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COURT OF APPEALS NO. 34321-5-II

SUPREME COURT
OF THE STATE OF WASHINGTON

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

AMICUS CURIAE MEMORANDUM
IN SUPPORT OF PETITION FOR REVIEW TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

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I. IDENTITY OF AMICUS CURIAE

The Washington Council of Police and Sheriffs (WACOPS) is seeking status as amicus curiae in support of the Petition for Review filed by the Kitsap County Deputy Sheriffs Guild (Guild).

II. COURT OF APPEALS DECISION

WACOPS supports the review of *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 140 Wn. App. 516, 165 P.3d 1266 (2007).

III. ARGUMENT

A. Summary of Argument

This Court should accept the Petition for Review filed by the Guild. The decision of the Court of Appeals relies upon an undefined “public policy” exception to the general principle that decisions issued under negotiated arbitration clauses in collective bargaining agreements should be final and binding. In doing so, the decision undermines the finality of arbitration processes in collective bargaining agreements throughout the state.

The decision of the Court of Appeals would allow courts to easily overturn the decisions of labor arbitrators, a result contrary to legislative intent. In addition, the contours of the Court of Appeals’ “public policy” rule are inconsistent with decisions from this Court, the United States Supreme Court, the Ninth Circuit, and the decisions of other state courts.

B. The “Public Policy” Exception Has Been Narrowly Construed by This Court, the Supreme Court, and the Ninth Circuit.

While the public policy exception has apparently only been discussed by Washington courts once before,¹ it is not new to the jurisprudence in other courts. The Court of Appeals’ decision is a marked departure from the established confines of the public policy rule.

From the perspective of WACOPS, the analysis must start with the collective bargaining process itself. WACOPS members and other labor organizations and employers have collectively bargained for binding arbitration to resolve questions about the interpretation and application of their collective bargaining agreements. Arbitration clauses such as those in Kitsap County, where employers and labor organizations have reached arms-length agreements that arbitration decisions should be “final and binding,” are typical. As this Court recently noted, binding arbitration clauses are designed to forfeit the right of appeal in exchange for a relatively speedy and inexpensive resolution of the dispute. *Clark County Pub. Util. Dist. No. 1 v. Inter. Broth. of Elec. Workers*, 150 Wn.2d 237, 247, 76 P.3d 248 (2003). If arbitrators’ decisions are freely appealable – if they are something other than “final” or “binding” – the entire process will become protracted and costly.

¹ In *Kennewick Educ. Ass’n v. Kennewick School Dist. No. 17*, 35 Wn. App. 280, 282, 666 P.2d 928 (1983), the Court of Appeals refused to enforce an arbitrator’s decision that awarded punitive damages, citing long-standing Washington law that punitive damages were only recoverable if specifically authorized by statute.

These principles are firmly rooted in Supreme Court jurisprudence. In *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960), the Supreme Court supported the finality of labor arbitration and held that courts should not review the merits of arbitration awards arising from collective bargaining agreements. *Id.* at 596. From the Court's perspective, as long as an arbitrator's award "draws its essence from the collective bargaining agreement," the award should be upheld. *Id.* at 597.

The Supreme Court has elaborated on these principles on several occasions. In *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 103 S. Ct. 2177, 76 L. Ed.2d 298 (1983), the Court dealt for the first time with the notion of a public policy exception to the finality of labor arbitration decisions. The Court entertained that such an exception could exist, but it narrowly defined the exception, holding that the public policy must be "well defined and dominant" and "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* at 766.

In *United Paperworkers Int'l Union v. Misco Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987), the Court explained why it placed strict limits on the public policy exception: "The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government." *Id.* at 37. The Court also criticized the more expansive

construction of the public policy doctrine applied by the Fifth Circuit in the case: “The Court of Appeals made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a ‘well-defined and dominant’ policy against the operation of dangerous machinery while under the influence of drugs. Although certainly such a judgment is firmly rooted in common sense, we explicitly held in *W.R. Grace* that a formulation of public policy based only on ‘general considerations of supposed public interests’ is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement.” *Id.* at 44.

Most recently, in *Eastern Assoc. Coal. Corp. v. United Mine Workers of America*, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000), the Court, which has never invalidated a labor arbitrator’s decision on public policy grounds, again emphasized the narrow scope of the public policy exception. The Court warned about the application of the public policy doctrine where there is a detailed regulatory scheme in place, observing “courts should approach with caution pleas to divine further public policy in the area.” *Id.* at 63. In the case, the Court was considering an arbitrator's award reinstating a truck driver who was subject to Department of Transportation regulations requiring random drug testing of workers engaged in “safety-sensitive” tasks. The driver twice tested positive for marijuana, was fired on each occasion by the employer, and was twice reinstated by an arbitrator. In upholding the second arbitrator’s reinstatement decision, the Supreme Court held that “[n]either Congress

nor the Secretary has seen fit to mandate the discharge of a worker who twice tests positive for drugs. We hesitate to infer a public policy in this area that goes beyond the careful and detailed scheme Congress and the Secretary have created.” *Id.* at 67.

The Ninth Circuit’s observation 12 years ago that “courts should be reluctant to vacate arbitral awards on public policy grounds” signaled that it too follows a narrow approach to the public policy doctrine. *See Ariz. Elec. Power Coop., Inc. v. Berkeley*, 59 F.3d 988, 992 (9th Cir.1995). Most recently in *Virginia Mason Hosp. v. Washington State Nurses Ass’n.*, ___ F.3d ___, 2007 WL 4463924 (9th Cir. Dec. 21, 2007), the Court held that a party seeking to overturn an arbitrator’s award must identify not only the sort of “explicit, well defined, and dominant” public policy “ascertained by reference to the laws and legal precedents” demanded by *Eastern Associated Coal*, but would also have to show that the public policy “specifically militates against the relief ordered by the arbitrator.” *Id.* at *4. In that case, the arbitrator prohibited the employer from implementing a mandatory immunization policy because the employer had failed to bargain with the union representatives. The Court held that even though the policy would enhance the infection control procedures required by state and federal regulations, the employer was unable to meet its high burden of establishing an explicit public policy that was contravened by the arbitrator’s award. *Id.* at *5.

Other state courts follow a similar approach in their review of labor arbitration decisions. For example, the Supreme Court of Illinois

concluded that an arbitration award reinstating two mental health technicians, who had left the facility short-staffed to go shopping while a patient tied to a toilet seat passed away, did not violate public policy. *American Federation of State, County and Municipal Employees v. Illinois*, 529 N.E.2d 534 (Ill. 1988). The Supreme Court of Minnesota determined that the reinstatement of a local auditor who had falsified expense reports and lied during the investigation did not violate public policy. *State, Office of State Auditor v. Minn. Ass'n of Prof'l Employees v. Minnesota Assoc. of Professional Employees*, 504 N.W.2d 751 (Minn. 1993). And, the Supreme Court of Connecticut held that the reinstatement of a police officer who had been terminated for lack of fitness did not violate public policy. *Town of South Windsor v. South Windsor Police Union Local 1480*, 770 A.2d 14 (Conn. 2001). These courts all acknowledged that the employees clearly engaged in misconduct that may have violated some generalized notion of public policy, but the arbitrators' awards of reinstatement did not violate a "well-defined and dominant" public policy.

While this Court has never squarely addressed the confines of the public policy rule, its decisions suggest a much narrower scope of review of arbitrators' decisions than that found in the Court of Appeals' decision in this case. Most notably, only four years ago this Court flatly stated "we do not review the merits of arbitration decisions." *Clark County PUD #1*, 150 Wn.2d at 247. This Court observed that Washington state courts have often looked to federal case law for guidance in analyzing labor disputes,

and quoted approvingly from three federal decisions. *See E. Associated Coal Corp.*, 531 U.S. at 62, 69 (“But as long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.”); *Nat’l Wrecking Co. v. Int’l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993) (“Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party. Rather, reviewing courts ask only if the arbitrator’s award ‘draws its essence from the collective bargaining agreement.’”); *Richmond, Fredericksburg & Potomac R. Co. v. Transp. Communications Int’l Union*, 973 F.2d 276, 282-83 (4th Cir. 1992) (“Nothing would be more destructive to arbitration than the perception that its finality depended upon the particular perspectives of the judges who review the award.”).

This Court’s closing words in *Clark County PUD #1* could well have been uttered about the decision of the Court of Appeals here:

Finally, we note that the procedural posture of this case underscores the importance of an extremely limited standard of review because it highlights the importance of supporting the finality of bargained for, binding arbitration. When parties voluntarily submit to binding arbitration, they generally believe that they are trading their right to appeal an arbitration award for a relatively speedy and inexpensive resolution to their dispute. [citation omitted] We also note that in the present case, arbitration has not resulted in an expeditious, inexpensive resolution. Since the arbitrator made her award over six years ago, issues stemming from it have reached this court twice, undoubtedly at great expense to the parties. These circumstances reinforce our view that binding

arbitration awards are not subject to being vacated by courts, except in the very limited circumstances we outline above.

150 Wn.2d at 247.

C. This Court Should Accept Review Because the Decision of the Court of Appeals Adopts an Expansive and Unclear Approach to the Public Policy Doctrine.

In overturning the arbitrator's decision in this case, the Court of Appeals engaged in only a brief discussion of the public policy doctrine. The Court identified a sole source of law purportedly breached by the arbitrator's decision – RCW 36.28.010, which requires sheriff's deputies to make arrests, keep the public peace, and execute court orders and warrants. In the eyes of the Court, the fact that a deputy sheriff “mishandled evidence, neglected to obtain warrants, failed to follow through on cases with prosecutors, and generally conducted himself with a lack of candor” meant that the deputy could not “possibly serve” in his former position, making the arbitrator's decision conditionally reinstating him unenforceable. 165 P.3d at 1271.

The decision of the Court of Appeals involves precisely the sort of judicial intervention into the arbitration process that this Court, and many others, have repeatedly cautioned against. RCW 36.28.010 contains no provisions that address the job status of sheriffs' deputies who mishandle evidence, neglect to obtain warrants, fail to follow through on cases, and generally conduct themselves with a lack of candor. More specifically, nothing in RCW 36.28.010 provides that deputies who fail to comply with

the terms of the statute must be discharged as opposed to being disciplined in some other fashion.

The decision of the Court of Appeals also ignores the fact that the Legislature has acted in the realm of police officer discipline. The Legislature has not only affirmatively evidenced an intention to enforce labor arbitration awards but has clearly specified the circumstances under which a law enforcement officer's certificate may be revoked. In 2005, through RCW Chapter 43.101, the Legislature adopted a law enforcement officer certification system that requires removal of individuals from law enforcement employment for specified types of misconduct. The offenses committed by the deputy sheriff here do not fall into the statute's definition of disqualifying misconduct. RCW 43.101.010 (7).

In addition, revocation of certification is permitted for certain forms of misconduct only after an employee's discharge becomes "final," which the statute defines as occurring after appeals of the discharge have been exhausted without resulting in reinstatement of the officer. RCW 43.101.105; RCW 43.101.010(9). In other words, the Legislature has determined that an arbitrator's award reinstating an officer accused of disqualifying misconduct is entitled to complete deference. In so doing, the Legislature recognized that arbitrators have the authority to assess all of the aggravating and mitigating factors and reinstate employees for certain types of misconduct, even proven misconduct.

Rather than consider these standards, the Court of Appeals made its own determination as to whether the deputy sheriff's misconduct

warranted termination, substituting its judgment for that of the arbitrator, and all without identifying clear external law that mandated overturning the arbitrator's decision. When parties collectively bargain for arbitration decisions to be final and binding, they do not bargain for a court's reevaluation of the arbitrator's decision as to whether a contract has been violated and, if so, what the appropriate remedy should be.

Of statewide interest here, and of particular interest to WACOPS, is that the decisions of arbitrators, bargained to be final and binding, should be precisely that, except in the rarest of cases. If an arbitrator's decision exceeds the authority granted under the contract or violates clearly articulated and dominant public policy, then the decision should not be enforced. Otherwise, arbitrators' decisions, even if deemed unwise or outright wrong by the courts, should not be disturbed.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Review.

RESPECTFULLY SUBMITTED this 2nd day of January, 2008.

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