

NO. 36298-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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WISHKAH VALLEY EDUCATION ASSOCIATION,

Appellant,

v.

WISHKAH VALLEY SCHOOL DISTRICT,

Respondent.

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY  
COURT REPORTER

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APPEAL FROM THE SUPERIOR COURT  
FOR GRAYS HARBOR COUNTY  
HONORABLE F. MARK MCCAULEY

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. THERE IS NO DISPUTE PRESENTED HEREIN THAT A COURT, NOT THE ARBITRATOR, IS THE PROPER BODY TO DETERMINE WHETHER A GRIEVANCE IS ARBITRABLE: THE DISPUTE CONCERNS WHEN AND HOW SUCH A JUDICIAL DETERMINATION MUST TAKE PLACE..... 1

II. RESPONDENT IS ATTEMPTING TO RELITIGATE THE ARBITRATION HEARING THAT IT CHOSE TO IGNORE. .... 14

III. THE DISTRICT’S ARGUMENTS REGARDING THE INCORPORATION OF THE AMERICAN ARBITRATION ASSOCIATION’S VOLUNTARY ARBITRATION RULES INTO THE PARTIES’ COLLECTIVE BARGAINING AGREEMENT ARE FOR THE BARGAINING TABLE, NOT THE COURT..... 15

IV. THE DISTRICT DOES NOT CONTEST THAT IT RECEIVED NOTICE OF THE ARBITRATION HEARING AT ISSUE AND THUS IS NOT AT LIBERTY TO MAKE A FACIAL DUE PROCESS CHALLENGE..... 17

V. THE DISTRICT MAKES NO LEGAL ARGUMENT THAT AN AWARD OF ATTORNEYS’ FEES TO THE UNION CANNOT BE MADE IN THESE CIRCUMSTANCES, MERELY A FACTUAL ARGUMENT THAT THE COURT SHOULD NOT MAKE SUCH AN AWARD BASED ON THE RECORD..... 17

VI. CONCLUSION..... 18

## TABLE OF AUTHORITIES

### Cases

<i>Bullard v. Morgan H, Grace Co., Inc.</i> , 240 N.Y. 388, 148 N.E. 559 (N.Y. 1925).....	11
<i>George Day Const. Co., v. United Broth of Carpenters and Joiners of America</i> , 722 F.2d 1471, 1476 (9 <sup>th</sup> Cir, 1984).....	5
<i>International Brotherhood of Electrical Workers v. Public Utility District No. 1</i> , 40 Wn.App. 61, 63, 696 P.2d 1264 (1985) .....	1
<i>International Union of United Rubber, Cork, Linoleum &amp; Plastic Workers</i> , 461 U.S. 757, 103 S.Ct. 2177, 2180, 76 L.Ed.2d 298 (1983).....	8
<i>Kanmack Mills, Inc. v. Society Brand Hat Co.</i> , 236 F.2d 240 (8 <sup>th</sup> Cir. 1956) .....	13
<i>Kentucky River Mills v. Jackson</i> , 206 F.2d 111 (1953).....	12
<i>ML Park Place Corporation v. Hedreen</i> , 71 Wn.App. 727, 739, 862 P.2d 602 (1993), review denied, 124 Wn. 2d 1005, 877 P.2d 1288 (1994).....	15, 16
<i>O'Connor Co. v. Carpenters Local Union No. 1408</i> , 702 F.2d 824, (9 <sup>th</sup> Cir.1983).....	8
<i>Peninsula School District v. Employees</i> , 130 Wn.2d 401, 413-414, 924 P.2d 13 (1996) .....	3
<i>Ralph Andrews Productions v. Writers Guild of America</i> , 938 F.2d 128 (9 <sup>th</sup> Cir., 1991).....	9
<i>Steelworkers' Trilogy</i> .....	3, 12
<i>Peninsula School District v. Employees</i> , 130 Wn.2d 401, 413-414, 924 P.2d 13 (1996).....	3

*W.R. Grace & Co. v. Local 759 , International Union of United  
Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 103  
S.Ct. 2177, 2180, 76 L.Ed.2d 298 (1983) ..... 8

*Westmark Properties, Inc. v. McGuire*, 53 Wn.App. 400, 402, 766  
P.2d 1146 (1989)..... 15

Statutes

RCW 7.04.160 ..... 15

Other Authorities

Arbitration Law § 3.....12

*Contempo Design, Inc. and Sign Display & Allied Crafts*, 120 LA  
(BNA) 1317 (Bogue 2004) ..... 8

**I. THERE IS NO DISPUTE PRESENTED HEREIN THAT A COURT, NOT THE ARBITRATOR, IS THE PROPER BODY TO DETERMINE WHETHER A GRIEVANCE IS ARBITRABLE: THE DISPUTE CONCERNS WHEN AND HOW SUCH A JUDICIAL DETERMINATION MUST TAKE PLACE.**

The District devotes the majority of its brief to arguing that, absent specific language in a collective bargaining agreement to the contrary (not present here), a court, and not an arbitrator, is the ultimate body to determine whether a grievance is subject to the arbitration provisions of a collective bargaining agreement under which it purportedly arises. This proposition is not in dispute. See *pp. 33-37 of Brief of Appellant*. Both the underlying Superior Court action and the instant appeal ask that the court determine whether the grievance was subject to arbitration, and, should the court find that it was, to confirm and enforce the arbitration award that issued from the arbitration hearing.<sup>1</sup>

Rather, it is only the timing of, and the procedural mechanism through which, that determination must be made that is at issue. The District asserts that this determination must be made

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<sup>1</sup> See *Local Union No. 77, International Brotherhood of Electrical Workers v. Public Utility District No. 1*, 40 Wn.App. 61, 63, 696 P.2d 1264 (1985) (A reviewing court is obligated to make its own decision regarding arbitrability and deference need not be given to the decision of the trial court). Consequently, the trial court's letter opinion, heavily relied upon by the District, is irrelevant.

prior to the arbitration, and must be brought to the court via a union's motion to compel arbitration, regardless of the terms of the collective bargaining agreement, and regardless of the terms of the arbitration rules of the arbitrable authority which is has contracted to use to resolve grievances.

Put another way, the District's position is that it, as the employer, is vested with the authority to make an initial, unilateral determination as to whether a grievance is subject to arbitration. Under its theory, if it concludes in its own mind that the grievance is arbitrable, it will participate in the arbitration process. On the other hand, if it concludes that it is not, it contends that it may simply ignore the grievance and the arbitration process, and refuse to participate further, until such time as the union files a lawsuit seeking a court order compelling it to arbitrate the grievance.

Under this theory, which grants the employer the unilateral right to sanction the legitimacy of the arbitration process in any particular case, it necessarily follows that should it not agree with the arbitrator's award, it may again unilaterally ignore that award, and again force the union to return to court to secure yet a second judgment confirming and enforcing the award, as the underlying premise is the same in either case – That the arbitration process

agreed to in the parties' collective bargaining agreement is of no moment, and an employer is free to ignore it, absent a court order to the contrary.

Such a position turns the labor relations system on its head. As demonstrated in Appellant's opening brief, at pages 13-16, the long standing and unanimous body of law is to just the contrary. Given the strong presumption of arbitrability in labor relations arising from the *Steelworkers Trilogy* cases and subsequent decisions,<sup>2</sup> so long as the issue even arguably arises under the collective bargaining agreement, i.e. so long as the collective bargaining agreement is capable of *an* interpretation that covers the dispute, the issue is presumed arbitrable, and it is thus instead

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<sup>2</sup> The arbitrability of Washington public sector labor-management disputes is governed by the rules set forth in the *Steelworkers' Trilogy*. *Peninsula School District v. Employees*, 130 Wn.2d 401, 413-414, 924 P.2d 13 (1996), to wit: (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.

incumbent upon the party resisting arbitration to secure a judicial ruling to the contrary, either in the form of a pre-hearing injunction prohibiting the arbitration, or in a post-hearing action to vacate the award.

Moreover, the District goes so far as to claim that “the only way a party can know whether he is compelled to proceed with the arbitration is by a court compelling it do so.” *Respondent’s Brief* at p. 23. To the contrary, for a party to know whether a dispute is subject to the arbitration provisions of the contract it entered into, it can simply read the contract. Here, the arbitration clause of the collective bargaining agreement provided:

*Grievances or complaints arising between the District and an individual employee, a group of employees, or the Wishkah Valley Education Association with respect to the interpretation or application of terms and provisions of the negotiated contract shall be resolved in compliance with this article.*

Thus, all the District needed to do to determine whether the dispute was subject to arbitration was to ask itself in good faith: 1) Is there a “grievance or complaint”?, (Yes); 2) Does it involve “an employee or group of employees or the WVEA”?, (Yes); 3) Does it involve “the interpretation or application” of terms and provisions of the collective bargaining agreement?, (Yes).

Where, as here, the union filed a grievance on behalf of an employee, alleging that the district violated specific portions of the collective bargaining agreement, the obvious answer is yes, the issue is subject to arbitration. The District in no way needs a court to perform that simple analysis for it and order it to comply with its obligation to participate in good faith in the grievance and arbitration process.

In support of its position, the District relies primarily upon out-of-context dictum, from a case whose holding clearly supports the Union's position, not its own. Specifically, at page 13, the District quotes a paragraph from *George Day Const. Co., v. United Broth of Carpenters and Joiners of America*, 722 F.2d 1471, 1476 (9<sup>th</sup> Cir, 1984):

As the employer points out, in the usual case, an employer who objects to arbitration on jurisdictional grounds may refuse to arbitrate the case. The union is then put to the task of petitioning the court to compel arbitration under section 301 of the Act. In such cases the question of substantive arbitrability comes before the court in the first instance.

However, when placed in context, it is clear that the holding from the case is directly adverse to the District's argument. At issue primarily in *George Day Construction* was whether an employer was obligated to arbitrate a grievance that was filed

following the expiration of the collective bargaining agreement, and, as is relevant to the instant case, whether the employer had consented to have the arbitrator decide whether the grievance was arbitrable, or whether the issue of arbitrability had been reserved for judicial determination.

That court's discussion of the various judicial procedural mechanisms through which the question of arbitrability may be determined tracks, nearly exactly, the same discussion advanced by the Union herein at pages 37-38 of its opening brief, and arrives at the same conclusion-that there is no obligation for a union to secure a pre-arbitration judicial determination of the question:

Under these circumstances, we conclude that the employer impliedly consented to the arbitrator's deciding both the question of arbitrability and the merits of the controversy. The employer, by its conduct, clearly demonstrated this purpose.

Had the employer objected to the arbitrator's authority, refused to argue the arbitrability issue before him, and proceeded to the merits of the grievance, then, clearly the arbitrability question would have been preserved for independent judicial scrutiny. The same result could be achieved by making an objection as to jurisdiction and an express reservation of the question on the record. However, where, as here, the objection is raised, the arbitrability issue is argued along with the merits, and the case is submitted to the arbitrator for decision, it becomes readily apparent that the parties have consented to allow the arbitrator to decide the entire controversy, including the question of arbitrability.

As the employer points out, in the usual case, an employer who objects to arbitration on jurisdictional grounds may refuse to arbitrate the case. The union is then put to the task of petitioning the court to compel arbitration under section 301 of the Act. In such cases the question of substantive arbitrability comes before the court in the first instance.

The employer states, however, that the collective bargaining agreement applicable to this action contained a provision allowing a default award in the event a party fails to participate in an arbitration. It complains that it would be unfair to hold that the employer waived its right to an independent judicial evaluation of the arbitrability question under these circumstances.

We find no unfairness in this result. First, the employer agreed to the default provision in the collective bargaining agreement. The employer cannot be heard to complain on fairness grounds about ramifications arising out of a contractual provision to which it knowingly assented.

Second, the employer could have avoided the problem by simply not giving the arbitrability question to the arbitrator for decision. The employer merely had to voice its objection on the arbitrability issue and state on the record that it was reserving that question for later judicial determination. In this way, the question could be preserved for an independent judicial scrutiny at any subsequent proceeding for vacatur or enforcement.

Third, the employer could have taken the initiative by seeking declaratory and injunctive relief prior to the commencement of arbitration. *Cf. W.R. Grace & Co. v. Local 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, ----, 103 S.Ct. 2177, 2180, 76 L.Ed.2d 298 (1983); *O'Connor Co. v. Carpenters Local Union No. 1408*, 702 F.2d 824, 825 (9th Cir.1983). Had any of these steps been taken the employer could have obtained an independent judicial examination of the question of arbitrability.

The District also cites dictum from a labor arbitration award in support of its position, *In re Contempo Design, Inc. and Sign Display & Allied Crafts*, 120 LA (BNA) 1317 (Bogue 2004), at p. 14. However, once again, when placed in context, both the “holding” of the award<sup>3</sup> and the quotation relied upon, support the Union’s, not the District’s position.

The paragraph cited at page 14 of the *Brief of Respondent* is part of Arbitrator Bogue’s award, in which he awarded attorneys’ fees and costs associated with the arbitration hearing to the union, based upon *the employer’s failure to participate in the arbitration process*, (beyond initially selecting an arbitrator), conduct which the arbitrator found to evidence “a marked lack of good faith in carrying out its contractual duty to comply with the collective bargaining agreement.”<sup>4</sup>

Again, when placed in context, the citation supports the union’s, not the District’s, position, as the sentence immediately proceeding the cited language reads: “The policy embodied in

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<sup>3</sup> Such an award is clearly not any form of binding precedent.

<sup>4</sup> Thus, to the extent that decision has any bearing upon the instant proceedings, it provides clear support and rationale for an award of attorneys’ fees and costs to the Union herein, as requested at pages 40-48 of the Union’s opening brief.

these rules [FMCS rules providing for default arbitration awards, upon proper notice] recognizes that it would thwart enforcement of the collective bargaining agreement if a party could refuse to allow an arbitration to go forward merely by failing to appear at a properly noticed hearing.”

A portion of a sentence from *Ralph Andrews Productions v. Writers Guild of America*, 938 F.2d 128 (9<sup>th</sup> Cir., 1991), is similarly cited, entirely out of context, by the District at page 13 of its brief for the proposition a pre-arbitration court order compelling arbitration is always required.

There, the union initiated arbitration with two corporations in which Ralph Andrews was the sole officer and shareholder. It thereafter amended its grievance to name Andrews in his individual capacity, (even though he was neither a party to the employment contract at issue, nor a party to the collective bargaining agreement under which the grievance was filed, (unlike here)), alleging that he was an alter ego to the corporations. Andrews appeared at the arbitration hearing in order to protect the interests of his closely-held corporations, at which time he objected to being named individually, as he also did in a post hearing brief.

The arbitrator found Andrews personally liable as an alter ego of the corporations, all of whom then sued seeking to vacate the arbitrator's award. With respect to Andrews as an individual, the issue before the court was whether, by appearing and arguing on behalf of his corporations, Andrews had effectively agreed to having the question of arbitrability decided by the arbitrator, as opposed to the court, and thus had waived his right to a judicial determination of the question. In holding that he had not, the court stated:

Andrews was not a party to the employment contract at issue. He was not a party to the collective bargaining agreement. Andrews clearly and unequivocally objected to being named a party to the arbitration. He appeared at the arbitration hearing, without an attorney, only in order to address claims against the corporations. He could not have left the arbitration without abandoning the corporations he endeavored to protect. Andrews did all that could be expected under the circumstances to assert clearly that the arbitrator had no authority to bind him personally. **We hold that his conduct, taken as a whole, did not constitute voluntary submission of the alter-ego issue to the arbitrator. Thus, Andrews did not waive the right to an independent judicial examination of the question.**

*Id.* at 130.

Thus, the court in no way held, as the District represents, that it was incumbent upon the union to seek a pre-hearing order compelling Andrews, as an individual, to submit to arbitration.

Rather, it merely held that his actions in appearing and arguing on behalf of his closely held corporations did not constitute a voluntary submission and subsequent waiver of his right to a judicial determination of the question of the arbitrability of the claims made against him as an individual. *Id.* Consequently, *Andrews* provides no support for the District.

The District's reliance upon selected excerpts from *Bullard v. Morgan H, Grace Co., Inc.*, 240 N.Y. 388, 148 N.E. 559 (N.Y. 1925) is similarly misplaced. First, that case involved a commercial arbitration involving the sale of Argentine butter, and was interpreting specific aspects of New York's commercial arbitration statutes, in no way involving labor law or a collective bargain agreement. Thus, it is of marginal relevance to the central issue presented here of the proper application of Washington common law regarding public employment collective bargaining.

Second, through a liberal use of ellipses, excising fully two pages of the opinion between the excerpts quoted, the District represents its cited quotation as a holding of the court, when in fact the court was merely paraphrasing the statutes applicable to commercial disputes, in New York, as of 1925, specifically, "Arbitration Law § 3." *Id.* at 395.

All that being said, the court in *Kentucky River Mills v. Jackson*, 206 F.2d 111 (1953), the court which the District asserts “distinguished” *Bullard* stated “it is not clear that the [*Bullard*] court, by its holding that the award was invalid, intended to declare that all awards rendered in *ex parte* statutory arbitrations were invalid except where the party desiring the arbitration procured an enforcement order under Section 3 of the State Arbitration Law.” *Jackson*, 206 F.2d at 118-119.

Thus, given that both *Jackson* and *Bullard* involved the interpretation of New York commercial arbitration statutes as they existed in the 1920’s, forty years prior to the United States Supreme Court’s subsequent *Steelworkers’ Trilogy* decisions and well prior the Washington State Supreme Court’s subsequent adoption of the *Steelworkers* rules as controlling law in Washington, and that both held that pre-arbitration enforcement proceedings are not required, neither case in any way supports the District’s position.

*Kanmack Mills, Inc. v. Society Brand Hat Co.*, 236 F.2d 240 (8<sup>th</sup> Cir. 1956), cited by the district to the effect that a pre-hearing action to compel arbitration is required, held just the opposite. See page 15 of *Brief of Respondent*. To the extent that case has any

direct relevance to the instant issue, as it again involved a commercial arbitration, involving the sale of fabric, and interpretation of a foreign state's commercial arbitration statutes, its holding was that there was no requirement for a pre-arbitration order compelling arbitration.

We do not hold that Section 4<sup>5</sup> enables the respondent in arbitration proceedings to halt the proceedings and force the petitioner to resort to a court at every stage before award by merely asserting that there is a lack of jurisdiction.

*Id.* at 252.

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<sup>5</sup> "Section 4 of the Act, so far as relevant here, provides:

'A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration **may** petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. \*  
\* \*'

**The provision that a party aggrieved may apply to a court is permissive merely and carries no implication that he must apply.** It can not be fairly said that Society was a party aggrieved by a determination on Kanmak's part not to defend itself before the arbitrators. All that Kanmak was entitled to on the arbitration was the opportunity to maintain the issues on its part to be maintained. If in fact the arbitrators were without jurisdiction of the subject matter of the arbitration, their award could not be enforced in favor of either party to it." *Id.* at 251 (footnote in original; emphasis added).

**II. RESPONDENT IS ATTEMPTING TO RELITIGATE THE ARBITRATION HEARING THAT IT CHOSE TO IGNORE.**

The District devotes considerable space to impinging the arbitrator's factual findings and reasoning behind his decision, in essence, seeking to re-litigate the merits of the dispute which was the subject of the arbitration hearing. See *Brief of Respondent* at pp. 7-8; 24-28. However, as noted previously at *Brief of Appellant* at pp. 18-27, a court passing upon arbitrability has extremely circumscribed discretion in reviewing an arbitrator's award, being limited to review of the arbitration award, the contentions of the parties, and the face of the award itself, with virtually no ability to review the merits of the award, including its factual findings and rationale. *ML Park Place Corporation v. Hedreen*, 71 Wn.App. 727, 739, 862 P.2d 602 (1993), review denied, 124 Wn. 2d 1005, 877 P.2d 1288 (1994).

In conducting such a review, the evidence before the arbitrator may not be considered. *Westmark Properties, Inc. v. McGuire*, 53 Wn.App. 400, 402, 766 P.2d 1146 (1989).

McGuire has presented us with a four-volume report of proceedings, all exhibits, and a line-by-line-almost word-by-word-analysis of the arbitrator's three-page letter. He approaches the matter exactly as would a party making a detailed and sophisticated attack on findings of fact and conclusions of law following a

Superior Court trial. This approach reflects a misconception of the nature of arbitration and the role of the court in the process.

The very purpose of arbitration is to avoid the courts. It is designed to settle controversies, not to serve as a prelude to litigation. Arbitration is similar to a judicial inquiry only in that witnesses are called and evidence is considered, but the arbitrator's role is markedly different from that of a judicial officer. Judicial scrutiny of an arbitration award is strictly limited; courts will not review an arbitrator's decision on the merits.

An arbitration award can be vacated only upon one of the grounds specified in RCW 7.04.160. . . The grounds for vacation must appear on the face of the award. The evidence before the arbitrator will not be considered. An award consists of a statement of the outcome, much as a judgment states the outcome. A statement of reasons for the award is not part of the award.

*Id.* at p. 402

**III. THE DISTRICT'S ARGUMENTS REGARDING THE INCORPORATION OF THE AMERICAN ARBITRATION ASSOCIATION'S VOLUNTARY ARBITRATION RULES INTO THE PARTIES' COLLECTIVE BARGAINING AGREEMENT ARE FOR THE BARGAINING TABLE, NOT THE COURT.**

The District again argues that this court should rule on the merits of the collective bargaining agreement it entered into with the Union. Specifically, despite having executed a collective bargaining agreement that specifically provides that the parties will use an American Arbitration Association arbitrator, and that "the arbitration

shall be conducted under the voluntary rules of the AAA”<sup>6</sup> it now has the temerity to argue here that it cannot be held to the terms of that contract, and consequently, cannot be held to the terms of AAA voluntary arbitration rules.

First, the court is without authority to rule on the substantive terms of the collective bargaining agreement, as that is exclusively the province of an arbitrator. See generally *ML Park Place Corporation v. Hedreen*, 71 Wn.App. 727, 739, 862 P.2d 602 (1993), review denied, 124 Wn. 2d 1005, 877 P.2d 1288 (1994). Equally important, if the District seeks to change the terms of the collective bargaining agreement that it voluntarily negotiated and executed with the Union, that must be done at the bargaining table, and not through a back door appeal to this court to do so.<sup>7</sup>

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<sup>6</sup> See CP 8 p. 26 (Wishkah Valley School District/WVEA Collective Bargaining Agreement).

<sup>7</sup> In this same regard, the District’s closing arguments that the issue of arbitrability is not properly before the court nearly defy comprehension, as that was the singular issue before both the Superior Court and herein.

**IV. THE DISTRICT DOES NOT CONTEST THAT IT RECEIVED NOTICE OF THE ARBITRATION HEARING AT ISSUE AND THUS IS NOT AT LIBERTY TO MAKE A FACIAL DUE PROCESS CHALLENGE.**

Without benefit of authority, the District postulates that an award in favor of the union would sound the death knell for due process in Washington. *See Brief of Respondent*, pp. 21-24. This argument is a red herring, as it is beyond dispute that the District received timely and actual notice of the arbitration hearing it chose not to participate in, and thus the adequacy of any notice is plainly not issue herein. Consequently, any opinion in that regard by the court would be purely advisory.

**V. THE DISTRICT MAKES NO LEGAL ARGUMENT THAT AN AWARD OF ATTORNEYS' FEES TO THE UNION CANNOT BE MADE IN THESE CIRCUMSTANCES, MERELY A FACTUAL ARGUMENT THAT THE COURT SHOULD NOT MAKE SUCH AN AWARD BASED ON THE RECORD.**

Finally, the District does not contest that decided authority provides for an award of attorneys' fees where a party has refused to participate in arbitration or abide by any subsequent arbitration award. Rather, it argues only that it was justified in its actions, and that consequently, as a factual matter such an award is not appropriate in this case. *See Brief of Respondent* at pp. 28-31.

The facts and the District's actions are not controverted. Consequently, the court need only examine those actions in light of the long settled law and make a determination as to whether such an award is justified.

**VI. CONCLUSION**

The Court should reverse the decision of the Superior Court that dismissed Appellant WVEA's Motion for Summary Judgment; order the Respondent School District to immediately and fully comply with the arbitrator's decision in all respects, including payment of the arbitrator's fees advance on behalf of the District; award Appellant WVEA its costs and reasonable attorneys' fees expended on this appeal; and order entry of a judgment to that effect.

Respectfully submitted this <sup>21<sup>st</sup></sup> ~~20<sup>th</sup>~~ day of September, 2007.



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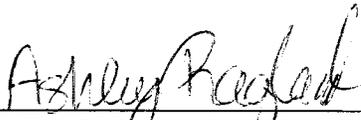
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the Reply Brief of Appellant in the above captioned matter, upon the person named below, or his/her authorized agent, by email today and by the United States Postal Service, pursuant to prior agreement with counsel:

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DATED in Federal Way, Washington, this 21<sup>st</sup> day of August, 2007.

  
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ASHLEY RAGLAND

COURT OF APPEALS  
DIVISION II  
07 SEP 21 PM 3:42  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY