

65037-8

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NO. 65037-8-I

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

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL
286,

Appellant,

v.

PORT OF SEATTLE,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

The superior court erred in:

- A. Granting the Port of Seattle's Motion for Entry of Post-Hearing Order, through an Order dated February 4, 2010 (CP 722-724);
- B. Issuing an Order on February 4, 2010, vacating Arbitrator Vivenzio's arbitration award (CP 725-727); and
- C. Partially denying International Union of Operating Engineers, Local 286's motion for an award of reasonable attorneys fees pursuant to RCW 49.48.030, through an Order issued March 1, 2010 (CP 738-739).

II. ISSUES PRESENTED

- A. Did the Court improperly substitute its own judgment for that of the agreed-upon labor arbitrator when it vacated Arbitrator Vivenzio's award reducing Mark Cann's termination to a 20-day suspension and instead ordered Mr. Cann suspended for a period of time in excess of twelve months, to apologize, to attend diversity and anti-harassment training, and to be immediately fired by the Port if he commits any new act prior to September 22, 2013, that violates the Port's anti-harassment policy, without recourse to any collectively-bargained grievance procedure that might then be in effect?
- B. Did the Court improperly refuse to award any reasonable attorneys fees at all for the value of the work performed by in-house counsel, on the

grounds that in-house counsel did not keep contemporaneous records of the time he spent on this matter, when in-house counsel submitted an estimate and description of the time he spent on this matter and nothing in that declaration was disputed or challenged by the Port of Seattle?

III. STATEMENT OF THE CASE

A. The Underlying Workplace Misconduct

The arbitration award that gave rise to this litigation was issued by Arbitrator Anthony Vivenzio on February 2, 2009. CP 633 - 659 (“the Award”). This 26-page decision adjudicated grievances filed by the International Union of Operating Engineers, Local 286 (“Local 286” or “the Union”) protesting the termination of Port of Seattle (“Port”) employee Mark Cann and the verbal warning given to Port employee Terry Chapman for their roles in a prank of making and hanging a noose at the Port worksite. It is only the discipline that was issued to Mr. Cann, and the arbitrator’s and then the trial court’s subsequent modifications of that discipline, that is at issue in this dispute.

According to the undisputed evidence presented to Arbitrator Vivenzio, on December 12, 2007, Mr. Cann, a long-time Port employee, was asked by his supervisor to remove a length of coiled rope from the floor of his workplace. CP 641 (Award, page 8). Mr. Cann took the rope and, with the help of Mr. Chapman, tied and hung a full-sized hangman’s

noose. This was done in the presence of two other co-workers, Barry Basher and Marty Jewell. CP 691.

According to the Port, when Mr. Cann hung the noose he said something to the effect that “this will get his goat.” CP 661. The Union pointed out in its post-hearing brief, which it submitted to the arbitrator:

He (Cann) was tying a noose for Dick Calhoun. It was a long standing joke between him and Dick. And it was a matter of Dick being old guy and Mark being a dumb OE [Operating Engineer]. That’s how they used to joke between each other. We’d call him a dumb OE. And Mark called Dick an old DMR (Duty Maintenance Registrar.) It was a way of them to make light of the day, have a joke, make time go by.

CP 691.

The Union also pointed out in its brief the complete absence of any comments by Mr. Cann, while he was making this noose, that were derogatory or showed hostility because of anyone’s race. CP 691.

Soon after the noose was hung, an African-American employee, Rafael Rivera, with whom Mr. Cann had had a recent falling out, observed the noose, took offense, and reported the incident to management. According to the Port, they

conducted an investigation, which conclusively established that Mr. Cann had violated the Port’s anti-harassment policy, hereinafter referred to as “HR-22,” by displaying the hangman’s noose. Based on his displaying a threatening object, his violation of the Port’s anti-harassment policy and his disobeying a supervisor direct

order, Mr. Cann's employment was terminated on February 11, 2008. Mr. Chapman was issued a verbal warning on January 30, 2008.

CP 662.

Concurrent with the Port's investigation, the Port's police department opened an investigation into the noose incident to determine whether RCW 9A.36.080, the Malicious Harassment/Hate Crime statute was violated. The Police Report on this incident was introduced as an exhibit in the arbitration hearing. Among other things, this report contains a statement made by Mr. Rivera: "Thursday morning when [blank] came to work he met with [blank] and CANN. CANN apologized to [blank] for the incident, said the noose wasn't meant for him, it was intended as a joke for another employee." CP 109 - 112.

The police concluded their investigation with this finding; "This incident does not meet the statutory requirements of RCW 9A.36.080... The victim [Rivera] in this case repeatedly told me verbally and in a written statement, that he did not feel threatened.... He, in fact stated that he didn't believe the suspect would have tied the noose as a way of trying to threaten him." The case was closed as legally insufficient. CP 110.

B. The Arbitration Hearing

The Union filed grievances on behalf of both Mr. Cann, who had been terminated for his role in the noose incident, and Mr. Chapman, who

had only been given a verbal warning for his role in the incident. Those grievances were processed to arbitration and litigated before Arbitrator Vivenzio on October 13 and 14, 2008.

The arbitration hearing lasted two days, and both the Port and Union were afforded a full opportunity “to call witnesses and examine, and cross examine them under oath. Additionally, the parties were given the opportunity to introduce exhibits into evidence.” Award, p. 1, CP 634. Significantly, and using the Port’s own writing, the parties stated that the issue presented to the arbitrator was; “Was there just cause for the Port to terminate Mark Cann’s employment, and if not, what is the appropriate remedy?” (Emphasis added). CP 663.¹ The critical undisputed fact concerning the statement of the issue is that the Port gave to the arbitrator the power to fashion a remedy if he found that there was not just cause for the termination.

At the arbitration hearing, the Port’s letter of proposed termination, CP 33 - 34, actual termination letter, CP 35 and HR-22 (the Port’s anti-harassment policy), CP 39-45, were introduced as exhibits. These letters and policy make clear that Cann was terminated for the violation of HR-

¹ The arbitrator wrote “At the hearing the parties stipulated the issues before the Arbitrator as follows: Did the Employer have just cause for their termination of Mark Cann on February 11, 2008, and if not, what shall the remedy be? Award, p. 2, CP 635.

22, which provides that “[v]iolations of this policy may result in disciplinary action up to and including termination.”

Also, the Port, jointly with the Union, introduced the parties’ collective bargaining agreement into evidence. Collective Bargaining Agreement (“CBA”), CP 60-85. Significantly, that exhibit at Section 22.02 provides that “The arbitration board shall have jurisdiction to decide any dispute arising under the agreement....” (Emphasis added). CP 71.

C. Arbitrator Vivenzio’s Award

After the close of the hearing and receipt of post-hearing briefs from both parties, Arbitrator Vivenzio issued his Award. In that Award, Mr. Cann’s termination was reduced to a twenty-day suspension. The Port was furthered ordered to make Mr. Cann “whole” for all wages and benefits lost beyond those which he would have lost as a result of the 20-day suspension. Award, p. 25, CP 658.²

Several aspects of the Award are material to the issue in dispute herein. This Award stated that “during the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument.”

² He also upheld the Port’s “verbal warning” given to Mr. Chapman for his role in the making of the noose. Award, p. 26, CP 659.

Award, p. 1, CP 634. The arbitrator acknowledged that “[t]he complement of employees is diverse, with different ages and ethnic groups represented.” CP 635. The arbitrator noted that the CBA contained an Equal Employment Opportunity clause and the clause which stated “The arbitrator board shall have jurisdiction to decide any dispute arising under the agreement....” CP 637. The arbitrator acknowledged the various arguments made by the Port: that the noose represented racial harassment to most people; that the CBA limits the arbitrator’s role; and that if the arbitrator found just cause for discipline but imposed some other penalty, such a decision would contradict state and federal policies of anti-discrimination. CP 639 - 641.

The arbitrator also acknowledged several of the arguments the Union had made: that Mr. Cann had worked for the Port for almost 12 years and had never been disciplined; that Mr. Cann freely admitted that he “in a joking fashion, tied a noose and said ‘this is for Calhoun (75-year old white co-worker) to put himself out of his misery;’” that the noose was a singular result of a thoughtless prank; that “[t]he employer’s witness had to admit on cross examination that Mr. Rivera told her he didn’t think the noose was harassing or criminal;” and that if any discipline was warranted “the appropriate discipline would be a suspension of three to five days.” Award, p. 8 - 10, CP 641 - 643.

In the “DISCUSSION” part of the award, the arbitrator explained how he was approaching the question of “just cause.” The arbitrator explained that this phrase included the issue of whether the penalty assessed by the employer should be upheld, mitigated, or otherwise modified, and he analyzed the case relative to the seminal “Seven Tests” approach to just cause that was authored by Carroll Daugherty in *Enterprise Wire Co.* at 46 LA 359 (1966).³ The arbitrator found against the Union’s argument/position with respect to six of the “Seven Tests.” Award, p. 18 - 21, CP 643 - 654. His findings on the seventh part of the test forms the basis for this litigation.

The Arbitrator recounted the seventh part of the test as being, “Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the Employer?” As to Mr. Cann, the arbitrator answered this question with a “No” and explained his answer. Award, p. 22, CP 655.

Among other things, the arbitrator noted (1) that Mr. Cann had worked for the Port for twelve years; (2) there was evidence of reliability, with no history of performance problems; (3) employees had come

³ As this Court just recently noted, this “seven tests” analysis is widely used to guide arbitrations under collective bargaining agreements. *City of Seattle v. City of Seattle*, ___ Wn. App. ___, 230 P.3d 640, 644 (May 3, 2010).

forward and asked that Mr. Cann not be terminated for a joke; (4) a management witness retracted her statement that Mr. Cann had “race problems”; (5) Mr. Cann had an impression that the noose derived from “Cowboys and Indians” and not race; and (6) that neither Calhoun nor Rivera suffered harm. Award, p. 22, CP 655.

The arbitrator dealt with and rejected the Port’s claim that the arbitrator did not have the authority to modify the penalty, and the arbitrator explained his perceived authority to do so. The arbitrator opined;

The ultimate impression the Arbitrator holds concerning Mr. Cann is that, in this matter, he was more clueless than racist. While Mark Cann’s conduct deserves discipline, even substantial discipline, the Arbitrator finds that, on the complete record, termination was excessive, and without just cause. This finding is consistent with *Federal Aviation Administration and National Air Traffic Controllers Association*, 109 LA 699 (1997). There, the employee’s two-day suspension for displaying a noose in a prominent portion of the workplace was converted to a written admonishment. The arbitrator there believed that the grievant intended a prank [sic] had no idea the display would be offensive. The penalty awarded there, less severe than the penalty this Arbitrator is awarding, was a result of the employee’s having received no training in diversity, and having made a sincere apology.... As a recommendation only, the Arbitrator believes it might be productive for both of these employees to retake the training module, perhaps with mentoring, and not during work hours.

Award, p. 24, CP 657.

D. Superior Court Proceedings Subsequent to the Award

Despite issuance of the Award, the Port refused to return Mr. Cann to work or to compensate him for lost wages and benefits. This led to two actions being commenced in King County Superior Court. On February 25, 2009, the Port filed a constitutional writ of certiorari seeking to overturn the arbitration award. Case 09-2-10355-1 SEA. On April 22, 2009, Local 286 filed a lawsuit to compel enforcement of the Award. Case 09-2-16679-0 SEA.

These two actions were subsequently consolidated and adjudicated by The Honorable Steven C. Gonzalez. After cross-motions for summary judgment, on February 4, 2010, Judge Gonzalez granted the Port's motion and vacated Arbitrator Vivenzio's Award on the grounds that it was "excessively lenient." CP 726. He simultaneously denied Local 286's motion to enforce the Award. However, Judge Gonzalez then ordered the following:

1. The Port was required to reinstate Mr. Cann to employment.
2. The Port was required to pay Mr. Cann a total of six months' backpay, minus interim earnings and

unemployment benefits received during the time period covered by the backpay award.

3. Mr. Cann was required to write a “sincere letter of apology.”
4. Mr. Cann was required to attend diversity and anti-harassment training.
5. For a period of four years from the date of his reinstatement to employment, which occurred on September 22, 2009, the Port was required to “immediately terminate” Mr. Cann should it find that he had violated the Port’s anti-harassment policy, and this termination could not be challenged through any collectively bargained grievance procedure that might then be in effect.

CP 725-727.

Because Mr. Cann had previously been reinstated to employment by the Port on September 22, 2009, *see* February 4, 2010, Order, CP 726, this ruling by the superior court effectively replaced the 20-day unpaid suspension imposed by Arbitrator Vivenzio with an unusual remedy of the court’s own devising: a one-year unpaid suspension, a mandatory apology, diversity and anti-harassment training, and a four-year period following September 22, 2009, during which the Port is affirmatively required to fire Mr. Cann for any violation of the Port’s anti-harassment policy.

E. The Superior Court’s Ruling on the Union’s Attorneys Fees Request

Subsequent to the superior court’s ruling on the merits of this dispute, Local 286 timely sought and received an award for

reimbursement of its attorneys fees reasonably incurred, pursuant to RCW 49.48.030, which provides for an award of such fees in any action where a judgment for wages is obtained. *See* CP 728-734 (Local 286's motion for fees); CP 738-739 (Order granting attorneys fees motion in part).

In granting Local 286's motion for attorneys fees in part, however, the superior court denied any award of fees to Local 286 arising from the work performed prior to the date of the superior court's decision by Terry Roberts, Local 286's in-house counsel.

In support of Local 286's motion, Mr. Roberts submitted a declaration in which he stated, in pertinent part:

7. In preparing his case for arbitration I spent at least ten hours interviewing witnesses, two hours reviewing statements, sixteen hours preparing requests for information, four hours reviewing responses to the requests for information, twelve hours preparing outlines for arbitration testimony, three hours preparing witnesses for testimony, and four hours collecting, sorting and reviewing exhibits.

8. I spent approximately twelve hours in the arbitration itself which occurred October 13 and 14, 2008. Following the hearing I spent at least twenty four hours researching the law and arbitration decisions, at least forty hours writing a post hearing brief, and one hour in an oral conference with the arbitrator and counsel for the Port.

9. Following the receipt of the award and the Ports action to vacate the award, I spent at least sixteen hours researching the law, forty eight hours drafting argument opposing the Port's position and supporting the Union's position, and at least eight hours preparing for oral

argument before this court. I spent one hour in court on oral argument.

...

11. Conservatively, I spent one hundred and twenty eight hours of time working on the Arbitration aspect of this case and seventy three hours working on legal issues related to the vacation and confirmation of the Arbitrator's award. The fair value of my time is \$350.00 per hour and I spent at least two hundred and one hours on this matter.

CP 736-737.

Notwithstanding that declaration and the fact that the superior court had first-hand knowledge of at least part of Mr. Robert's contribution to the litigation (e.g., the time spent by Mr. Roberts at hearing, where Mr. Roberts presented Local 286's arguments to the court), the superior court ruled that because Mr. Roberts had not provided contemporaneous records of the time he had spent on this matter, but had merely presented an estimate of such time spent through his declaration, "[a]ny calculation would be arbitrary," and on that basis awarded no fees at all for Mr. Roberts' work. CP 739. The Court on this basis reduced the amount of its attorneys fees award to Local 286 by \$70,350. CP 739.

IV. SUMMARY OF ARGUMENT

In *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 434-436, 291 P.3d 675 (2009), the Washington State Supreme Court held that an arbitration decision arising out of a collective

bargaining agreement may be vacated if it violates public policy, but **only** if the arbitrator's decision violates an "explicit, well defined and dominant" public policy. The Court stated, "We now join the federal and other state courts in adopting the narrow public policy exception to enforcing arbitration decisions." *Id.* at 436.

Where the "public policy" challenge is directed not at the arbitration decision *in toto*, but rather at "specific relief" provided in that decision, it is the burden of the party challenging the decision to show that the "specific relief" violates the public policy. Thus, the party challenging the arbitration decision has to demonstrate that public policy "specifically militates against the relief ordered by the arbitrator." *Virginia Mason Hosp. v. Washington State Nurses Ass'n*, 511 F.3d 908, 916 (9th Cir. 2007), quoting *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1212-13 (9th Cir.1989).

In the instant dispute, Mr. Cann was found by the arbitrator not to have committed a racially-based act of discrimination, but only to have acted foolishly and inappropriately – "cluelessly," in the words of Arbitrator Vivenzio. Under those circumstances, Arbitrator Vivenzio's decision to sustain Local 286's grievance and order the Port to reinstate Mr. Cann to employment, with only a 20-day unpaid suspension as corrective discipline, was not antithetical to any "explicit, well defined and

dominant” public policy in Washington State. For that reason, the superior court’s decision to substitute its judgment for that of Arbitrator Vivenzio, on the basis that the arbitrator’s decision was “too lenient,” exceeded the legitimate authority of that court and should be reversed.

The superior court’s subsequent decision to disallow any reimbursement of attorneys fees for the work of Local 286’s in-house counsel, on the basis that Mr. Roberts had not provided contemporaneous records of the time he had spent on this matter, but had merely presented an estimate of such time spent through a declaration submitted in support of the Union’s motion, is also error. Especially in light of the fact that the superior court had first-hand knowledge of at least some of the work put in by Mr. Roberts in this case, e.g., the time he spent participating in the oral argument before that court, it was not appropriate for the superior court to have placed a value of zero on Mr. Roberts’ contribution. Its decision to do so, rather than coming up with its own best estimate as to the value of that contribution, was therefore an error which this Court of Appeals should order corrected.

V. ARGUMENT

A. STANDARD OF REVIEW

The decision of the superior court below regarding whether to enforce or vacate Arbitrator Vivenzio’s Award involved a pure question of

law. As such, it is subject to de novo review by this Court. *Kitsap County Deputy Sheriff's Guild*, 167 Wn.2d at 434; *State v. Ford*, 125 Wn.2d 919, 923, 891 P.2d 712 (1995).

Where a statute or contract authorizes attorney fees, an appellate court reviews the trial court's determination of the amount of fees for abuse of discretion. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993); accord, *Boeing Co. v. Heidi*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Boeing Co.*, 147 Wn.2d at 90.

B. BECAUSE ARBITRATOR VIVENZIO ACTED LEGALLY AND PURSUANT TO HIS AUTHORITY UNDER A COLLECTIVE BARGAINING AGREEMENT, HIS DECISION IS NOT SUBJECT TO BEING VACATED BY A REVIEWING COURT AND MUST BE ENFORCED.

1. Under Well-Established Washington and Federal Law, an Arbitration Decision Must be Enforced if the Arbitrator Acted Lawfully and Within the Authority Given to Him Under the Collective Bargaining Agreement.

Washington public policy, like federal labor law policy, strongly favors finality of arbitration awards. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). Accordingly, the Supreme Court has set out an extremely limited standard of review for arbitration awards. *Clark County PUD No. 1 v. Int'l Bhd. of Elec. Workers, Local 125*, 150 Wn.2d 237, 246,

76 P.3d 248 (2003) (“*Clark County*”). Review of an arbitration decision under a constitutional writ of certiorari is limited to whether the arbitrator acted illegally by exceeding his or her authority under the contract. *Id.* at 245.

What this means is that when reviewing an arbitration proceeding, an appellate court does not reach the merits of the case. *Clark County*, 150 Wn.2d at 245. Courts instead must “give exceptional deference to an arbitrator’s decision, particularly in the realm of labor relations.” *Klickitat County v. Beck*, 104 Wn. App 453, 460, 16 P.3d 692 (2001). *Accord: Department of Agriculture v. State Personnel Bd.*, 65 Wn. App. 508, 515, 828 P.2d 1145 (1992). *See also City of Yakima v. Yakima Policy Patrolmans Association*, 148 Wn. App, 199, 194 P.3d 484 (2009) (“*Yakima*”) (“labor arbitration awards are afforded great deference”). “So long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.” *Yakima, supra*, 148 Wn. App. at 192-93.

The *Clark County* Court explained:

We conclude that our review [of an arbitration award] is extremely limited. We do not reach the merits of an arbitrator's legal conclusions; we evaluate only whether the arbitrator acted outside of the authority given to her by the parties

...

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

Id. at 239, 247.

The circumstances outlined by the *Clark County* Court include when there is a “conflict between the method set out in the award and the award itself,” or whether the arbitrator’s award is “illegal,” such that the award exceeds the authority granted to the arbitration by the parties’ contract. *Id.* at 247 (citing *DSHS v. State Pers. Bd.*, 61 Wn. App. 778, 785, 812, P.2d 500 (1991)).⁵

Furthermore, in finding that an “exceptionally limited” standard of review applies to review of labor arbitration awards, the *Clark County* Court noted that both parties voluntarily submit to binding arbitration in the collective bargaining context in order to achieve speedy and inexpensive resolutions to their disputes. *Clark County*, 150 Wn.2d at 253. “The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.” *Id.* (citing *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S.

⁵ See also *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998) (“The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority”).

593, 596, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

Therefore, an arbitration award may only be overturned when an arbitrator acts illegally by exceeding his or her authority under the contract. *Clark County*, 150 Wn.2d at 245, 247.

2. Arbitrator Vivenzio Acted Both Lawfully And Within the Authority Given to Him Under the Collective Bargaining Agreement.

Here, as was noted above, the parties agreed by contract that an arbitrator “shall have jurisdiction to decide any dispute arising under the agreement.” CP 60 - 85. The Port did not object to the arbitrator’s authority at the hearing, including the arbitrator’s authority to fashion an appropriate remedy.

Once a party submits to the authority of an arbitrator to resolve a dispute, that party cannot later accuse the arbitrator of acting outside of his or her authority, including with regard to the remedy, if any, ordered by the arbitrator. *See Clark County*, 150 Wn.2d at 249 (“The parties are bound by their consent to have the arbitrator fashion an appropriate remedy”).

Such authority is in any event implicit in the arbitrator’s role. In the absence of any explicit provision, the arbitrator is free to bring “his informed judgment to bear in order to reach a fair solution of a problem.

This is especially true when it comes to formulating remedies.’ ” *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 41, 108 S.Ct. 364 (1987) (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). “[W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect.” *Id.*, 484 U.S. at 38.

Indeed, the Port stipulated at the hearing and in its briefing that the proper issue before the Arbitrator was: “Was there just cause for the Port to terminate Mark Cann’s employment, and if not, what is the appropriate remedy.” CP 635.

After two full days of hearing, testimony from witnesses, the introduction of exhibits, and the submission of two lengthy post-hearing briefs by the parties, the Arbitrator rendered a 26-page decision that considered both the CBA and public policy. The Arbitrator carefully explained his view of the ‘Just Cause’⁶ standard against which the case was to be measured. He fully incorporated the “Seven Tests” of just cause, discussed above, and then went on to measure the evidence against

⁶ The CBA does not define “just cause,” thus, the arbitrator is the one who must interpret this phrase. See *E.I. DuPont de Nemours v. Grasselli Employees Independent Association of East Chicago*, 790 F.2d 611, 619 (7th Cir. 1986).

each and every one of the seven elements. Moreover, the Arbitrator explicitly considered his authority to modify a penalty, and found that he had such authority based on specific arbitral case law. CP 656.

There can be no serious dispute that the Arbitrator made an informed decision on authority and explained his decision and award, and in particular his decision to reduce Mr. Cann's termination to a 20-day suspension.

In light of the foregoing, there can be no doubt that the Arbitrator acted lawfully in accordance with the authority granted to him by the parties and the parties' agreement.

3. The "Public Policy" Exception is not Applicable to This Case.

- a. A court may not overturn an arbitration decision based on the relief granted by it unless that "specific relief" violates an "explicit, well defined and dominant" public policy.**

As was noted above, *Kitsap County Deputy Sheriff's Guild* held that an arbitration decision arising out of a collective bargaining agreement may be vacated if it violates public policy, but **only** if the arbitrator's decision violates an "explicit, well defined and dominant" public policy. 167 Wn.2d at 436. This requires the party challenging the decision to identify particular statutes, regulations or other legislative enactments which establish the public policy that allegedly exists; such a

policy cannot simply be inferred from, for example, “obvious moral or ethical standards.” 167 Wn. at 435 n. 4.⁷

The Court thus adopted in Washington the standard set forth by the United States Supreme Court, which requires that “a public policy must be explicit, well defined, and dominant for a court to overturn an arbitration decision.” *Id.* at 435, n. 4, quoting *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 67 (2000) (“*Eastern*”). “General considerations of supposed public interests” alone do not trigger the “exacting requirements” of the public policy exception to the enforcement of arbitration awards. *Id.* at 435, quoting *W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757 (1983).

Where the “public policy” challenge is directed not at the arbitration decision *in toto*, but rather at “specific relief” provided in that decision, it is the burden of the party challenging the decision to show that the “specific relief” violates the public policy. Thus, the party challenging

⁷ Both the *Kitsap County Deputy Sheriff’s Guild* case and the *Virginia Mason Hosp.* case, cited above, provide excellent illustrations of how this search for a “public policy exception” should be undertaken. In the former case, the Court methodically analyzed each purported source of the alleged public policy against reinstating a dishonest police officer – state criminal statutes and the *Brady* rule – before finding that no such policy was established. In *Virginia Mason Hosp.*, the Ninth Circuit equally methodically analyzed all purported “state and federal regulations regarding infection control in hospitals” to see if they were “positive law sources for the public policy” the hospital claimed was contravened by the arbitrator’s award. 511 F.3d at 916.

the arbitration decision has to demonstrate that public policy “specifically militates against the relief ordered by the arbitrator.” *Virginia Mason Hosp.*, 511 F.3d at 916, quoting *Stead Motors of Walnut Creek*, 886 F.2d at 1212-13.

- b. There is no public policy in Washington State which demands any particular punishment or sanction against an employee who, like Mr. Cann, is merely accused of, but not found guilty of, racial harassment.**

There is no public policy in Washington State which prohibits the Port, or any other public or private employer, from employing or re-employing a person who has been accused, but not found guilty, of having allegedly engaged in conduct that might be considered discriminatory, racist, or harassing, absent some substantial discipline having first been imposed. Indeed, such a policy would be patently unfair to all employees, as their employment could be dramatically impacted based on an unfounded accusation alone.

All that is present in the instant case is an accusation: the Port contended that Mr. Cann acted in a racist, discriminatory manner. However, the Arbitrator jointly selected by the Port and Local 286 to adjudicate this matter disagreed. Instead, after hearing the live testimony of witnesses and observing their demeanor, the Arbitrator made credibility determinations and found that Mr. Cann did not have racial motives when

he created the noose. Instead, as was noted above, the Arbitrator found that Mr. Cann engaged in a “clueless” prank making fun about the age of one of his co-workers, not a racially offensive act.

Under the doctrine of common law arbitration, the arbitrator is the final judge of both the facts and the law, and “no review will lie for a mistake in either.” *Clark County*, 150 Wn.2d at 245 (citing *Dep’t of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wash.App. 778, 785, 812 P.2d 500 (1991)). That means that this Court is bound by Arbitrator Vivenzio’s specific finding that Mr. Cann did not intentionally engage in racially discriminatory conduct.

In light of the fact that Mr. Cann was expressly found not to have engaged in racially harassing misconduct, there is clearly no public policy grounded in anti-discrimination statutes and concerns that justifies setting aside the arbitration award in Mr. Cann’s favor.

- c. **Even if Mr. Cann’s conduct had been judged to be racial harassment, which it was not, there is no “explicit, well defined and dominant” public policy in Washington State prohibiting employers from reinstating with only a 20-day suspension a worker who commits an act of racial harassment.**

As was noted above, Arbitrator Vivenzio found that Mr. Cann did not act in a racially discriminatory manner and that his act did not warrant more severe punishment than a 20-day suspension. However, even if the

Arbitrator had found that Mr. Cann's act was motivated by wrongful racial discrimination, there is no explicit policy in Washington State requiring a more severe punishment, such as the one-year suspension and other consequences imposed by the superior court in this case.

Washington's Law Against Discrimination ("WALD") established a Commission with the authority to eliminate and prevent discrimination in employment. RCW 49.60 *et. seq.* Among the rights guaranteed to Washington citizens is the right to "obtain and hold employment without discrimination." RCW 49.60.030(1)(a). However, there is nothing in the statute that states, or even remotely suggests, that a person who has committed a discriminatory act of some sort must, as an inevitable result, be suspended for an extended period of time (e.g., one year without pay), prior to being permitted to return to work, nor that such a person must be (for example) stripped of his/her "just cause discharge" rights under a collectively bargained agreement for four years, as was ordered by the superior court here.

Nor has the Port itself adopted any such formal policy or requirement. While the Port's own internal policy provides that "illegal harassment" can "result in disciplinary action up to and including termination," HR 22, CP 39 - 45, it does not require either termination or any particular length of suspension for any such offense. Moreover, the

Port permitted the employee who assisted Mr. Cann in making the noose to continue working in his job without any period of suspension at all. Award, p. 26, CP 659.

It is worth noting, in this context, that countless courts have concluded that there is no dominant or well-defined “public policy” generally opposing the reinstatement of employees who were fired for having engaged in acts of racial or other harassment. *See, e.g., Way Bakery v. Truck Drivers Local No. 164*, 363 F.3d 590, 596 (6th Cir. 2004) (enforcing arbitrator’s award reinstating employee who was terminated for making a racially offensive remark to a black coworker, noting that the arbitration award did not condone Zentgraf’s behavior, but rather punished him); *Gits Mfg. Co., L.L.C. v. Local 281 Intern. Union*, 261 F. Supp. 2d 1089, 1100 (S.D. Iowa 2003) (award reinstating employee who used racial epithet once did not violate public policy, because honoring arbitration award would not mean employer tolerates or condones racial discrimination); *N.Y. State Elex. & Gas Corp. v. System Council U-7*, 328 F. Supp. 2d 313, 316, 317 n. 8 (N.D.N.Y. 2004) (award of reinstatement for employee who had been terminated for expressing desire to harm certain other employees was not unenforceable as against public policy); *Local 509, S.E.I.U. v. Fidelity House, Inc.*, 518 F. Supp. 2d 317, 325 (D. Mass. 2007) (award reinstating employee discharged from home for

mentally disabled for jeopardizing health and safety not unenforceable against public policy, where employer could cite to no “explicit, well-defined and dominant” policy against reinstatement).

While these cases are not directly on point to the instant dispute, because the superior court in this case held that it was not “reinstatement” that contravened public policy, but “reinstatement with only a 20-day unpaid suspension,” the principle illustrated in these cases applies with equal force, to wit, that a reviewing court must enforce the remedy set forth in an arbitration award arising out of this type of alleged misconduct unless the public policy opposing that specific remedy is both clear and extremely compelling.

The United States Supreme Court warned against a broad expansion of the “public policy” exception to the enforcement of arbitration awards, such as occurred below, in *Misco*. In that case, the Court explained why it placed strict limits on the public policy exception: “[t]he reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government.” *Id.* at 37; *see also Eastern*, 531 U.S. at 63 (warning of that “courts should approach with caution pleas to divine further public policy in the area”); *Ariz. Elec.*

Power Coop., Inc. v. Berkeley, 59 F.3d 988, 992 (9th Cir.1995) (stating that “courts should be reluctant to vacate arbitral awards on public policy grounds”).

Similarly, in *Kitsap County*, the Washington State Supreme Court made clear that, in Washington as under federal law, the public policy exception is a “strict standard,” 167 Wn.2d at 438, which is not met simply because the Court believes the arbitrator’s decision “was not good public policy” or thinks the remedy ordered by the arbitrator was “distasteful.” *Id.* at 439. Rather, the public policy must have an “explicit, well defined and dominant” source in the law, and must be a public policy prohibiting the remedy ordered by the arbitrator, not merely a public policy condemning the underlying misconduct.

While there is no doubt a public policy in Washington to promote a discrimination-free workplace, this is by no means the same thing as a public policy that specifically requires an extended period of unpaid suspension and other onerous requirements, such as a four-year period of being stripped of contractual “just-cause discharge” rights, to be imposed on any employee who commits a discriminatory act. There is, to put it bluntly, not one statute, regulation, or judicial opinion which makes it a requirement that a person found guilty of a clueless prank on one occasion must be subjected to a discipline in excess of the 20-day suspension

imposed by Arbitrator Vivenzio. The public policy cited by the superior court that supposedly renders unacceptable “excessive leniency” in these types of situations simply does not exist.

- d. At heart, the superior court’s decision did not involve application of any “explicit, well defined and dominant” public policy opposing “excessive leniency,” but merely the impermissible substitution of the superior court’s judgment in place of Arbitrator Vivenzio’s.**

The superior court erred in adjusting Arbitrator Vivenzio’s award to have it comport with the court’s own opinion as to what would have been an appropriate disciplinary and remedial sanction for the arbitrator to have imposed. Arbitrator Vivenzio made his decision after a lengthy hearing and live testimony from witnesses. The U.S. Supreme Court recognized the unique role of arbitrators in disputes such as these, “especially ... when it comes to formulating remedies.” *Misco*, 484 U.S. at 41. The superior court’s decision to modify Arbitrator Vivenzio’s award under these circumstances therefore cannot be justified.

Moreover, there is even less of a rationale for a reviewing court to substitute its own judgment for that of the arbitrator on the grounds of “excessive leniency” than there might be, in a different situation, for refusing to enforce an arbitration decision on the grounds that reinstatement of an employee to work violates public policy. The implicit

or explicit rationale behind an arbitrator imposing any particular punishment on an employee like Mr. Cann, after all, is that the arbitrator has concluded that this punishment will be adequate to prevent any future offenses of this type by the employee. The Ninth Circuit Court of Appeals made this clear in *Stead Motors of Walnut Creek*, where it stated:

Ordinarily, a court would be hard-pressed to find a public policy barring reinstatement in a case in which an arbitrator has, expressly or by implication, determined that the employee is subject to rehabilitation and therefore not likely to commit an act which violates public policy in the future. As *Misco* recognized, **an arbitral judgment of an employee's "amenability to discipline" is a factual determination which cannot be questioned or rejected by a reviewing court.** 108 S.Ct. at 374; *see also United States Postal Serv. v. National Ass'n of Letter Carriers*, 839 F.2d 146, 149 (3d Cir.1988). **Judgments about how a specific employee will perform after reinstatement if given a lesser sanction are nothing more than an exercise of the arbitrator's broad authority to determine appropriate punishments and remedies.** *See Misco*, 108 S.Ct. at 372; *Enterprise Wheel*, 363 U.S. at 597, 80 S.Ct. at 1361 (general proposition that courts must allow an arbitrator to use his "informed judgment ... to reach a fair solution of a problem" is "especially true when it comes to formulating remedies")....

886 F.2d at 1212-13 (emphasis added).

The concern that "an arbitral judgment of an employee's 'amenability to discipline'" not be second-guessed by a reviewing court could hardly be more implicated than it is in the instant dispute. After all, in this case, it was Arbitrator Vivenzio, not the superior court, who heard

the testimony of the witnesses to the event that led to discipline being imposed upon Mr. Cann. It was Arbitrator Vivenzio who had the opportunity to observe the demeanor of those witnesses, while they were giving testimony under oath. It was Arbitrator Vivenzio who had the opportunity to see, hear, and observe Mr. Cann during his testimony and throughout the arbitration hearing.

Who better, then, than Arbitrator Vivenzio to determine what discipline was most appropriate for Mr. Cann? It is simply not compatible with any degree of deference to an arbitrator's decision regarding "remedy," therefore, to sanction a superior court in substituting its own opinion regarding what discipline is, or is not, "too lenient" for the opinion of the duly appointed arbitrator, given that the superior court could only have at best second-hand knowledge of some or all of the facts most pertinent to such a determination.

C. THE SUPERIOR COURT ERRED IN FAILING TO EXERCISE DISCRETION TO DETERMINE AND AWARD TO LOCAL 286 THE REASONABLE VALUE OF MR. ROBERTS' LEGAL SERVICES IN THIS CASE.

1. Local 286 Was Entitled to Be Awarded Its Reasonable Attorneys Fees Incurred in Obtaining a Judgment for Back Wages for Its Member.

RCW 49.48.030 states that reasonable attorney fees "shall be assessed" against an employer "[i]n any action in which any person is

successful in recovering judgment for wages or salary owed to him.” It is well established under Washington law that when a labor organization is successful in recovering judgment for wages or salary owed to its represented employees, it is a “person” entitled to reimbursement under this provision. *IAFF, Local 46 v. City of Everett*, 146 Wn.2d 29, 44-46, 42 P.3d 1265 (2002); *see also Hitter v. Bellevue School District No. 405*, 66 Wn. App. 391, 396-97, 832 P.2d 130 (1992) (arbitration proceeding is an “action,” and arbitration award is a “judgment,” within meaning of RCW 49.48.030), *review denied*, 120 Wn.2d 1013 (1992).

Awards for attorney fees under the statute that allows such awards for successful actions to recover wages or salary are not limited to judgments for wages or salary earned for work performed, but, rather, are recoverable whenever a judgment is obtained for any type of compensation due by reason of employment, specifically including “back pay” awards. *Gaglidari v. Denny’s Restaurants*, 117 Wn.2d 426, 449, 815 P.2d 1362 (1991) (statute construed to include awards that were not for wages for work actually performed, but rather, money due by reason of employment); *Bates v. City of Richland*, 112 Wn. App. 919, 940, 51 P.3d 816 (2002) (accord).

The Superior Court recognized Local 286’s right to attorney fees pursuant to RCW 49.48.030 and granted a partial attorney fee award.

However, the Superior Court denied the fees of Terry Roberts, Local 286's in house counsel, on the basis that "adequate documentation" did not accompany the fee request. CP 738-739 (Order granting attorneys fees motion in part).

2. The Superior Court's Decision to Deny Local 286 Any Attorneys Fees For the Legal Work Performed by In-House Counsel Terry Roberts Was an Abuse of Discretion.

The superior court's decision to entirely deny Mr. Roberts' fees in this case was unreasonable, as Local 286 provided evidence that was more than sufficient to permit the court to make a determination regarding the reasonable value of his work.

Washington courts apply the lodestar approach in calculating reasonable attorney fees, which involves the following considerations:

The trial court must determine the number of hours reasonably expended in the litigation. To this end, the attorneys must provide reasonable documentation of the work performed. **This documentation need not be exhaustive or in minute detail**, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.). The court must limit the lodestar to hours reasonably expended...

Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193, 203 (1983) (emphasis added); *see also Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 759, fn. 5, 162 P.3d 1153,

1162 (2007) (“Trial courts determine a reasonable attorney fee award by calculating a lodestar figure, which is the market value of the attorney's services calculated by multiplying the hours reasonably expended in the litigation by a reasonable rate of compensation”).

“In principle, [an attorney’s fee award] is grounded specifically in the market value of the property in question—the lawyer's services.” *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210, 1215-1216 (1993)(en banc)(internal citations omitted). Documentation “is not dispositive on the issue of the reasonableness of the hours.” *Scott Fetzer Co.*, 122 Wn.2d at 151, citing *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 744, 733 P.2d 208 (1987).

The lodestar approach is not a fill-in-the-blank calculation where the court inserts an exact number of billed hours and an hourly rate to reach an award amount. Rather, the method relies on the court’s independent judgment of “reasonableness”:

“[T]he trial court, instead of merely relying on the billing records of the plaintiff’s attorney, should make an independent decision as to what represents a reasonable amount for attorney fees”. *Tampourlos*, at 744, 733 P.2d 208. Along with the considerations outlined above, the trial court may also examine reasonableness of the hours claimed in light of the testimony of other attorneys called as experts.

Scott Fetzer Co., 122 Wn.2d at 151.

Indeed, in *State v. Weston*, 66 Wn. App. 140, 148-49, 831 P.2d 771, 776 (1992), the court specifically noted that a breakdown of the number of hours spent on each task is not required for an attorney fee award, reasoning:

[A]ppellant claims that even if an award of attorney fees is authorized, the trial court erred in making its award because there was insufficient evidence to determine the amount of the award. Appellant cites *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 675 P.2d 193 (1983), for the proposition that the evidence in the present case was insufficient to justify an award because it did not include a breakdown of time spent on each task. Appellant contends that such a breakdown is required in order for the court to determine hours spent on "unsuccessful claims, duplicated effort, or otherwise unproductive time." *Bowers*, at 597, 675 P.2d 193. We disagree.

The court in *Bowers* stated that the documentation for an award of attorney fees need not be exhaustive, and it specifically stated what was required to make a reasonable calculation: the total number of hours worked, the type of work performed, and the category of attorney who performed the work. *Bowers*, at 597, 675 P.2d 193. This information was provided in the present case.

See also, Sherwood v. Wise, 132 Wn. 295, 305-06, 232 P. 309 (1925) (absence of evidence on which to fix attorney's fees is no reason for disallowing them); *Swenson v. Lowe*, 5 Wn. App. 186, 194, 486 P.2d 1120 (1971) (court properly awarded attorney's fees without evidence where "the legal services for which the fee was fixed were rendered in litigation before the court passing on the value of such services, and the

court, on the basis of his familiarity with the case derived from his participation, was, despite the absence of opinion testimony, empowered to determine the reasonableness of the fee to be awarded”).

In the present case, the court erred by not providing an award for Mr. Roberts’ attorney’s fees, as Local 286 provided ample evidence to support its fee request. First, Mr. Roberts’ declaration provides clear evidence of the number of hours worked and of the type of work performed:

- At least 10 hours interviewing witnesses in preparation for Mr. Cann’s arbitration;
- 2 hours reviewing statements in preparation for the arbitration;
- 16 hours preparing requests for information;
- 4 hours reviewing responses to the requests for information;
- 12 hours preparing outlines for arbitration testimony;
- 3 hours preparing witnesses for testimony;
- 4 hours collecting, sorting and reviewing exhibits for arbitration;
- 12 hours in the arbitration hearing;
- 24 hours researching the law and arbitration decisions post-hearing;
- 40 hours writing the post hearing arbitration brief;

- One hour in oral conference with the arbitrator and Port counsel;
- 16 hours researching the law concerning the Port's action to vacate the arbitration award;
- 48 hours drafting the argument in opposition to the Port's position and in support of the Union's position;
- 8 hours preparing for oral argument in superior court; and
- One hour in superior court in oral argument.

CP 736-737 [Roberts declaration].

In total, Local 286 requested fees for 128 hours of Mr. Roberts' time working on Mr. Cann's arbitration case and 73 hours working on the legal issues related to subsequent Superior Court litigation. Roberts Dec ¶ 11, CP 737. This request was quite conservative and excluded numerous hours of clearly "billable" conferences critical to the Cann case; it did not include the many hours of internal Union conferences Mr. Roberts participated in concerning the arbitration and subsequent litigation, nor did it include the several hours of conferences and conversation Mr. Roberts had with Port personnel. Roberts Dec ¶ 10, CP 736.

Lastly, Mr. Roberts' declaration clearly presented evidence that he is in the category of senior attorney, having exclusively practiced labor and employment law for the past 27 years. Roberts Dec. ¶¶ 4,5, CP 736.

Another Washington attorney in good standing, Martin S. Garfinkel, attested without contradiction that based on Mr. Roberts' 27 years of experience, a rate of \$350 per hour is "reasonable and fair." CP ___ (Declaration of Martin S. Garfinkel, page 2, par. 5).⁸ Thus, Local 286 presented all the evidence as required in *Bowers* for the court to make an independent decision as to a reasonable amount for Mr. Robert's attorney fees in the matter.

Local 286 presented the requisite evidence for superior court to determine a reasonable attorney fee award for Mr. Roberts' time on the McCann case. The Port did not dispute any evidence contained in Mr. Robert's declaration, yet the court declined to award any fees due to lack of documentation. The superior court's denial of Local 286's fee request concerning Mr. Roberts' time was unreasonable; therefore, the Court should reverse the denial of the request and order the superior court to issue a reasonable attorney fee award concerning Mr. Roberts' fees.

VI. CONCLUSION

For all the reasons stated herein, Local 286 respectfully requests that this Court reverse the superior court's orders as to which error has been assigned and remand for further proceedings consist therewith.

⁸ The proper CP number will be provided once a supplemental designation of clerk's papers is filed and a corresponding index of clerk's papers is generated.

RESPECTFULLY SUBMITTED this 16th day of June, 2010.



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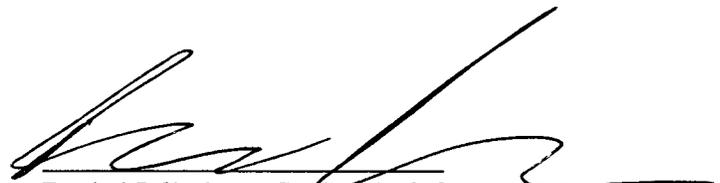
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2010, I caused the original and one copy of the foregoing Brief of Appellant to be delivered via legal messenger to:

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And a true and correct copy of the same to be delivered via legal messenger to:

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