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Court of Appeals Case No. 58809-5-1

CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
SUPREME COURT OF THE STATE OF WASHINGTON

Nick ALMQUIST, ET AL.

Appellants,

v.

CITY OF REDMOND, a political subdivision of the state  
of Washington,

Respondent.

RESPONSE TO PETITION FOR REVIEW

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**A. ISSUE**

Should the Court accept review of a decision by the Court of Appeals holding that the issuance of an interest arbitration award did not create an immediate obligation on the employer to pay money to the employees enforceable under the Minimum Wage Act (Ch. 49.46 RCW), the Wage Payment Act (Ch. 49.48 RCW), and the Wage Rebate Act (Ch. 49.52 RCW), when the arbitration award requires the parties to include in their new collective bargaining agreement language providing for retroactive wage increases?

**B. STATEMENT OF THE CASE**

The facts are well summarized in the Appellate Court's decision at pages 2-5 of the Published Opinion (Appendix to Petition for Review) and in the stipulated facts before the trial court. See Appendix A hereto for the stipulated facts.

**C. SUMMARY OF ARGUMENT**

The Petitioner has failed to demonstrate that the decision of the Court of Appeals is in conflict with any decision of the Supreme Court or another decision of the Court of Appeals. The holdings in *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 93 P.3d 108 (2004) and *City of Moses Lake v. International Ass'n. of Firefighters, Local 2052*, 68 Wn. App. 742, 749, 847 P.2d 16 (1993) do not support Petitioner's position nor are they in conflict with the decision at issue. There is no issue of substantial public interest since the interest here of the Petitioners is one particular to

their employment and economic interest. None of the considerations governing acceptance of review under RAP 13.4 have been satisfied.

**D. ARGUMENT**

1. The Decision is not inconsistent with the “letter and spirit” of Washington’s minimum wage act statutes.

Washington’s minimum wage acts and WAC 296-128-035 relied upon by Petitioners do not address the issue of when a retroactive wage award by an interest arbitrator under Ch. 41.56 RCW becomes “due.” In *Clark v. City of Kent*, 136 Wn. App. 668, 673, 150 P.3d 161 (2007), the Court of Appeals recognized that although the first sentence of WAC 296-128-035 establishes one month as the maximum interval for the payment of wages subject to the regulation and that “all wages due” shall be paid on “established regular pay days,” the regulation does not specify when such wages become “due.”

This court has recognized that retroactive pay awards by interest arbitrators do not arise out of employment, but out of an interest arbitration proceeding. *IAFF, Local 46 v. City of Everett*, 146 Wn.2d 29, 46-47 (2002). Retro pay is therefore not *wages*, as *wages* are defined as compensation due by reason of employment, not by reason of an interest arbitration award. “When the employees worked the hours, they were not entitled to the additional pay subsequently required by the arbitration award.” *IAFF, Local 46 v. City of Everett*, at 47.

Petitioner's argument that RCW 49.52.050(2) mandates payment of any wages arising under statute, ordinance, or contract (Petition for Review at page 8), is technically accurate, but fails to prove their point. An interest arbitration award is neither a statute, an ordinance or a contract.

For the reasons above stated, the Court of Appeals decision does not conflict with the wage payment statutes nor the interpretive administrative regulation cited by the Petitioner. The arbitrator's award requiring that the new contract between the City of Redmond and the Redmond Police Association contain wage increases for the years the employees worked between the end of the old bargaining agreement and the start of the new bargaining agreement yet to be executed does not itself create an obligation to pay *wages*. The award required the City to enter into a contract with the Petitioner's bargaining representative providing for the retro wage increases as awarded by the arbitrator. Interest arbitration is used to determine the terms of the contract between the parties when they cannot negotiate a new agreement. *IAFF, Local 46 v. City of Everett*, at 29, citing *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 376, 831 P.2d 738 (1992). Once executed, the new labor contract obligated payment of the retro pay award. *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 861-862, 93 P.3d 108 (2004).

2. Petitioner misconstrues and misapplies *City of Moses Lake International Ass'n of Firefighters, Local 2052*, 68 Wn. App. 742, 749, 847 P.2d 16 (1993).

Petitioner argues that the court of appeals decision at issue is inconsistent with *City of Moses Lake International Ass'n of Firefighters, Local 2052*, 68 Wn. App. 742, 749, 847 P.2d 16 (1993). Petition for Review at pages 9 through 10. Petitioner's attempt to extend the decision in *Firefighters* to award prejudgment interest to the facts of the instant case falls flat. The Court of Appeals in the decision at issue correctly distinguished the opinion published by Division III in *Firefighters*:

*Firefighters* does not compel the conclusion that retroactive payments become "due" as of the date of the arbitration award. The discussion in *Firefighters* does not specifically mention retroactive pay and there was no issue about the application of the payment interval rule. What the court decided is that the firefighters were entitled to prejudgment interest, an issue that typically arises only in a case where there is a judgment. A binding arbitration award is not the equivalent of a judgment. *Dep't of Corr. v. Fluor Daniel, Inc.*, No. 78290-3, 2007 Wash. LEXIX 472, at 9-10 (July 6, 2007).

In this case, unlike in *Firefighters*, the City did not resist its obligation to abide by the award. Neither party sought review of the arbitration award and no judgment enforcing it had to be entered.

See page 9 of Published Opinion at Appendix to Petition For Review.

In this case, there was no judgment. There was no basis for an award of prejudgment interest. There was no need to determine when the award of prejudgment interest would began to run. The reasoning of Division III in *Firefighters* that the signing of a collective bargaining agreement in accordance with that award is not a prerequisite to the legal obligation to abide by the award is entirely consistent with the reasoning of Division I in the instant case. The award obligated the City to include the provisions in a new contract with the employees' bargaining representative and then to comply with the contract by paying the required retro pay. RCW 41.56.480. Failure of the employer to enter into the required contract subjects the employer to an enforcement action under RCW 41.56.480. The Public Employment Relation's Commission unfair labor practice jurisdiction is also available to the employees and their bargaining representative. RCW 41.56.160.

3. An interest arbitration award may be "final and binding," but it is not a judgment for the payment of money.

The Petition for Review at pages 10 - 12 argues that because an arbitration award is considered to be "final and binding" by RCW 41.56.450, it must create an obligation to pay money. The Petitioner claims that, "To ensure that result, the date of the award must be viewed as a due date." See Petition for Review at page 12:20-21. The argument fails because the Petitioner is unable to cite a single authority for this interpretation of the statute. The decision at issue is not contradicted by

any decision of this court or any other court of appeals decision. The court of appeals correctly rejected this argument.

4. The Petition fails to raise an issue of substantial public interest.

The Petitioners confuse their own private employment interests with the public interest. Whether or not an interest arbitration award creates an immediate obligation for an employees employer to pay retroactive wage increase included in the award is not an issue of public interest but an issue limited to those employees covered by Ch. 41.56 RCW and their public employers. Whether the Petitioners were due the retro pay earlier than they were paid is a matter of interest to them but not the public. Ch. 41.56 RCW is not part of the state minimum wage statutes protecting employees public and private, uniformed and non-uniformed, throughout the state. Ch. 41.56 RCW, and in particular the interest arbitration provisions for certain uniformed public employees, are far more limited in application. The Petitioner fails to raise an issue of substantial public importance.

E. CONCLUSION

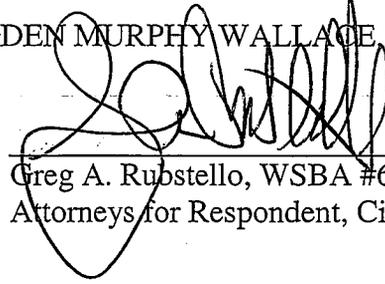
The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 24th day of October, 2007.

Respectfully submitted,

OGDEN MURPHY WALLACE P.L.L.C.

By



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Greg A. Rubstello, WSBA #6271  
Attorneys for Respondent, City Of Redmond

**APPENDIX A**

**STIPULATED FACTS FROM TRIAL COURT**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

ALMQUIST, et al.,	)	
	)	
Plaintiff,	)	NO. 04-2-40865-2 SEA
	)	
v.	)	STIPULATED FACTS AND
	)	TRIAL EXHIBITS
CITY OF REDMOND, a political	)	
subdivision of the state of Washington,	)	
	)	
Defendant.	)	

The Parties stipulate to the admission of the following facts and exhibits in the trial scheduled for June 19, 2006:

1. Plaintiffs were employed by the Defendant City of Redmond ("City") as "uniformed personnel" as that term is defined in Washington's Public Employees Collective Bargaining Act, RCW 41.56.030(7).
2. Plaintiffs were represented for purposes of collective bargaining by the Redmond Police Association ("RPA"), an exclusive "bargaining representative" as that term is defined in Washington's Public Employees Collective Bargaining Act, RCW 41.56.030(3)

STIPULATED FACTS AND TRIAL EXHIBITS- 1

**Aitchison & Vick, Inc.**  
5701 6<sup>th</sup> Avenue South  
Seattle Design Center, Suite 491A  
Seattle, Washington 98108  
(206) 957-0926 Fax: 206-762-2418

1           3.     The RPA and the City participated in the negotiations for a January 1, 2002  
2 through December 31, 2004 collective bargaining agreement between RPA and the City. This  
3 collective bargaining agreement was to be a successor to a January 1, 2001 through December  
4 31, 2001 collective bargaining agreement between the RPA and the City and was to set forth the  
5 wages, hours, and other terms and conditions of employment for the Plaintiffs.

6           4.     A copy of the January 1, 2001 through December 31, 2001 collective  
7 bargaining agreement between RPA and the City is attached hereto as Exhibit 1.

8           5.     The City and the RPA were able to reach agreement on some but not all of the  
9 terms of a January 1, 2002 through December 31, 2004 collective bargaining agreement.  
10

11           6.     The dispute over the unresolved issues between the RPA and the City (the  
12 terms of the January 1, 2002 through December 31, 2004 collective bargaining agreement) was  
13 submitted to "interest arbitration" in accordance with RCW 41.56.450.

14           7.     Jane Wilkinson was selected as the Interest Arbitrator to hear and decide the  
15 unresolved issues between the RPA and the City (the terms of the January 1, 2002 through  
16 December 31, 2004 collective bargaining agreement).

17           8.     On March 3, 2004, Interest Arbitrator Jane Wilkinson issued an Arbitrator's  
18 Award.

19           9.     A copy of Interest Arbitrator Jane Wilkinson's March 3, 2004 Award is  
20 attached hereto as Exhibit 2.

21           10.    Interest Arbitrator Jane Wilkinson's March 3, 2004 Award (Exhibit 2) was  
22 received by the parties on March 5, 2004.  
23

24           11.    Neither the City nor the RPA sought superior court review of Arbitrator  
25 Wilkinson's determinations as permitted by RCW 41.56.450.

STIPULATED FACTS AND TRIAL EXHIBITS- 2

**Aitchison & Vick, Inc.**  
5701 6<sup>th</sup> Avenue South  
Seattle Design Center, Suite 491A  
Seattle, Washington 98108  
(206) 957-0926 Fax: 206-762-2418

1           12.     On March 17, 2004 at 12: 03 pm, Doug E. Albright, the City's Attorney and  
2 Chief Negotiator in the negotiations with the RPA, sent Jeffrey Julius, the RPA's Attorney and  
3 Chief Negotiator in the negotiations with the City, an email.

4           13.     A copy of the March 17, 2004 email from Doug E. Albright to Jeffrey Julius  
5 is attached as Exhibit 3.

6           14.     On March 17, 2004 at 1:23 pm, Jeffrey Julius sent Doug E. Albright an email.

7           15.     A copy of the March 17, 2004 email from Jeffrey Julius to Doug E. Albright  
8 is attached as Exhibit 4.

9           16.     On March 28, 2004 at 7:05 pm, Jeffrey Julius sent Doug E. Albright an email.

10          17.     A copy of the March 28, 2004 email from Jeffrey Julius to Doug E. Albright  
11 is attached as Exhibit 5.

12          18.     On March 30, 2004 at 2:09 pm, Doug E. Albright sent Jeffrey Julius an email.

13          19.     A copy of the March 30 2004 email from Doug E. Albright to Jeffrey Julius is  
14 attached as Exhibit 6.

15          20.     On March 31, 2004 at 2:23 pm, Jeffrey Julius sent Doug E. Albright an email.

16          21.     A copy of the March 31, 2004 email from Jeffrey Julius to Doug E. Albright  
17 is attached as Exhibit 7.

18          22.     On April 1, 2004 at 12:21 pm, Doug E. Albright sent Jeffrey Julius an email.

19          23.     A copy of the April 1, 2004 email from Doug E. Albright to Jeffrey Julius is  
20 attached as Exhibit 8.

21          24.     On April 1, 2004 at 5:17 pm, Doug E. Albright sent Jeffrey Julius an email.

22          25.     A copy of the April 1, 2004 email from Doug E. Albright to Jeffrey Julius is  
23 attached as Exhibit 9.  
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26. On April 2, 2004 at 8:51 am, Jeffrey Julius sent Doug E. Albright an email.

27. A copy of the April 2, 2004 email from Jeffrey Julius to Doug E. Albright is attached as Exhibit 10.

28. On April 5, 2004 at 12:37 pm, Doug E. Albright sent Jeffrey Julius an email.

29. A copy of the April 5, 2004 email from Doug E. Albright to Jeffrey Julius is attached as Exhibit 11.

30. On April 9, 2004 at 5:12 pm, Doug E. Albright sent Jeffrey Julius an email.

31. A copy of the April 9, 2004 email from Doug E. Albright to Jeffrey Julius is attached as Exhibit 12.

32. On May 10, 2004 at 4:11 pm, Jeffrey Julius sent Doug E. Albright an email.

33. A copy of the May 10, 2004 email from Jeffrey Julius to Doug E. Albright is attached as Exhibit 13.

34. On May 12, 2004 at 3:30 pm, Doug E. Albright sent Jeffrey Julius an email.

35. A copy of the May 12, 2004 email from Doug E. Albright to Jeffrey Julius is attached as Exhibit 14.

36. The City's regularly scheduled pay dates for Plaintiffs were and are on the 10th and 25th of each month.

37. The City paid the Plaintiffs the wages due and owing them under the March 3, 2004 Award on May 25, 2004.

38. The amount of the retroactivity payments paid to each Plaintiff by Defendant on May 25, 2004 is set forth in Exhibit 15.

39. Five intervening paydays passed between the receipt of the Interest Arbitration Award and the payment of the wages required by that Award.

1           40.    The RPA and the City executed a January 1, 2002 through December 31, 2004  
2 successor collective bargaining agreement that incorporates the terms of Interest Arbitrator Jane  
3 Wilkinson's March 3, 2004 Award.

4           41.    A copy of the January 1, 2002 through December 31, 2004 collective  
5 bargaining agreement is attached hereto as Exhibit 16.

6           42.    The City provided the RPA with the amount of wages that were paid to the  
7 Plaintiffs on May 25, 2004 under the March 3, 2004 Interest Arbitration Award.

8           43.    A copy of the documents reflecting the amount of wages that were paid to the  
9 Plaintiffs on May 25, 2004 under the March 3, 2004 Interest Arbitration Award is attached  
10 hereto as Exhibit 15.

11           44.    The Plaintiffs claim that interest has accrued at the rate of 12 % per annum  
12 from March 25, 2004 through May 25, 2004 on the retroactivity payments made by the  
13 Defendant to the Plaintiffs (hereinafter "principal amount"). If the court finds for the Plaintiffs  
14 on this claim the amount of interest shown in the fifth column of the spreadsheet attached hereto  
15 as Exhibit 17 accurately states the principal amount due Plaintiffs from Defendant.

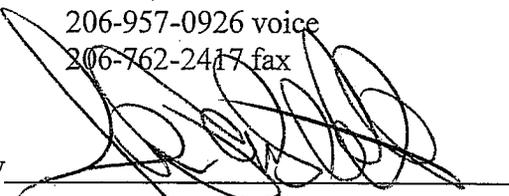
16           45.    The Plaintiffs also claim that interest has accrued at the rate of 12 % per  
17 annum on the principal amount from May 25, 2004 through the date of payment of the principal  
18 amount by Defendant to Plaintiffs (hereinafter "pre-judgment interest amount"). If the court  
19 finds for the Plaintiffs on this claim for prejudgment interest, the amount of interest shown in the  
20 sixth column of the spreadsheet attached hereto as Exhibit 17 accurately states the pre-judgment  
21 interest amount through May 25, 2006.  
22  
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1           46.     Plaintiffs did not object to the Defendant after the payment of the retroactivity  
2 pay and before the filing of this lawsuit that additional monies were due them as a result of the  
3 delinquent payment of the retroactivity pay.

4           49.     By Plaintiffs answer to Defendant's written interrogatories and request for  
5 production of documents the Plaintiffs first identified to Defendant the principal amount and the  
6 pre-judgment amount Plaintiffs claim to be due them under the Second Cause of Action stated in  
7 their Complaint. The Defendant served the interrogatories and request for production of  
8 documents on Plaintiffs on March 13, 2006. The Plaintiffs served their answers and response on  
9 the Defendant on May15, 2006.

11                   Dated this 13th Day of June, 2006

12  
13                   By   
14                             Jeffrey Julius, WSBA #26845  
15                             Attorney for Plaintiffs  
16                             Aitchison & Vick, Inc.  
17                             5701 6<sup>th</sup> Avenue South, Suite 491-A  
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20                             206-762-2417 fax

21                   By   
22                             Greg A. Rubstello, WSBA#6271  
23                             Attorney or Defendant  
24                             Ogden, Murphy, Wallace P.L.L.C  
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