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NO. 36298-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DIVISION II  
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STATE OF WASHINGTON  
BY Chad Horner  
DEPUTY

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WISHKAH VALLEY EDUCATION ASSOCIATION,

Appellant,

v.

WISHKAH VALLEY SCHOOL DISTRICT,

Respondent.

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BRIEF OF RESPONDENT

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

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## **I. RESPONDENT'S STATEMENT OF THE CASE**

### **A. Introduction**

The threshold question in this case is whether the arbitrator had the authority to determine whether the Union's grievance was arbitrable. The Superior Court ruled, and the Union apparently now concedes, that the arbitrator had no such authority. Remarkably, however, the Union now asks this Court to enforce the illegitimate *ex parte* decision of the arbitrator *ex post facto*, claiming that it had no obligation to first obtain a judicial determination of arbitrability. In essence, the Union argues that the District should have participated in the arbitrator's improper determination of his own authority, and because the District did not participate, the Union has the right to proceed with the arbitration *ex parte* and have a later court determine arbitrability and enforce the award. Because the law did not give the arbitrator authority to do what he did, and because the Union should have followed the normal practice of seeking a judicial determination of arbitrability once the District objected to the arbitrator's authority, the decision of the trial court refusing to enforce the *ex parte* arbitration award should be affirmed.

### **B. Overview of the Superior Court Case**

This case originated with a Complaint filed by the Appellant,

Wishkah Valley Education Association (the “Union”) with the Superior Court for Grays Harbor County seeking enforcement of an arbitration Opinion and Award, which it had obtained *ex parte* after the Respondent, the Wishkah Valley School District (the “District”) objected to arbitration on the ground that no agreement to arbitrate the parties’ dispute existed. CP 1-4. The relief sought by the Union was to order the District to “immediately and fully comply with the affirmative relief awarded in arbitrator’s Opinion and Award in all respects.” CP 4.

The Union filed a motion for summary judgment seeking enforcement of the award. CP 8-25. The District filed a cross motion for summary judgment on the ground that the arbitrator has no authority to determine arbitrability, that a determination of arbitrability had not been sought by the Union in Superior Court, and that the award could not be enforced as a matter of law absent a prior judicial determination of arbitrability. CP 124-31.

After oral argument, the Grays Harbor Superior Court agreed with the District and entered orders granting the District’s Motion for Summary Judgment and denying the Union’s Motion, along with a written opinion explaining its ruling. A copy of the Court’s opinion is attached to the

Appendix as Exhibit “A.”<sup>1</sup> In his ruling, Superior Court Judge F. Mark McCauley stated that under state law, the question of arbitrability is “a judicial question unless the parties *clearly* provide otherwise in the contract” and that the contract between the parties here made “no attempt to provide...that issues regarding arbitrability will be submitted to the arbitrator.” *Judge McCauley’s Written Opinion* (“Written Opinion”) at 2 (emphasis in original). Instead, the “language specifically limits the arbitrator’s power.” *Id.* Therefore, Judge McCauley concluded that the arbitrator did not have the power to decide the issue of arbitrability. *Id.* at 3. Judge McCauley also agreed with the District that the issue of arbitrability was not properly before the trial court for consideration, and advised the Union to bring a motion to compel if it wanted to seek arbitration. *Id.*

**C. Respondent’s Statement of the Facts**

**1. Relationship Between the District and the Union**

The District and the Union are parties to a collective bargaining agreement that governs the employment relationship between the District and its teachers (the “Teachers Contract”). CP 28-72; 134. The District is also a party to a separate collective bargaining agreement with the

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1. The District has filed a request to supplement the Union’s designation of Clerk’s Papers to add the court’s written opinion. Upon filing this brief, the District does not yet

Wishkah Valley Activities Association (the “WVAA”) that governs the District’s employment relationship with its coaches (the “Coaches Contract”). CP 74-87; 134. Both contracts are typical labor contracts in that they address issues regarding wages, hours and working conditions and issues related to appealing disciplinary actions. *See generally* CP 28-72; 74-87. However, while the Teachers Contract permits teachers to appeal unresolved grievances to an arbitrator, the Coaches Contract does not. *Compare* CP 56-57 *with* CP 80-82. The Coaches Contract contains no arbitration provision whatsoever. *See* CP 80-82.

## **2. The Underlying Grievance**

On or about November 8, 2005, the WVEA and WVAA submitted a grievance (the “Grievance”) to the District regarding the District’s investigation and subsequent termination of the coaching contract of Rob Ashler, a bargaining unit member of the WVEA and the WVAA. CP 135. The circumstance giving rise to the Grievance was the District’s finding that Mr. Ashler had inappropriately touched the breasts of a female football player during football practice. CP 135. After an investigation of the complaint, the District’s superintendent issued a letter on November 1, 2005 terminating Mr. Ashler’s coaching contract. CP 139. In the

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have a confirmation of the CP numbers assigned to the written ruling, so therefore will reference the pages of the written ruling itself.

termination letter, the District specifically stated that the termination of his coaching contract was based on Mr. Ashler's actions on the football field and that it did not affect his teaching contract. CP 139.

The Union grieved the termination of his coaching contract under the Teachers Contract and the Coaches Contract. *See* CP 139. The District refused to process the Union's grievance brought under the Teachers Contract because the discipline arose solely from Mr. Ashler's activities as a coach and did not affect his teaching position. CP 135. The District, however, did process the grievance brought under the Coaches Contract, denied the grievance in part and granted it in part. CP 139-40.

### **3. The Union's Request to Arbitrate**

On or about December 29, 2005, the Union filed a "Demand for Arbitration" with the American Arbitration Association ("AAA"). CP 135. Because no agreement to arbitrate coaching disciplinary matters existed, and because the arbitrator had no authority under the Teachers Contract to address such matters, the District refused to participate during the entire course of the AAA arbitration proceedings, other than to officially inform AAA and the Union that it would not participate in the process, nor abide by any decision issued by the arbitrator. CP 135-36. Specifically, the District registered its objection as follows:

The district refused to process the Wishkah Valley

Educational Association's underlying grievance in this matter as the grievance pertained to matters not covered by the collective bargaining agreement. This matter is therefore not properly before the AAA, and the district will not be selecting an arbitrator nor otherwise acquiescing in the union's arbitration request.

CP 142. In response to another correspondence from AAA expressing its intention to determine arbitrability and proceed with the Union's request for arbitration, the District again responded by refusing to participate:

Whether an arbitrator (and not a court) decides whether a case is arbitrable is a question of law that the AAA staff has no legal authority to make. Accordingly – and as the district has indicated to you and the union on more than one occasion – the district will not be cooperating in the processing of this arbitration.

CP 143.

Rather than seek a judicial determination of the arbitrability of the dispute pursuant to Washington practice and procedure<sup>2</sup>, the Union proceeded with the arbitration *ex parte* with the Union presenting its case to the arbitrator. CP 3. On August 10, 2006, AAA announced the arbitrator's award and opinion. CP 3. In his award, the arbitrator decided that the matter was arbitrable, and awarded affirmative relief to the Union. CP 3. The District refused to honor the arbitrator's ruling, as it was outside

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2. *See, e.g.*, RCW 7.04A.070. While this statute is not directly applicable to such arbitrations, it provides a procedural framework for an expedited procedure utilized by Washington's courts for arbitrability determinations. In its written decision, the trial court also referenced the process in place for determining arbitrability: "If the plaintiff intends to pursue arbitration, it will have to bring an action to compel arbitration, and note the

the scope of any authority given to it by any agreement between the Union and the District. CP 136.

In its brief, the Union states that one of the reasons that the termination of Mr. Ashler's coaching contract was arbitrable under the Teachers Contract was because of the District's unwillingness to permit Mr. Ashler to place a rebuttal of the termination letter into his personnel file. This factual claim should be rejected for two reasons. First, this was a disputed issue of fact, and was not material to the trial court's conclusion that the arbitrator lacked authority to determine arbitrability. The record does not show that the District ever denied Mr. Ashler the ability to place a rebuttal into his file. This alleged fact did not appear in the Union's Complaint nor in the fact section of its Motion for Summary Judgment, but only in the recital of the facts found by the arbitrator in his *ex parte* proceeding. *See* CP 99. The record contains an averment from the District that Mr. Ashler was never denied such a right. CP 164. This fact was disputed, and therefore had the trial court ruled on arbitrability (which it did not), this disputed fact may have precluded summary judgment for either party.

Second, the Union's claim that the District refused Mr. Ashler the right to place a rebuttal into his personnel file should have been the subject

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matter in accordance with the statute." Written Opinion at 3.

of a separate grievance. *See* CP 2. In the Union's Complaint, it states only that the purpose for the grievance was the discipline imposed on the grievant. *See* CP 2, ¶ 6. It does not mention any failure to allow Mr. Ashler to include a rebuttal in his file regarding the grievance. Never was such a claim made in the grievance that was the subject of the arbitration. *Id.* Presumably, the Union presented this argument at arbitration because it was the only argument that could bring the proceeding under the Teachers Contract. However, this was not properly before the arbitrator because it was never alleged in Mr. Ashler's grievance. Therefore, the District contends that this disputed fact is not properly before this Court.

## **II. ARGUMENT**

### **A. Standard of Review**

This Court's review of the trial court's order on summary judgment is *de novo*. *See Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). The Union, however, improperly seeks a more deferential standard of review in this case. It supports this request by reference to cases in which the trial court was reviewing an arbitrator's award. In this case, however, the trial court never reviewed the arbitrator's award. Instead, the trial court ruled that the arbitrator did not have authority to determine arbitrability and that the issue of arbitrability was not properly before it.

Written Opinion at 2-3.

The District has never challenged the *factual* findings of the arbitrator, which ordinarily would be subject to a deferential standard of review. Instead, the District has always challenged the arbitrator's underlying authority to make the factual findings and conduct the arbitration, as well as the Union's ability to enforce an award without obtaining a prior judicial determination of arbitrability. The conclusion reached by the trial court that the arbitrator lacked authority to determine arbitrability is subject to a *de novo* standard of review. *See Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, 138 Wn. App. 203, 214-15, 156 P.3d 293 (2007). Also, the question of whether the Union was required to obtain a judicial determination of arbitrability prior to arbitration is a legal question subject to a *de novo* standard of review. *See id.* at 214.

Finally, the question of whether the matter brought by the Union is arbitrable would be subject to a *de novo* standard of review. *Id.* However, as the trial court concluded, the arbitrability issue was not before it, and it did not decide it. Unlike cases such as *Tacoma Narrows Constructors*, 138 Wn. App. at 209, the Union here did not seek a motion to compel, and did not seek the determination of arbitrability in its Complaint. It simply

sought enforcement of the arbitrator's award. Therefore, the issue of arbitrability, as well as the facts that would assist the trial court in determining arbitrability, were not before the trial court for determination. The trial court's decision – based entirely on legal conclusions – should therefore be subject to a *de novo* standard of review.

**B. The Arbitrator had no authority to determine arbitrability.**

The Union seems to concede that the arbitrator had no authority to determine arbitrability. Its briefing below and before this Court spends little time analyzing the fact that courts, not arbitrators, must decide this threshold issue, absent clear language otherwise in the contract. “The arbitrability of labor disputes in Washington is controlled by federal law.” *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn. App. 281, 285 135 P.3d 558 (2006). Federal courts have stated that “[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.... [T]he question of arbitrability – whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination.” *Carpenters 46 Northern California Counties Conference Bd. v. Zcon Builders*, 96 F.3d 410, 414 (9th Cir. 1996) (citing *Steelworkers*

*v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1358 (1960) and *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S. Ct. 1415 (1986) and holding that district court erred in deferring to arbitrator's decision regarding arbitrability). (Internal citations and quotation marks omitted.) The "issue of arbitrability is clearly reserved for the Courts, and is not, itself, a proper subject of arbitration." *Id.* at 414-15; *see also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547, 84 S. Ct. 909 (1964).

Washington law is in accord with federal labor law that the threshold determination of arbitrability must be made by a court, not an arbitrator, unless the parties have clearly provided otherwise. *See Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 456, 45 P.3d 594 (2002); *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45-46, 17 P.3d 1266 (2001). The District also notes that, "[t]he party claiming that arbitrability is for the arbitrator to decide bears the burden of proof and must show that the contract clearly manifests such an intention." *Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, 138 Wn. App. 203, 214, 156 P.3d 293 (2007). The contract at issue in this case does not place questions of arbitrability in the hands of the arbitrator. *See* CP 57. Instead, the arbitrator's powers are limited to making decisions regarding alleged

violations of the specific articles of the contract. CP 57. Therefore, the arbitrators had no power to determine arbitrability and his determination is void. *See ACF Property Management, Inc. v. Chaussee*, 69 Wn. App. 913, 920-21, 850 P.2d 1387 (1993) (declaring void an arbitration decision made by an arbitrator without authority to consider the issues raised in the arbitration).

**C. The District cannot be bound to the *ex parte* arbitration award when the Union failed to obtain a prior judicial determination of arbitrability.**

Washington courts often look to federal caselaw when deciding issues involving arbitration. *See Mount Adams School District v. Cook*, 150 Wn.2d 716, 723, 81 P.3d 111 (2003); *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn. App. 281, 287-88, 135 P.3d 558 (2006). Both the Ninth Circuit and the U.S. Supreme Court have made clear that a party may not be compelled into arbitration without the other party first obtaining a court order:

The duty to arbitrate being of contractual origin, a **compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty**. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.

*John Wiley & Sons, Inc.*, 376 U.S. at 547 (emphasis added).

In *Ralph Andrews Productions, Inc. v. Writers Guild of America*, West, 938 F.2d 128, 130 (9th Cir. 1991), the Ninth Circuit held that a party who “clearly and unequivocally objected to being named a party to the arbitration” “did all that could be expected under the circumstances to assert clearly that the arbitrator had no authority to bind him personally.”

Under federal labor law, it is common practice to require the party wishing to compel arbitration to seek a court order in the face of the other party’s refusal to arbitrate. The correct procedure to follow in such a case was laid out by the Ninth Circuit Court of Appeals in *George Day Const. Co. v. United Broth. of Carpenters and Joiners of America*:

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 [National Labor Relations] Act. In such cases the question of substantive arbitrability comes before the court **in the first instance**.

*George Day Const. Co. v. United Broth. of Carpenters and Joiners of Am.*, 722 F.2d 1471, 1476 (9th Cir. 1984) (emphasis added). In *George Day Const. Co.*, the employer was held to have impliedly consented to have the arbitrator decide arbitrability by arguing the issue before the arbitrator, and as a result review of the arbitrator’s arbitrability determination was limited. *Id.* at 1475. In contrast, in the case at bar, the District followed the

“usual” route explained above by clearly and repeatedly refusing to arbitrate. *See also In re Contempo Design, Inc. and Sign Display & Allied Crafts*, 120 LA (BNA) 1317 (Bogue 2004) (“A party who believes it has no legal obligation to arbitrate a particular grievance has the right to seek court intervention to enjoin the arbitration, or **it can notify the other party that it refuses to proceed because the matter is not arbitrable. The burden is then on the party wishing to proceed to obtain a court order compelling arbitration.**”) (emphasis added).

As described above, a critical distinction exists between cases in which arbitrability is not at issue and cases – like here – where a party has objected to the arbitrator’s authority. In a case cited by the Union in support of its arguments, *Kentucky River Mills v. Jackson*, 206 F.2d 111, 118-19 (6th Cir. 1953), the Sixth Circuit expressed its reservations about whether a court could confirm an *ex parte* award if the party opposing arbitration questioned the authority of the arbitrator. In that case, the party opposing arbitration did not question the authority of the arbitrator, so the Sixth Circuit held that the *ex parte* award was enforceable. However, it distinguished a case, *Bullard v. Morgan H. Grace Co., Inc.*, 240 N.Y. 388, 148 N.E. 559 (N.Y. 1925), in which a party clearly objected to the authority of the arbitrator. In *Bullard*, the court reasoned that:

[N]either the agreement to arbitrate nor the submission is

self-executory.... A party aggrieved by the failure, neglect or refusal of another to perform either under a contract or a submission providing for arbitration may petition the Supreme Court for an order directing that the arbitration proceed.

....

If a bona fide question arises as to the proper construction of the submission agreement, a party may raise the question by withdrawing from the arbitration. **If the party aggrieved then desires to go on with the arbitration he must apply to the court** and the court will determine whether or not the withdrawing party was in default in refusing to proceed to arbitrate a question covered by the submission agreement.

*Id.* at 395-97 (emphasis added).

In another case cited by the Union, *Kanmak Mills, Inc. v. Society Brand Hat Co.*, 236 F.2d 240, 243-44 (8th Cir. 1956), the party opposing arbitration invited the other side to arbitrate the case, then thoroughly answered the arbitration complaint, and only during the arbitration hearing itself did it contest some aspects of the arbitrator's authority. *Id.* at 243-44. It should be no surprise given the party's participation in the arbitration that the court concluded that both parties "agree[d] in writing upon arbitration of clearly defined controversies and so became irrevocably bound under this section of the Act." *Id.* at 251.

Another of the Ninth Circuit case cited by the Union, *Sheet Metal Workers' Int'l Assn. v. Standard Sheet Metal, Inc.*, 699 F.2d 481 (9th Cir. 1983), is also distinguishable for the same reason. The critical distinction

between that case and the one at bar is that the employer in *Standard Sheet Metal* did “not dispute that the contract contemplates arbitration of a new collective bargaining agreement.” *Id.* at 483. Instead, the employer argued that there existed the possibility of a conflict between enforcement of the award and a pending NLRB decision and that the interest arbitration clause itself was unenforceable. *Id.* In the case at bar, the District has all along insisted that no arbitration provision exists that covers the matter that was the subject of the Union’s grievance, but that the arbitration provision of the Teachers Contract is enforceable. The *Standard Sheet Metal* court was never faced with making a determination of arbitrability under the arbitration clause itself, and acknowledged that “...arbitrability is a matter for the courts to determine.” *Id.* at 483, *citing Alpha Beta Co. v. Retail Store Employees Union*, 671 F.2d 1247 (9th Cir. 1982).

In *Toyota of Berkeley v. Automobile Salesman’s Union*, 834 F.2d 751, 754-55 (9th Cir. 1987), relied upon by the Union, Toyota of Berkeley willingly participated in the arbitration process for nearly three years, helping to select an arbitrator, agreeing to an initial hearing date, and agreeing to reschedule the arbitration while arbitrability of a timeliness issue was resolved judicially. It was only after this long period of acquiescence to arbitration and after Toyota of Berkeley failed to follow

through until the last minute with its effort to have arbitrability of one issue judicially determined that it became incumbent on Toyota of Berkeley, rather than the party seeking arbitration, to stop the arbitration with judicial action. *Id.* The holding of *Toyota of Berkeley*, was that under such circumstances, “[w]here... one party withdraws after selection of an arbitrator and the scheduling of a hearing, the burden of going into court should rest on the party contesting the right to arbitrate under the contract.” *Id.* at 755.

In addition, in *Providence Teachers Union v. School Comm. of City of Providence*, 113 R.I. 169, 176-77, 319 A.2d 358 (1974), the issue of arbitrability was not in dispute. The union and the employer had already engaged in arbitration about the same issue with different employees. In its defense for not appearing, the employer stated that the arbitrator did not call a hearing within the ten days required by the contract. Unremarkably, the court held that this was only a “matter of procedure” and that such a delay could not affect the rights of the parties. In *Ramonas v. Kerelis*, 102 Ill. App. 2d 262, 274, 243 N.E.2d 711 (1968), the court concluded that the arbitrator did not exceed his power. In the case at bar, however, it is clear that the arbitrator did exceed his powers when he determined arbitrability.

The Union also relies on dicta in a one hundred and six year old

case called *Zindorf Const. Co. v. Western Am. Co.*, 27 Wash. 31, 67 P. 374 (1901). However, like the other cases cited above, there appears to be no dispute that the issues before the arbitrator were arbitrable. Instead of refusing to arbitrate on arbitrability grounds, one party chose to file a case on the merits in court instead of proceeding before the designated arbitrator. Moreover, when the party in *Zindorf* filed the arbitration award with the court, the other party never objected to entry of the award. Therefore, the court's dismissal of the case on the grounds that the case was previously arbitrated was unremarkable. Also, this case was decided well before the U.S. Supreme Court and Ninth Circuit cases, cited above, in which courts have recognized that a judicial determination of arbitrability must be obtained prior to a compulsory submission to arbitration. *See also Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 456, 45 P.3d 594 (2002) (outlining the process for obtaining a judicial determination of arbitrability under prior Chapter 7.04 RCW).

All of these cases stand for the proposition that when one party objects to the authority of the arbitrator, it is the duty of the party seeking to arbitrate to go to court and obtain a judicial determination of arbitrability.

**D. The AAA rules do not permit the arbitrator to conduct a hearing contrary to Washington law.**

Although it does not brief the point, the Union notes as an issue pertaining to its assignments of error that “the arbitration rules incorporated into the parties’ collective bargaining agreement allow for *ex parte* arbitration proceedings upon due notice to the defaulting party, and mentions the AAA rules in its summary of the facts.” Appellant’s Brief at 2, 6.

As an initial matter, the District does not believe that the AAA Rules are properly incorporated into the Teachers Contract by reference. *See Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000) (incorporation by reference must be “clear and unequivocal”). The rules are merely referenced as the procedures to be used by an arbitrator when conducting any grievance arbitration. The section referencing the AAA rules is as follows: “An arbitrator shall be selected from the panel and the arbitration shall be conducted under the voluntary rules of the AAA.” CP 57. This language is not the “clear and unequivocal” incorporation that is required by Washington caselaw.

Even if the AAA rules were incorporated into the Teachers

Contract, however, the rules do not assist the Union because they defer the question of the propriety of conducting an *ex parte* arbitration to Washington law, thus begging the question. The AAA Labor Arbitration Rules provide as follows:

27. Arbitration in the Absence of a Party or Representative

**Unless the law provides to the contrary**, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

CP 116 (emphasis added.)

The question of whether Washington law is contrary to allowing an arbitrator to proceed *ex parte*, decide arbitrability, and decide the merits of the dispute in the face of one party's objection to arbitrability is the very subject of the instant appeal. The rule simply allows the arbitrator to proceed *ex parte* where it would comport with the law, such as where the parties had not contested arbitrability, where the parties participated in the arbitration, or where there existed a court order compelling arbitration. The rule does not authorize the arbitrator to proceed *ex parte*, or at all, over matters that are not arbitrable, including the determination of arbitrability. It also clearly does not constitute the sort of evidence that clearly manifests an intention in the contract to submit the issue of

arbitrability to an arbitrator, which the Union has the burden of showing.

*See Tacoma Narrows Constructors*, 138 Wn. App. at 214.

**E. Washington’s due process guarantees would be eroded if the Union’s position on *ex parte* arbitration hearings were to prevail.**

The consequences of the Union’s position regarding *ex parte* arbitration awards could have a significant adverse effect for due process inside and outside of labor relations. Washington law requires parties who file a civil lawsuit against another party to include a summons describing exactly how to respond to the complaint for relief. RCW 4.28.040. The summons must describe the time required to provide a response and who to respond to. CR 4(a) and (b); *Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 264, 108 P.3d 805 (2005). It must also be served in a specific method to ensure that the party who is named in the complaint receives actual notice of the claims against him. RCW 4.28.080. A request for arbitration, on the other hand, has few of these protections. In an arbitration setting, the law permits notice in any way agreed to by the parties, including by mail. *See* RCW 7.04A.090. There is nothing in place to determine whether such notice satisfies constitutional requirements of due process.

And, although arbitration has few of these important due process

protections, vacating a default on an arbitration award is more difficult than vacating a default on a case brought in superior court. For example, a defaulted party in an arbitration hearing must show corruption, fraud, evident partiality by the arbitrator, corruption of the arbitrator, misconduct by the arbitrator, that the arbitrator had no authority, or that the minimal amount of notice required was not followed. *See* RCW 7.04A.230. In vacating such an award, a court is not authorized by RCW 7.04A to analyze whether the defaulted party had a valid defense or whether any neglect in the parties' appearance was excusable, which would be permitted if the default were taken from a court of law. *See White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

Arbitration agreements, such as the one here, are not limited to sophisticated labor unions and school districts. Arbitration agreements may appear in consumer contracts or between individual employees and their employers. The Union's position – i.e., that a party could obtain an enforceable default arbitration decision over the objection of the other party without first obtaining a court order – could potentially strip from these parties the fundamental due process protections afforded parties who are sued in our judicial system. The effect could be more and easier default judgments for parties who would otherwise be required to follow the

procedural burdens of Washington's civil procedure system. *See* Title 4 RCW.

Aside from due process concerns, however, it makes practical policy sense to require a party seeking arbitration, but who encounters an objection from the other party, to seek a court order compelling arbitration first. Our judicial system favors having matters decided on the merits and not by default, but arbitration is merely a substitute for judicial resolution of disputes. As the party seeking an extra-judicial remedy, the burden should be on the party seeking arbitration to obtain a court order compelling arbitration if the other party does not agree that the issue is subject to arbitration. The language of the U.S. Supreme Court in *Livingstone*, and the other cases cited herein, endorse this reasoning.

It also makes practical policy sense that when the authority of an extra-judicial decisionmaker is in dispute, the determination of that authority through the courts should precede the disputed hearing and decision. The only way a party can know whether he is compelled to proceed with the arbitration is by a court compelling it to do so. That is why a party who believes that an arbitrator has power to make a decision should first go to court to compel the other party into arbitration – i.e., establish that the decisionmaker has the power to decide the case.

**F. The grievance was not arbitrable.**

The District argued below, and the trial court agreed, that arbitrability was not properly before the court. *See* CP 162 and Written Opinion at 3. The issue of whether arbitrability was properly before the court also has not been briefed by the Union on appeal and any claim of error with regard to this ruling has been abandoned. *Washington State Bar Ass'n v. Great Western Union Federal Sav. & Loan*, 91 Wn.2d 48, 60, 586 P.2d 870 (1978); *Weems v. North Franklin School Dist.*, 109 Wn. App. 767, 778, 37 P.3d 354 (2002) (issues not briefed are waived).

Though the District continues to maintain that the issue of arbitrability is not properly before this Court, as it was not properly pled before the Superior Court and the record therefore was insufficient to make a finding of arbitrability, the District below offers its argument as to why the dispute is not arbitrable in the first place.

It is undisputed that the Coaches Contract contains no arbitration provision. The arbitration clause in the Teachers Contract from which the arbitrator allegedly derived his authority arises from the Grievance Procedure article, which covers grievances or complaints arising with respect to the interpretation or application of terms and provisions of the negotiated contract. *See* CP 56. The arbitration provision specifically

limits the arbitrator's powers:

It shall be the function of the arbitrator, and he/she shall be empowered except as his/her powers are limited below, after due investigation, to make a decision in cases of alleged violation of the specific articles and sections of this Agreement.

...

The arbitrator shall confine his/her inquiry and decision to the specific area of the Agreement as cited in the grievance form. Matters for which law provides another course of review shall be excluded or exempt from this grievance procedure.

CP 57. The Superior Court agreed that the collective bargaining agreement was limited: "The arbitration clause in the teachers' contract is very narrow. The arbitrator has specific, limited powers." Written Opinion at 2.

Apart from the fact that the grievance related to discipline for conduct solely related to Mr. Ashler's duties as a football coach governed by the Coaches Contract and unrelated to Mr. Ashler's teaching duties, it is clear that the grievance was a matter that was provided another course of review by way of the Coaches Contract Grievance Procedure. The Teachers Contract's arbitration provision therefore expressly excludes the grievance. *See* CP 57.

The Union states two bases for maintaining that the grievance fell under Mr. Ashler's teaching contract. First, the District's superintendent reported Mr. Ashler's misconduct to OSPI. The District's report to OSPI does not bring into play the Teachers Contract. WAC 181-86-110

(formerly 180-86-110) states that each district superintendent must make a report to OSPI whenever he or she possesses reliable information to believe that a “certificated employee” has committed an act of unprofessional conduct. The unprofessional conduct at issue here was committed during Mr. Ashler’s coaching duties. The reporting requirements, however, do not distinguish between conduct that happened while an employee was engaged in his certificated duties, noncertificated duties, or even off the job.

Furthermore, whether the employee is a teacher is not relevant to the superintendent’s reporting duty, only whether the employee is certificated. Certificated employees can include principals, superintendents, directors, and coordinators, in addition to teachers. *See* RCW 28A.405.230. There can be little dispute that – whether the District participated in the arbitration or not – the arbitrator would have no authority to prevent the superintendent from forwarding a concern to OSPI under the regulations addressing rules of unprofessional conduct. Nowhere in the Teachers Contract are OSPI complaints contemplated as a bargaining issue.

The second issue raised by the Union concerns the termination letter in Mr. Ashler’s “personnel file” and the alleged refusal by the

District to allow him to place a rebuttal into the file. As discussed above in Section I.C.3, this is a disputed issue of fact that was not considered by the trial court because it was not material in reaching its decision. The record shows that the District denied this allegation. CP 164. There is also no evidence to show that this claim was in the grievance itself. The Union uses this disputed fact now to show arbitrability.

The Union also confuses Mr. Ashler's "personnel file" with his "teacher's file." Mr. Ashler's "personnel file" contains many documents that do not affect Mr. Ashler's teaching contract at all, including non-teaching related contracts (referred to as "supplemental contracts") and resignations from supplemental positions that clearly fall outside of the purview of the Teachers Contract. CP 139. While the Teachers Contract does address the personnel file as far as items related to such contract are placed in it, it does not address unrelated documents that may also be in a personnel file.

Nowhere in the Teachers Contract is the District required to maintain separate personnel files depending on whether the document involves a teaching duty or a coaching duty. In fact, the Teachers Contract specifically prohibits the District from maintaining "other" personnel files. CP 36. Under the Union's logic, any letter of discipline or

evaluation, whether the letter of discipline or evaluation has no impact on his teaching or teaching contract, would be grievable under the Teachers Contract.

In addition to this argument, the Union relies upon the arbitrator's reasoning that even discipline not affecting a teacher's teaching position would be arbitrable due to *Hoagland v. Mount Vernon School District*, 95 Wn.2d 424, 623 P.2d 1156 (1981). See Brief of Appellant at 25-27. This is a fundamental misreading of *Hoagland* and turns the case on its head. In that case, the Washington Supreme Court established the standards under which a school district could discharge a teacher *from his teaching position* for conduct that occurred outside of his profession. *Ruchert v. Freeman School District*, 106 Wn. App. 203, 212, 22 P.2d 841 (2001). In this case, however, Mr. Ashler's teaching position was never affected – only his *coaching position* was affected. Any affect on his teaching contract was purely imagined by the arbitrator and the Union. Therefore, *Hoagland* is completely inapplicable.

**G. The Union is not entitled to attorney fees.**

The Union's request for an award of attorney fees is entirely without merit. The Union's claim that the District has acted in bad faith is hypocritical given its attempt to override the legitimate bargaining process

in two important respects: (1) by attempting to have an arbitrator determine arbitrability when no such right was bargained for in the contract, and (2) by attempting to force the District to arbitrate over the termination of Mr. Ashler's coaching contract when the parties never bargained an arbitration provision in their Coaches Contract.

The Union's own brief concedes that non-participation is a method of contesting arbitrability. The Ninth Circuit Court of Appeals has also endorsed this method. *See* Appellant's Brief at 37-38 (listing procedural mechanisms by which validity of arbitration awards can be determined and citing *Ralph Andrews Productions, Inc. v. Writers Guild of America*, 938 F.2d 128 (9th Cir. 1991), which condoned a party's refusal to participate in arbitration as method of contesting the authority of an arbitrator). *See also* *George Day Const. Co., Inc. v. United Broth. of Carpenters and Joiners of America, Local 354*, 722 F.2d 1471 (9th Cir. 1984) ("[I]n the usual case, an employer who objects to arbitration on jurisdictional grounds may refuse to arbitrate the case."). Had the District participated in the arbitration, the Union would now be claiming that the District acquiesced in the arbitration proceeding and had no standing to challenge the arbitrability determination and the findings of the arbitrator. *George Day Const. Co., Inc.*, 722 F.2d at 1475-76 (consent to grant

arbitrator authority to decide certain issues can be implied by conduct of parties, even if authority did not exist in collective bargaining agreement).

Whatever expense has been incurred by the Union in this matter is of its own making. When presented with a legitimate objection to arbitration, the Union could have simply filed a motion in Grays Harbor County Superior Court to determine arbitrability. Under Chapter 7.04A RCW, the courts have a system for “proceed[ing] summarily to decide the issue” of arbitrability. *See* RCW 7.04A.070(1). In its written opinion, the Superior Court noted that such a process was available to the Union if it wished to use it. Written Opinion at 3. Furthermore, even after the Union received the ruling from the Superior Court, it could have brought a motion to compel arbitration, but instead opted to appeal the trial court’s decision.

The Union’s bad faith argument is equally specious given that the Grays Harbor Superior Court agreed with the District that the arbitrator lacked authority to conduct the arbitration. The fact that the District received a favorable ruling from the trial court should put to rest any claim that the District’s actions amounted to “bad faith,” were “legally untenable,” “completely unreasonable,” or “frivolous.”

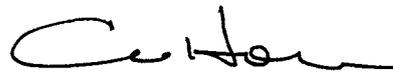
In fact, the same terms might be used to describe the Union’s

attempt to use the Teachers Contract's arbitration provision to overcome its failure to bargain an arbitration provision in its Coaches Contract. The same terms might also be used to describe the Union's suit in Superior Court trying to enforce an arbitration award when the arbitrator clearly had no authority to decide the issue. The Union should not be shocked that the District objected to arbitrability when the Union chose to arbitrate under the Teachers Contract the termination of Mr. Ashler's coaching contract. Accordingly, the Union's request for attorney fees should be denied.

### III. CONCLUSION

For the foregoing reasons, the ruling of the Honorable F. Mark McCauley of the Superior Court of Grays Harbor County should be affirmed.

Dated this 21st day of August, 2007.



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# APPENDIX

THE SUPERIOR COURT OF WASHINGTON  
GRAYS HARBOR COUNTY

GORDON L. GODFREY, JUDGE  
DAVID FOSCUE, JUDGE  
F. MARK McCAULEY, JUDGE  
(360) 249-6363  
BONNIE KINDLE, ADMINISTRATOR  
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April 5, 2007

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RE: *Wishkah Valley Education Association v. Wishkah Valley School District No. 117*  
Grays Harbor County Cause No. 06-2-01053-8

Dear Counsel:

The motion for summary judgment was filed in an effort to enforce an arbitration award. The defendant refused to participate in the arbitration claiming the collective bargain agreement regarding coaches did not provide for arbitration. It is undisputed that the alleged misconduct occurred while the teacher/coach was coaching. The motion for summary judgment is denied because the issue of arbitrability is for the court unless a contract (collective bargaining agreement) clearly provides otherwise.

In *Godfrey v. Hartford Casualty Insurance Company*, 142 Wn.2d 885, 894, 16 P.3d 617 (2001) the Washington Supreme Court stated:

The parties are free to decide if they want to arbitrate. By their agreement to arbitrate, the parties may control the issues to be arbitrated. RCW 7.04.010. As we noted in *Price*, the reasons for this rule are as follows:  
“(a) that parties are free to decide whether they wish to use arbitration in lieu of the judicial process, (b) that they may agree on what matters they wish to submit to an arbitrator, (c) that a party is only required to arbitrate those matters which are the subject of such an arbitration agreement, and (d) that the arbitration clause in the uninsured motorist coverage terms is a clear and unambiguous agreement to submit certain specified question-and only disputes involving those questions-to arbitration.”

*Price*, 133 Wash.2d at 496, 946 P.2d 388 (quoting 2 *Alan J. Widiss, Uninsured and Underinsured Motorist Insurance* § 24.2, at 265 (2d ed. 1992)).

*Godfrey*, at 894 (emphasis added).

The Washington Appellate Court has clearly emphasized that the question of arbitrability is a judicial question:

In determining whether the two parties agree to arbitrate the particular dispute, we considering four guiding principles: 1) the duty to arbitrate arises from the contract; 2) a question of arbitrability is a judicial question unless the parties clearly provide otherwise; 3) a court should not reach the underlying merits of the controversy when determining arbitrability; and 4) as a matter of policy, courts favor arbitration of disputes.

*See Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 41, 45-46, 45 P.3d 594 (2002); and *Stein v. Geonerco, Inc.* 105 Wn. App. 41, 45-46, 17 P.3d. 1266 (2001) (emphasis added).

The arbitration clause in the teachers' contract is very narrow. The arbitrator has specific, limited powers. The specific powers given to the arbitrator are as follows:

It shall be the function of the arbitrator, and he/she shall be empowered except as his/her powers are limited below, after due investigation, to make a decision in cases of alleged violation of the specific articles and sections of this Agreement. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement. The arbitrator shall confine his/her inquiry and decision to the specific area of the Agreement as cited in the grievance form. Matters for which law provides another course of review shall be excluded or exempt from this grievance procedure.

*Wishkah Valley Education Association and Wishkah Valley School District Collective Bargaining Agreement* (September 1, 2003-August 31, 2006), page 26 (emphasis added).

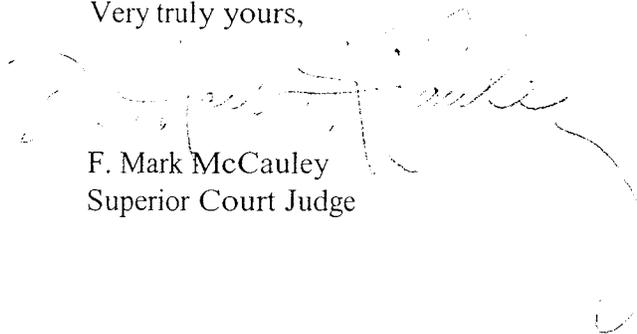
As stated in the cases above, the question of arbitrability is a judicial question unless the parties clearly provide otherwise in the contract. Here, there is no attempt to provide in the Agreement that issues regarding arbitrability will be submitted to the arbitrator. In fact, the language specifically limits the arbitrator's power. In *Mendez*, the Court stated that contracting parties may put language in a contract that will preclude judicial review of arbitrability. *See Mendez*, at 456.

The defendant uses a substantial portion of its reply brief to complain how unions will be at a great disadvantage if they must submit the issue of arbitrability to the courts every time the issue comes up. The simple answer is that a union may negotiate to add language in a contract that provides that the issue of arbitrability will be submitted to arbitration. Also, the statutory framework to compel arbitration usually only requires a motion to the court followed by argument.

The defendant here proceeded with arbitration, and the arbitrator considered the issue of arbitrability, despite the fact that the collective bargaining agreement between the parties did not give the arbitrator the power to decide the issue of arbitrability.

Finally, I agree with the defendant that the issue of arbitrability is not properly before this Court. If the plaintiff intends to pursue arbitration, it will have to bring an action to compel arbitration, and note the matter in accordance with the statute.

Very truly yours,



F. Mark McCauley  
Superior Court Judge

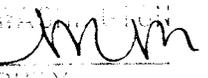
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FILED  
COURT OF APPEALS  
DIVISION II

**CERTIFICATE OF SERVICE**

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Tammy W. Peters, being first duly sworn, on oath deposes and says:

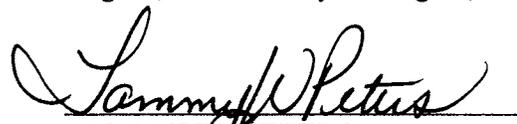
STATE OF WASHINGTON  
BY   
DEPUTY

I am over the age of 18 years and am not a party to the within cause. I work at Curran Law Firm P.S. and on this date I caused to be served by email, facsimile transmission and regular U.S. mail (in the absence of a physical address) a true and correct copy of the above **Brief of Respondent** on the following person set forth below:

*Counsel for Appellant*  
Michael J. Gawley  
Wishkah Valley Education Association  
PO Box 9100  
Federal Way, Washington 98063-9100  
Facsimile: 253-946-7232  
Email: mgawley@washingtonea.org

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

DATED at Kent, Washington, this 21st day of August, 2007.

  
TAMMY W. PETERS