

NO. 41225-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
FERRIES DIVISION,

Appellant,

v.

MARINE EMPLOYEES' COMMISSION, and
MARINE ENGINEERS' BENEFICIAL ASSOCIATION,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant, Washington State Department of Transportation, Ferries Division (WSF), requests that this Court exercise its inherent, common law power of review as provided by Const. art. IV, § 6 to issue a writ of certiorari and vacate Paragraph 5 of a grievance arbitration award issued by the Washington State Marine Employees' Commission (MEC) in *Marine Eng'rs Beneficial Ass'n v. Wash. State Ferries*, MEC Case No. 16-08 (July 24, 2009). Paragraph 5 of the MEC's award orders WSF to reimburse the Marine Engineers' Beneficial Association (Union) for attorney's fees incurred by the Union in bringing its grievance action before the MEC for arbitration. Agency Record (AR) at 87.¹ The MEC's arbitration award of attorney's fees was illegal, because it exceeded the MEC's arbitration authority, which derives solely from the terms of the collective bargaining agreements (CBAs) between the Union and WSF. Those CBAs do not allow an arbitrator to order one side to pay the other side's attorney fees.

The MEC and the Union concede that the terms of the CBAs and WAC 316-65-150 require that each side must bear its own expenses in a grievance arbitration. They instead suggest that a labor arbitrator

¹ The superior court has transmitted the MEC's record of the arbitration proceedings below to this Court. Page citations to the Agency Record refer to the documents as numbered by the MEC.

possesses equitable authority to override the explicit terms of the CBA, ignore the WAC, and award attorney's fees whenever the arbitrator is displeased with the legal position argued by a party during the course of the grievance arbitration proceedings, or feels that the party should have settled rather than exercising its right under the CBA to bring the dispute to arbitration.

The above proposition has no footing under established law, nor does it comport with established policy. To the extent that a grievance arbitrator may have equitable authority, such authority must be constrained by the terms of the parties' CBAs. Lawful contractual provisions, negotiated and expressly agreed upon, cannot be ignored or overridden by the arbitrator under the guise of equity. The MEC exceeded its authority as arbitrator under RCW 47.64.150, WAC 316-65-050(6), and most importantly, the binding agreement of the parties, when it awarded attorney's fees to the Union. This Court should reverse the superior court decision, grant Appellant's petition, and vacate Paragraph 5 of the MEC's arbitration award.

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II. ASSIGNMENT OF ERROR

1. **The superior court erred in affirming the MEC's arbitration decision awarding attorney's fees to the Union and in dismissing WSF's petition for issuance of a writ of certiorari.**

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Under Washington law, does a labor arbitrator selected by the parties to adjudicate a grievance pursuant to the parties' collective bargaining agreement have the authority to alter or override the terms of the collective bargaining agreement in issuing his/her arbitration award?**
2. **When the MEC is selected by the parties to arbitrate a grievance, is the MEC's authority delimited by the terms of the parties' collective bargaining agreement, by statute, and by administrative rule?**

IV. STATEMENT OF THE CASE

A. Identity Of The Parties.

WSF is a subdivision of the State Department of Transportation, operated under authority conferred pursuant to RCW 47.60.

The Union is the certified bargaining representative for all licensed and unlicensed engine room employees who work for WSF.

The MEC consists of three members, appointed by the Governor, authorized to adjudicate unfair labor practice complaints, provide impasse mediation, determine bargaining units, certify fair representation organizations, and certify issues for interest arbitration when parties

remain at impasse. The MEC is also authorized to arbitrate contract grievances, but only if the parties' CBA authorizes the MEC to serve as an arbitrator. It is up to the employer and the union to negotiate agreement with respect to grievance procedures. RCW 47.64.150 provides that such procedures may provide for binding arbitration of ferry employee grievances and disputes over the interpretation and application of agreements. The statute further provides that "[a]n arbitrator's decision on a grievance shall not change or amend the terms, conditions or applications of the collective bargaining agreement."

B. Factual Background.

There are two CBAs between the Union and WSF. One CBA covers licensed engine room employees while the other covers unlicensed engine room employees.² Each CBA contains a provision specifying that the MEC will arbitrate grievances arising under the CBA, unless the parties mutually agree to refer the matter to another independent third party. AR at 275, 294.

On June 8, 2007, the Union filed grievances against WSF under each CBA, seeking back wages for its members. The grievances alleged that engine room employees were entitled to additional compensation for

² The CBAs governing this case are the Licensed Engineer Officers Agreement and the Unlicensed Engine Room Employees Agreement, and the 1999-2001 CBAs were the agreements stipulated by the parties to govern the grievance arbitration. Arbitration Hearing Exhibits (Arb. Hrg. Ex.) J-2--J-3, AR at 249-322.

watch turnover activities, and that WSF had not compensated them.³ See Arb. Hrg. Exs. U-10--U-11, AR at 338-43. These grievance filings were prompted by the Court of Appeals' decision in *Davis v. State, Dep't of Transp.*, 138 Wn. App. 811, 159 P.3d 427 (2007); *review denied*, 163 Wn.2d 1019 (2008). There, the Court reversed summary judgment and dismissed a class action lawsuit by the engine room employees seeking additional compensation for watch turnover, because the employees had failed to pursue their contractual or administrative remedies. *Davis*, 138 Wn. App. at 825. However, despite having dismissed the employees' lawsuit, the *Davis* Court also opined that the CBAs entitled the employees to extra pay for watch turnover. *Id.* at 825-26.

The CBAs provide that in the event the employer and the union are unable to agree on a resolution of a grievance, either party may submit the matter to arbitration.⁴ The parties were unable to resolve the grievances informally, and on March 14, 2008, the Union filed a request for grievance arbitration with the MEC. AR at 5-8. The Union's arbitration request sought wages on behalf of all engine room employees (licensed and

³ Engine room employees work 12 hour watches. Watch turnover describes the exchange of information that occurs between employees on the oncoming watch and employees being relieved. *Davis*, 138 Wn. App. 811.

⁴ See Section 23 of the CBA for Licensed Engineer Officers, AR at 275; Rule 16 of the CBA for Unlicensed Engine Room Employees, AR at 293-95.

unlicensed) for time spent by these employees performing routine watch turnover activities. AR at 8.

At arbitration, the Union argued that the *Davis* Court's commentary regarding watch turnover was binding on the arbitrator. AR at 81. WSF disagreed, maintaining that because the *Davis* Court had dismissed the engine room employees' wage lawsuit on the grounds that the employees had failed to pursue their administrative remedies under their CBAs, the Court's observations regarding the relative merits of the employees' potential grievance action were *dicta* and not binding on the parties, nor on the grievance arbitrator.⁵ Under the terms of both CBAs, it is the grievance arbitrator, not the court, that is vested with authority to decide the meaning of a disputed term in the CBA, and it is the arbitrator's decision, not the court's, that is final and binding.⁶ WSF argued that it is not for the court to decide the merits of a labor grievance; the grievance arbitrator, not the court, is the final judge of both the facts and the law, and no judicial review will lie for a mistake in either. *See, e.g., Clark Cy. PUD No. 1 v. Int'l Bhd. Of Elec. Workers, Local 125*, 150 Wn.2d 237, 245, 76 P.3d 248 (2003), (quoting *Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 783-84, 812 P.2d 500 (1991)). WSF thus

⁵ The Union was not a named party, nor did the Union participate in the *Davis* wage case in superior court.

⁶ *See* Section 23(d) of the CBA for Licensed Engineers, AR at 275; Rule 16, Step III (d) for the Unlicensed Engine Room Employees, AR at 295.

relied on well-established law in urging the arbitrator to independently decide the merits of the watch turnover grievances, based on the long-standing implied agreement between the parties that routine watch turnover activity did not qualify for extra compensation under the CBAs. *See* Respondent's Post-Hearing Brief, AR at 45-55.

The MEC issued its Arbitration Decision and Award in favor of the Union, concluding that under the overtime provisions of their CBAs the engine room employees were entitled to extra pay for routine watch turnover activities. AR at 87. The MEC also ordered WSF to reimburse the Union for "attorney fees incurred in bringing this grievance before the MEC." *Id.*

WSF petitioned the MEC to reconsider its award of attorney's fees, on the grounds that the parties' CBAs expressly provide that each party shall bear its own expenses incurred in grievance arbitrations, and the MEC, acting in its capacity as the grievance arbitrator, had no authority to override or alter the parties' agreements. Section 23(f) of the CBA between WSF and the Licensed Engineers provides as follows:

All costs, fees and expenses charged by the arbitrator will be shared equally by the Employer and the Union. *All other costs incurred by a party resulting from an arbitration hearing will be paid by the party incurring them.*

AR at 275 (emphasis added).

Rule 16, Step III (f) of the CBA between WSF and the Unlicensed Engine Room Employees contains nearly identical language:

All costs, fees and expenses charged by the arbitrator will be shared equally by the Parties. *All other costs incurred by a Party resulting from an arbitration hearing will be paid by the Party incurring them.*

AR at 295 (emphasis added). The above contractual language regarding “all other costs incurred by a Party” is plain and unambiguous, and well understood by the parties to include attorney’s fees. Neither CBA contains a provision authorizing the grievance arbitrator to override the cost allocation articles and award attorney’s fees in the event the arbitrator is displeased with, or annoyed by, the legal arguments of the non-prevailing party.

WSF’s petition for reconsideration also reminded the MEC that its arbitration award of attorney fees violated the MEC’s own rule, WAC 316-65-150, which states that “each party shall pay the expenses of presenting its own [grievance arbitration] case.” *See* WSF’s Petition for Reconsideration, AR at 90-92.

The MEC denied WSF’s request for reconsideration of the attorney fee award, stating that “[t]he Arbitrator acted appropriately and within his contractual authority and obligations.” AR at 102. The MEC cited no contract article, nor did it cite any authority or precedent in support of its

decision to award attorney's fees. In fact, there is no precedent. The MEC admits that it "has not awarded attorney's fees in any proceeding that was solely a grievance since 1998, and that at least 200 grievance cases have been filed with the MEC since 1998, that a majority of them involved claims for back wages." Answer of MEC, ¶ 3.8, Clerk's Papers (CP) at 123. WSF has been unable to find any arbitrator's decision awarding attorney's fees in any MEC-arbitrated grievance proceeding, even before 1998.

Nor did the MEC attempt to explain why it believed that it could, in this case, ignore the plain language of the CBAs providing that costs incurred in a grievance arbitration "will be paid by the party incurring them." The MEC Order also failed to explain how, and upon what authority, the MEC could ignore the plain terms of RCW 47.64.150 and the MEC's own rule expressly prohibiting an arbitrator from altering the terms of a CBA. Although the MEC acknowledged that "[i]t can be argued that our decision has limited merit as to whether the Arbitrator should find an implied obligation in the contract or the RCW's [sic] regarding attorney's fees," it felt the WSF should have accepted the *Davis* court's interpretation of the CBAs and settled the grievance informally rather than allowing the matter to be advanced to arbitration for final resolution. AR at 103. Apparently the MEC believed that it had no

choice but to follow the *Davis* court's interpretation of the parties' CBAs, and did not agree with WSF's position that the arbitrator had the exclusive authority under the CBAs to independently decide the dispute.

C. Superior Court Proceedings.

WSDOT filed its petition for writ of certiorari and review of arbitration decision awarding attorney's fees on October 8, 2009. CP at 3-105. Following submission of briefs and oral argument, the Superior Court entered an Order affirming the MEC decision and dismissing the petition. CP at 242-43.

V. STANDARD OF REVIEW

This Court has jurisdiction over this matter pursuant to the Court's inherent power to review grievance arbitration decisions. In *Clark Cy. PUD No.*, 150 Wn.2d at 245, the Court explained the scope of review:

Review of an arbitration decision under a constitutional writ of certiorari is limited to whether the arbitrator acted illegally by exceeding his or her authority under the contract. "The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." *Saldin Sec., Inc. v. Snohomish Cy.*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998).

Thus, this case involves a question of law, and review by the Court is de novo. *Kitsap Cy. Deputy Sheriff's Guild v. Kitsap Cy. & Kitsap Cy. Sheriff*, 167 Wn.2d 428, 434, 219 P.3d 675 (2009).

VI. ARGUMENT

A. In An Arbitration Proceeding, The MEC Is Bound By The Terms Of The Collective Bargaining Agreements And Has No Authority To Award Attorney's Fees Under Any Circumstances.

The law is clear—an arbitrator is confined to interpretation and application of the CBA. *See, e.g., Clark Cy. PUD No. 1*, 150 Wn.2d at 247. As the Court stated in *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960), “[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.” *See also City of Yakima v. Yakima Police Patrolman's Ass'n*, 148 Wn. App. 186, 192, 199 P.3d 484 (2009); *Endicott Educ. Ass'n v. Endicott Sch. Dist. No. 308*, 43 Wn. App. 392, 394, 717 P.2d 763 (1986); *N. Beach Educ. Ass'n v. N. Beach Sch. Dist. No. 64*, 31 Wn. App. 77, 85-86, 639 P.2d 821 (1982).

Thus, any express contractual limitations must be adhered to. *Endicott*, 43 Wn. App. at 395. The MEC did not adhere to the express

limitation in the CBAs and regulation that each party is to bear its own costs incurred in the grievance arbitration, and, therefore, went beyond the bounds of its authority as arbitrator.

The court's decision in *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 287-90, 654 P.2d 712 (1982), *review denied* 99 Wn.2d 1006 (1983), is instructive. There, the court reviewed an arbitrator's decision declining to award attorney's fees to either party, even though the parties' contract provided that the prevailing party was entitled to its fees. In reversing the arbitrator's decision on fees, the court explained:

The question of whether or not attorney's fees should be awarded to the prevailing party was not an issue submitted to the tribunal for arbitration with the other claims and disputes; having already been decided by the parties by agreement, it was not arbitrable. To hold otherwise would require us to ignore the express language of a contract, something that courts may not do. *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980). A court may not create a contract for the parties which they did not make themselves. *It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties.* *Wagner v. Wagner, supra; Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 549 P.2d 9 (1976).

Agnew, 33 Wn. App. at 288 (emphasis added).

The rationale expressed by the court in *Agnew* applies with equal force to the facts of this case. WSF and the Union are entitled to the benefit of their bargained agreement, under which neither party is liable

for the other party's attorney's fees. Sitting as arbitrator, the MEC had no authority to ignore this lawful contract provision.

B. A Grievance Arbitrator's Equitable Remedy Cannot Override The Terms of the Parties' Collective Bargaining Agreements.

The MEC and the Union claim that the MEC, sitting in its capacity as arbitrator, had authority to award attorney's fees to the Union as an equitable remedy. However, an arbitrator cannot rewrite the contract under the guise of equity. The authority of the arbitrator, legal and equitable, derives from the contract of the parties. *Barnett v. Hicks*, 119 Wn.2d 151, 155, 829 P.2d 1087 (1992) (an arbitrator's powers are governed by the agreement to arbitrate); *Balfour, Guthrie & Co., Ltd. v. Comm'l Metals Co.*, 93 Wn.2d 199, 202, 607 P.2d 856 (1980) (arbitration stems from a contractual, consensual relationship); *Tombs v. NW Airlines, Inc.*, 83 Wn.2d 157, 162, 516 P.2d 1028 (1973) (arbitrator's award is legitimate only so long as it draws its essence from the CBA and is unenforceable if the award manifests an infidelity to the obligation to interpret the agreement); *Agnew*, 33 Wn. App. at 287 (the authority of the arbitration tribunal derives from the contract of the parties).

The case of *Yakima Cy. v. Yakima Cy. Law Enforcement Officers Guild*, 157 Wn. App. 304, 237 P.3d 316 (2010), provides useful guidance with respect to an arbitrator's equitable authority to fashion an attorney's

fee award while remaining within the bounds of a CBA. There, the union acknowledged that under the terms of its CBA with the employer, it had contractually waived its right to seek attorney's fees for the grievance arbitration proceeding. *Yakima Cy.*, 157 Wn. App. at 338.⁷ The union did not seek attorney's fees for the arbitration itself, but did seek fees incurred by the union in its court action against the employer to compel the employer to submit to grievance arbitration. *Id.* The grievance arbitrator awarded attorney's fees only for the court action *preceding* the arbitration, on the equitable grounds that the employer had refused "without justification" to arbitrate. *Yakima Cy.*, at 338-39.

On appeal, the union also requested attorney's fees expended in a subsequent action to enforce the arbitration award in superior court. The *Yakima Cy.* court denied this request for attorney's fees, holding that the contract waiver of attorney's fees extended to fees incurred in enforcing the arbitrator's award in superior court. *Yakima Cy.*, at 344.

Thus the attorney's fees that were awarded to the union in *Yakima Cy.* were only for the judicial action that preceded arbitration, and were

⁷ The operative language in the parties' CBA provided: "Each party shall pay the expenses of their own representatives, witnesses and other costs associated with the presentation of their case. The cost and expense of the arbitrator shall be borne equally by the parties." *Yakima Cy.* at 344.

awarded on the grounds that the union should not have had to go to court to compel the employer to arbitrate a grievance under the CBA.⁸

In *Yakima Cy.*, the arbitrator's award of attorney's fees was lawful, because, in contrast to the present case, the award did not override or alter the terms of the parties' CBA, but adhered to the parties' agreement that each side bears its own fees for grievance arbitration. In contrast to the present case, the arbitrator in *Yakima Cy.* did not attempt to alter the parties' contract under the guise of equity, but instead fashioned an equitable remedy that did not conflict with the terms of the parties' CBA.

C. An Arbitrator's Legal or Equitable Authority Cannot Override A Statute That Prohibits Modification, Amendment Or Alteration of The Parties' Collective Bargaining Agreement.

RCW Chapter 47.64 does not contain any provisions authorizing an arbitrator to award attorney's fees when arbitrating a grievance. It does, however, contain specific limitations on the arbitrator's authority.

RCW 47.64.150 provides, in part:

Negotiated procedures may provide for binding arbitration of ferry employee grievances and of disputes over the interpretation and application of existing agreements. *An arbitrator's decision on a grievance shall not change or amend the terms, conditions, or applications of the collective bargaining agreement.* The procedures shall provide for the invoking of arbitration only with the

⁸ Under that theory, it is WSF that was in the position of having to endure a judicial proceeding to enforce the grievance requirements of the CBAs and the statute, and, thus, equity should be on the side of WSF. *Davis*, 138 Wn. App. at 811.

approval of the employee organization. The costs of arbitrators shall be shared equally by the parties.

(Emphasis added).

Thus, when sitting in its capacity as grievance arbitrator, the MEC's arbitration authority is circumscribed by the terms of the parties' CBA. As arbitrator, the MEC has no authority to disregard, alter or amend the terms of a CBA. The MEC's own administrative rule incorporates the limitation on an arbitrator's authority set forth in RCW 47.64.150, and requires parties submitting grievance arbitration requests to stipulate that "the arbitrator's decision on the grievance shall not change or amend the terms, conditions, or applications of the collective bargaining agreement." WAC 316-65-050(6). In awarding attorney's fees in the present case, the MEC clearly exceeded its lawful authority under the governing CBAs and violated the terms of RCW 47.64.150.

D. The Applicable Collective Bargaining Agreements Provide That Each Side Pays Its Own Expenses For Grievance Arbitration, and Washington Case Decisions Have Interpreted Similar CBA Provisions To Disallow Attorney Fee Awards In Wage Actions.

Washington follows the "American" rule concerning attorney fees, under which such fees are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996).

The general rule in labor arbitration is that each side shall pay its own attorney fees unless there is “specific statutory or contractual authorization” to the contrary. *Int’l Firefighters Local 46 v. City of Everett*, 146 Wn.2d 29, 48, 42 P.3d 1265 (2002) (citing Fairweather’s *Practice and Procedure in Labor Arbitration* 497 (Ray J. Schoonhoven ed., 4th ed. 1999)).

It is well-recognized that even a statutory right to attorney’s fees can be bargained away in a CBA. In *Hitter v. Bellevue Sch. Dist. No. 405*, 66 Wn. App. 391, 832 P.2d 130 (1992), *review denied*, 120 Wn.2d 1013 (1992), a union member grieved his termination from employment, and his termination was overturned by an arbitrator following a grievance arbitration hearing. Following his reinstatement, Hitter filed a lawsuit against the District seeking, inter alia, attorney’s fees as authorized under a wage recovery statute, RCW 49.48.030. The District argued that the CBA precluded recovery of attorney’s fees. The terms of that CBA provided, in relevant part:

The fees and expenses of the arbitrator shall be shared equally by the District and the Union. All other expenses shall be born by the party incurring them, and neither party shall be responsible for the expenses of witnesses called by the other.

Hitter, 66 Wn. App. at 397. The Court of Appeals rejected Hitter’s argument for attorney’s fees, finding that the above contractual language

negotiated between Hitter's union and the District—which is indistinguishable from the language contained in the two CBAs in the present action—precluded Hitter from recovering attorney's fees for amounts incurred during his arbitration or on appeal. *Id.* at 399.

Hitter was cited with approval by the Supreme Court in *Int'l Firefighters*, 146 Wn.2d at 36. There, the Supreme Court ruled that a labor union can recover attorney's fees in a superior court action brought under RCW 49.48.030 (the wage recovery statute) when the union successfully recovers wages or salaries owed to its employee members in a labor arbitration hearing. Significantly, however, the court also observed that:

An employer could still avoid an award of attorney's fees by specifically providing in the collective bargaining agreement that each side pay their own fees and costs. *See Hitter*, 66 Wn. App. at 397-99, 832 P.2d 130, (holding that plaintiff had waived right to attorney fees because his collective bargaining agreement specifically provided that each side would pay its own fees and costs).

Int'l Firefighters, *supra* at 49.⁹

When WSF and the Union negotiated the terms of the CBAs for Licensed and Unlicensed engine room employees, they were careful to

⁹ *Hitter* was also cited with approval and followed by the court in *Yakima Cy.*, 344-45. The *Yakima Cy.* court relied on *Hitter* in denying the union's request for attorney's fees incurred in seeking judicial enforcement of the arbitrator's award, reasoning that "[t]he superior court proceedings are then not so attenuated from the arbitration proceeding itself as to be separate for purposes of attorney fee recovery under RCW 49.48.030 and was then waived by the CBA." *Id.*

negotiate specific agreements providing that each side will pay its own arbitration costs and fees. This is precisely the type of agreement recognized by our Supreme Court as sufficient to protect the parties from an attorney's fee award related to wage claims decided through grievance arbitration. WSF is entitled to the benefit and protection of the contracts it negotiated with the Union.

E. The MEC's Award Of Attorney's Fees Violated The MEC's Own Rule Requiring Each Party To Pay Its Own Arbitration Expenses.

WAC 316-65-150, promulgated by the MEC, provides:

Grievance arbitration --- Expenses.

Each party shall pay the expenses of presenting its own case and the expenses and fees of its member, if any, of an arbitration panel. The expenses of witnesses shall be paid by the party producing them. The fees and traveling expenses of an arbitrator selected by the parties from a panel designated by the commission and any costs for recording and/or transcription of proceedings to be used by the parties shall be paid by the parties under the terms of their collective bargaining agreement or such other arrangements as they may agree upon. The commission shall pay the salary and traveling expenses of a commissioner assigned as a grievance arbitrator.

(Emphasis added). This rule could not be clearer. It does not contain any exceptions allowing the grievance arbitrator to award fees to the prevailing party.

F. The Public Policy Favoring Arbitration Is Undermined By An Arbitration Award That Contravenes Express Contractual Language.

There is a strong public policy in Washington in favor of arbitration. *King Cy. v. Boeing Co.*, 18 Wn. App. 595, 602, 570 P.2d 713 (1977). The policy which encourages arbitration would be “undermined if contracting parties perceived that lawful contractual provisions, negotiated and expressly agreed upon, could be ignored by the arbitration tribunal.” *Agnew*, 33 Wn. App. at 289-90. Once made, the parties to a CBA are entitled to the benefit of their bargain. There is little incentive to negotiate and agree to arbitration if contracting parties cannot be secure in the fact that the arbitrator will exercise only that authority granted by the contract.

VII. CONCLUSION

Considerations of precedent and public policy should lead this Court to conclude that the MEC, sitting in its capacity as grievance arbitrator, acted illegally by exceeding its authority under the parties’ CBAs when it awarded attorney’s fees to the Union. Appellant respectfully requests that this Court reverse the superior court, grant

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Appellant's petition for certiorari, and vacate Paragraph 5 of the MEC's arbitration award, awarding attorney's fees to the Union.

RESPECTFULLY SUBMITTED this 23rd day of December, 2010.

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
DEPARTEMENT OF
TRANSPORTATION,

Appellant,

v.

MARINE EMPLOYEES'
COMMISSION, and MARINE
EMPLOYEES BENEFICIAL
ASSOCIATION,

Respondents.

CERTIFICATE OF
SERVICE

COURT OF APPEALS
DIVISION II
10 DEC 27 AM 11:39
STATE OF WASHINGTON
BY _____
DEPUTY

I certify that I served a copy of Brief of Appellant on all parties or their counsel of record on December 23, 2010 as follows:

- U.S. mail and email to Mr. McCarthy; and
- Email and personal delivery to Mr. Daniels

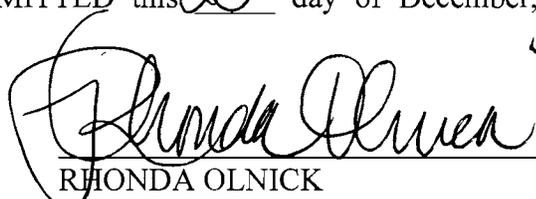
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 23rd day of December, 2010.


RHONDA OLNICK