burden of proving such an affirmative defense rests upon Grievant. Stated another way, it is not the Employer's burden to disprove the affirmative defense of Grievant. The burden rests on Grievant and/or the Union) (*citing Mississippi Lime Company*, 29 LA 559, 561 (Updegraff, 1957). *See also In re City Of Seaside* [Ore.], 119 LA 1341 (Reeves, 2004) ("Union bears the burden of proving any affirmative defenses, and any mitigating factors").

Applying the correct burden of proof leads to the inevitable conclusion that LaFrance's discharge should not have been modified by the Arbitrator, because "the Employer was able to show by a simple preponderance of the evidence that the remedy was appropriate." CP 1252. This being the case, the Guild is unable to prove by a preponderance that LaFrance's discharge was inappropriate. Thus, the Arbitrator's decision should be set aside, thereby reinstating LaFrance's discharge.

Reviewing the evidence and applying the correct burden of proof leads one to the inevitable conclusion that LaFrance and the Guild did not meet their burden of proving that LaFrance was disabled and the County

knew it. The Arbitrator acknowledged that no medical evidence exists that LaFrance was disabled in 2000 or 2001 and LaFrance himself “had no idea of the medical problems he was suffering from until well after his termination”. CP 1252. In placing the burden on the County to prove the negative, that LaFrance was not disabled, places an impossible burden on an employer, overturns well-established law and precedent, and is likely to lead to more litigation.

THE COUNTY’S RESPONSE TO THE GUILD’S APPEAL

If the Court finds that the trial court erred and the Arbitrator exceeded his jurisdiction and authority in reinstating LaFrance’s employment, then the Guild’s and LaFrance’s appeal seeking back wages, benefits, and penalties for failing to remove termination matters from LaFrance’s personnel files becomes moot. If the Court upholds the trial court’s decision dismissing the petition for writ of certiorari, then Kitsap County requests consideration of the following response to the Joint Brief of Appellants.

RESPONSE TO APPELLANTS’ STATEMENT OF THE ISSUES

Issue No. 1. Did the County violate the Arbitrator’s Decision and Award by reinstating LaFrance’s employment effective the date of his discharge and delaying LaFrance’s return to full duty until he passed psychological and physical fitness-for-duty exams, when the Arbitrator’s

Decision and Award conditioned LaFrance's return to full duty on his passing the fitness-for-duty exams?

Issue No. 2. Whether the County violated the Arbitrator's Decision and Award by providing access to sick leave, annual leave, health care, and retirement benefits retroactive to the date of LaFrance's discharge, but denying payment of full wages and benefits, when the Arbitrator's award provides that:

“LaFrance should be allowed to access any benefits that an officer in good standing could have accessed as of the date of discharge including sick leave, disability benefits, or any other benefit provided to disabled employees covered by [the] Collective Bargaining Agreement” but “[s]ince Deputy LaFrance was (and possibly still is) incapacitated he is not entitled to back pay per se, but may keep any Unemployment Insurance benefits for which he is monetarily eligible. . . and “[t]he retroactivity of the return of [LaFrance] to regular status is not an issue in this case due to the lengthy continuance requested by the Guild and necessitated by Deputy LaFrance's heart attack.”

Issue No. 3. Whether the Guild's and LaFrance's claim that the County violated the collective bargaining agreement when it failed to remove termination letters from LaFrance's personnel files and disseminated that information to third parties is a claim that is subject to the mandatory arbitration provisions of the parties' contract.

STATEMENT OF THE CASE TO THE GUILD'S APPEAL

LaFrance and the Guild claim they are seeking enforcement of the Arbitrator's Decision and Award. They argue that the remedy awarded

includes retroactive payment of full wages and benefits to November 29, 2001, the date of LaFrance's discharge. In the alternative, they argue for retroactivity to August 21, 2003 when a psychiatrist determined that LaFrance could participate in the arbitration hearing. They propose a third alternative, retroactivity to July 17, 2004, the date of the Arbitrator's Decision and Award.

The Arbitrator did not award retroactive wages. The remedy awarded was access to benefits that disabled officers in good standing could have accessed. LaFrance's and the Guild's appeal of trial court's decision which denied the relief they request should be denied.⁸

Some background may be helpful to understanding the remedy in the Decision and Award. The arbitration hearing on LaFrance's grievance was initially scheduled to begin on February 3, 2003. CP 1260-1261, 1263-1264. A month before the hearing was to commence LaFrance and the Guild requested a continuance until May 2003 or later. The grounds for the continuance were that LaFrance had suffered a heart attack and was still suffering adverse health effects from it. CP 1263-1273.

⁸ During oral argument before the trial court, the Guild and LaFrance contended that they are not seeking judicial interpretation or modification of the Arbitrator's decision. They just want the decision to be enforced. RP 13-14. However, it seems impossible to grant them the relief they seek, full wages and benefits retroactive either to discharge, or August 2003 or July 2004, without modifying the Arbitrator's decision.

On July 1, 2003, LaFrance and the Guild requested another continuance of the arbitration hearing. They wanted LaFrance to be examined to determine his fitness for the hearing and for duty as a deputy sheriff. CP 1275-1279. LaFrance submitted to a psychiatric examination and a report was issued on August 21, 2003. CP 1283-1290. The psychiatrist opined that, based on the data he reviewed, LaFrance was “capable, from a psychiatric standpoint,” to participate in the arbitration hearing and capable of performing the duties of a deputy sheriff. CP 1290. The arbitration hearing was re-set and took place on January 21-23, 2004, February 23-24, 2004, March 11-12, 2004, and April 1, 2004. CP 1208.

As discussed in the first section of this brief, the Arbitrator found LaFrance guilty of the misconduct as charged, but concluded that LaFrance’s disability should have mitigated the discharge penalty. The Arbitrator reduced LaFrance’s discharge to three written warnings. Not only did the Arbitrator accept the claim that LaFrance was disabled before and at his discharge, but the Arbitrator concluded that LaFrance’s disability continued throughout the arbitration proceedings and existed at the time the Decision and Award was issued. The Arbitrator states:

Since the Grievant was not fit for duty at the time of his discharge, he should be made whole by retroactively placing him in the position that he would otherwise have been in.

Specifically, Deputy LaFrance should be allowed to access any benefits that an officer in good standing could have accessed as of his date of discharge including sick leave, disability benefits, or any other benefit provided to disabled employees covered by this Collective Bargaining Agreement. Since Deputy LaFrance was (and possibly still is) incapacitated he is not entitled to back pay per se, but may keep any Unemployment Insurance benefits for which he is monetarily eligible.

The Grievant should also be allowed to return to full duty upon passing independent psychological and physical fitness-for-duty exams as normally utilized by the Employer. The retroactivity of the return of the Grievant to regular status is not an issue in this case due to the lengthy continuance requested by the Guild and necessitated by Deputy LaFrance's heart attack.

CP 1253.

It is clear that the arbitrator did not award retroactive wages to LaFrance. The remedy awarded was access to benefits that disabled officers in good standing could have accessed. Moreover, the Arbitrator held that while LaFrance's return to duty was conditioned upon passing independent psychological and physical fitness-for-duty exams. Thus, no wages were due until LaFrance passed the two exams and returned to work. Under the award, if LaFrance did not pass both exams, i.e., he was not both mentally and physically fit for duty as a deputy sheriff, he would not be returned to duty.

LaFrance refused to submit to independent physical and psychological examinations as conditioned by the Arbitrator until March 4

and March 30, 2005, respectively. Reports stating that LaFrance was physically and mentally fit to return to duty were issued on March 23 and April 6, 2005, respectively. The next day, April 7, 2005, LaFrance was contacted and he was returned to work on Monday April 11, 2005. He began receiving full pay and benefits when he returned to work.

LaFrance claims that in the alternative, he should be paid wages retroactive to August 21, 2003, the date that a psychiatrist determined that he was capable of attending the arbitration hearing and fit for duty as a deputy sheriff. This claim, too, is contrary to the Arbitrator's award. When he issued his Decision and Award, the Arbitrator stated that LaFrance was "and possibly still is" incapacitated and not entitled to back pay. The arbitrator knew that LaFrance and the Guild had requested two continuances of the arbitration hearing because they believed LaFrance was disabled. And, while LaFrance might have been capable of performing the duties of a deputy sheriff at the time of the August 2003 psychiatric evaluation, the evidence was insufficient to establish that LaFrance was fit for duty almost a year later when the arbitration award was issued. For these reasons, the claim that LaFrance should be paid wages retroactive to August 2003 should be rejected.

Any claim by the Guild that the County delayed LaFrance's return to duty should also be dismissed. The delay in LaFrance's return to work

was caused by LaFrance's own refusal to provide dates he was available for the mental and physical fitness-for-duty examinations, by the Guild's request to delay the exams so LaFrance could apply for disability retirement, by LaFrance's and the Guild's objections to the fitness for duty exams, and by LaFrance's failure to submit to the examinations until March 2005. The day following the date the County learned that LaFrance had passed both examinations as conditioned by the Arbitrator, he was contacted and returned to work.

The benefits that were awarded to LaFrance by the Arbitrator have been computed and offered to LaFrance and the Guild several times. CP 715-716, 717-718, 724, 727-728, 739-742, 354-360, 1139, 1256-1259. LaFrance was informed that he needed to make an election between reinstatement and payout of his leave benefits. CP 1139. He did not make an election. Id. In a detailed letter to LaFrance dated April 22, 2005, LaFrance was offered options for payment or reinstatement of sick and annual leave, health care and retirement premiums, and longevity pay. CP 1139, 1256-1257. Despite the efforts to pay or reinstate LaFrance's benefits, LaFrance made no election for accessing them. CP 1139.

**LEGAL AUTHORITY IN RESPONSE TO THE GUILD'S AND
LAFRANCE'S APPEAL**

A. Summary Judgment Standards.

When reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. *Seattle Mortg. Co., Inc. v. Unknown Heirs of Gray*, ___ Wn.App. ___, 136 P.3d 776, 779-780 (No. 33664-2, June 14, 2006); citing *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). “Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law.” *Id.*; citing CR 56(c). The appellate court considers all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Seattle Mortg. Co. Inc.*, ___ Wn.App. at ___, 136 P.3d at 779-780; citing *Grundy*, 155 Wn.2d at 6, 117 P.3d 1089. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Seattle Mortg. Co. Inc.*, ___ Wn.App. at ___, 136 P.3d at 780; citing *Lilly v. Lynch*, 88 Wash.App. 306, 312, 945 P.2d 727 (1997).

B. The County Is Not Liable to LaFrance for Retroactive Wages Because the Arbitrator Did Not Award Them.

LaFrance claims that he should be paid wages retroactive to the date of his termination, November 29, 2001. In the alternative, LaFrance claims that he should be paid wages retroactive to August 21, 2003, the date of the psychiatric examination that determined he was capable of participating in the arbitration hearing, or July 17, 2004, the date of the Decision and Award. As a matter of law, LaFrance's and the Guild's claims for retroactive wages must be rejected, because the arbitrator did not award retroactive wages.

Generally, all parties to a contract have an affirmative, good faith obligation to perform all conditions precedent in the contract. *Egbert v. Way*, 15 Wn.App. 76, 79, 546 P.2d 1246 (1976). *See Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 556-57, 730 P.2d 1340 (1987). "Conditions precedent" are "those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964) (Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent

of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances.)

LaFrance's submission to and passing both of the mental and physical examinations as conditioned by the Arbitrator were conditions precedent to his return to work as a deputy sheriff. The nonfulfillment of these two conditions until April 2005, excuses the County's action in not returning LaFrance to work until April 11, 2005.

In addition, the doctrine of impossibility and impracticability discharges a party from contractual obligations when a basic assumption of the contract is destroyed and such destruction makes performance impossible or impractical, provided the party seeking relief does not bear the risk of the unexpected occurrence. *Pub. Util. Dist. No. 1 of Lewis County v. Washington Pub. Power Supply Sys.*, 104 Wn.2d 353, 363-64, 705 P.2d 1195, 713 P.2d 1109 (1985); *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn.App. 73, 81, 96 P.3d 454 (2004). The County's performance, returning LaFrance to work, was made impossible by LaFrance's failure to submit to fitness-for-duty exams until March 2004.

There is no genuine issue of material fact that the arbitrator did not award retroactive wages, and that LaFrance did not submit to and pass physical and mental fitness-for-duty examinations until April 2005. Thus, no wages are due for the period between November 29, 2001, and the date

he returned to duty, April 11, 2005. The claim that LaFrance is entitled to retroactive wages should be dismissed.

C. The County Did Not Violate the Arbitration Award by Failing to Pay LaFrance Benefits Retroactive to November 29, 2001.

LaFrance and the Guild argue that the Arbitrator has authority to fashion a remedy and acted within his jurisdiction, yet they want a judicial modification of the arbitrator's remedy with an award of overtime and administrative leave wages. They argue that the arbitrator acted extra-jurisdictionally by trying to concern himself with the period after the termination (e.g., in holding that LaFrance was possibly still disabled). They contend that if a proper jurisdictional reading is given, LaFrance should have been placed in a paid administrative leave position either from the date of LaFrance's discharge, the date of the August 2003 psychiatric examination, or the date of the Decision and Award.⁹

⁹ LaFrance and the Guild claim that the Sheriff failed to reinstate LaFrance's employment despite several letters from the Sheriff's Office that LaFrance's employment was reinstated effective November 29, 2001. CP 707-708, 717-718, 724, 727-728. They also apparently contend that reinstatement requires payment of wages regardless whether the employee returns to work or not. The Arbitrator did not use the term "reinstatement". The term has been used by the employer to describe that LaFrance was re-employed effective the date of his termination, and also to describe that any leave benefits he is entitled to under the Award will be reinstated into LaFrance's leave bank, unless he elects to be paid the benefits. LaFrance and the Guild are purposefully ignoring the distinction between reinstatement and return to work.

The arbitrator did not award administrative leave, overtime, or any other wages. Specifically, the remedy awarded was access to benefits that disabled officers in good standing could have accessed. The Decision and Award expressly excludes back wages. No reasonable reading of the remedy awarded would justify a payment of wages except when and unless LaFrance passed independent psychological and physical fitness-for-duty exams and returned to work.

The state of being employed, or reinstated, does not, in and of itself, entitle an employee to wages. The employee has to actually perform work to receive a wage. The Award does not provide otherwise. LaFrance and the Guild are simply fashioning their own version of a remedy by arguing for an interpretation that is contrary to the one awarded.

The Sheriff's Office sent three letters to LaFrance offering to pay LaFrance's benefits in accordance with the collective bargaining agreement and arbitration award if he would elect whether he wants the benefits reinstated in his leave account to be available for future use, or be paid in cash. LaFrance did not respond by making an election. Exercising this choice was necessary because under the contract, reinstatement of leave or payout of leave produces different results. The County acted in

good faith in attempting to pay LaFrance his benefits.¹⁰ The claim that the County has unlawfully withheld LaFrance's benefits should be dismissed.

D. Disputes Over the Amount of Benefits Due, the Removal of Records from LaFrance's Personnel Files, and the Dissemination of Records in His Files Are Subject to the Mandatory Arbitration Provisions of the Parties' Contract.

Disputes over the calculation of benefits that are due LaFrance, and what records should or should not be removed and released from LaFrance's personnel files are subject to the mandatory arbitration provisions of the parties' collective bargaining agreement. Besides objecting to the County's calculation of benefits due, LaFrance and the Guild claim that the County violated the Arbitrator's Decision and Award and the parties' collective bargaining agreement when the County failed to timely remove letters concerning his termination from LaFrance's personnel files and allegedly disseminated those letters to third parties. The County's response is that disputes over what benefits are due under the collective bargaining agreement and what should and should not be removed from LaFrance's personnel file are subject to the mandatory arbitration provisions of the parties' contract.

¹⁰ Any claim that the County's computation and offer of benefits were inaccurate is a matter requiring interpretation of the collective bargaining agreement. As described in detail in the next section, such a claim is subject to the mandatory arbitration provisions of the parties' contract.

The parties' collective bargaining agreement governs the wages, benefits, and working conditions applicable to LaFrance. Article II of the agreement proscribes the wages, hours, rates of pay, allowances, and bonuses to be paid to deputy sheriffs. CP 100-107. Article III, Sections A, B, and C prescribe terms relating to holidays, annual leave, and sick leave benefits paid to deputy sheriffs. CP 107-109. Article II, Section H prescribes terms relating to health and disability benefits paid to deputy sheriffs. CP 104-105. Appendix B, the Deputy Bill of Rights, contains provisions relating to personnel files, and the disclosure and confidentiality of information in personnel files. CP 129-130.

The collective bargaining agreement also contains a provision requiring any controversy arising under the agreement be submitted to final and binding arbitration for resolution. The pertinent language states as follows:

Definition: A grievance shall be defined as a dispute or disagreement arising between the employee and the Employer with regard to the interpretation or application of the specific provisions of this Agreement. Specifically excluded from further recourse to the grievance procedure are grievances that have been processed and decided, and grievances not presented within the time limits established in this Section. The Guild or any employee within the bargaining unit who may feel aggrieved by the Employer's interpretation or application of the terms of this Agreement may seek his/her remedy by the procedure provided in this Agreement. No complaint or grievance involving the same incident, problem, or other matter may be filed under this

grievance procedure and the Civil Service Commission,
subject to Section J.

CP 94-95.

As provided in the parties' collective bargaining agreement and as discussed in detail below, disputes and disagreements arising over the failure to pay wages, leave, leave, benefits, and disclosure of personnel records are matters that are subject to the mandatory grievance and arbitration procedures of the collective bargaining agreement. Indeed, in their Second Amended Complaint LaFrance and the Guild assert that "any controversy arising from the agreement be submitted to final and binding arbitration for resolution." CP 380.

RCW 41.56.122 provides for "binding arbitration of a labor dispute arising from the application or the interpretation of the matters contained in a collective bargaining agreement." In Washington, the arbitrability of public sector labor-management disputes is governed by rules set forth in the "Steelworkers' Trilogy". *Peninsula School Dist. No. 401*, 130 Wn.2d at 413 citing *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 80 S.Ct. 1363, 4 L.Ed.2d 1403, 4 L.Ed.2d 1432 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 80 S.Ct. 1363, 4 L.Ed.2d 1409, 4 L.Ed.2d 1432 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S.

593, 80 S.Ct. 1358, 80 S.Ct. 1363, 4 L.Ed.2d 1424, 4 L.Ed.2d 1432 (1960). See also *Mount Adams School Dist. v. Cook*, 150 Wn.2d 716, 723, 81 P.3d 111 (2003). Washington courts have framed those rules as follows:

(1) Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which *on its face* is governed by the contract. (2) An order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (3) There is a strong presumption in favor of arbitrability; all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.

Mount Adams School Dist. v. Cook, 150 Wn.2d at 723, 81 P.3d 111 (emphasis in original), quoting *Peninsula School Dist. No. 401*, 130 Wn.2d at 413-414 (quoting *Council of County & City Employees v. Spokane County*, 32 Wn.App. 422, 424-25, 647 P.2d 1058, review denied, 98 Wn.2d 1002 (1982), and *Meat Cutters Local # 494 v. Rosauer's Super Markets, Inc.*, 29 Wn.App. 150, 154, 627 P.2d 1330, review denied, 96 Wn.2d 1002 (1981)). "Thus, apart from matters that the parties specifically exclude, the questions on which they disagree must come within the scope of the grievance and arbitration provisions of the collective bargaining agreement." *Peninsula School Dist. No. 401*, 130

Wn.2d at 414, *citing Meat Cutters Local # 494 v. Rosauer's Super Markets, Inc.*, 29 Wn.App. at 154-55, 627 P.2d 1330 (*citing Warrior & Gulf, supra*, 363 U.S. at 578-83, 80 S.Ct. at 1350-53).

As established by the foregoing authorities, a dispute over the calculation of benefits, the contents of personnel files, and the release of information from those files is within the scope of the grievance and arbitration provisions of the parties' collective bargaining agreement, and is for an arbitrator to determine.

CONCLUSION

The Arbitrator's Decision and Award violates the parties' contract, offends public policy, and is thus illegal. The Arbitrator exceeded his jurisdiction and authority under the applicable contract by requiring reinstatement of Deputy LaFrance's employment after concluding by clear, cogent, and convincing evidence that LaFrance was guilty of more than a few episodes of untruthfulness. The Arbitrator also exceeded his jurisdiction and authority when he shifted the well-established law as to the burden of proof, required the employer to prove by clear, cogent, and convincing evidence that LaFrance was disabled, and concluded that the penalty, termination for untruthfulness, was not appropriate for a deputy who was disabled. The trial court's decision denying the Kitsap County

Sheriff's motion to show cause and dismissing the Sheriff's petition for constitutional writ of certiorari should be reversed.

Appellants' claim for full wages and benefits retroactive to the date that LaFrance was discharged should be denied. The Arbitrator did not award retroactive wages. The remedy awarded was access to benefits that disabled officers in good standing could have accessed. The trial court's decision granting summary judgment to the County and denying Appellant's joint cross-motion for summary judgment should be upheld.

Respectfully submitted this 17th day of July, 2006.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney

A handwritten signature in black ink, reading "Jacquelyn M. Aufderheide". The signature is written in a cursive style with a horizontal line underneath the name.

JACQUELYN M. AUFDERHEIDE
WSBA No. 17374
Senior Deputy Prosecuting Attorney
Attorney for Respondent/Cross-Appellant
KITSAP COUNTY and KITSAP COUNTY
SHERIFF

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On July ____, 2006, I caused to be served the above document, entitled RESPONDENT/CROSS-APPELLANT KITSAP COUNTY'S AND KITSAP COUNTY SHERIFF'S OPENING BRIEF, in the manner noted upon the following:

George E. Merker, III
CLINE & ASSOCIATES
1001 Fourth Avenue, Suite 2301
Seattle, WA 98154

Brian LaFrance
c/o Attorney for Plaintiff KCDSG
1001 Fourth Ave., Suite 2301
Seattle, WA 98154

Via U.S. Mail
 Via Email:
*GMerker@clinelawfirm.com and
merkerlaw@comcast.net*

Via U.S. Mail
 Via Email
 Via Facsimile at
 Personal Service

Via Facsimile at (206)-838-8775
 Personal Service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this ____ day of July, 2006, at Port Orchard, Washington.

CARRIE BRUCE

FILED
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STATE OF WASHINGTON
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PORT ORCHARD

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On July 17th, 2006, I caused to be served the above document, entitled RESPONDENT/CROSS-APPELLANT KITSAP COUNTY'S AND KITSAP COUNTY SHERIFF'S OPENING BRIEF, in the manner noted upon the following:

George E. Merker, III
Merker Law Offices
P.O. Box 11131
Bainbridge Island, WA 98110-5131

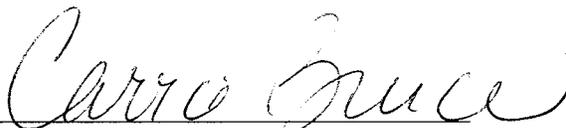
Brian and Jane Doe LaFrance
c/o George E. Merker, III
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 Via Facsimile at
 Personal Service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of July, 2006, at Port Orchard, Washington.


CARRIE BRUCE