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DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY DEPUTY SHERIFFS GUILD, DEPUTY BRIAN LA FRANCE AND JANE DOE LA FRANCE, AND THE MARITAL COMMUNITY COMPOSED THEREOF, ***APPELLANTS,***

VS.

KITSAP COUNTY AND KITSAP COUNTY SHERIFF, ***RESPONDENTS.***

JOINT BRIEF OF APPELLANTS

34321-5-II

George E. Merker
CLINE & ASSOCIATES

Attorneys for Appellant Guild

DEPUTY BRIAN LA FRANCE and JANE DOE LA FRANCE, and the marital community composed thereof

Pro Se

George E. Merker, WSBA #11124
Cline & Associates
1001 Fourth Avenue, Suite 2301
Seattle, WA 98154
206/838-8770

Brian La France, *Pro Se*
c/o Cline & Associates
1001 Fourth Avenue, Suite 2301
Seattle, WA 98154
206/838-8770

TABLE OF CONTENTS

Table of Authorities **2**

Table of Cases 2

Statutes 4

Regulations and Rules 4

Other Authorities 4

Assignments of Error **4**

Statement of the Case **5**

Summary of Argument **8**

Argument **9**

I. The Standards for Summary Judgment Preclude an Award for the County and Support a Summary Judgment of Enforcement **9**

II. The County Violated the Award by Failing to Timely Reinstate Deputy La France to Employment; the Appellants are Entitled to Reversal of the Summary Judgment Entered for the County and to a Summary Judgment of Enforcement **10**

a. Deputy La France was entitled to reinstatement by July 17, 2004. 13

b. Deputy La France was entitled to reinstatement by August 21, 2003. 14

c. Deputy La France was entitled to reinstatement as of his discharge on November 29, 2001. 15

III. The County Violated the Award, as well as the state wage acts and the FLSA, by Failing to Pay Deputy La France Either Wages or Employment Benefits upon his Reinstatement to Employment; the Appellants are Entitled to Reversal of the Summary Judgment Entered for the County and to a Summary Judgment of Enforcement and Monetary Relief **20**

IV. The County Violated the Award by Failing to Timely Remove Termination-Related Matters from Deputy La France's Personnel Files and by Disseminating Information Concerning his Wrongful Termination to Third Parties; the Appellants are Entitled to Reversal of the Summary Judgment Entered for the County and to a Summary Judgment of Enforcement **24**

V. The County Violated the state wage acts and the Federal FLSA in making untimely payments to Deputy La France; the Appellants La France are Entitled to Reversal of the Summary Judgment Entered for the County and to a Summary Judgment of Enforcement **26**

Conclusion **32**

TABLE OF AUTHORITIES

Table of Cases

Federal law

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707-10 (1945).

Braddock v. Madison County, Indiana, 34 F.Supp.2d 1098 (S.D.Ind. 1998).

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Wren v. Sletten Constr. Co., 654 F.2d 529, 533 (9th Cir. 1981).

State law

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Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Lillig v. Becton-Dickinson, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986).

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Fair Labor Standards Act, 29 USC §201, *et seq.*

State law

Washington Anti-Rebate Act, RCW 49.52.010, *et seq.*,

RCW 49.52.050(2).

RCW 49.52.050(4).

RCW 49.52.070.

Washington Law Against Discrimination, RCW 49.60.010, *et seq.*

Regulations and Rules

CR 56(c)

WAC 296-126-023

Other Authorities

Award in the Arbitration of Deputy La France, dated July 17, 2004.

CBA at Article I, Section F(3)(c).

ASSIGNMENTS OF ERROR

The Appellant, Kitsap County Deputy Sheriff's Guild (herein the "Guild"), views the Pierce County Superior Court, the trial court, as having erred in awarding summary judgment to Kitsap County and the

Kitsap County Sheriff (herein collectively, the "County") and in denying summary judgment to the Guild, on the following issues:

> 1. Whether Deputy Brian La France should have been reinstated by July 17, 2004 or earlier;
>
> 2. Whether Deputy Brian La France should have been paid wages and benefits upon reinstatement, rather than upon his return to full duty;
>
> 3. Whether the County should have timely removed termination-related matters from Deputy La France's personnel files and disseminated information concerning his wrongful termination to third parties.

All justifying enforcement of the arbitration Award.

The Appellants, Deputy Brian La France, his wife and marital community (herein, collectively, "La France"), view the trial court as having erred in awarding summary judgment to the County and in denying summary judgment to them, on the following issues:

> 1. Whether Deputy Brian La France should have been paid wages and benefits upon reinstatement, rather than upon his return to full duty, justifying relief under the state wage acts and the Federal Labor Standards Act (herein the "FLSA")

STATEMENT OF THE CASE

Over four and a half years ago, on November 29, 2001, Deputy Brian La France was wrongfully terminated from his employment as a Kitsap County Deputy Sheriff.[1] All of his allegedly wrongful acts which

[1] CP 711-834 at ¶4 (Bonneville Affidavit filed November 17, 2005). *See also* Amended Complaint, CP 8-84, at ¶2.3 as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a).

are at issue occurred prior to that date. The employee grieved the discharge, it was sustained, and then he and his union, the Guild, arbitrated the County's decision.[2] He was reinstated in a written arbitration award dated July 17, 2004, almost two years ago.[3] He applied for reinstatement, pay and various benefits.[4] On December 17, 2004, Deputy La France, not having been returned to employment, nor having been paid the wages and benefits to which he was entitled, and feeling that the arbitration award was not being implemented by the County, asked the Guild to seek enforcement of the award.[5] Since that time, Deputy La France was returned to employment and full duty, was paid current wages and benefits, but after three months was removed from full duty. He remained on paid administrative leave throughout these proceedings.[6]

The County moved for dismissal of this case under a variety of theories, each purporting to arise under the general parameters of Civil

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[2] CP 835-865 at ¶1 (Aufderheide Affidavit filed November 17, 2005). *See also* Amended Complaint, CP 8-84, at ¶2.4 as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a).

[3] Amended Complaint, CP 8-84, at ¶¶2.7-2.8 as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a). *See also* CP 711-834 at ¶5 (Bonneville Affidavit dated November 17, 2005) (Exhibit 2 thereof is the Arbitrator's Decision and Award, pp. 1-47). Also attached as Attachment 1 to the Bonneville Declaration, CP 609-663, filed November 9, 2005) and in Exhibit C to the Declaration of George E. Merker, CP 897-1028, filed November 28, 2005)

[4] Amended Complaint, CP 8-84, at ¶2.8 as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a).

[5] *See* Amended Complaint, CP 8-84, as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a).

[6] Bonneville Affidavit, CP 711-834 at ¶11

Rule 12(b)(6).[7] Argued on March 11, 2005, their motion was denied.[8] Meanwhile, a motion was granted to amend that Complaint to add La France as parties to assert state wage act and FLSA claims.[9]

Rather than further pursue matters in this proceeding, the County then filed for a stay of these proceedings, and sought a constitutional or statutory Writ of Certiorari in the Kitsap County Superior Court.[10] After argument, the Guild successfully changed venue to Pierce County before the County's Motion for a Show Cause Order was decided or a Writ issued.[11] The Sheriff was added as a party defendant, and the County's desired Writ was allowed as a counterclaim on November 18, 2005.[12] The County then sought to obtain a summary judgment on the original complaint to enforce while the employee and Guild sought a cross-motion for summary judgment enforcing the award.[13] Summary judgment for the County on the enforcement claim was granted on December 15, 2005,[14] and this appeal followed.[15]

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[7] CP 186-198.
[8] CP 371-372.
[9] CP 373-374.
[10] *See* CP 674-693; CP 596-598.
[11] *Id.*
[12] CP 876-877. *See also* CP 599-608.
[13] CP 694-710; CP 1029-1044.
[14] CP 1135-1138.
[15] CP 1141-1150; CP 1151-1155.

SUMMARY OF ARGUMENT

The Trial court's award of summary judgment for the County was improper and unwarranted. Instead, summary judgment enforcing the award, and also granting relief to Deputy La France, his wife and marital community under the state wage act and FLSA, should have been entered for the employee and the Guild.

Specifically, the Award should have been enforced in three ways: (1) Deputy La France should have been reinstated as of July 17, 2004 or earlier, particularly since Deputy La France's actual physical and psychological status at any time *since* his discharge on November 29, 2001 was clearly not resolved; (2) Deputy La France should be paid his full wages and benefits as of the date of his reinstatement, not the date of his restoration to *full duty*; and (3) the County should have timely removed termination-related matters from Deputy La France's personnel files and disseminated information concerning his wrongful termination to third parties. Meanwhile, La France also should have been granted relief, including but not limited to a double wage penalty and his attorneys' fees, under both the state wage acts and the FLSA for the County's failure to pay Deputy La France the wages which were due.

ARGUMENT

I. The Standards for Summary Judgment Preclude an Award for the County and Support a Summary Judgment of Enforcement

The standards for summary judgment are well established. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[16] All reasonable inferences from the facts must be considered in the light most favorable to the nonmoving party.[17] Upon a motion for summary judgment, facts asserted by the nonmoving party and supported by affidavits or any other proper evidentiary material must be taken as true.[18] An order of summary judgment is reviewed *de novo*, and the appellate court performs the same inquiry as the trial court.[19]

Under these circumstances, the reasonable inferences arising from the evidence establish that Deputy La France was not reinstated until after he passed physical and psychological fitness exams,[20] that Deputy La

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[16] CR 56(c); *Retail Clerks Union Local 648, AFL-CIO v. Hub Pharmacy, Inc.,* 707 F.2d 1030, 1033 (9th Cir. 1983); *Sheikh v. Choe* , 156 Wn.2d 441; 128 P.3d 574 (2006); *Babcock v. Mason County Fire Dist No. 6.,* 144 Wn.2d 774, 784, 30 P.3d 1261 (2001) (citing *Folsom v. Burger King,* 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).

[17] *Degel v. Majestic Mobile Manor, Inc.,* 129 Wn.2d 43, 48, 914 P.2d 728 (1996); *Snohomish County v. Anderson,* 124 Wn.2d 834, 840, 881 P.2d 240 (1994); *Scott v. Pacific West Mt. Resort,* 119 Wn.2d 484, 502, 834 P.2d 6 (1992); *Hash v. Children's Orthopedic Hosp. & Medical Ctr.*, 49 Wn.App. 130, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988); *Turngren v. King County,* 104 Wn.2d 293, 705 P.2d 258 (1985).

[18] *Bond v. State,* 62 Wn.2d 487, 383 P.2d 288 (1963).

[19] *Jones v. Allstate Ins. Co.,* 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

[20] Bonneville Affidavit, CP 711-834 at ¶11.

France was not paid either wages or key benefits prior to that time,[21] and that the County failed to purge his files and records, or either advise third parties that the discharge was wrongful and that he was reinstated, or correct them regarding the prior disclosures that had been made.[22] These facts are uncontroverted. All of this makes summary judgment for the County, as awarded by the trial court, impossible. Summary judgment for the County must be denied.

By contrast, summary judgment enforcing the arbitration Award should be granted. There are no inferences to be drawn for the County from the facts presented, and the employee and the Guild are entitled to judgment as a matter of law.

II. The County Violated the Award by Failing to Timely Reinstate Deputy La France to Employment; the Appellants are Entitled to Reversal of the Summary Judgment Entered for the County and to a Summary Judgment of Enforcement

The Arbitrator decided that the termination of Deputy La France was improper, and that it should be reversed.[23] The question remained whether Deputy La France should also be returned to *full duty*, or just be kept on paid administrative leave. The language of the Award seems

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[21] *Id.*

[22] CP 224-245 at ¶16.

[23] Amended Complaint, CP 8-84, at ¶¶2.7-2.8 as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a). *See also* CP 711-834 at ¶5 (Bonneville Affidavit dated November 17, 2005) (Exhibit 2 thereof is the Arbitrator's Decision and Award, pp. 1-47). Also attached as Attachment 1 to the Bonneville Declaration, CP 609-663, filed November 9, 2005) and in Exhibit C to the Declaration of George E. Merker, CP 897-1028, filed November 28, 2005).

clear. The Arbitrator found that Deputy La France "was not fit for duty at the time of his discharge" and that "[s]ince Deputy LaFrance was (and possibly still is) incapacitated he is not entitled to back pay, *per se*...."[24] It then continues:

> The Grievant should also be allowed to return to *full duty* upon passing independent psychological and physical fitness-for-duty exams as normally utilized by the Employer. The retroactivity of the return of the Grievant to regular status is not an issue in this case....[25]

The meaning of the section is reasonably apparent. An appointed arbitrator is constricted by the parties. He cannot make generalized fitness evaluations, he cannot assess disabilities unless asked to do so, and he cannot condition reinstatement upon fitness evaluations outcomes because to do so would be a denial of due process since the employee could seek disability accommodation, and the Guild would presumably have the power to contest unfavorable fitness findings with its own doctor and even a separate arbitration hearing.

Indeed, the federal courts have carefully examined this question. Both the employer and the union have granted to the arbitrator the authority to interpret the meaning of their agreement.[26] They have

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[24] *Id.* at 46.
[25] *Id.* (emphasis added).
[26] *See Steelworker v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 4 L.Ed.2d 1424, 80 S.Ct. 1358 (1960).

"bargained for" the "arbitrator's construction" of their agreement.[27] It follows that courts will set aside the arbitrator's interpretation of what their agreement means only in rare circumstances.[28] Judicial scrutiny of an arbitrator's award is extremely limited.[29] This is the essence of deferral. Yet, deferral *per se* is not contested. Instead, it is the appellants' position that an arbitrator will act lawfully if he or she can, and that an arbitrator's decision must be read as if it were lawful.

It follows that the arbitrator did not act illegally here; instead, he made an enforceable decision to reverse the discharge. He did not condition *reinstatement* upon the fitness exams. That would be unlawful because, among other things it is not called for in the CBA, and it would violate the Americans with Disabilities Act of 1990[30] and the Washington Law Against Discrimination.[31] To the contrary, once he decided the dispute before him, *i.e.,* the termination dispute, this matter was done. As he explained: The employee's "return ... to regular status [was] not an issue in this case."[32]

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[27] *Id.*
[28] *Id.* at 596.
[29] *Stead Motors v. Auto. Machinists Lodge,* 886 F.2d 1200, 1208, n. 8 (9th Cir. 1989).
[30] 42 U.S.C. §12101, *et seq.*
[31] RCW 49.60.010, *et seq.* *See e.g., Josephs v. Pacific Bell,* 443 F.3d 1050, 17 Am. Disability Cases (BNA) 1465 (2006).
[32] *Id.*

a. Deputy La France was entitled to reinstatement by July 17, 2004.

Notwithstanding this result, the County did not return Deputy La France to any kind of employment, even on paid administrative leave when the Award was issued, on July 17, 2004, and instead conditioned any relief upon the his fitness for *full duty*.[33] This is a denial of the reinstatement the employee was awarded. Indeed, if the County is correct in its analysis, and there was no relief awarded until subsequent medical exams occurred, one is tempted to ask what "reinstatement" as granted in the Award means. When the Award grants reinstatement, it must necessarily envision reinstatement to employment. The examinations were merely a condition of "*full duty*."

The employee and the Guild were entitled to enforcement of the Award and were entitled to summary judgment employing Deputy La France from and after the date of the Award, July 17, 2004. A summary judgment for the employer on this issue, as issued by the trial court, was improper and unwarranted. It should be reversed and summary judgment should be granted for the employee and the Guild on this uncontested factual issue.

[33] *See* CP 694-710 (Kitsap County's Motion for Summary Judgment [of] Dismissal) at 4.

b. Deputy La France was entitled to reinstatement by August 21, 2003.

Deputy La France was also entitled to reinstatement nearly a year earlier, on August 21, 2003.[34] Indeed, Deputy La France was deemed fit for duty by Dr. John E. Hamm, a licensed medical doctor, and a practicing psychiatrist, on August 21, 2003; well after the heart attack occurred, and well before the July 17, 2004 arbitration Award was issued. That doctor did not note any physical incapacity, although physical condition was noted, did not find any incapacity for duty, and he rendered an opinion that the Deputy was fit for duty. His report was not refuted by the County.

Thus, if the Arbitrator reversed the 2001 termination, and conditioned Deputy La France's return upon his physical and psychological fitness for duty, that condition was met almost a year before the Award, or by August 21, 2003.[35] Once the Award was issued, the

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[34] If the Award is read, contrary to its express terms, to require a fitness exam *prior* to a return to *any employment*, it should be noted that the Arbitrator should have taken evidence regarding Deputy La France's psychological and physical condition beyond his discharge on November 29, 2001, but he did not. In any event, that evidence would have disclosed the facts surrounding the first examination by Dr. John E. Hamm (a blackened copy of his report is attached as Exhibit 7 to the Aufderheide Declaration, CP 835-865), resulting in his opinion dated August 21, 2003, and the exact timing of any delay caused by the January 2003 heart attack suffered by Deputy La France.

[35] Ironically, in 2004 the County refused to give the first report by Dr. Hamm any credence, and ultimately acted unilaterally to schedule new appointments with Dr. Hamm (again) and another doctor. The County then tried to skew these exams by submitting a host of unfounded accusations about Deputy La France to these Doctors. *See* Bonneville Declaration, CP 609-663 at ¶10 (a copy of the letter to Dr. Hamm was furnished as Exhibit 12 to the Aufderheide Declaration dated September 22, 2005 and filed as Exhibit 7 to the Merker Declaration, CP 897-1028). As a result, the Guild properly objected to the examinations as required by the applicable civil service rules, and the County just ignored these objections. Eventually, in order to be reinstated and paid, Deputy La

Deputy should have been reinstated as of that date. In any event, a summary judgment for the employer on this issue, as issued by the trial court, was improper and unwarranted. Again, it should be reversed and summary judgment should be granted for the employee and the Guild on this uncontested factual issue.

c. Deputy La France was entitled to reinstatement as of his discharge on November 29, 2001.

The sole question before the arbitrator was whether the discharge of Deputy La France on November 29, 2001 was warranted. As noted, the arbitrator held that it was not, and that the discharge of Deputy La France was improper and should be reversed. The County correctly notes that the Arbitrator denied "back pay *per se...*" in his finding that Deputy La France was disabled when discharged.[36] Yet, Deputy La France's actual physical and psychological status at any time *since* his discharge on November 29, 2001 was clearly not resolved. It is unknown, and certainly not examined by the Arbitrator, whether he was fit for *full duty* or whether he was to be reinstated as an employee on paid administrative leave.

France voluntarily submitted to these examinations despite his objections. He passed both. Bonneville Affidavit, CP 711-834 at ¶11.

[36] See Award at 46. Amended Complaint, CP 8-84, at ¶¶2.7-2.8 and Exhibit B, as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a). *See also* CP 711-834 at ¶5 (Bonneville Affidavit dated November 17, 2005) (Exhibit 2 thereof is the Arbitrator's Decision and Award, pp. 1-47). Also attached as Attachment 1 to the Bonneville Declaration, CP 609-663, filed November 9, 2005) and in Exhibit C to the Declaration of George E. Merker, CP 897-1028, filed November 28, 2005).

Specifically, Deputy La France admits that he had an intervening heart attack, but his ability to do his job at any given point in time after he was wrongfully fired, even the next day, is unclear. There is nothing in the record that justified a failure to pay him after his wrongful discharge was reversed. This interpretation would hold that even though he was not entitled to back pay for periods during which he did not work there is no evidence which would preclude his reinstatement, and any comments by the arbitrator to the contrary were beyond both the evidence and his jurisdictional authority. Presumably, the County could hereafter, after reinstatement, contest wages for any period during which the evidence in another hearing shows that Deputy La France was actually disabled and would not have been entitled to wages or their equivalent in leave.

As argued above, although the Court should defer to the arbitrator, the arbitrator's jurisdictional power is limited. Even though it is true that an arbitration Award will be treated with great deference, an arbitrator cannot be given unfettered deference. Obviously, an arbitrator does not have authority to bind the parties by "deciding issues not submitted by the parties."[37] Here, as argued in the trial court,[38] the Award provides for reversal of the La France discharge; restoration of "good standing"; access to any benefits "that an officer in good standing could have accessed as of

[37] *Wren v. Sletten Constr. Co.,* 654 F.2d 529, 533 (9th Cir. 1981).
[38] *See* KCDSG Brief In Opposition To Writ and In Opposition To Show Cause Motion dated November 11, 2005, CP 674-693, at fn. 4.

his date of discharge including sick leave, disability benefits, or any other benefit provided to disabled employees covered by [the] Collective Bargaining Agreement (herein 'CBA');" and fitness exams "as normally utilized by the Employer" before Deputy La France can return to *full* duty.

The County argued previously that the Guild really wants the Court to "interpret" the arbitration Award and that the Court itself lacks the jurisdiction to do so.[39] Nevertheless, the Guild contends (1) that the arbitrator's acts should be applied properly, and viewed as having arisen from a proper application of his jurisdiction, *i.e.,* that he had jurisdiction to act and that his actions must be viewed in that light, and (2) that the limits inherent in the arbitrator's jurisdiction should be read as having empowered the Court to act where the Arbitrator cannot. This is consistent with federal and state labor law.

If the Award is viewed as having arisen within the arbitrator's stated jurisdiction— if the Award is limited to the issue presented for arbitration— the arbitrator rules only on the basis of information presented in the hearing before him, and the arbitrator's power is limited to the enforcement and application of the express terms of [the] Agreement— the only proper way to evaluate the decision is to recognize that one must reverse the discharge; restore Deputy La France's "good standing";

[39] *See* CP 186-198.

provide him access to any benefits "that an officer in good standing could have accessed as of his date of discharge including sick leave, disability benefits, or any other benefit provided to disabled employees covered by [the] Collective Bargaining Agreement," or their monetary equivalent. This requires that he be reinstated, if not returned to "*full*" patrol duties, and that he then submit to physical and psychological exams before he be returned to "*full duty*."

As one might predict, in adopting the CBA the parties severely limited the arbitrator's authority, deliberately cloaking the Court with the power to decide all other issues. As noted, the arbitrator's jurisdiction is drawn from the CBA which provides in relevant part:

> **c. Authority of the Arbitrator.** The arbitrator shall be authorized to rule and issue a decision in writing on the issue presented for arbitration, such decision shall be final and binding on both parties. The arbitrator shall rule only on the basis of information presented in the hearing before him/her and shall refuse to receive any information after the hearing except when there is mutual agreement, and in the presence of both parties. The arbitrator shall have no power to render a decision that will add to, subtract from, or alter, change or modify the terms of this Agreement, and the arbitrator's power shall be limited to interpretation and application of the express terms of this Agreement.[40]

This jurisdictional language does not limit the development of proper remedies. In this case, the Guild maintains that the arbitrator had

[40] Amended Complaint at Exhibit A (CBA at Article I, Section F(3)(c)) as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a). (emphasis added). *See also* CP 224-245 at ¶22.

jurisdiction to act on the termination case which he was given, that he generally acted within that jurisdiction, and that implementation of the Award generally will provide the Guild the relief it seeks.

As the Guild asserted below, the uncontroverted evidence shows that the County failed to implement the Award by failing to return Deputy La France to employment, even in a paid administrative leave capacity, before the fitness for duty exams occurred;[41] that a fitness for duty exam which was given in mid-2003 before the arbitration hearing, was disregarded and then entirely discounted by the County;[42] and that the Arbitrator acted extra-jurisdictionally by trying to concern himself with the period after the termination (*e.g.,* in holding that Deputy La France was still disabled) rather than only with the period before and up to the termination in rendering the non-remedy portions of his Award.[43] In short, if a proper jurisdictional reading is given, when the Arbitrator reversed the termination and Deputy La France won the right to have been employed, Deputy La France should have been placed in a paid administrative leave position, certainly from the effective date of the

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[41] Bonneville Affidavit, CP 711-834 at ¶11.

[42] *See* Exhibit 8 to the to the Aufderheide Declaration dated September 22, 2005 and filed as Exhibit 7 to the Merker Declaration, CP 897-1028

[43] See Award at 46. Amended Complaint, CP 8-84, at ¶¶2.7-2.8 and Exhibit B, as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a). *See also* CP 711-834 at ¶5 (Bonneville Affidavit dated November 17, 2005) (Exhibit 2 thereof is the Arbitrator's Decision and Award, pp. 1-47). Also attached as Attachment 1 to the Bonneville Declaration, CP 609-663, filed November 9, 2005) and in Exhibit C to the Declaration of George E. Merker, CP 897-1028, filed November 28, 2005).

Award, *e.g.* July 17, 2004, possibly from the date of his prior fitness examination by Dr. Hamm, August 21, 2003, or even from his termination, November 29, 2001.

He was not so reinstated. This "jurisdictional" limit does not mean that the arbitrator lacked jurisdiction to make any award whatsoever; or that he lacked jurisdiction to make any effective remedy; or that his Award should not be enforced where he had jurisdiction. It only restricts the reading of the Award and remedy which he made regarding the employee's alleged disability. It would be wrong to read the Award as finding that Deputy La France was disabled at any and all times after his discharge. Those particular facts were not submitted to the arbitrator and were not at issue in the arbitration. Again, as the arbitrator himself said "[t]he retroactivity of the return of the Grievant to regular status is not an issue in this case...."[44]

In any event, a summary judgment for the employer on this issue, as issued by the trial court, was improper and unwarranted. Again, it should be reversed and summary judgment should be granted for the employee and the Guild as a matter of law on this uncontested factual issue.

III. The County Violated the Award, as well as the state wage acts and the FLSA, by Failing to Pay Deputy La France Either

[44] *Id.*

Wages or Employment Benefits upon his Reinstatement to Employment; the Appellants are Entitled to Reversal of the Summary Judgment Entered for the County and to a Summary Judgment of Enforcement and Monetary Relief

It would seem axiomatic that once a person is reinstated to a paid position, even an administrative position, they are entitled to the ordinary contractual pay and employment benefits associated with their position. Where they had not been demoted, these pay and other employment benefits would be equal to those enjoyed in his or her last position.

In this case, that would mean that Deputy La France would be entitled to the pay and benefits he received when last employed by the Department. As argued, that would mean that of the effective date of the Award, July 17, 2004, he would be so entitled, and that if he were reinstated as of some earlier date such as August 21, 2003 or November 29, 2001, as argued, the pay and benefits would run from those dates.

In this regard, as noted, the Award clearly provides for access to any benefits "that an officer in good standing could have accessed as of his date of discharge including sick leave, disability benefits, or any other benefit provided to disabled employees covered by [the] Collective Bargaining Agreement" and it does so as of the date of his wrongful termination, November 29, 2001. Regarding pay, and again as noted, the Arbitrator found that "[s]ince Deputy LaFrance was (and possibly still is) incapacitated he is not entitled to back pay, *per se*...." But if Deputy La

France is reinstated he is entitled to be paid from that point in time, and when he was or should have been returned to *full duty* he was clearly entitled to be paid for that work.

However, it is uncontroverted that the County did not restore either pay or employment benefits until well after the Award. Instead, it is clear from the County's own evidence, that the County did not begin to pay Deputy La France wages on either November 29, 2001 or on August 21, 2003.[45] Indeed, they did not pay him until he was reinstated *after* had met the additional condition for a return to *full duty*, the extra-jurisdictional fitness exams.[46] These facts are simply admitted.

The County's provision of benefits is also undisputed. In that regard, the County argued below that"[t]he benefits that were awarded to LaFrance by the Arbitrator have been computed and offered to LaFrance several times."[47] This representation is misleading and therefore false for the purposes of summary judgment.[48]

The computation is dependent upon the County receiving a favorable interpretation of the foregoing issue concerning Deputy La France's return to employment. For example, first, even if the Deputy's sick leave banks were reinstated, his "return to employment date" as seen

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[45] *See* Kitsap County's Motion for Summary Judgment Dismissal, CP 694-710, at 4.
[46] Bonneville Affidavit, CP 711-834 at ¶11.
[47] *See* Kitsap County's Motion for Summary Judgment Dismissal, CP 694-710, at 6, 12.
[48] CP 224-245 at ¶17.

by the County in its offer is still set at April 11, 2005, and he was deemed to be on an "unpaid status" at any time after November 29, 2001. Second, contrary to his reinstatement in the Award, Deputy La France was deemed by the County to be on COBRA. Third, the payment of LEOFF retirement premiums was limited, and, fourth, the County's ordinary responsibility for the losses incurred when the Deputy and his dependents had to pay for their own medical expenses because of the County's illegal acts were simply ignored.

In essence, only if Deputy La France agreed with the County's illegal withholding of his wages, could he have the benefits the County "offered," but the "offer" was far less than the full benefits to which Deputy La France was entitled by the Award. This was a bad deal; not contemplated by the Arbitrator in his Award, or in any reasonable reinstatement of Deputy La France. As a result these benefits "that an officer in good standing could have accessed as of his date of discharge..." were and still have not been paid at all.

Given this clear evidence regarding both pay and benefits, a trial is unnecessary. Deputy La France and the Guild are entitled to summary judgment enforcing the Award to pay benefits to Deputy La France as an employee from and after November 29, 2001. The County is not. Deputy La France and the Guild are entitled to summary judgment enforcing the

Award to pay wages to Deputy La France as an employee from and after the date of his reinstatement. The County is not.

IV. The County Violated the Award by Failing to Timely Remove Termination-Related Matters from Deputy La France's Personnel Files and by Disseminating Information Concerning his Wrongful Termination to Third Parties; the Appellants are Entitled to Reversal of the Summary Judgment Entered for the County and to a Summary Judgment of Enforcement

The County clearly did not comply with the Award regarding the prompt removal of termination-related matters from Deputy La France's personnel files, or by either stopping or correcting the dissemination of information concerning his wrongful discharge. Despite the clear nature of these factors as remedies well within the Arbitrator's jurisdiction, the County says these matters lie outside the arbitration agreement of the parties.[49]

Nevertheless, Washington courts have repeatedly held that an arbitrator having jurisdiction over a collective bargaining dispute also has the power to fashion an appropriate remedy.[50] As the court stated in *Endicott School District*: "[i]nherent in the authority to adjudicate the breach [of a collective bargaining agreement] is the power to remedy it."[51]

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[49] Instead, they argue that a second arbitration should be held to purge the files. CP 694-710, at 16.

[50] *See, Endicott Education Assoc. v. Endicott School District,* 43 Wn.App. 392, 394-95, 717 P.2d 763 (1986); *North Beach Education Assoc. v. North Beach School District No. 64,* 31 Wn.App. 77, 85-86, 639 P.2d 821 (1982); *Firefighters Local 1433 v. City of Pasco,* 53 Wn.App. 547, 768 P.2d 524 (1989).

[51] 43 Wn.App. at 394

Yet, it is illogical to argue that the Arbitrator had jurisdiction to decide matters which occurred well after the dispute occurred, *e.g.,* the duration and effect of the Deputy's heart attack or the meaning of the August 21, 2003 medical examination, but to deny the Arbitrator the power to fashion a reasonable remedy for the wrongful event at issue. Once jurisdiction is established, a reasonable remedy is fully appropriate.

Again, the allegations which have been made by the Guild and Deputy La France are uncontroverted. Clearly, the Deputy's personnel files contained information that he was discharged well after the Award. The agency did not notify the Washington Criminal Justice Training Commission that the Deputy had been reinstated and that the termination was reversed. Moreover, in providing the written warnings the County has again referred to the discharge. The termination was published in the KITSAP SUN, but the County issued no retraction when the termination was reversed. The County may have lost the arbitration but it seems determined to win the war by smearing Deputy La France at every step.

As before, in any event, a summary judgment for the employer on this issue, as issued by the trial court, is improper and unwarranted. Again, it should be reversed and summary judgment should be granted for the employee and the Guild as a matter of law on this uncontested factual issue.

V. The County Violated the state wage acts and the Federal FLSA in making untimely payments to Deputy La France; the Appellants La France are Entitled to Reversal of the Summary Judgment Entered for the County and to a Summary Judgment of Enforcement

The County's failure to pay the due and payable wage and benefit payments to Deputy Brian La France in full also constitute the willful payment of less than the full amount which the County, as an employer, is obligated to pay, with the intent to deprive the employee of a part of his or her wages, in violation of the Wage Anti-Rebate Act at RCW 49.52.050(2). The County's actions in failing to pay the due and payable wage payments to Deputy Brian La France are:

a. willful in that the County knew the amounts owing were due and unpaid, had no *bona fide* dispute as to any employee's entitlement thereto; and failed to pay the payments in a reasonably timely manner; and

b. willful in that the County failed to show openly and clearly, in its books and records in due course, any deduction from such wage and benefit payments, in violation of the Wage Anti-Rebate Act at RCW 49.52.050(4).

The County's failure to pay wages, plus an additional equal amount of liquidated damages, costs, and reasonable attorney's fees withheld to Deputy Brian La France is also a violation of the provisions of

WAC 296-126-023 and the Washington Anti-Rebate Act, RCW 49.52.010, *et seq.*, which prohibit the willful withholding of wages at sections RCW 49.52.050(2) and RCW 49.52.070.

Further, and under federal law, the County's action in failing to pay the due and payable wage and benefit payments in full to Deputy Brian La France constitutes the withholding and diversion of a portion of employee wages; the willful payment of less than the full amount which the County, as an employer, is obligated to pay, with the intent to deprive the employee of a part of his or her wages; and the underpayment of wages, all in violation of the Fair Labor Standards Act, 29 USC §201, *et seq.*

These admitted acts, and the resulting violations of law, warrant liquidated damages under both state and federal law, although the formulas for getting there are quite different. Under the latter, federal law, an employee who successfully brings an FLSA lawsuit is entitled to receive all his or her pay which is due. Unless the employer can show that it was acting both reasonably and in good faith, the employee is also entitled to received "liquidated damages" equivalent to the amount of back pay due.[52] Even if the employer was acting in good faith, the court still

[52] *Joiner v. City of Macon,* 814 F.2d 1537 (11th Cir. 1987); *Lockwood v. Prince George's County, Maryland,* 58 F.Supp.2d 651 (D.Md. 1999); *Braddock v. Madison County, Indiana,* 34 F.Supp.2d 1098 (S.D.Ind. 1998); *Burgess v. Catawba County,* 805 F.Supp. 341 (W.D.N.C. 1992).

retains the discretion to award liquidated damages.[53] An employer must also pay the attorney fees of an employee who successfully brings an FLSA lawsuit.[88] In *Brooklyn Savings Bank v. O'Neil,* the Supreme Court opined that the FLSA's liquidated damages provision:

> Constitutes a Congressional recognition that failure to pay the statutory minimum wage on time may be so detrimental to maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.[54]

As argued above, granting summary judgment is proper only where the moving party is entitled to judgment as a matter of law and no genuine issue remains for trial. This is certainly untrue for the County. Moreover, since the facts are uncontested, and the law is clear, summary judgment for La France is appropriate under the FLSA.

Summary judgment for La France is also appropriate under Washington state law.[55] Chapter 49 RCW governs state labor regulations including the regulations covering wages and hours worked. RCW 49.52 specifically deals with unpaid wage payments to current employees and the penalties imposed on employers who violate this statute. As clearly stated in the statute, an employee will be awarded double damages or

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[53] *Hayes v. McIntosh,* 604 F.Supp. 10 (N.D.Ind. 1994).
[54] 324 U.S. 697, 707-10 (1945).
[55] RCW 49.52.010, *et seq.*

"exemplary damages" when the wages are willfully and intentionally withheld. The Washington Supreme Court decision in *Radio Holdings, Inc.,*[56] clarified the term "willful":

> In the past, our test for 'willful' failure to pay has not been stringent: the employer's refusal to pay must be volitional. Willful means 'merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.'[57]

In *Schilling,* in 1998, the state Supreme Court set an extremely high standard on the employer to avoid double damages. Washington has recognized only two instances when an employer's failure to pay wages is not willful:[58] (1) When the employer was careless or erred in failing to pay, or (2) when a *bona fide* dispute existed.[59] The issue of whether a *"bona fide"* dispute exists is a question of fact.[60] A *bona fide* dispute does <u>not</u> exist when, as here, there is well-established law supporting the payment of wages owed. Thus, in *Overnite*, where 11 employees had worked a total of 2000 hours without receiving their statutory overtime rate and the employer based its refusal to pay on their mere belief that the

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[56] *Schilling v. Radio Holdings, Inc., 1*36 Wn.2d 152, 961 P.2d 371 (1998).
[57] *Schilling,* 136 Wn.2d at 159-60, citing *Ebling v. Gove's Cove, Inc.,* 34 Wn. App. 495, 500, 663 P.2d 132 (1983) ("Under RCW 49.52.050(2), a non-payment of wages is willful when it is not a matter of mere carelessness, but the result of knowing and intentional action."); *Lillig v. Becton-Dickinson,* 105 Wn.2d 653, 659, 717 P.2d 1371 (1986).
[58] *Schilling,* 136 Wn.2d at 160.
[59] *Id.*
[60] *Id.* Numerous other Washington cases have dealt with the *"bona fide"* dispute defense. *E.g. Dept. of L&I v. Overnite Transportation Co.*, 67 Wn. App. 24, 834 P.2d 638 (Div. 1, 1992)*; Ebling v. Grove's Cove, Inc., supra; McAnulty v. Snohomish Sch. Dist. 201*, 9 Wn. App. 834, 838, 515 P.2d 523 (1973)*; Lillig v. Becton-Dickinson,supra; Chelan Co. Deputy Sheriffs' Ass'n. v. County of Chelan,* 109 Wn.2d 282, 745 P.2d 1 (1987).

Federal Motor Carrier Act (FMCA) preempted state wage law, that inopposite case law was wrongly decided, and that one Supreme Court case supported their contentions, the Court pointed out that the Dept. of L&I had previously notified the employer that the FMCA did not in fact preempt the Washington Minimum Wage Act and cited the supporting case law. Although the employer did respond that there was a case that supported their position, they cited no authority that had subsequently adopted that case holding. The Court stated,

> In our view, Overnite's allegation that *Pettis* was wrongly decided, absent meritorious argument to that effect and absent citation to authority which supports its view, does not amount to a *bona fide* dispute which justifies invoking the narrow exception to the statute providing for double damages.[61]

Thus, the exception for a *bona fide* dispute is quite narrow, and the County's assertion of a legal basis for their effort to withhold wages is insufficient by itself to warrant a finding that a *bona fide* dispute occurred; indeed, they must be 100% right. Moreover, as with waivers, contributory negligence and other similar assertions, the burden of showing such a dispute rests upon the employer.

Washington has held that there is no *bona fide* dispute when the withholding of wages simply seems unreasonable or simply because there

[61] *Overnite,* 67 Wn. App. at 36, 834 P.2d at 644.

is a disagreement.[62] In *Ebling* an independent contractor (Ebling) was hired to sell boats for a boat company (Gove's Cove). The parties had originally agreed to a commission rate of 20%. Gove's Cove and Ebling subsequently contracted for Ebling to run a second office and receive commission on sales from that office at a rate of 35%. After 3 months, Gove's Cove notified Ebling that his commission rate would be decreased to 15%. Ebling never agreed to the decrease in rate and was eventually terminated. Ebling had sold several more boats during the period between the notification of the new commission rate and the termination during which time the employer either paid Ebling the 15% rate or no commission at all.

Later, the employer argued that revising the commission rate was customary in the industry and that it paid no commission on some sales because Ebling had not been authorized to sell those particular boats. In affirming that there was no *bona fide* dispute, the Court of Appeals found that the trial court had substantial evidence to hold that the employer's understanding of the dispute was arbitrary and unreasonable, therefore, RCW 49.52.050 applied and double damages were awarded.[63]

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[62] *Ebling,* 34 Wn. App. at 502, 663 P.2d at 136.

[63] *Id. But see Lillig, supra.* In *Lillig,* a much older case than *Schilling,* the employer had asked the employee to resign. The employee agreed on the condition that he would still receive his full bonus for that year to which the employer gave his written assurance he would. When the employer gave a bonus check smaller than expected, the employee sued for the remainder. At trial the employer argued that the full bonus was not paid for

Again, granting summary judgment is proper only where the moving party is entitled to judgment as a matter of law and no genuine issue remains for trial. This is certainly untrue for the County. Moreover, since the facts are uncontested, and the law is clear, summary judgment for La France is appropriate under the FLSA. In any event, however, this matter should not be resolved in the County's favor.

CONCLUSION

The appellant seeks reversal of the trial court's award of summary judgment for the County, and an award of summary judgment enforcing the arbitration award for the employee and the Guild.

Respectfully submitted,

CLINE & ASSOCIATES

By: _____
George E. Merker, WSBA #11124

Attorneys for Appellant Guild

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two reasons. One, he did not believe that the written assurance was an enforceable contract, and two, the amount of the bonuses for all employees constantly varied based on several economic factors. The Supreme Court, despite a strong dissent, affirmed the trial court and held that the reasons put forth by the employer above did satisfy the *bona fide* dispute requirement and double damages were not awarded. *Lillig,* 105 Wn.2d at 660, 717 P.2d at 1375. Nevertheless, *Lillig* does not represent the current thinking on the Court and remains an exception to the general rule. Nevertheless, in any event, the fact of a dispute and its nature remain jury questions unsuitable for summary judgment.

DEPUTY BRIAN LA FRANCE and JANE DOE LA FRANCE, and the marital community composed thereof,

By: _____
Brian La France, *pro se*

CERTIFICATE OF SERVICE

I, Dawn E. Rochon, of Counsel to Cline & Associates, acknowledge that on June 15, 2006 I served the foregoing **JONT BRIEF OF APPELLANTS** and this subjoined Certificate of Service in the above-referenced matter by depositing the same in the U.S. mail, postage prepaid, addressed as follows:

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
Jacquelyn M. Aufderheide
Senior Deputy Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676

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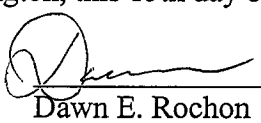
BY _____
DEPUTY

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

DATED at Seattle, Washington, this 15th day of June, 2006.



Dawn E. Rochon