

58809-5

58809-5

80804-0

No. 58809-5
COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

NICK ALMQUIST, ET AL.

Appellants,

v.

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

Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2006 DEC 26 PM 3:48

CITY OF REDMOND RESPONSE BRIEF

Greg A. Rubstello, WSBA #6271
Attorney for Respondent
OGDEN MURPHY WALLACE,
P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000
Fax: 206.447.0215

ORIGINAL

TABLE OF CONTENTS

Page

A. INTRODUCTION/ISSUES.....1

1. Whether or not the interest arbitration award created an immediate obligation for wages due the Police Employees under Chapter 49.46 RCW, Chapter 49.48 RCW, or Chapter 49.52 RCW, requiring payment of retroactivity pay before the May 25, 2004 retroactivity payments made by the City; and..... 2

2. If so, then whether or not all or part of the Order Granting Summary Judgment or the Final Order/Judgment should be reversed. 2

B. STATEMENT OF THE CASE.....2

C. SUMMARY OF ARGUMENT4

D. ARGUMENT.....6

1. The interest arbitration award did not create an immediate obligation to pay money to the employees. 6

a. The determinations of an interest arbitrator are not self executing and do not become effective until included in an approved collective bargaining

agreement that is signed by the parties or until
enforced by judgment of the superior court or as
part of a remedy ordered by the PERC in an unfair
labor practice proceeding..... 6

b. The determinations of an interest arbitrator do not
constitute an order to pay money..... 8

c. An interest arbitration award issued pursuant to
RCW 41.56.450 is not fully liquidated until
incorporated by the parties into a collective
bargaining agreement or a judgment..... 10

d. WAC 296-126-023 does not have application to the
payment of a retroactive wage increase arising from
an interest arbitration award..... 11

e. Interest did not accrue on the retroactivity pay
award between March 25, 2004, and May 25, 2004,
because the retroactivity pay was not due and owing
during that time period..... 14

f. Any interest that accrued between March 25, 2004,
and May 25, 2004, does not fall within the
definition of wages in RCW 49.46.010(2)..... 14

g.	RCW 49.48.030 does not create any entitlement by the employees to pre-judgment interest or to attorney fees.	15
2.	Even if the retroactivity pay constituted wages due prior to the May 25, 2004 payday, the City still has no liability under the MWA statutes.	16
a.	Equitable doctrines of laches prohibit a judgment under RCW 49.48.030. Motion to Amend Answer.	16
3.	The trial court correctly granted the City's motion for summary judgment on the claim brought under RCW 49.46.090(1) on the basis that either all of the retroactivity pay due had been paid prior to the filing of the lawsuit or that the statute does not apply to overtime wage payments in excess of the minimum wage.	19
4.	The trial court correctly granted summary judgment on the claim brought under RCW 49.52.050 since no wages were willfully withheld with an intent to pay the employees a lower wage than the wage the City was obligated to pay each employee by statute or contract.	20

a.	RCW 49.52.050(2) and RCW 49.52.070 require that an Employer both willfully and with intent to deprive the employee of any part of their wages, pay the employee a lower wage than the employer is obligated to pay.	20
b.	The Police Employees knowing submitted to the May 25, 2004 payment.	24
E.	CONCLUSION.....	25
	APPENDIX A: Administrative Policy Statement.....	A-1

TABLE OF AUTHORITIES

Page

CASES

Barclay v. City of Spokane, 83 Wn.2d 698, 521 P.2d 937 (1974)-----13

Brown v. Continental Can Co., 765 F.2d 810, 814 (9th Cir. 1985)-----18

Buell v. City of Bremerton, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972)---18

Cahill v. City of New Brunswick, 99 F. Supp. 2d 464, 475
(D.N.J. 2000) -----22

City of Bellevue v. Int’l Ass’n of Fire Fighters, Local 1604, 119 Wn.2d
373, 376, 831 P.2d 738 (1992) -----7, 11

City of Moses Lake v. IAFF, Local 2052, 68 Wn. App. 742,
847 P.2d 16 (1993)-----8, 9, 11

Clark County Pub. Util. Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 848,
991 P.2d 1161 (2000)-----18

Cotton v. City of Elma, 100 Wn. App. 685 (April, 2000) -----18

DOC v. Fluor, 130 Wn. App. 629, 631-632, 126 P.3d 52 (2005)-----10

Felida Neighborhood Ass’n v. Clark County, 81 Wn. App. 155, 162, 913
P.2d 823 (1996)-----18

Hisle v. Todd Pac. Shipyards, 151 Wn.2d 853, 93 P.3d 108 (2004)----- 8

<i>IAFF, Local 46 v. City of Everett</i> , 146 Wn.2d 29, 46, 42 P.3d 1265 (2002)	
-----	7, 12, 13
<i>In re Disciplinary Proceeding Against Vanderbeek</i> , 153 Wn.2d 64, 101	
P.3d 88 (2004) -----	4
<i>LaVergne v. Boysen</i> , 82 Wn.2d 718, 513 P.2d 547 (1973)-----	18
<i>Lillig v. Becton-Dickinson</i> , 105 Wn.2d 653, 717 P.2d 1371 (1986) -----	23
<i>Lindsay v. Pacific Topsoils, Inc.</i> , 129 Wn. App. 672 (2005) -----	15
<i>Pierce v. King County</i> , 62 Wn.2d 324, 332, 382 P.2d 628 (1963)-----	18
<i>Pope v. University of Washington</i> , 121 Wn.2d 479, 491, 852 P.2d 1055	
(1993)-----	23
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 165, 961 P.2d 371	
(1998)-----	24
<i>Seattle Professional Engineering Employees Association v. The Boeing</i>	
<i>Company</i> , 139 Wn.2d 824, 834-835, 991 P.2d 1126 (2000)-----	20, 22
<i>State ex rel Peninsula Neighborhood Association v. DOT</i> , No. 69432-0,	
(slip opinion, November 9, 2000)-----	18
<i>Vance v. City of Seattle</i> , 18 Wn. App. 418, 425, 569 P.2d 1194 (1977) --	18

STATUTES

Chapter 41.49 RCW -----	1
Chapter 41.52 RCW -----	1

Chapter 41.56 RCW -----	6, 7
Chapter 49.46 RCW -----	2, 20
Chapter 49.48 RCW -----	1, 2
Chapter 49.52 RCW -----	2, 22
RAP 10.3(g)-----	1
RCW 41.56.160 -----	17
RCW 41.56.400 -----	6, 12
RCW 41.56.430 -----	12
RCW 41.56.950 -----	13
RCW 49.38.030 -----	2
RCW 49.46.010(2)-----	12, 14, 15
RCW 49.46.090 -----	19, 20
RCW 49.46.090(1)-----	5, 19
RCW 49.48.030 -----	12, 15, 16, 19
RCW 49.52.050 -----	6, 20, 21, 22
RCW 49.52.050(2)-----	5, 20
RCW 49.52.070 -----	5, 20, 21, 22, 24, 25
U.S.C. § 216(b)-----	20
WAC 296-126-023-----	11, 13
WAC 296-128-035-----	4

WAC 415-108-457-----13

OTHER AUTHORITIES

HOW ARBITRATION WORKS, Elkouri and Elkouri, 6th Ed; BNA Inc.,

2003 ----- 7

REINSTATEMENT, Second, Contracts §354-----14

A. INTRODUCTION/ISSUES.

This appeal seeks review of the dismissal by the trial court of the three claims brought by existing and former Redmond Police Officers (hereinafter "Police Employees") under Washington's minimum wage acts.¹ The claims under Chapter 41.49 RCW and Chapter 41.52 RCW were dismissed by summary judgment. The claim brought under Chapter 49.48 RCW was dismissed on stipulated facts and exhibits in lieu of a trial. The stipulated exhibits, excepting for Exhibits 15 and 17, were also before the court on the motion for summary judgment as attachments to the declarations submitted in support of or in opposition to the motion for summary judgment. The trial court entered findings of fact and conclusions of law supporting the later dismissal.

Although the Police Employees claim error with the findings and conclusions entered by the trial court,² no particular findings of fact or conclusions are single out or identified as being made in error as is required by RAP 10.3(g). Listed below are issues pertaining to Appellant's Assignments of Error:

¹ Chapters 49.46, 49.48 and 49.52 RCW.

² See OPENING BRIEF at page 1, paragraph A. 3.

1. Whether or not the interest arbitration award created an immediate obligation for wages due the Police Employees under Chapter 49.46 RCW, Chapter 49.48 RCW, or Chapter 49.52 RCW, requiring payment of retroactivity pay before the May 25, 2004 retroactivity payments made by the City; and
2. If so, then whether or not all or part of the Order Granting Summary Judgment or the Final Order/Judgment should be reversed.

B. STATEMENT OF THE CASE

The facts for the determination of the claim brought under RCW 49.38.030 were stipulated and apply equally to all three claims. [CP 383-388] The City of Redmond agrees with the statement of the case set forth by the Appellant Police Employees with the exception of the argumentative characterization of the facts beginning at 4:7 and ending at 4:17 of the Opening Brief of Appellants. The City of Redmond restates the facts relating to the communications between the parties that occurred between the time of the Arbitrator's Award and the payment of retroactivity pay on May 25, 2004, as follows:

After receiving the Arbitrator's Award on March 5, 2004, the parties respective collective bargaining representatives worked cooperatively on completing a final draft of the 2002 - 2004 collective bargaining agreement. [Stipulated Facts 12 - 25 at CP 385 and Stipulated Exhibits 3 - 10 at CP 383-563] The final draft incorporated the tentative agreements reached in collective bargaining, the agreements reached going into interest arbitration, and the determinations of the arbitrator.

[Exhibit 3 at CP 383 - 563]. Contract language issues were resolved between the bargaining representatives on or about April 2, 2004, a week following the March 25, 2006 pay day. [Stipulated Facts 26 and 27 (CP 386) and Exhibit 10 (CP 383 - 563)].

On April 2, 2004, the Police Employees bargaining representative inquired of the City representative as to whether the collective bargaining agreement would be submitted to the City Council for ratification on April 9, 2004. [Stipulation 26 and 27 at CP 386] The bargaining representative also asked *why payment of the retroactivity [pay] is being delayed in light of RCW 41.56.450 which makes the Arbitrator's decision final and binding on the parties.* [Exhibit 11 at CP 383 - 563]. On April 9, 2004, the City bargaining representative responded that the contract is on the agenda for council approval on May 4, 2004, and that the retroactivity pay due the employees would be included in the May 25, 2004 payroll due to the number of employees involved and the time consuming manual calculations required for each employee. [Stipulated Facts 30 and 31 at CP 386 and Exhibit 12 at CP 383 - 563] No protest from the employee bargaining representative or any employee appears in the record.

The retroactivity pay was paid as part of the May 25, 2004 payroll. [Stipulation 37 at CP 386]. Paydays are regularly the 10th and 25th of each month. [Stipulated Fact 36 at CP 386] No protest by the bargaining representative or any employee as to the amount paid on May 25, 2004,

appears in the record. The collective bargaining agreement was signed on June 7, 2004, by the President of the Police Employees bargaining representative and on June 8, 2004, by the Mayor. Exhibit 16, at CP 383 - 563].

Neither the employees nor the bargaining representative raised the issue of the failure by the City to pay the interest the employees now claim to be due, for the period between April 25, 2004, and May 25, 2004, until this lawsuit was filed in December 2005. [Stipulated Fact 46 at CP 388] The employees first disclosed the actual amount of *wages*³ they claim to be owed and unpaid, on May 15, 2006 [Stipulated Fact 49 at CP 388], well after the commencement of this lawsuit.

None of the individual findings of fact made by the trial court were identified by the Police Employees in their Opening Brief as being made in error. The twelve findings of fact set forth in the signed FINDINGS OF FACT AND CONCLUSIONS OF LAW [CP 593-596.] are, therefore, verities for purposes of this appeal. *In re Disciplinary Proceeding Against Vanderbeek*, 153 Wn.2d 64, 101 P.3d 88 (2004).

C. SUMMARY OF ARGUMENT

All three of the claims brought by the Police Employees under the minimum wage act statutes required proof that *wages due* were not paid when the wages were due the Police Employees under WAC 296-128-035.

³ The employees claim interest due at 12% per annum from March 25, 2004 through May 25, 2004 (“principle amount”) and additional interest at 12% per annum from May 25, 2004 until the principle amount of interest is paid. See Stipulations of Fact 44 and 45 and stipulated Exhibit 17. [CP 387]

The Police Employees did not meet this burden of proof. When all the evidence was before the trial court, the court correctly concluded as a matter of law that *the interest arbitration award did not create an immediate obligation to pay money to the employees.* [Conclusion of Law 2.1 at CP 593-596.] For this reason alone, the trial court orders/judgments should be affirmed.

In addition, since the City actually paid the Police Employees months before the filing of this lawsuit all the retroactivity wages they were due, the trial court correctly granted the City summary judgment on the claim under RCW 49.46.090(1). Employer liability under the statute is reduced dollar for dollar by any amount actually paid to the employee by the employer. The employer had no possible liability under RCW 49.46.090(1) at the time the lawsuit was commenced.

The benefits provided in RCW 49.52.070, including *twice the amount of wages unlawfully rebated or withheld and attorney fees*, are not available to the Police Employees, for additional reason. RCW 49.52.050(2) requires that the wages withheld be withheld *willfully and with intent to deprive* the employee of wages that the employer is obligated to pay *by any statute, ordinance, or contract.* The Police Employees failed to raise a contested issue of fact in their opposing affidavits on summary judgment as to whether the delay in payment until May 25, 2004, was the result of willfulness and an intent to deprive the employees of wages then known to be due. Summary judgment was properly granted

dismissing the claim under RCW 49.52.050. Once the actual language of the wage and other new provisions of the CBA was agreed upon by the bargaining representatives, a time consuming hand calculation of overtime pay for over 70 employees required additional time. The Police Employees did not dispute the factual basis for the time it reasonably took the City to calculate the retroactivity payments due after agreement on the language of the new contract.

D. ARGUMENT

1. The interest arbitration award did not create an immediate obligation to pay money to the employees.
 - a. The determinations of an interest arbitrator are not self executing and do not become effective until included in an approved collective bargaining agreement that is signed by the parties or until enforced by judgment of the superior court or as part of a remedy ordered by the PERC in an unfair labor practice proceeding.

Public sector interest arbitration is a statutory process set out in RCW 41.56.400 through RCW 41.56.450. The interest arbitration award is final and binding regarding the issues it covers, but the interest arbitration award is not the final step in the statutory process. After the award is issued, the good faith collective bargaining obligation created by Chapter 41.56 RCW obligates the parties to an interest arbitration to include the determinations of the interest arbitrator in a new collective bargaining agreement along with the other terms negotiated by the parties in collective bargaining. The city and the employee bargaining

representative (the "RPA") both recognized and fulfilled the mutual obligation to incorporate the agreements made at the bargaining table and the agreements reached through interest arbitration in a new collective bargaining agreement. See Stipulated Exhibits 3 through 12. "Interest arbitration "is used to determine the terms of the contract between the parties when they cannot negotiate an agreement and results in a new agreement." *IAFF, Local 46 v. City of Everett*, 146 Wn.2d 29, 46, 42 P.3d 1265 (2002), citing *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 376, 831 P.2d 738 (1992). The terms still needed to be included in a collective bargaining agreement executed by the parties.

"Statutory interest arbitration procedures are an instance where the Chapter 41.56 RCW requires the parties to agree to a obligation to agree to a proposal or make a concession." *City of Bellevue v. IAFF, Local 1604*, at 384. The PERC will enforce through its unfair labor practice jurisdiction the obligation of a public employer or bargaining representative to sign a written agreement ratifying the agreements reached in collective bargaining. *City of Bellevue v. IAFF, Local 1604, supra*.

The determinations of an interest arbitrator are more legislative than judicial. See *HOW ARBITRATION WORKS*, Elkouri and Elkouri, 6th Ed; BNA Inc., 2003, at Ch. 22.3. The authors of the treatise further note at Ch. 22.1 that:

Arbitration of interest disputes may be viewed more as an instrument of collective

bargaining than as a process of adjudication: “Interest arbitration is a method by which an employer and union reach agreement by sending the disputed issues to an arbitrator rather than by settling them through collective bargaining and economic force.” Interest arbitration is most frequently found in industries where collective bargaining is well established.

- b. The determinations of an interest arbitrator do not constitute an order to pay money.

The determinations of an interest arbitrator do not constitute an order to pay money. The Police Employees were unable to cite to the trial court and are now unable to cite to this court any Washington case law supporting an argument to the contrary. *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 93 P.3d 108 (2004) cited by the Police Employees held only that the overtime provisions of the MWA apply to retroactive payment provisions contained in a collective bargaining agreement (CBA) signed by the parties. *Hisle v. Todd Pac. Shipyards* at 861-862. The fact that the provisions of the CBA were determined by an interest arbitrator rather than by agreement of the parties at the collective bargaining table was only a background fact in the case. The interest arbitration award binds the parties to agree on the determinations made by the interest arbitrator and incorporate them into a collective bargaining agreement. The parties did so here without compulsion by the courts or the PERC.

City of Moses Lake v. IAFF, Local 2052, 68 Wn. App. 742, 847 P.2d 16 (1993) also relied upon by the Police Employees is distinguishable on its facts. Unlike Redmond, the City of Moses Lake did not fulfill its

statutory duty and agree with the determinations of the interest arbitrator signed on May 31, 1991. Moses Lake would not enter into the required collective bargaining agreement and did not provide the employees with the salary increases for 1990, 1991, and 1992 included in the interest arbitration award. Moses Lake filed a lawsuit attempting to avoid its obligations under the interest arbitration award. It was necessary for the bargaining representative to bring a counter claim and obtain a judgment for the amount of the salary increases not paid the employees after the Moses Lake refused to incorporate the terms of the Arbitrator's award into a new collective bargaining agreement. Pre-judgment interest was then awarded by the Court of Appeals when it entered its decision nearly two years later on February 16, 2003, because of the judgment on the Union's counter claim.

The facts of *City of Moses Lake v. IAFF, Local 2052* are not before this court. The City of Redmond accepted the arbitration award and then incorporated the award into a CBA that was negotiated in good faith. Redmond promptly paid its employees after detailed hand calculations were completed for more than 70 employees, even before the contract was signed by the parties. *City of Moses Lake v. IAFF, Local 2052* is not inconsistent with the arguments of the City of Redmond made herein or with the decision of the trial court. The language of *City of Moses Lake v. IAFF, Local 2052* relied upon by the employees appears at page 749 of the opinion:

As of May 31, 1991, the date of the award, the City was under a duty to raise the firefighters' salaries in the amount specified, subject only to review as provided in RCW 41.56.450. Contrary to the City's argument, 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.

Redmond fulfilled the duty created by Arbitrator Wilkinson's interest arbitration award by incorporating the terms of the award in the new collective bargaining agreement and by paying the retroactivity pay. An after the fact lawsuit by the Police Employees for payment of the retroactivity pay was unnecessary.

- c. An interest arbitration award issued pursuant to RCW 41.56.450 is not fully liquidated until incorporated by the parties into a collective bargaining agreement or a judgment.

Comparison of the interest arbitration award to an arbitrator's award under Chapter 7.04 RCW is also helpful. An arbitrator's award under Chapter 7.04 RCW is not a liquidated sum entitling a party to prejudgment interest from the date of the arbitrator's decision. *DOC v. Fluor*, 130 Wn. App. 629, 631-632, 126 P.3d 52 (2005). In *Fluor*, the court found the arbitrator's award to be analogous to a jury verdict because of the court's authority under arbitration statutes to modify, vacate, or correct the award. The award is not fully liquidated until the arbitrator's award is reduced to judgment. *Fluor* at 634. Likewise, an interest arbitration award issued pursuant to RCW 41.56.450 is not fully

liquidated until incorporated by the parties into a collective bargaining agreement or a judgment as in *City of Moses Lake v. IAFF, Local 2052*. If the interest arbitrator's award was to be the equivalent of the collective bargaining agreement, there would have been no reason for the legislature to provide the process for incorporating the award into a contract or for the requirement on the parties to agree to the determination of issues decided by the interest arbitrator as recognized in *City of Bellevue v. IAFF, Local 1604, supra*.

- d. WAC 296-126-023 does not have application to the payment of a retroactive wage increase arising from an interest arbitration award.

WAC 296-126-023, entitled "Payment Interval," is explained by the Department of Labor and Industries in an Administrative Policy Statement. attached hereto as Appendix A. In pertinent part the policy reads as follows:

The department interprets the payment interval rule as follows:

1. The employer must establish regularly scheduled paydays occurring at least once a month.
2. Employees must be paid all **wages due for the pay period** on the established payday. (Emphasis added.)

The retroactive wage rates included in the arbitrator's award and subsequently included in the new collective bargaining agreement between the parties are not *wages* and even if they were, were not wages due for the pay period preceding the March 25, 2004 pay day.

Wage is defined by statute to mean *compensation due to an employee by reason of employment*. See RCW 49.46.010(2). Retroactive wage rates included in an interest arbitration award do not arise out of the employment of the employees that are the beneficiaries of the award, but out of the interest arbitration proceeding. In *IAFF, Local 46 v. City of Everett*, 146 Wn.2d 29, 47, 42 P.3d 1265 (2002), our state's Supreme Court held that "interest arbitration served a specific purpose that was unrelated to vindicating the rights of workers to receive "wages or salary owed." The Court's opinion distinguished between grievance and interest arbitration. The Court reasoned that the purpose of RCW 49.48.030 was served by a grievance arbitration proceeding in which an employee is seeking to vindicate an existing right, but not by an interest arbitration proceeding which is used to determine the terms of the contract between the parties when they cannot negotiate an agreement and results in a new agreement. *IAFF, Local 46 v. Everett*, at 46. An interest arbitrator's determination that a retroactive salary increase is warranted is clearly not within the meaning of the term *wages* as that term is used in the wage and hour statutes:

Furthermore, **the authorization of binding arbitration under RCW 41.56.450 serves a specific purpose unrelated to vindicating the rights of workers to receive "wages or salary owed."** In enacting RCW 41.56.400 and 41.56.450, the Legislature intended to avoid strikes by uniformed personnel. See RCW 41.56.430. Thus, any additional wages received by the union members in Moses Lake were merely

incidental to the legislative purpose of
avoiding strikes by providing for arbitration.
(Emphasis added.)

IAFF, Local 46 v. City of Everett.

Even were a retroactive pay award by an interest arbitrator interpreted to be within the term *wages* as used in the wage and hour statutes, WAC 296-126-023 is still not applicable since the retroactive pay applies to hours worked in pay periods for which the pay dates have long passed. Arbitrator Wilkinson's March 3, 2004 interest arbitration award (Stipulated Exhibit 2) raised salaries for 2002, 2003, and 2004. Retroactive salary increases are defined as "reportable compensation' in the form of a payment of additional salary for services already rendered" by the Washington State Department of Retirement Systems ("DRS") for public employees. WAC 415-108-457. A **"bona fide retroactive salary increase"** is specifically defined in WAC 415-108-457(1)(c) as **"retroactive payments made pursuant to a collective bargaining agreement"** (bold emphasis added). Retroactive salary increases are expressly authorized by statute under RCW 41.56.950 which permits parties to bargain for retroactive wages and fringe benefits traditionally discussed in Collective bargaining. *Barclay v. City of Spokane*, 83 Wn.2d 698, 521 P.2d 937 (1974) (upholding retroactive agreements under RCW 41.56.950).

The interest arbitration award of March 3, 2004, is not the equivalent of an order or judgment to pay money, nor is it the equivalent of a collective bargaining agreement.

- e. Interest did not accrue on the retroactivity pay award between March 25, 2004, and May 25, 2004, because the retroactivity pay was not due and owing during that time period.

A key mixed issue of law and fact for the trial court to decide was when the performance (the payment of the retroactivity pay) was due the employees after the issuance of the interest arbitration award. Interest is not payable as damages for non-performance until performance is due. REINSTATEMENT, Second, Contracts §354. For the reasons stated above, the City had no obligation to pay the retroactivity pay before payment was made on May 25, 2004. The language of the new collective bargaining agreement was not agreed to in principle by the labor representatives until April 2nd. The collective bargaining agreement was not signed until June 8, 2004. The City of Redmond paid the employees before the legal obligation for performance was created by the signing of the 2002 - 2004 collective bargaining agreement. Interest did not accrue prior to May 25, 2004, as claimed by the employees.

- f. Any interest that accrued between March 25, 2004, and May 25, 2004, does not fall within the definition of wages in RCW 49.46.010(2)

If the retroactivity pay does not fall within the definition of *wages* in RCW 49.46.010(2), then any interest on retroactivity pay that would

accrue, were there any, between March 25, 2004, and May 25, 2004, would also not fall within the definition of *wages*. The employees reliance upon *Lindsay v. Pacific Topsoils, Inc.*, 129 Wn. App. 672 (2005)⁴ is not well taken. Lindsey sought attorney fees under RCW 49.48.030 because he sought a judgment for the interest he claimed on the amount of unpaid wages for which he was awarded judgment by the trial court. *Lindsay v. Pacific Topsoils, Inc.* is totally distinguishable on its facts. Additionally, the interest due, if any, is not “compensation due an employee by reason of employment” under RCW 49.46.010(2), but is due because of a common law doctrine that allows for prejudgment interest on liquidated amounts due for a wide variety of reasons unrelated to wages.

- g. RCW 49.48.030 does not create any entitlement by the employees to pre-judgment interest or to attorney fees.

RCW 49.48.030, which states as follows, has no application to the facts before this court:

In any action in which any person is successful in recovering **judgment for wages** or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer; PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

⁴ See PLAINTIFFS RESPONSE TO SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, at page 4.

For the reasons stated above, there can be no recovery by judgment for wages or salary owed to the employees. The retro payments, which did not constitute the payment of wages, were made on May 25, 2004, before the collective bargaining agreement creating the performance obligation was ratified and signed by the City and the RPA.

No interest accrued between March 25, 2004, and May 25, 2004, for which judgment can be entered by this Court. There is no basis for a judgment for pre-judgment interest. Additionally, plaintiffs are attempting to obtain compound interest from the court by claiming that they are entitled to an award of interest on interest and have provided no legal support for their contention.

2. Even if the retroactivity pay constituted wages due prior to the May 25, 2004 payday, the City still has no liability under the MWA statutes.
 - a. Equitable doctrines of laches prohibit a judgment under RCW 49.48.030. Motion to Amend Answer.

Although the trial court judge concluded otherwise (Conclusion of Law 2.8), application of the equitable doctrine of laches should prevent any recovery under RCW 49.48.030. The stipulated facts demonstrate that the employer had no reason to know from the employee's conduct that there was any claim that the employees were paid less than what they were owed on May 25, 2004. The employees received their pay checks on that date without any complaint or claim they were also due an accrued interest payment. No unfair labor practice complaint was threatened or filed with

the PERC. The statute of limitations for the filing of an ULP is six months, which expired fourteen months before the filing of the employee's lawsuit. RCW 41.56.160. The employer was completely unaware until the lawsuit was filed in December of 2005 that any claim for unpaid wages was being asserted by the employees. It was not until May 15, 2006, that the employees first notified the City of the amount of interest they claim to be due and owing. Stipulated Fact 49. This conduct represents a classic demonstration of "sandbagging" and "gotcha" that should not be favored, encouraged, or ratified by the courts.

In its written final argument to the trial court, the City moved to amend its Answer to conform to the evidence and to add the affirmative defenses of laches. CP 580-592.

The Police Employees and their bargaining representative had knowledge or reasonable opportunity to discover that the employees had a claim and cause of action against the City prior to the May 25, 2004 pay day. The City acted in reliance upon the silence of the employees and their bargaining representative in making the May 25, 2004 payments in the amounts set forth in Stipulated Exhibit 15. It is totally unreasonable that the employees ignored the City for nearly fourteen months after the payment of the retro pay on May 25, 2004, apparently hoping that through the passage of time, they could manufacture a case for non-payment by entrapping the City. No demand for interest appears anywhere in the record but for the prayer for relief in the Compliant served and filed on

December 30, 2005. The City will suffer economic damages resulting from this unreasonable delay should the employee's claims have any validity. See *LaVergne v. Boysen*, 82 Wn.2d 718, 513 P.2d 547 (1973); *State ex rel Peninsula Neighborhood Association v. DOT*, No. 69432-0, (slip opinion, November 9, 2000); *Cotton v. City of Elma*, 100 Wn. App. 685 (April, 2000):

“The equitable doctrine of laches is the implied waiver arising from knowledge of existing conditions and acquiescence in them.” *Felida Neighborhood Ass’n v. Clark County*, 81 Wn. App. 155, 162, 913 P.2d 823 (1996) (citing *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972)). “Laches consists of two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay.” *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 848, 991 P.2d 1161 (2000) (citing *Brown v. Continental Can Co.*, 765 F.2d 810, 814 (9th Cir. 1985)). “[T]he main component of the doctrine is not so much the period of delay in bringing the action, but the resulting prejudice and damage to others.” *Wilkinson*, 139 Wn.2d at 849 (citing *Pierce v. King County*, 62 Wn.2d 324, 332, 382 P.2d 628 (1963); *Vance v. City of Seattle*, 18 Wn. App. 418, 425, 569 P.2d 1194 (1977)).

The inquiry made by the bargaining representative on April 2, 2004, as to why the retroactivity payments were being delayed falls short of a demand for payment. The bargaining representative by failing to object to the City's response that the payments would be made in the May 25, 2004 payroll further lead the City to believe that there was no

issue between the City and the Police Employees with payment on that date.

No excuse for the delay in asserting the claim for interest as wages under RCW 49.48.030 has been offered by the employees. Prejudice to the City is evident from the claim for damages and attorney fees under the statute. Had the claim been promptly made prior to payment on May 25, 2004, the City could have made a payment decision at that time with full knowledge of the claim and the opportunity to avoid the accrual of additional interest and attorney fees.

3. The trial court correctly granted the City's motion for summary judgment on the claim brought under RCW 49.46.090(1) on the basis that either all of the retroactivity pay due had been paid prior to the filing of the lawsuit or that the statute does not apply to overtime wage payments in excess of the minimum wage.

RCW 49.46.090 does not authorize a recovery of costs and "reasonable attorneys' fees" without a recovery of wages due, but not paid by the employer.

RCW 49.46.090(1) states as follows:

(1) Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate, **less any amount actually paid to such employee by the employer**, and for costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between such employee and the employer to work for less

than such wage rate shall be no defense to such action. (bold emphasis added)

Liability for payment of the statutory minimum wages due and not yet paid at the time the action is brought is a clear pre-requisite for any recovery under this statute. *Seattle Professional Engineering Employees Association v. The Boeing Company*, 139 Wn.2d 824, 834-835, 991 P.2d 1126 (2000). Since the Plaintiffs have been paid all the wages due them prior to the commencement of this lawsuit, and because the retro active pay award is for wages in excess of the minimum wage provided in Chapter 49.46 RCW, there is no cause of action under RCW 49.46.090.

In addition, Former Supreme Court Justice Talmadge in a decision concurred in by the remaining eight members of the Court, made clear that RCW 49.46.090 only addresses a remedy for the minimum wage and not for overtime or other wage payments in excess of the minimum wage rate. *Seattle Professional Engineering Employees Association v. The Boeing Company*, unlike U.S.C. § 216(b) which includes overtime compensation and unpaid minimum wage, does not provide a remedy for unpaid overtime wages.

4. The trial court correctly granted summary judgment on the claim brought under RCW 49.52.050 since no wages were willfully withheld with an intent to pay the employees a lower wage than the wage the City was obligated to pay each employee by statute or contract.
 - a. RCW 49.52.050(2) and RCW 49.52.070 require that an Employer both willfully and with intent to deprive the employee of any part of their wages,

pay the employee a lower wage than the employer is obligated to pay.

RCW 49.52.050 and RCW 49.52.070 provide in pertinent part as follows:

RCW 49.52.050 Rebates of wages -- False records -- Penalty.

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

...

(2) Willfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

...

Shall be guilty of a Misdemeanor.

RCW 49.52.070 Civil liability for double damages.

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

Since the City paid Plaintiffs all retroactive wages due them prior to the commencement of this lawsuit, Plaintiffs have no cause of action under RCW 49.52.050 and RCW 49.52.070. The purpose of Chapter 49.52 RCW “is to see that the employee shall realize the full amount of wages which by statute, ordinance, or contract, he is entitled to receive from his employer.” *Seattle Professional Engineering Employees Association v. The Boeing Company, supra*, at 831. None of the Plaintiffs have been deprived of any part of the retroactive wages due them by the City. The City has not withheld wages due any Plaintiff. There are no wages to recover by the filing of this lawsuit.

Additionally, the requirement of “willfulness” and “intent to deprive” cannot be established by the Plaintiffs based on the facts before the court. *See* Dec. of Gianini, CP 141-142.. The City’s efforts at making the necessary payroll calculations detailed by Brown show not an intent to deprive, but an intent to pay the Plaintiffs every dime they were owed. The wage payments were made by the City on May 25, 2004, immediately after the necessary calculations were completed and before the Agreement was even signed by the parties. A retroactive pay award going back three years for seventy plus employees working varied overtime hours and with different specialty pays created an unusual and difficult and time consuming calculation project for a city payroll and accounting staff. *Cahill v. City of New Brunswick*, 99 F. Supp. 2d 464, 475 (D.N.J. 2000) relied upon by the Police Employees is factually different from the facts

before the court in this case. There is no evidence that the City had set up an inefficient accounting procedure for its regular payroll.

The record facts verify the City's intent to pay the Plaintiffs the retro wages they were due by the arbitration award. There is a complete absence of any facts showing there was any intent to deprive the Plaintiffs of the wages owed. *See Pope v. University of Washington*, 121 Wn.2d 479, 491, 852 P.2d 1055 (1993) where the University's delay in making a decision as to whether social security should be deducted from certain wage payments to employees was held by the court not to be an intentional decision by the University to deprive employees of wages. The many documents showing the internal debate on the subject was not substantial evidence of a consensus intent by the University to deprive the employees of wages. The emails in the stipulated exhibits show an intent by the City to accomplish the retroactivity payments before the approval of the new collective bargaining agreement.

In the present case, the emails between the bargaining representatives demonstrate that the City did not refuse to pay money it admittedly owed the employees. The question of whether an employer willfully withheld money is a question of fact. Review is limited to whether there was substantial evidence to uphold the trial court's decision. *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 717 P.2d 1371 (1986). As in *Lillig v. Becton-Dickinson*, the facts here demonstrate that if there was any dispute between the parties as to the obligation of the City to pay the

retroactivity pay before it was paid on May 25, 2004, the dispute was a bona fide dispute. The City believed that payment was not due until the new contract was ratified by the parties. The City believed that it was accommodating the desire of the employees to be paid the retro pay as soon as possible by making payment several weeks before the new contract was before the city council for approval. There was certainly a bona fide dispute as to the amount owed each employee until the amounts could be calculated based upon the arbitrator's award and the agreed new language for the contract.

- b. The Police Employees knowing submitted to the May 25, 2004 payment.

In *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 165, 961 P.2d 371 (1998), at FN6 the court notes that:

RCW 49.52.070 provides a specific exception to the double damages requirement of the statute for an "employee who has knowingly submitted to such violations."

The facts herein are uncontroverted that the employees' bargaining representative agreed with the Employer's representative that before the retroactive wage payments could be made to the employees, the parties would first have to agree on the language of the contract implementing the interest arbitration award and the City Council would then approve the contract. The wages would only then be paid. *See* Second Declaration of Douglas Albright, CP 364-366. The Guild was fully advised of the

extended time it would take to process the amounts owed the plaintiffs after the draft language was agreed to and did not contest or raise the MWA statutes as requiring an earlier payment. When the City's representative advised that he was requesting the City to process the retroactive wage payments due the employees under the new contract before its approval by the City Council, which would take several weeks, there was no objection by the Guild. The Plaintiffs here through their designated bargaining representative submitted to the process that was used. They are not entitled after the fact to claim double damages and attorney's fees under RCW 49.52.070. What the Plaintiffs ask for is inequitable and barred by the very statute they seek to use to boot strap damages and attorney's fees.

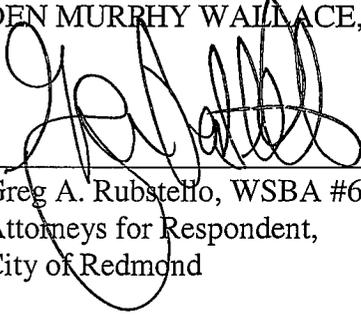
E. CONCLUSION

The decisions of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this ^{26th} day of December, 2006.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By: 

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

APPENDIX A

Administrative Policy Statement

ADMINISTRATIVE POLICY



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	PAYMENT INTERVAL	NUMBER:	ES.C.5
CHAPTER:	<u>WAC 296-126-023</u> <u>WAC 296-131-010</u>	REPLACES:	ES-020 ES-030
		ISSUED:	1/2/2002

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

Payment Interval. All employers who are subject to RCW 49.12 or RCW 49.46 or who employ agricultural workers as defined by RCW 50.04.150 must pay wages at least once a month on a regular payday. To facilitate bookkeeping, an employer may implement a regular payroll system in which wages from up to seven days before payday may be withheld from the pay period covered and included in the next pay period. This same provision appears in WAC 296-126-023 (Employment Standards), WAC 296-128-035 (Minimum Wages), and WAC 296-131-015 (Agricultural Employment Standards).

The department interprets the payment interval rule as follows:

1. The employer must establish regularly scheduled paydays occurring at least once a month.
2. Employees must be paid all wages due for the pay period on the established payday.
3. The withholding of up to seven days pay "to facilitate bookkeeping" applies to monthly payrolls. If payday falls on the last business day of the month, the employer may withhold (or cut off) up to seven days prior to the end of the month to allow time to prepare the payroll. The seven days would be included in the following month's payroll.
4. Payment must be made no later than midnight on the established payday. If the paychecks are mailed, the envelope must be postmarked by midnight on the established payday. If a payday falls on a non-business day, payment must be made by midnight of the next business day. Employers who pay their employees by direct deposit must ensure such deposits have been made and are available to workers on the established payday.

No. 58809-5

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

NICK ALMQUIST, ET AL.

Appellants,

v.

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

Respondent.

DECLARATION OF SERVICE

Greg A. Rubstello, WSBA #6271
Attorney for Respondent
OGDEN MURPHY WALLACE,
P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000
Fax: 206.447.0215

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 DEC 26 PM 3:48

N. Kay Richards hereby makes the following declaration: I am now and was at all times material hereto over the age of 18 years. I am not a party to the above-entitled action and am competent to be a witness herein. I certify that on December 26, 2006, I messengered a copy of City of Redmond Response Brief and this Declaration of Service to Jeffrey Julius, Aitchison & Vick, Inc., 5701 Sixth Avenue South, Suite 491A, Seattle, Washington 98108-2527.

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

12/26/06 Seattle, WA
Date and Place

N. Kay Richards
N. Kay Richards