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## I. INRODUCTION

Consistent with longstanding and well-established public sector labor law, the trial court properly concluded that grievances that arise after a CBA terminates and involve rights that do not survive the expired CBA are not subject to arbitration. The trial court properly dismissed Kitsap County Deputy Sheriffs' Guild's claim that Kitsap County breached the parties' CBA when the County refused to submit to arbitration grievances that arose after the Contract expired.

On the whole, the facts of this case are undisputed. A decision will not turn on the credibility of witnesses. Rather, the case involves the simple question whether provisions for final and binding arbitration of grievances survive the normal expiration of a collective bargaining agreement. The answer is an "no" unless the parties *expressly* intended them to, and these parties did not.

## II. COUNTERSTATMENT TO ASSIGNMENTS OF ERROR

A. The trial court properly granted Kitsap County's Motion for Summary Judgment and correctly entered judgment in favor of Kitsap County dismissing Kitsap County Deputy Sheriffs' Guild's complaint with prejudice. CP 163-165.

B. The trial court properly denied Kitsap County Deputy Sheriffs' Guild's motion for reconsideration of the order granting Kitsap County's Motion for Summary Judgment. CP 311-313.

**III. COUNTERSTATEMENT OF ISSUES  
PERTAINING TO ASSIGNED ERRORS**

A. Did the trial court properly grant Kitsap County's Motion for Summary Judgment and enter judgment in favor of Kitsap County dismissing Kitsap County Deputy Sheriffs' Guild's complaint with prejudice? CP 163-165.

B. Did the trial court properly deny Kitsap County Deputy Sheriffs' Guild's motion for reconsideration of the order granting Kitsap County's Motion for Summary Judgment? CP 311-313.

**IV. COUNTERSTATEMENT OF THE CASE**

**A. The Parties**

Kitsap County and the Kitsap County Sheriff are public employers of uniformed deputy sheriffs. Kitsap County is the employer of deputy sheriffs for wage-related matters and the Kitsap County Sheriff is the employer of deputy sheriffs for nonwage-related matters (hereafter referred to collectively as "the County"). The Kitsap County Deputy Sheriffs' Guild ("the Guild") is the bargaining representative of uniformed deputy sheriffs employed by the County.

The Public Employee Collective Bargaining Act (“PECBA”) differentiates “uniformed” personnel from other public employees. Uniformed personnel include law enforcement officers, correctional employees, peace officers employed by a fire district, security forces, firefighters, employees of fire departments who dispatch for fire or emergency medical services, and advanced life support technicians. RCW 41.56.030(7). The PECBA provides for mediation and interest arbitration to resolve impasses in collective bargaining negotiations for uniformed personnel. RCW 41.56.440-.470.<sup>1</sup>

**B. Nature of the Dispute**

This case arises from a labor dispute between the County and the Guild that traces back to early 2003 when the County refused the Guild’s demand to arbitrate grievances arising after the parties’ December 31, 2002, collective bargaining agreement (“CBA”) expired. CP 14, 40. The parties’ subsequent CBA was not executed until August 22, 2005, and no contract was in place during the 31+ months between December 31, 2002 and August 22, 2005. CP 386.

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<sup>1</sup> This case concerns *grievance* arbitration under an expired contract, not *interest* arbitration under the PECBA. Grievance arbitration is a *contractual* dispute resolution forum to address an alleged breach of an existing contract. Interest arbitration is a proceeding to determine the wages, hours, and working conditions to be included in a *new* collective bargaining agreement. *See City of Bellevue v. Int’l Ass’n of Firefighters Local 1604*, 119 Wn.2d 373, 376 (1992); RCW 41.56.122(2); RCW 41.56.450-.465.

During the parties' contract hiatus, several events occurred giving rise to discipline and grievances. The first event occurred on February 23, 2003, almost two months after the 2000-2002 CBA had expired. Deputy Brad Wathall was involved in a one car, patrol vehicle collision, and the Sheriff's Office imposed a one-day disciplinary suspension without pay on Deputy Wathall for unsafe driving. CP 37. The Guild grieved the suspension on behalf of Deputy Wathall in April 2003. CP 43, 41.

Kitsap County Undersheriff Dennis Bonneville denied the Wathall grievance in an April 17, 2003 letter to the President of the Guild, Detective Mike Rodrigue. In the letter, Undersheriff Bonneville reminded the Guild that because the parties' CBA had expired, the arbitration clause was not effective, and the Wathall grievance was not subject to arbitration. CP 40. In the letter to the Guild, Undersheriff Bonneville stated:

As you know, the contract between the guild and the Sheriff's Office expired December 31, 2002. An arbitration clause does not survive contract expiration with regard to grievances. This collision and subsequent discipline arose after the expiration of the contract. Therefore, the arbitration clause in the expired contract is inapplicable to this matter.

CP 40.

The second event occurring during the contract hiatus was on June 16, 2004, when the Sheriff's Office suspended Deputy Josh Miller for one day for a patrol vehicle collision. CP 61. The Guild grieved the discipline

on behalf of Deputy Miller that same month. CP 71, 75. The parties had still not reached agreement on new CBA. In his July 27, 2004 letter to Guild President Rodrigue, Undersheriff denied the grievance and repeated his reminder that the arbitration clause in the parties' expired agreement was not effective for grievances arising after expiration of the agreement, and the Miller grievance was not subject to arbitration. CP 70. However, during the contract hiatus the County was willing to negotiate a grievance process. In the July 24 letter, Undersheriff Bonneville encouraged the Guild to contact him stating, "the Employer is willing and ready to negotiate a process for resolving the dispute." CP 70.

The Guild expressly acknowledged that Undersheriff Bonneville was correct that the arbitration clause did not survive expiration of the CBA. In a letter to Undersheriff Bonneville, Guild Vice President Jay Kent stated:

You are correct in your assertion that the arbitration clause of the Collective Bargaining Agreement between Kitsap County and the Deputy Sheriff's Guild did not survive contract expiration and accordingly the Guild does not have the right to demand arbitration in this matter or the obligation to do so within 30 days.

CP 89. The Guild's stated position at that time was that ratification of a new contract is retroactive and will serve to restore the Guild's right to

demand arbitration of grievances. In the same letter, Guild Vice President

Kent stated:

When the contract is ratified it's [sic] effect is retroactive and restores the Guild's right to demand arbitration on the issue at that time. Therefore, barring a mutually agreed upon settlement of this matter before that time the Guild reserves the right to demand arbitration on this matter at that time.

CP 89. Later, however, assertions made by the Guild's attorney reflect that the Guild did not expect non-economic terms of a successor contract to be retroactive.

During the contract hiatus, discipline continued to be imposed by the County and grieved by the Guild, but none of the grievances were advanced to arbitration. In November 2004, the Sheriff's Office disciplined Deputy Victor Cleere for a physical altercation with a fellow deputy. CP 96. The Guild grieved the discipline imposed on Deputy Cleere -- a two-day suspension from duty without pay and one-year suspension from serving as a defensive tactics instructor. CP 102. In March 2005, Deputy Benny Myers was suspended for one day for improper discharge of his service weapon. CP 113.<sup>2</sup>

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<sup>2</sup> Three other grievances are identified in the Guild's Complaint for Declaratory Relief and Breach of Contract as arising during a contract hiatus, but these three grievances were not raised by the parties in the motion for summary judgment or motion for reconsideration to the trial court below. CP 7. One grievance concerned whether Deputy Rich Smith forfeited sick and annual leave when he failed to give two weeks notice of retirement in December 2004 as required by

As noted earlier, the parties executed a new CBA on August 22, 2005, which expired on December 31, 2005. CP 366-386. In June 2008, during the contract hiatus, Deputy LaFrance was discharged from his employment with the County. The Guild grieved LaFrance's discharge on June 12, 2006. A successor CBA was not executed until July 24, 2006. CP 443.

Two grievances at issue in this case arose during the time that a CBA was in effect. One grievance claimed that the County violated the CBA when the County placed Deputy Brian LaFrance on paid administrative leave in November 2005 rather than returning him to patrol duty following an arbitrator's award reinstating his employment. CP 7. See also CP 130. While this grievance arose when the 2005-2006 CBA was in place, the grievance was rendered moot by Division II's decision in *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 140 Wn.App. 516,

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CBA, the civil service rules, and the department's rules and regulations. Another grievance arose in February 2005 concerning an allegation that the collective bargaining agreement does not allow the Sheriff's Office of Professional Standards ("OPS") to maintain files on employees. CP 7. OPS conducts internal investigations into allegations of deputy misconduct. The third grievance listed in the Guild's Complaint but not addressed in the motions for summary judgment or reconsideration concern release time. CP 8. However, the release time grievance arose while the 2006-2007 collective bargaining agreement was in effect, and in fact an arbitration hearing to resolve this grievance is scheduled to take place on July 30, 2008.

165 P.3d 1266 (2007), vacating the arbitrator's award reinstating LaFrance's employment.<sup>3</sup>

Another grievance arising when a CBA was in place arose in July 2006, after the 2005-2006 CBA was executed. The Guild filed a grievance alleging that Deputy Prosecutor Martin Muench threatened Deputy Sheriff Jim Rye with his employment if Deputy Rye continued to run for County Sheriff. CP 139. The Sheriff's Office denied this grievance, not because the CBA and arbitration clause had expired, but because the Guild was attempting to enforce the CBA against persons who are not parties to the CBA. Deputy Prosecutor Martin is an employee of the Prosecuting Attorney, not the Sheriff. CP 137. The County and Guild's CBA covered regular full and part-time commissioned uniformed deputy sheriffs, corporals, and sergeants. CP 418. Thus, the Rye grievance was outside the purview of the Guild's and County's CBA.<sup>4</sup>

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<sup>3</sup> On June 4, 2008, the Washington State Supreme Court granted the Guild's Petition for Review. As of the date of this Response, supplemental briefs have not been filed and oral argument has not been scheduled.

<sup>4</sup> *Osborn v. Grant County*, 130 Wn.2d 615, 621 (1996) stands for the principle that county officials of one elected office have no authority to interfere with employment matters falling within the scope of another elected county official's office. Similarly, the Kitsap County Prosecuting Attorney's Office is not a signatory to the CBA between the County, Sheriff, and Guild. Under the very precise language of *Osborn*, the language of the collective bargaining agreement between the sheriff and the Guild had no effect on the Prosecuting Attorney, who was not a party to that separate agreement.

Based on previous representations of the Guild, the following facts are not in dispute. The underlying events, discipline, and grievances concerning Deputies Wathall, Miller, Cleere, Meyers, LaFrance arose after a CBA expired. Deputy Smith's failure to notify the County of his retirement, his consequential forfeiture of accrued leave, and the grievance opposing it all arose after the CBA expired. The grievance alleging maintenance of OPS files arose after the CBA expired. CP 326.

The County contends that three grievances listed in the Complaint are not properly before this court. Jim Rye's grievance against Deputy Prosecutor Martin Muench is outside the scope of the parties' CBAs. LaFrance's grievance about being placed on administrative leave rather than patrol duty is moot. The parties did submit the grievance concerning release time to grievance arbitration and that grievance is currently scheduled for a hearing.

No evidence was presented that the County ever indicated, either expressly or by clear implication, that the CBA arbitration clause would survive expiration of the parties' contract. The County has consistently advised the Guild that the right of arbitration does not survive the parties' expired CBA. CP 40, CP 70. The Guild expressly acknowledged this longstanding understanding. CP 89.

No evidence was presented to the trial court that the County has ever arbitrated a grievance that arose after the parties' CBA expired. No evidence was presented that after a successor contract was ratified, its effect was applied retroactively to restore the right of arbitration to a grievance that arose after the previous contract expired. Indeed, in preparation of finalizing the parties' 2003-2005 contract, counsel for the Guild expressly stated that absent explicit language indicating otherwise, non-economic terms are prospective only. James Cline stated in an email dated July 12, 2005:

The term of the agreement needs to be the term of the agreement and that's all our amendment requires. After that, the explicit terms of the contract and presumptive rules of contract interpretation take over. *As you know, I think, absent explicit language indicating otherwise, economic terms are presumed retroactive and non-economic terms are considered prospective only.* The email policy is one such non-economic term. So there is no issue that you should have with that change if your only concern was application of the email language.

CP 161 (emphasis added).

In the same email, James Cline goes on to assert, quite strongly, that non-economic terms of the contract *may not* be applied retroactively.

He states:

But what I find even more puzzling if not troubling, Rob, is your reference to discipline. You state: "I do not want to face the issue of retroactive discipline under the electronic communications provisions."

What discipline are you talking about Rob? The electronic communications provision applies to Guild use of electronic email. Are you suggesting that you are going to assess whether they [sic] have now been violations under that policy and discipline Guild officers for supposed violations?

Even assuming that you could retroactively apply such provisions, that whole line of thinking seems to be off track on one critical premise--there is nothing new in that policy to apply! It was quite clear and made explicit in our discussions with your predecessor when we reached that tentative agreement, that the language agreed upon reflects the long established practice in the office. That language is nothing other than a memorializations [sic] of long established practices.

CP 161-162.

In arguing in this litigation that the grievance arbitration clause is retroactive, but rejecting retroactivity as to other, similar, non-economic terms, the Guild's position is inconstant and capricious.

### **C. Proceedings Below**

The Guild filed a Complaint for Declaratory Judgment and Breach of Contract with the Pierce County Superior Court on June 20, 2007 ("the Complaint"). CP 3. Ignoring well established labor law and precedent to the contrary, the Guild alleged that the County's refusal to submit the grievances described above to an arbitrator constituted a breach of contract. CP 9-10. Seeking to turn contract law on its head, the Guild also sought a sweeping declaratory ruling that "any grievance proceeding or

arbitration arising during *or after* the expiration of a prior CBA, and during the effective dates of a retroactive and successor agreement that contains a grievance proceeding or arbitration clause, is subject to that successor agreement, and under the two successor CBAs at issue the County is bound to comply with any otherwise valid demand to grieve or arbitrate.” CP 10. (Emphasis added).

The County answered the Complaint, rejecting the contention that the parties’ successor CBAs applied retroactively to resurrect any grievances filed after the previous contract expired. CP 13-15. The County asserted that it did not agree to arbitrate any grievances arising after the CBA expired, and it cannot be compelled to arbitrate any dispute which it has not agreed, by contract, to submit to arbitration. CP 16. The County admitted that it had offered to negotiate a new process for handling the grievances that arose after the CBA expired, but the Guild had rejected the offer, thereby waiving the right to arbitrate them. CP 17.

The County moved for summary judgment dismissal of the Guild’s complaint. CP 19. The Guild filed a response and cross-motion for summary judgment. CP 323. The Guild largely conceded to the facts as stated in the County’s motion. CP 326. The Guild controverted that LaFrance’s grievance was moot because his termination was the subject of

appeal. *Id.* The Guild also alleged that the Jim Rye grievance is against the Sheriff, not the Prosecutor. *Id.*

The County filed a reply to the Guild's response and cross motion. CP 143. A hearing on the motion and cross motion was heard by the trial court. RP 1 (October 16, 2007). The trial court concluded that there was no genuine issue of material fact in the matter and that the County was entitled to judgment as a matter of law. CP 163-164. The trial court issued an order granting the County's Motion for Summary Judgment and further ordered the entry of judgment in favor of the County dismissing the Guild's causes of action with prejudice. CP 164.

The Guild moved for reconsideration. CP 166. The County responded and a hearing was held. RP 1 (November 30, 2007). The trial court entered an order denying the Guild's motion for reconsideration. CP 311-312.<sup>5</sup> The Guild has appealed both the order granting summary judgment and the order denying reconsideration. CP 471.

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<sup>5</sup> In support of its motion for reconsideration, the Guild submitted a supplemental declaration and various records. The County moved to strike this evidence. The Guild had been in possession and aware of the evidence before the Court had considered and granted the County's motion for summary judgment, and the County believed it was improper to submit the evidence to the Court when the Guild could easily have done so earlier. The Court denied the County's motion to strike. After the Guild filed its Notice of Appeal, the County filed Notice of Cross-Appeal of the trial court's order denying the County's motion to strike. The County has withdrawn its cross-appeal.

## V. SUMMARY OF ARGUMENT

The Guild asks the Court to embrace the unprecedented position that grievance arbitration survives the expiration of the contract that created it. In so doing, the Guild asks the Court to reject the views of the Public Employment Relations Commission (“PERC”) and state and federal court precedent. The Guild also asks the Court to reject the views of the Washington Legislature as reflected in the clear terms of the PECBA and to rewrite the PECBA. Relying on purported policy arguments rather than the express terms of the statute, the Guild invites the Court to substitute its own judgment for that of the legislature and PERC, and to disregard well established labor law precedent.

The Guild’s demand for arbitration fails as a matter of basic contract law. The Guild seeks to utilize a contractual arbitration provision to assert a breach of contract claim. But there can be no breach of contract claim because the contract expired well before the events giving rise to the grievances arose, and the contractual commitment to arbitration necessarily expired with the contract. The well settled rule in Washington--and everywhere else--is that grievance arbitration does not survive expiration of a CBA. The only exception is for grievances that actually arise *before* expiration of the CBA or are based on vested obligations. Here, the Guild asks for arbitration of grievances that are

based on nonvested obligations that do not survive the agreement-- discipline and discharge, notice of resignation and retirement, and personnel records, all of which arose *after* expiration of the parties' CBAs.

## VI. ARGUMENT

### A. Great Deference is Accorded PERC'S Interpretations of Washington Public Sector Labor Law

PERC is the authoritative source for interpretations of Washington public sector labor law. Washington courts accord great deference to PERC's decisions by because of its specialized knowledge and experience in the area of labor relations. *See Pasco Police Officers Ass'n v. City of Pasco*, 132 Wn.2d 450, 458 (1977) (PERC, as the agency charged with administration and enforcement of PECBA, is accorded great weight in determining legislative intent); *City of Bellevue v. International Ass'n of Firefighters, Local 1604*, 119 Wn.2d 373, 381 (1992) ("Because of the expertise of PERC's members in labor relations . . . the courts of this state give 'great deference' to PERC's decisions and interpretation of the collective bargaining statutes.")

### B. The Guild Asks the Court to Reject Settled PERC Law

The Guild's appeal must be rejected unless the Court is prepared to overrule well-settled Washington labor law, as articulated by PERC. The well settled rule, for uniformed and non-uniformed personnel alike, is that

a contractual grievance arbitration forum does not apply to disputes arising after expiration of the CBA. This rule is axiomatic as a matter of simple contract law. Arbitration is a creature of contract and exists to resolve breach of contract disputes. When there is no contract, there can be no breach of contract claim and no applicable arbitration provision to resolve a posited--but lapsed--breach of contract claim.

A leading case of this is *Teamsters Union, Local 313 v. Pierce County*, Decision 2693 (PECB 1987). As the examiner in that case explained, “th[is] case involves a simple issue: Do provisions for final and binding arbitration of grievances survive the normal expiration of a CBA?” *Id.* at \*4. The examiner answered flatly in the negative, concluding that the employer did not violate the PECBA when it ceased giving effect to the contractual grievance arbitration provision upon expiration of the CBA. *Id.* at \*8. The examiner explained:

Although a grievance procedure is a mandatory subject of bargaining, it is a different type of mandatory subject than are wages, hours or working conditions. The litany of “wages, hours and working conditions” denotes the areas of concern between bargaining unit members and employers. These mandatory subjects of bargaining must be maintained at status quo upon the expiration of the collective bargaining agreement . . .

There are, however, certain other mandatory subjects which are frequently bargained between employers and unions, and incorporated in collective bargaining agreements, which expire when the collective bargaining agreement

ends. These are clauses which establish the manner and the means whereby the employer will satisfy its statutory obligation to deal with the union as the exclusive bargaining representative during the life of the agreement and the way in which the union may enjoy its statutory privilege of representing the employees. Union security is one example. . . The provision for binding grievance arbitration is another such clause which is a mandatory subject of bargaining but which addresses the relationship between the union and the employer as opposed to the employee and the employer.

*Id.* at \*4-5 (Cited case omitted).

In the public sector, the continuation of bargaining agreements for an indefinite period of time is discouraged. “. . . Any agreement which contains a provision for automatic renewal or extension of the agreement shall not be a valid agreement; nor shall any agreement be valid if it provides for a term of existence for more than three years.” RCW 41.56.070. *A finding that an agreement to arbitrate would continue for months after the contract has expired would violate the intent of RCW 41.56.070.*

On the balance, a public policy favoring the resolution of labor disputes through arbitration is not damaged by a finding that the provision for binding arbitration is a right which runs to the union, not to the individual employee. *Thus, operating like a union security clause, binding arbitration expires when a collective bargaining agreement naturally terminates.*

The conclusion reached by the hearing examiner in the *Teamsters* case was also reached by the full Commission in *International Ass'n of Firefighters v. City of Yakima*, Decision 3880 (PECB 1991). In a case involving uniformed personnel, the issue was whether an unfair labor practice case should be referred to the grievance and arbitration

procedures under the parties' expired CBA. The Commission concluded that referral to arbitration was inappropriate because the agreement for grievance arbitration expired with the parties' CBA:

There is no indication of a written agreement of the parties extending their contract. The most that can be said is that the union behaved at one moment in time as if there were still a contract in effect, when it filed a grievance on the matter.

. . . The agreement to arbitrate survives the expiration of a collective bargaining agreement only with respect to causes of action which arose while the contract was in effect. Even if the union had claimed here that some specific provision of the expired contract would have applied, the . . . sole incident addressed in the complaint . . . clearly occurred after the contract had expired.

. . . Neither a collective bargaining agreement nor viable grievance arbitration machinery was in effect at the time this dispute arose.

*Id.* at \*3-4.

PERC also recognized these concepts in *Washington State Council of County and City Employees, Local 1553 v. Spokane County*, Decision 6708 -PECB, and Decision 6709 - PECB (1999) where the Executive Director stated:

The deficiency notice also pointed out Commission precedents holding that grievance procedures are not part of the status quo which must be maintained unless and until the duty to bargain has been satisfied. . . There are, however, certain other mandatory subjects which are frequently bargained between employers and unions, and incorporated in collective bargaining agreements, which

expire when the collective bargaining agreement ends. These are clauses which establish the manner and the means whereby the employer will satisfy its statutory obligation to deal with the union as the exclusive bargaining representative during the life of the agreement and the way in which a union may enjoy its statutory privilege of representing the employees. Union security is one example. The provision for binding grievance arbitration is another such clause is a mandatory subject of bargaining much which addresses the relationship between the union and the employer as opposed to the employee and the employer.

Another PERC case involving uniformed personnel is *Enumclaw Police Officers Ass'n v. City of Enumclaw*, Decision 4897 (PECB 1994).

In that case, the union submitted a grievance over discipline of a union member, and the employer declined to submit the matter to grievance arbitration under an expired CBA. The union contended that the employer's refusal to arbitration was an unlawful change in past practice. The Commission's Executive Director dismissed the union's claim for arbitration for failure to state a cause of action, stating as follows:

[T]he Commission has held an arbitration clause does not survive contract expiration with regard to grievances arising after the expiration date. *City of Yakima*, Decision 3880 (PECB, 1991). The allegation with regard to an unlawful change of past practice by refusing to arbitrate [the] grievance fails to state a cause of action.

*Id.* at \*1-2; *see also Geforos v. City Of Tacoma*, Decision 5085 (PECB 1995) ("Neither union security nor grievance arbitration provisions survived the expiration of a collective bargaining agreement.") (*Citing*

*Clark County*, Decision 3451 (PECB 1990); *City of Yakima*, Decision 3880 (PECB 1991).

**C. PERC’S View Is Consistent with Federal Labor Law**

PERC’s view that contractual grievance arbitration expires with the contract is consistent with the view of the United States Supreme Court for private sector collective bargaining agreements under the National Labor Relations Act. In *Litton Financial Printing Division v. N.L.R.B.*, 501 U.S. 190, 205, 111 S.Ct. 2215, 115 L. Ed. 2d 177 (1991), the Supreme Court emphasized that “[t]he object of an arbitration clause is to implement a contract, not to transcend it” and held that, upon expiration, the contractual obligations of the parties, including the duty to arbitrate grievances, cease to exist. *Litton*, at 205-206. The Court explained:

A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Any other reading of *Nolde Brothers* seems to assume that postexpiration terms and conditions of employment which coincide with the contractual terms can be said to arise under an expired contract, merely because the contract would have applied to those matters had it not expired. But that interpretation fails to recognize that an expired contract has by its own terms released all its parties from their

respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract.

*Litton*, at 205-206, citing *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977); and *Office and Professional Employees Ins. Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc.*, 783 F.2d 919, 922 (9th Cir. 1986) (“An expired [collective-bargaining agreement] . . . is no longer a ‘legally enforceable document.’” (Citation omitted)).

The right to arbitrate draws its existence from the contract and a party cannot be required submit to arbitration any dispute which he has not agreed so to submit. In *Procter & Gamble Independent Union of Port Ivory, New York v. Procter & Gamble Manufacturing Co.*, 312 F.2d 181, 184 (1962), *cert. denied*, 374 U.S. 830, 83 S.Ct. 1872, 10 L.Ed. 1053 (1963), the Court of Appeals for the Second Circuit ruled that, “[t]he duty to arbitrate is wholly contractual and courts have the obligation to determine whether there is a contract imposing such a duty,” and further, “that no right of employees to arbitrate survives the expiration of the collective agreement.”

The Guild, in its complaint, alleges that by making the succeeding contract retroactive the parties agree that grievances occurring between the contract period are suddenly resurrected. This statement is not correct. In 20 Williston on Contracts §56:6 (4th ed.) the author states:

If a grievance concerning a dispute is submitted when no collective bargaining agreement is in force, neither party is obligated to arbitrate the grievance even though a collective bargaining agreement requiring arbitration of grievances subsequently becomes effective. This is because arbitration is solely a matter of contract.

*Citing In Procter & Gamble Independent Union of Port Ivory, New York v. Procter & Gamble Manufacturing Co.*, 312 F.2d 181, 184 (1962); and *International Broth. of Elec. Workers, Local Union No. 1102, AFL-CIO v. Wadsworth Elec. Mfg. Co.*, 240 F.Supp. 292 (E.D. Ky. 1965).

**D. Washington Case Law Supports PERC's View**

Perhaps the most compelling indication that contractual grievance arbitration expires with the contract is the decision of Division One of the Washington State Court of Appeals in *Maple Valley Professional Firefighters, Local 13062 v. King County fire protection Dist. No. 43*, 135 Wn.App. 749 (2006). In that case a firefighters union filed an action against a county fire protection district, seeking an order compelling arbitration of their health plan grievance under an expired CBA. The

Superior Court for King County granted the district's motion to dismiss arbitration claim. In affirming the trial court's decision the court ruled:

A grievance arbitration clause does not survive the expiration of a collective bargaining agreement with regard to grievances arising after the expiration date of the agreement. Here, the grievance arose one year after the expiration of the collective bargaining agreement; thus the Union is not entitled to the grievance arbitration procedures established under the expired collective bargaining agreement.

*Id.*, at 750. The court stated that the issue squarely before it is whether under RCW 41.56.470 a grievance arbitration procedure contained in an expired collective-bargaining agreement remains in effect during the pendency of interest arbitration proceedings involving uniform public employees. The court then went on to give a review of federal and Washington State labor law on this issue stating:

Federal case law interpreting the National Labor Relations Act (NLRA) states that while grievance arbitration is part of the wages, hours and other conditions of employment that are subject to mandatory bargaining, it is not the kind of provision that survives the expiration of a collective bargaining agreement during a hiatus between agreements. Decisions of the Washington Public Employment Relations Commission (PERC) have followed this federal precedent in decisions interpreting the Public Employees Collective Bargaining Act (PECBA).

*Id.*, at 754. The court cited extensively from PERC's decision in *Teamsters Local 313 v. Pierce County*, Decision 2693 (PECB 1987).

The court then proceeded to explain that the court gives great deference to PERC's expertise in interpreting Labor Relations Law, pointing out that PERC had spoken on the issue and held that in the context of uniform employees, including firefighters, arbitration clauses do not survive the expiration of a CBA with regard to grievances arising after the expiration date. *Id.*, 757-759.

The court then proceeded to explain that the Legislature had not intended to extend grievance procedures beyond the expiration of the collective-bargaining agreement as it had with nonuniformed employees. It therefore found that the Legislature knew how to extend the procedure and had chosen not to. *Id.*, at 759-760. The County encourages the Court to adopt the reasoning held of Division I in *Maple Valley*.

**E. The Guild Asks the Court to Reject the Plain Terms of the PECBA and the Obvious View of the Washington Legislature**

The Guild claims that the expired contract was breached when the County imposed discipline against Deputies Wathall, Miller, Cleere, Meyers, and LaFrance, forfeited Deputy Smith's accrued leave, and maintained OPS files. The Guild also contends that the contract was breached when the County refused to submit these grievances to arbitration. As noted above, if the contract expired there can be no breach of contract, and there would be no point in convening an arbitration

proceeding unless the Guild could assert an actionable breach of contract claim. In other words, the Guild asks the Court to revive the entirety of the expired CBAs. The Guild's request is not supported by the plain terms of the PECBA and the obvious view of the Washington legislature.

**1. The Legislature Did Not State That All Terms of an Expired Collective Bargaining Agreement Shall Remain in Effect**

The Guild's argument is based on a false premise that RCW 41.56.470 somehow requires all terms and written agreements specified in an expired CBA to remain in effect after its expiration. But the words used in the statute show that the legislature did not intend to continue indefinitely all terms of an expired CBA for uniformed personnel.

The legislature knows how to require all "terms" of a CBA to "remain in effect." In RCW 41.56.123, the legislature stated that "all of the terms and conditions specified in [a] collective bargaining agreement shall remain in effect until the effective date of a subsequent agreement, not to exceed one year from the termination date stated in the agreement." RCW 41.56.123. The legislature exempted uniform personnel from this requirement. RCW 41.56.123(3)(a).

In contrast, RCW 41.56.470, which applies to uniformed personnel, does not require all terms of an expired CBA to remain in effect. Rather, RCW 41.56.470 states as follows:

During the pendency of the proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under chapter 131, Laws of 1973.

The plain terms of this statute state that the employer shall not “change[.]” “existing wages, hours and other conditions of employment.”

If the legislature had intended that entire contracts would continue-- immune to any contractual expiration date--then: (a) the legislature would have stated that all “terms” of an expired agreement “shall remain in effect,” as provided in RCW 41.56.123 for non-uniformed personnel; and (b) uniformed personnel would not be excluded from application of RCW 41.56.123. Obviously, then, there is no express statutory basis to require all the terms of the County-Guild CBA to remain in effect beyond its expiration date.

## **2. The Legislature Did Not State That Grievance Arbitration Shall Remain in Effect**

PECBA does not support a construction in which the statute preserves grievance arbitration following contract expiration pending resolution of a successor agreement. The plain terms of the statute and obvious view of the legislature recognize that grievance arbitration is a creature of contract and not an externally required obligation. RCW 41.56.122(2) (providing that a CBA may provide for arbitration of

disputes over application of the contract). The legislature clearly knows how to extend grievance arbitration for expired CBAs. RCW 41.56.100 states in pertinent part:

If a public employer implements its last and best offer where there is no contract settlement, allegations that either party is violating the terms of *the implemented offer shall be subject to grievance arbitration procedures* if and as such procedures are set forth in the implemented offer, or, if not in the implemented offer, if and as such procedures are set forth in the parties' last contract.

(Emphasis supplied). This provision does not apply to uniformed personnel because employers may not unilaterally implement its last and best offer but instead must use the interest arbitration process of the PECBA. RCW 41.56.470.

If the legislature had intended to extend “grievance arbitration procedures” for all expired contracts, or for uniformed personnel, it would have done so. Instead, the legislature chose to expressly address grievance procedures only for unilaterally implemented contracts applicable to non-uniformed personnel. For uniformed personnel, there is nothing in PECBA stating that grievance arbitration shall remain in effect post-contract expiration.

**F. The Guild’s Arguments that Disputes as to Arbitrability Should be Decided By An Arbitrator are Misguided**

The Guild argues that any and all disputes as to arbitrability should be decided by an arbitrator, citing the “Steelworkers Trilogy” line of cases.<sup>6</sup> But state and federal labor law precedent make clear that “[a]rbitrators and courts are still the principal sources of contract interpretation.” *Litton v. N.L.R.B.*, *supra*, 501 U.S. at 202-203, 111 S.Ct. 2215, *quoting NLRB v. Strong*, 393 U.S. 357, 360-361, 89 S.Ct. 541, 544, 21 L.Ed.2d 546 (1969). “Section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185, ‘authorizes federal *courts* to fashion a body of federal law for the enforcement of . . . collective bargaining agreements.” *Litton*, at 202-203, *quoting Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 451, 77 S.Ct. 912, 915, 1 L.Ed.2d 972 (1957) (emphasis added). The *Litton* court explained the risk of deferring all contract interpretation to arbitration:

We would risk the development of conflicting principles were we to defer to the [N.L.R.B.] in its interpretation of the contract, as distinct from its devising a remedy for the unfair labor practice that follows from a breach of contract.

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<sup>6</sup> “The principles governing arbitration of public sector labor disputes arising under a collective bargaining agreement are set forth by the United States Supreme Court in the “Steelworkers Trilogy.” *114 Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula*, 130 Wn.2d 401, 413, 924 P.2d 13 (1996). *See United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

We cannot accord deference in contract interpretation here only to revert to our independent interpretation of collective-bargaining agreements in a case arising under § 301.

*Litton*, at 203, citing *Local Union 1395, Int'l Brotherhood of Electrical Workers v. NLRB*, 797 F.2d 1027, 1030-1031 (D.C. Cir. 1986).

Washington court decisions are consistent with federal courts that the courts, not arbitrators, are the principle sources of contract interpretation. In *Mount Adams School Dist. v. Cook*, 150 Wn.2d 716, 723-724, 81 P.3d 111, 114 (2003) the court states:

In Washington [the “Steelworkers Trilogy”] principles are framed 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 District*, at 723, citing *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula*, 130 Wn.2d 401, 413, 924 P.2d 13 (1996) (quoting *Council of County & City Employees v. Spokane County*, 32 Wn.App. 422, 424-25, 647 P.2d 1058 (1982)).

The general rule that courts must decide the question of whether the parties agreed to arbitrate applies *unless* “the parties ‘clearly and unmistakably provide otherwise.’” *Mount Adams School District*, at 724, quoting *AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). “Where a party to a collective bargaining agreement claims the parties have agreed to allow an arbitrator to decide the issue of substantive arbitrability, the proper judicial inquiry is whether the parties have agreed that an arbitrator should decide that question.” *Mount Adams School District*, at 724, citing *Bhd. of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507, 510 (9th Cir.1987) (citing *AT & T Techs.*, 475 U.S. at 649, 106 S.Ct. 1415). See also *International Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 217, 45 P.3d 186, 191 (2002) (“the duty to arbitrate a dispute must be founded in the contract itself.”)

There is no evidence that the County agreed to have an arbitrator decide whether grievances arising after the expiration of the parties’ CBA are subject to arbitration. Any argument that the County so agreed is nonsensical considering the County’s longstanding position that grievances arising after the CBA expired are themselves not subject to arbitration.

**G. The Guild’s Own Conduct Serves to Interpret the Parties’ Use of the Phrase “Full Force and Effect”**

The Guild would have this court apply an interpretation of the parties’ contract that *the Guild’s own statements and conduct belie*.

Article V of the parties’ CBAs state: “[t]his Agreement shall be in full force and effect between the Guild and Employer, Kitsap County, from [date] through [date].” CR 203, 386, 443. The parties did not intend this clause to apply to non-economic terms, or terms that do not vest with employees. As noted earlier, the representations of the Guild’s own attorney bear this out: “*As you know, I think, absent explicit language indicating otherwise, economic terms are presumed retroactive and non-economic terms are considered prospective only.*” CP 161 (emphasis added).

The trial court got it right when it recognized that the “full force and effect” language of the term clause “simply says that this contract is effective as of such and such a date, which doesn’t make that stuff retroactive.” RP 23 (Nov. 30, 2007).

No evidence has been presented that the County ever indicated, either expressly or by clear implication, that the arbitration clause would survive expiration of the parties’ contracts. The County has consistently advised the Guild that the right of arbitration does not survive the parties’

expired CBA. CP 40, CP 70. No evidence has been presented that the County has ever arbitrated a grievance that arose after the parties' CBA expired. No evidence has been presented that after a successor contract was ratified, its effect was applied retroactively to restore the right of arbitration to a grievance that arose after the previous contract expired. Indeed, the Guild has expressly acknowledged that absent explicit language indicating otherwise, non-economic terms, like an email policy and discipline, are prospective only. CP 161. Likewise, with arbitration of grievances.

**H. The Guild Is Asking the Court to Rewrite the PECBA by Arguing the Purported Merits of Its Case and Proposed Policy Justifications**

Despite clear PERC authority and the plain terms of PECBA, the Guild offers various policy arguments in support of its position that the entirety of an expired CBA should remain in effect, including grievance arbitration. The County submits that the issue before the Court is a pure legal issue that does not turn on the purported merits of the Guild's case, and the Guild's policy arguments should be made to the legislature. In any event, the County responds to several of the Guild's contentions.

**1. Uniformed Personnel Did Not Give Up a Right to Strike**

The Court should reject an argument that all terms of a CBA should remain in effect as some sort of quid pro quo for uniformed

personnel giving up a right to strike. Uniformed personnel did not give up any such right; they never had a right to strike. It has been the law of this state for more than 50 years that strikes by public employees are unlawful. *See Port of Seattle v. International Longshoreman's Union*, 52 Wn.2d 317, 324 (1958); *accord Roza Irrigation District v. State*, 80 Wn.2d 633, 638 (1972) (“The legislature must have been aware [in enacting chapter 41.56 RCW] that this Court had held that public employees, while they have the right to organize, do not have the right to strike”).

The legislative declaration in RCW 41.56.430 concerning uniformed personnel is linked to mediation and interest arbitration to resolve impasses in collective bargaining negotiations, not to grievance arbitration under a CBA, much less an expired CBA. *See* RCW 41.56.440-.470.

## **2. The Guild Has Remedies Beyond Grievance Arbitration**

The Guild seems to suggest that employees will be left unprotected if grievance arbitration does not continue in effect after the expiration of the CBA. Any such arguments fail.

First, if the Guild is concerned with not having grievance arbitration, it has the self-help remedy of negotiating a process to address grievances during a contract hiatus. As detailed earlier, the County expressly offered to do this. CR 70.

Second, employer discipline rules are considered part of “wages, hours, and working conditions” that must continue without change pursuant to RCW 41.56.470. If an employer repudiates its own rules against arbitrary discipline, such a complaint would be subject to unfair labor practice proceedings, in an administrative forum (PERC) or in Superior Court, at the Guild choice .

Third, all deputies are covered under the provisions of Civil Service for Sheriff’s Office, chapter 41.14 RCW. This legislation originally passed as an initiative of the people to protect deputies from political actions by elected sheriffs. *See* RCW 41.14.010. Deputies removed, suspended, demoted, or discharged have the right to have such action investigated by the Kitsap County Civil Service Commission. *See* RCW 41.14.120. Failure to pursue civil service remedies rest squarely with the individual deputies, not the County.

**I. The Guild’s Request for Attorneys’ Fees Is Frivolous**

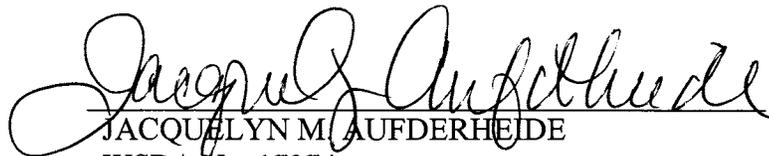
Considering that the trial court granted the County’s motion for summary judgment and denied the Guild’s request for reconsideration, and considering that the great weight of authority supports the County’s position, the Guild’s claim that the County’s refusal to arbitrate lacks substantial justification and warrants an award of attorneys’ fees is frivolous. The Guild’s claim for fees should be strongly rejected.

**VII. CONCLUSION**

For the foregoing reasons, the Guild's appeal should be dismissed.

Respectfully submitted this 20th day of June, 2008.

RUSSELL D. HAUGE  
Kitsap County Prosecuting Attorney

A handwritten signature in black ink, reading "Jacquelyn M. Aufderheide", written over a horizontal line.

JACQUELYN M. AUFDERHEIDE  
WSBA No. 17374  
Chief Deputy Prosecuting Attorney  
Attorneys for Respondents Kitsap County and  
Kitsap County Sheriff

**PROOF OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action and competent to be a witness therein;

That on the 20<sup>th</sup> day of June, 2008, I personally filed "Brief of Respondent Kitsap County" with the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, Washington, 98402.

Further, that on the 20 day of June, 2008, I placed in the mails of the United States, postage prepaid, a copy of the same to the following:

James M. Cline  
Cline & Associates  
1001 4th Avenue, Suite 2301  
Seattle, WA 98154

Respectfully submitted this 20<sup>th</sup> day of June, 2008, at Port Orchard, Washington.



JACQUELYN M. AUFDERHEIDE  
WSBA No. 17374  
Chief Deputy Prosecuting Attorney