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**SUPREME COURT OF THE STATE OF WASHINGTON**

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KITSAP COUNTY DEPUTY SHERIFF'S GUILD; and DEPUTY BRIAN  
LAFRANCE and JANE DOE LAFRANCE, and the marital community  
composed thereof,

Petitioners,

v.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondents.

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**AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL**

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ROBERT M. MCKENNA  
Attorney General

Kara A. Larsen  
Assistant Attorney General  
WSBA No. 19247  
Attorneys for State of Washington  
P.O. Box 40145  
Olympia, WA 98504-0145  
(360) 664-4167

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Attorney General represents state officials, departments, and agencies in litigation. RCW 43.10.045. The Attorney General also advises state officials, departments, and agencies on legal matters. *Id.* The Washington State Patrol (WSP) is a law enforcement agency. RCW 43.43. Other state agencies with law enforcement authority and employees include the Department of Fish and Wildlife, RCW 77.15, Department of Natural Resources, RCW 43.30, Parks and Recreation Commission, RCW 79A.05.160, Gambling Commission, RCW 9.46.210, Liquor Control Board, RCW 66.44.010, Lottery Commission, RCW 67.70.330, and Office of the Insurance Commissioner, RCW 48.135.040. These agencies wish to advise this Court of their interests in and position on the issue in this matter.

## **II. ISSUE OF INTEREST TO AMICUS**

Whether there exists in Washington a dominant public policy that a law enforcement officer found to be untruthful is no longer able to perform all essential functions of the position and, therefore, is not qualified to serve in a law enforcement capacity, so that reinstatement of a law enforcement officer despite proven untruthfulness violates this public policy.

### III. SUMMARY OF ARGUMENT

While it is self-evident that the public interest mandates public employees be truthful, the public policy at issue here is more precisely stated as the necessity for an employee to be able to perform all of the essential functions of the position to be considered eligible and qualified for that position, and that in the law enforcement context, a finding of untruthfulness precludes a law enforcement officer from performing all of the essential functions of the position, such that the employee is no longer qualified to hold that position. In such a situation, public policy demands that the employee not continue in the position and that an interpretation of a collective bargaining agreement to reinstate an employee to a position for which the employee is not qualified violates this public policy.

### IV. ARGUMENT

**A. An Arbitrator's Award Is Equivalent To The Collective Bargaining Agreement Itself And, Like The Contract, Cannot Be Enforced If It Is Contrary To Public Policy.**

When an arbitrator issues an award under the terms of a collective bargaining agreement (CBA), the law does not distinguish between the award and the CBA, because the parties have granted the arbitrator authority to interpret the meaning of the CBA language, including what constitutes "just cause" for discipline. *Eastern Associated Coal Corp. v.*

*United Mine Workers*, 531 U.S. 57, 61, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000).

In essence, the employer and the union have bargained for the arbitrator's interpretation, and a court is generally not permitted to second-guess it. *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers*, 461 U.S. 757, 765, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983). As long as an arbitrator is in good faith construing or applying the contract and acting within the scope of his or her authority, a court will not overturn the decision. *Eastern*, 531 U.S. at 62. Nevertheless, where the arbitration award is contrary to public policy, the court is obligated to decline to enforce it. *W.R. Grace*, 461 U.S. at 766.

This exception to deference to an arbitrator's interpretation of a CBA applies only where the public policy is explicit, well-defined, and dominant. *Id.* It is ascertained by reference to the laws and legal precedents and not from general perceptions of the public interest. *Id.*

**B. The Public Policy At Issue In This Case Is That Law Enforcement Officers Found To Be Untruthful Are Not Qualified To Be Law Enforcement Officers.**

- 1. Employees must be able to perform the essential functions of a position to be considered qualified.**

Essential functions are the work activities that are fundamental or critical to the position and that cannot be transferred or eliminated. *See, e.g., DOP Job Analysis Guide available at [http:// www.dop.wa.gov](http://www.dop.wa.gov) (visited on December 19, 2008).* They are the reason the position exists. Employees must have or demonstrate the capability or competency to perform all essential, critical work activities. If an employee cannot perform all of the essential functions identified for a job, the employee is not qualified for that job. For instance, if a job requires the employee to drive, then an employee without a driver's license is not qualified for the job.

The need to be qualified for a job in order to remain in the position is illustrated in the context of reasonable accommodation of disability as required by the Washington Law Against Discrimination (WLAD), RCW 49.60, which prohibits discrimination against employees on the basis of, among other protected statuses, an employee's disability. The WLAD's prohibition against disability discrimination does not apply if the disability prevents the employee from properly performing his or her job. *See* RCW 49.60.180; WAC 162-22-045; *Havlina v. Dept. of Transp.*, 142 Wn. App. 510, 517, 178 P.3d 354 (2007); *Dedman v. Pers. Appeals Bd.*, 98 Wn. App. 471, 486, 989 P.2d 1214 (1999).

If an employee is no longer qualified to perform his or her job, the employer has no duty to alter the fundamental nature of the job, or eliminate or reassign essential job functions. *Davis v Microsoft Corp.*, 149 Wn.2d 521, 535, 70 P.3d 126 (2003). Although the question arises most frequently in the context of employee disability, anything that causes an employee to become unqualified for a position means that the employee can no longer continue in the position.

**2. Truthfulness is an essential, fundamental requirement of the position of a law enforcement officer.**

Numerous statutes indicate that truthfulness is an essential and fundamental requirement of a law enforcement position in Washington. For example, RCW 43.101 establishes the Criminal Justice Training Commission, which governs training and certification of law enforcement personnel. The Commission is charged with proscribing minimum standards for physical, mental and moral fitness for the recruitment of criminal justice personnel. RCW 43.101.080(18). The Commission may deny or revoke a law enforcement officer's certification for acts of dishonesty.

(1) Upon request by a peace officer's<sup>1</sup> employer or on its own initiative, the commission may deny or revoke

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<sup>1</sup> "Peace officer" means any law enforcement personnel subject to the basic law enforcement training requirement. Commissioned officers of the Washington state patrol and Fish and wildlife officers with enforcement powers for all criminal laws under RCW 77.15.075 are peace officers. RCW 43.101.010(11). The term "law enforcement

certification of any peace officer, after written notice and hearing, if a hearing is timely requested by the peace officer under RCW 43.101.155, based upon a finding of one or more of the following conditions:

(a) The peace officer has failed to timely meet all requirements for obtaining a certificate of basic law enforcement training, a certificate of basic law enforcement training equivalency, or a certificate of exemption from the training;

(b) The peace officer has knowingly falsified or omitted material information on an application for training or certification to the commission;

(c) The peace officer has been convicted at any time of a felony offense under the laws of this state or has been convicted of a federal or out-of-state offense comparable to a felony under the laws of this state . . . ;

(d) The peace officer has been discharged for disqualifying misconduct;

(e) The peace officer's certificate was previously issued by administrative error on the part of the commission; or

(f) The peace officer has interfered with an investigation or action for denial or revocation of certificate by: (i) Knowingly making a materially false statement to the commission; or (ii) in any matter under investigation by or otherwise before the commission, tampering with evidence or tampering with or intimidating any witness.

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personnel" means any public employee or volunteer having as a primary function the enforcement of criminal laws in general or any employee or volunteer of, or any individual commissioned by, any municipal, county, state, or combination thereof, agency having as its primary function the enforcement of criminal laws. RCW 43.101.010(4).

RCW 43.101.105 (emphasis added). "Discharged for disqualifying misconduct" in subsection (d) above means:

[T]erminated from employment for: (a) Conviction of (i) any crime committed under color of authority as a peace officer, (ii) any crime involving dishonesty or false statement within the meaning of Evidence Rule 609(a), (iii) the unlawful use or possession of a controlled substance, or (iv) any other crime the conviction of which disqualifies a Washington citizen from the legal right to possess a firearm under state or federal law; (b) conduct that would constitute any of the crimes addressed in (a) of this subsection; or (c) knowingly making materially false statements during disciplinary investigations, where the false statements are the sole basis for the termination.

RCW 43.101.010(8) (emphasis added). Thus, a finding of untruthfulness can cause a law enforcement officer to lose his or her law enforcement certification.

The civil service statutes for law enforcement also delineate a fundamental requirement of truthfulness for such a position. RCW 41.14 is the civil service statute for sheriff's offices. RCW 41.14.110 states:

Tenure — Grounds for deprivation.

The tenure of every person holding an office, place, position, or employment under the provisions of this chapter shall be only during good behavior, and any such person may be removed or discharged, suspended without pay, demoted, or reduced in rank, or deprived of vacation privileges or other special privileges for any of the following reasons:

(1) Incompetency, inefficiency, or inattention to, or dereliction of duty;

(2) Dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public, or a fellow employee, or any other act of omission or commission tending to injure the public service; or any other wilful failure on the part of the employee to properly conduct himself; or any wilful violation of the provisions of this chapter or the rules and regulations to be adopted hereunder;

(3) Mental or physical unfitness for the position which the employee holds;

(4) Dishonest, disgraceful, or prejudicial conduct;

(5) Drunkenness or use of intoxicating liquors, narcotics, or any other habit forming drug, liquid, or preparation to such extent that the use thereof interferes with the efficiency or mental or physical fitness of the employee, or which precludes the employee from properly performing the function and duties of any position under civil service;

(6) Conviction of a felony, or a misdemeanor involving moral turpitude;

(7) Any other act or failure to act which in the judgment of the civil service commission is sufficient to show the offender to be an unsuitable and unfit person to be employed in the public service.

RCW 41.14.110 (emphasis added). RCW 41.12 is the civil service statute for city police and contains an identical provision. *See* RCW 41.12.080.

That truthfulness is essential to the performance of a law enforcement officer's job is borne out by an examination of some of the duties of law enforcement officers. Law enforcement officers swear out affidavits of probable cause for search warrants, provide police reports

made under penalty of perjury, and testify in criminal prosecutions. In all of these functions, credibility is essential. He or she irreparably harms his or her credibility as an affiant or witness if he or she has a record of untruthfulness.

Documented dishonesty of a law enforcement officer is information that, under prevailing Supreme Court precedent, must be disclosed to defense counsel in any criminal prosecution in which the law enforcement officer would be needed to testify. In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, the United States Supreme Court has imposed on the prosecution the obligation to disclose any material evidence that would be favorable to the defense. This would include any information affecting the credibility of witnesses, as well as impeachment evidence. See *United States v. Bagley*, 473 U.S. 667, 676-77, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Thus, when a law enforcement officer is called to testify, a defense attorney has the right to inquire about the integrity and honesty of the officer. If the officer has a record of dishonesty, his or her ability to effectively testify is compromised.

Without the ability to withstand close scrutiny by a defense attorney, jury, or judge, which is necessary of a witness providing a court

and/or jury with information, a law enforcement officer cannot perform essential functions of the job and becomes a liability to the employing law enforcement agency.

3. **Law enforcement positions are positions of great public trust, and law enforcement officers that are untruthful lose the confidence of their employer, colleagues, and the public.**

Law enforcement positions are positions of great public trust.

[H]e is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other 'client' or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer.

*Seattle Police Officer's Guild v. City of Seattle*, 80 Wn.2d 307, 312, 494 P.2d 485 (1972). Documented dishonesty erodes the public's confidence and trust in its law enforcement officers. Dishonesty goes to the character of the employee; truthfulness is a basic expectation of the employment relationship, relevant to the operational needs of the employer, and material to the hiring and retention of an employee. *In re Michigan Dep't of Corrections and Michigan Council 25, AFSCME*, 97 LA 286, 290 (Knott, Arb.) (1991).

An officer's indulgence in falsehoods to evade any issue naturally entails a consequent loss of credibility that undermines the willingness of fellow Officers to rely on him.

...

The Grievant was on notice that a higher standard of truthfulness was expected of him as a police officer. . . . Indeed, the Grievant admitted that he know that honesty and being able to rely on one another is one of the cornerstones or key elements of law enforcement and without that trustworthiness one is rendered ineffective.

*In re Hamilton Cy Sheriff's Dep't and Truck Drivers, Chauffers & Helpers, Local 100*, 99 LA 6, 11 (Duff, Arb.) (1992).

4. **A law enforcement officer found to be untruthful is no longer qualified to be a law enforcement officer, and it would violate public policy to retain such an officer in that position of public trust.**

A law enforcement officer found to be untruthful is unable to fulfill all of the requirements and perform all of the functions of his or her position. Accordingly, the officer is no longer qualified for that position. Retaining a law enforcement officer in the same position in such a situation would require the employing agency to eliminate some of the essential functions of the position, such as any duty in which the officer's credibility is at issue, which the employer cannot be required to do. *See Davis*, 149 Wn.2d 536. Thus, reinstating a law enforcement officer to his or her previous position after finding that the officer has been untruthful essentially requires the employing agency to remove some of the essential functions of the job. Neither an arbitrator nor a court can tell an employer how to structure individual jobs to accomplish its business goals or mission. *Id. See also Walsh v. United Parcel Serv.*, 201 F.3d 718, 727-28

(6th Cir. 2000); *Tardie v. Rehab. Hosp. of R.I.*, 168 F.3d 538, 544 (1st Cir. 1999); *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 45 P.3d 589 (2002). Accordingly, an arbitration award reinstating a law enforcement officer to his or her position, for which he or she is no longer qualified by virtue of a finding of untruthfulness, violates public policy.

#### V. CONCLUSION

Based on the foregoing, the State of Washington respectfully requests that the Court affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of December, 2008.

ROBERT M. MCKENNA  
Attorney General



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KARA A. LARSEN, WSBA #19247  
Assistant Attorney General  
Labor & Personnel Division

Attorneys for Washington State  
P.O. Box 40145  
Olympia, WA 98504-0145  
(360) 664-4167