

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,

Petitioner,

v.

KITSAP COUNTY and KITSAP
COUNTY SHERIFF,

Respondent.

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REPLY TO AMICUS CURIAE BRIEFS

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ORIGINAL

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I. INTRODUCTION

The Kitsap County Deputy Sheriff's Guild seeks enforcement of a final and binding labor arbitration decision against the employer, Kitsap County. Three attorney organizations have filed in support of the County's position, the Washington Association of Prosecuting Attorneys (WAPA), the Washington State Association of Municipal Attorneys (WAMA), and the Labor and Personnel Division of the Washington State Attorney General's Office. The Guild has filed no objection the filing of the Amici briefs¹ and replies simultaneously to the briefs below.

II. SUMMARY OF ARGUMENT

The Amici arguments stem from a faulty understanding of the record and the applicable law. Contrary to the claim that this case concerns "lying," the Arbitrator never made any finding that an intentional lie occurred and, by law, his determination is conclusive. Additionally, the Amici misapprehend the nature of *Brady v. Maryland*.² It is simply a discovery rule.

The Amici claims that sustained untruthfulness instances for law enforcement personnel is a per se disqualifier is not well grounded in reason or public policy. The idea that a single instance of untruthfulness might constitute the end of an individual's career cannot be squared with how this Court has addressed truthfulness issues for a related group of professionals — the attorneys themselves.

¹ The Guild recognizes the legitimate interests of the attorney organization in this proceeding extends not simply as the organization noted to their role as prosecutors, which was extensively discussed by the Amici, but also as their interests as partisan advocates for employers.

In attorney disbarment cases resulting from allegations of untruthfulness, this Court has recognized that the seriousness of untruthfulness requires a presumptive penalty of disbarment *but* the Court has expressly indicated that a wide range of aggravating and mitigating factors are to be considered, *including the emotional health of the individual*. The “just cause” analysis conducted by Arbitrator Gaba was very similar to the type of analysis that this Court engages in its assessment of attorney discipline. There is no public policy basis to conclude that attorneys should be subject to a more lenient standard of truthfulness than law enforcement officers. Common sense and fundamental fairness suggest that untruthfulness allegations cannot be assessed in a single one size fits all formula. Reason, not rigidity, is required in fairly assessing such matters.

III. ARGUMENT

A. **The Amici Rely on Unfounded Assertions of Fact that are not within the Arbitration Record.**

The actual parties to this proceeding — Kitsap County and the Deputies Guild — had a full and fair opportunity to litigate all the facts bearing on the appropriateness of Deputy LaFrance’s tenure and retention. By contract, they agreed to accept the result of a neutral arbitrator’s determination both as to the facts and the applicable law. This is neither the time nor the forum to relitigate what the “facts” should be or to entertain new legal theories that might have been interjected. The conclusion of final binding arbitration is not an invitation to

² 373 U.S. 83 (1963).

commence a round of judicial inquires or provide an audience for Monday Morning Quarterback opinions.

Amici either implicitly or, in the case of WAMA, explicitly argue their positions built on *the unfounded assertion* that LaFrance was guilty of some type of “lying.” As squarely addressed in the Guild’s brief,³ Arbitrator Gaba *never* adopted the claim that LaFrance intentionally lied.⁴ It is simply too late in this process to have to be readdressing this canard. As squarely addressed in the Guild’s Supplemental Brief, overwhelming case law indicates that any judicial review must proceed from the actual facts as established by the neutral arbitrator, not from pretend “facts” that one advocate or another would like to assert. With all due respect, the Amici may be entitled to their opinions but they are not entitled to their “facts.”

Amici also seek to relitigate the issue as to LaFrance’s fitness and qualification to retain his tenure, something already squarely decided by Arbitrator Gaba. In doing so, they seek to perpetuate the County’s end run on the arbitration process, citing to the post-arbitration materials interjected into the Superior Court record. Questions as to whether *Brady* principles create some type of per se bar to retention could have and (if the County so desired) should have been presented to Arbitrator Gaba. Post-arbitration materials which reflect the opinion of the local prosecuting attorney supervising the deputy representing the

³ See Guild Supplemental Brief at 11-13.

⁴ *Id.* at CP 15-16, CP 1251.

County not only violate the attorney as witness rule, but violate the labor agreement provision that arbitration be honored as “final and binding.”

B. Arguments as to Brady are Misplaced.

Apart from the defective procedure, the arguments are misplaced on substance. Amici misconstrue the application of *Brady* issues to deputy tenure issues. Both WAMA and the Attorney General appear to assume that *Brady* would permit instances of officer untruthfulness to move center stage in any trial proceeding in which the officer would be a witness.⁵ The Attorney General argues that in such proceedings, defense attorneys would have a “right” to cross examine on truthfulness instances. WAMA argues that retaining officers, apparently even with a single instance of untruthfulness, creates an “impossible dilemma” for police agencies. These contentions stem from a faulty understanding of *Brady* and the rules of evidence. At least one of the Amici, WAPA, candidly concedes that a witness is *not* disqualified based on a reputation for dishonesty.⁶

Credible police management personnel will place *Brady* issues in the proper perspective. At least once such manager writing for the official publication of the national police chief’s association has done exactly that. In the International Association of Chief and Sheriff’s official journal, *POLICE CHIEF*,⁷ Police Commander Jeff Noble takes aim at overly rigid discipline policies on

⁵ See, e.g., WAMA Brief at 14, Attorney General Brief at 9.

⁶ WAPA Brief at 9.

truthfulness issues. Noting that a number of police managers have enunciated a “no lies” subject to termination policy, Noble discusses a wide range of instances of deceptive conduct, some of which warrant termination and some of which do not. Noble argues that the rigid policies maintained by some police organizations reflect an overreaction and *misconception* of the *Brady* case. Noble concludes by warning police managers not to assume that *Brady* has stripped them of all discretion to impose proportionate discipline. Noble’s point supports the Guild’s argument that employees might tell a number of fibs in the workplace which may be worthy of some discipline, but would *not* invariably warrant discharge.

The appropriate forum to address issues of untruthfulness and its impact on tenure is in arbitration. In this instance, the County withheld their *Brady* arguments from the Arbitrator and raised them for the first time at the Superior Court. The County then re-litigated questions as to LaFrance’s fitness all over again in Superior Court in the context of *Brady*. Had the County presented their *Brady* issues to Arbitrator Gaba he could have and would have resolved them. But he likely (and appropriately) would have resolved them *against* the County.

In the recent arbitration of *Union County*,⁸ Arbitrator Sellman was squarely presented with similar *Brady* arguments and roundly rejected them, not only disputing the interpretation of *Brady* foisted here but finding that the police chief’s unreasonable reliance on that misinterpretation of *Brady* was itself a

⁷ Noble, *Police Officer Truthfulness and the Brady Decision* 70 POLICE CHIEF (October 2003).

⁸ 123 LA 1101 (2007).

violation of the “just cause” standard. In *Union County*,⁹ the police chief claimed that *Brady* required discharge when an officer falsely reported on a training accreditation issue. Sellman agreed that truthfulness in law enforcement was important and that *some discipline* was appropriate but that under all the circumstances, *discharge* was excessive. Sellman’s reasoning is apposite here:

Based upon certain circumstances, an employer could discharge an employee for an act of dishonesty, even if others were not. Arbitration decisions have held that dishonesty by law enforcement officers is both a serious and terminable offense, which does not require progressive discipline. See *City of Tampa and Hillsborough County Police Benevolent Association*, 109 LA 453 at 458 (Soll, 1997) and *County of Los Angeles, Sheriffs Department and Association of Los Angeles Deputy Sheriffs*, 108 LA 622 at 627-628 (Richman, 1997). *An Arbitrator must examine the underlying circumstances in each case as well as the parties’ collective bargaining agreement, however, in order to determine if the nature of the alleged dishonesty can be deemed a terminable offense.* The Arbitrator does not believe the facts of this case would warrant the penalties imposed in the above-cited line of cases.

A final analysis in any disciplinary case requires a determination of whether or not the penalty was reasonably related to the seriousness of the employee's offense and record of past service. Here the Employer believes that the termination was appropriate because of the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The Sheriff, in good faith, believed that any employee disciplined for dishonesty would be of no further use as a law enforcement officer as a result of these rulings. Based upon the advice given him, the Sheriff believed that an employee with a record of dishonesty should be fired. *The holdings in Brady and Giglio do not require an employer to terminate employees on a wholesale basis because their personnel file reflects that they were disciplined for dishonesty. While an employee can be terminated for dishonesty*

⁹ 123 LA 1101 (2007).

*under the proper circumstances, such circumstances do not exist here.*¹⁰

Sellman explained that the Chief had been misinformed as to the requirements of *Brady*:

The instructor at the FBI Academy seminar that the Sheriff attended followed the rationale existing in the law enforcement sector that, 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 testifying in court. If the law enforcement officer has been disciplined for dishonesty, his or her ability to effectively testify is compromised. It, therefore, must be concluded that any law enforcement officer accused of dishonesty must be terminated. *This theory is certainly is not the import of Brady or Giglio, nor is it properly derived from the essence of the collective bargaining agreement among the parties.*¹¹

To the extent that the County or the Amici suggest that instances of untruthfulness are a bar to a witness appearing, they are simply incorrect. As the Guild has argued in detail in previous briefs, *Brady* is a discovery rule, not a rule of testimonial admissibility. Further, an appropriate application of the rules of evidence would *not* permit inquiry into specific instances except in remote circumstances.

The County's argument seems to be built on a premise that trial court judges will misapply the law to the detriment of the Kitsap prosecutors. Law enforcement careers should not be ended on the premise that some future judge might make an erroneous evidentiary ruling at some point in time. Arbitrator

¹⁰ *Id* at 1112.

¹¹ *Id.* (Emphasis supplied.)

Sellman had it right — when a police chief assumes that *Brady* requires discharge, the decisionmaking is not rationally based and an action so premised is, therefore, not for just cause.

C. Amici Arguments Suggesting Untruthfulness is a Per se Occupational Disqualifier are Contrary to the Holdings of this Court.

To differing degrees and with differing apparent rationales, the Amici argue that the existence of a sustained untruthfulness allegation disqualifies a law enforcement office from continued employment. This conclusion is not only at odds with arbitration precedent, such as the *Union County* case cited above, it is at odds with the larger body of case law issued by this Court and the general principles derived from those cases. In particular, two lines of cases militate against the position offered by the Amici: Those concerning the importance of binding arbitration and those concerning discipline for another occupation participating in the legal system, namely attorneys.

As indicated in the Guild's previous Supplemental Brief, this Court's ruling in *Stair v. City of Kelso*¹² supports the application of the just cause principles applied here by Arbitrator Gaba. In *Stair*, this Court noted with seeming approval the "seven tests" of just cause which include requirements that discipline be progressive, corrective and proportionate. While labor relations participants have the "seven tests" as a ready guide to evaluate discipline and discipline appeals, there is nothing particularly exotic about those standards:

¹² 137 Wn.2d 166, 969 P.2d 474 (1999).

They simply stem from a collective wisdom about what is fair and right in the treatment of employees and their respective careers.

These principles, in fact, closely mirror the principles applied by this Court in the second line of cases relevant here: *those applying to the attorneys themselves*. In a multitude of attorney disbarment cases, this Court has seemingly applied *the very similar basic principles as those applied by labor arbitrators*. At their core, these principles simply reflect common sense and fundamental fairness.

Specifically as to attorney disbarment, this Court has recognized the very serious nature of untruths, but it has *not*, as urged by the Amici, found that untruths are *invariable* career enders. Rules of Professional Conduct 3.3 and 4.1 contain detailed and specific mandates that attorneys be truthful. This Court has repeatedly been called upon to evaluate when instances of untruthfulness require disbarment. The principles adopted by this Court very closely parallel the general arbitral consensus as to how to handle untruthfulness for law enforcement.

This Court has adopted the “presumptive” penalty for attorney untruthfulness as disbarment. But while the Court works from that starting point, it then considers the full range of aggravating and mitigating factors *and often arrives at discipline short of full disbarment*. As this Court explained *In re Disciplinary Proceedings Against Dynan*:

First, the court determines the presumptive sanction based on the ethical duty violated, the attorney's mental state, and the extent of actual or potential harm caused by the conduct. [Citation omitted.] The court then considers aggravating and mitigating factors, which may decrease or lengthen the presumptive sanction. [Citation omitted.] Finally, the court will adopt the Board's recommended sanction unless the sanction departs

significantly from sanctions imposed in other cases or the Board was not unanimous in its decision.¹³

The Court also indicated that a threshold question to address was whether the conduct actually constitutes “lying.”¹⁴ But even where the conduct rises to that level, “[v]arious explanations as to why lying occurred may mitigate the charge.”¹⁵ In particular, the Court found that the attorney’s “mental state” was an important consideration.¹⁶ As a result, even where there was intentional lying, “the absence of a dishonest or selfish motive” is a mitigating factor.¹⁷

The Court also engages, as do arbitrators, in a proportionality analysis. As explained in *Dynan*, proportionate sanctions are:

“[R]oughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability.” *Anschell*, 141 Wn.2d at 615 (quoting *In re Disciplinary Proceeding Against Gillingham*, 126 Wn.2d 454, 469, 896 P.2d 656 (1995)).¹⁸

This Court also recognizes emotional health issues as a mitigating factor. These factors were weighed extensively *In re Disciplinary Proceedings Against Dornay*:

The aggravating and mitigating factors we must balance in determining Dornay’s sanction are the aggravating factors of dishonest or selfish motive, vulnerability of victim, substantial experience in the practice of law, and the mitigating factors of personal or emotional problems, cooperation with the disciplinary proceedings, and absence of a prior disciplinary record. The weight

¹³ 152 Wn.2d 601, 611, 98 P.3d 444 (2004).

¹⁴ *Id.* at 616.

¹⁵ *Id.*

¹⁶ *Id.* at 617-18.

¹⁷ *Id.* at 621.

¹⁸ *Id.* at 623.

given to a mitigating factor is determined by the totality of the circumstances.¹⁹

The Attorney General argues that a finding of untruthfulness, “can” result in a loss of law enforcement officer certification.²⁰ It is true, that this *could* happen. But it is also true that under the statutory arrangement set forth by the Legislature, the decertification proceeding is *only* commenced after a *failed* discipline appeal. In other words, the Legislature knowingly vested in arbitrators (and Civil Service Commissions) the right to consider appeals using a just cause standard which would include a consideration of the full range of aggravating and mitigating factors as well as proportionality.

Contrary to the claim of Amici, “public policy” does *not* call for application of a per se test as to untruthfulness. Public policy actually supports the final and binding arbitration process defended here by the Guild.

Arbitrators are employed upon mutual selection of the parties. Their selection presumably is influenced the parties belief as to a given arbitrator’s common sense and fundamental fairness. This is the system allowed in Washington law that has worked quite well. It is built upon a consensus that, as to discipline cases, basic principles very similar to those applied by this Court in attorney disbarment proceedings make sense.

Amici have not explained why attorneys should be held to a lower standard than police. True, the police may be called upon to give sworn testimony

¹⁹ 160 Wn.2d 671, 688, 161 P3d 333 (2007).

but it is vital that attorneys, as officers of the court, have no less than the level of integrity expected of police officers. There exists no coherent reason why attorneys should be subject to any more lenient standard for truthfulness. Because this Court recognizes a full range of factors in attorney disbarment proceedings, no public policy is violated by allowing neutral arbitrators to weigh similar factors.

D. Amici Fail to Address the Limitations on Judicial Review of Final and Binding Arbitration Decisions.

There exists, though, one fundamental difference between attorney disbarment proceedings and arbitration proceedings — while this Court has *plenary* review authority over attorney discipline appeals whereas judicial review of final and binding arbitration awards is to be *very limited*. Because this Court has supervisory jurisdiction over the Bar Association, full reconsideration of the Bar discipline proceedings are appropriate: This Court is allowed to regulate who may appear before it. Arbitration, on the other hand, is a matter of private contract: The parties themselves agree to forego judicial review in exchange for a speedy, efficient and harmonious finality.

Certainly where this Court has extended due consideration to a wide range of factors in determining attorney discipline, as indicated, there is no reason to think that *less* discretion should be extended to arbitrators. Instead, arbitrators selected through the parties binding contractual arrangements should be allowed wide berth to develop standards appropriate to the given workplace. Inviting

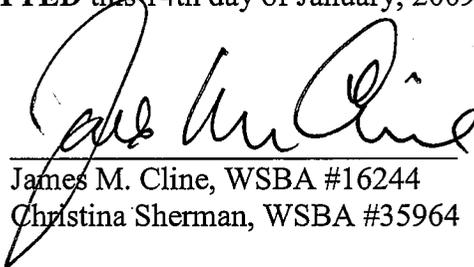
²⁰ Attorney General Brief at 6.
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judicial review of arbitration decisions will not simply extend court jurisdiction over the approximately 200 police labor contracts through the state — *it would create precedent to do so to the entire Washington public sector.* Disappointed employers would feel free to obtain a second bite at the apple. No compelling reason exists for such a change. The final and binding arbitration system works and should be allowed to continue.

IV. CONCLUSION

For the foregoing reasons, the County's Writ should be dismissed, the labor contract should be enforced and the Guild's appeal should be granted.

RESPECTFULLY SUBMITTED this 14th day of January, 2009, at
Seattle, Washington.



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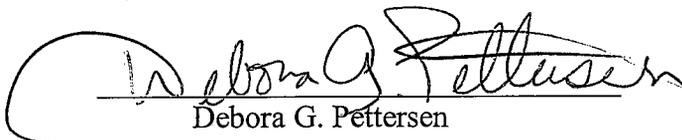
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Debora G. Pettersen