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NO. 89344-6

SUPREME COURT
OF THE STATE OF WASHINGTON

KITSAP COUNTY DEPUTY SHERIFFS' GUILD,
Respondent,

v.

KITSAP COUNTY,
Petitioner.

**APPELLANT KITSAP COUNTY'S REPLY BRIEF AND BRIEF IN
RESPONSE TO CROSS-APPEAL**

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I. INTRODUCTION¹

At any given moment, jurisdictions throughout the state are engaged in collective bargaining with the uniformed personnel in their employ. Collective bargaining is often contentious and the tension should be obvious: Our uniformed public servants want and deserve appropriate compensation for their critical work on behalf of us all, while our state, counties, cities, and fire districts just as rightfully must protect and preserve the public fisc needed to carry out the obligations of governing.

For uniformed employees and their employer, statutory interest arbitration is an extension of the collective bargaining and dispute resolution process. During bargaining and mediation, neither party is required to agree to a proposal or make a concession. When agreement cannot be reached however, the dispute is submitted to an interest arbitration panel. The panel is a state agency charged by law to determine the terms and conditions of a contract, considering several statutory factors so as to award a fair and responsible collective bargaining agreement.

The interest arbitration panel's Award was a compromise of the County and Guild's proposals, and the Superior Court's striking of one

¹ Kitsap County submits this brief in reply to the Kitsap County Deputy Sheriffs Guild's response brief. This brief also contains the County's response to the Guild's Cross-Appeal. The County incorporates its Petition for Direct Review and Opening brief as if fully set forth herein.

part of the Award changed the entire dynamic of the complete Award. Just as the parties make proposals as package, when the panel fashioned its decision it considered the parties' proposals, current market and economic conditions, the County's finances, and the increasing cost of health care. Both parties won some and lost some. CP 70-80.

As explained in the County's Petition for Direct Review, the Superior Court's ruling has a deleterious impact on collective bargaining state-wide. Consequently, this Court's attention is needed to resolve the dispute, and restore finality to the interest arbitration proceedings, reversing the Superior Court's substantive and procedural errors.

II. RESPONSE TO COUNTERSTATEMENT OF THE CASE

The declaratory judgment complaint filed by the Guild should have been filed as an appeal of the decision of the interest arbitration panel.² Review of an interest arbitration award is based on the record before the panel. The only part of the interest arbitration record that was before the Superior Court is the Award (CP 255-287), a few pages of the parties' expired collective bargaining agreement (CP 289-292), the 2012 premium

² This action began when the Guild filed a complaint for declaratory judgment with the Superior Court to prevent implementation of the Interest Arbitration Award. CP 1-47. The County answered the Complaint. CP 102-145. The Guild filed a motion for summary judgment. CP 204-227. The County challenged not only the Guild's failure to follow procedures for obtaining review of the arbitration panel's award, but contended that the standard to be applied was judicial review of the arbitration panel's decision under RCW 41.56.450, not CR 56 standards for summary judgment. CP 340-351.

and contribution rate sheet for deputy sheriff employees (CP 304), and Guild-selected excerpts of the transcript of the interest arbitration proceedings (CP 314-316, 318-325). Other records submitted to the Superior Court were not part of the record before the panel.³ The Guild's Complaint should have been dismissed on these grounds alone.

The County argued in the alternative to dismissal on procedural grounds that an examination of the Award, on its face, should be sufficient for the Superior Court to render a decision that, as a matter of law, the Award is not arbitrary or capricious. CP 340-351.

Evidence beyond what was in the record before the panel is inappropriate and should not be considered.⁴

III. ANALYSIS AND ARGUMENT IN REPLY

A. Standard of Review.

Judicial review of an interest arbitration decision is governed by the Public Employment Collective Bargaining Act (PECBA), chapter 41.56 RCW, and the Administrative Procedures Act (APA), chapter 34.05 RCW.⁵

³ CP 294-295, 297, 299, 301-302, 306, 308, 310-312, 368-369, 371-372, 374, 376, 378, 417-432, 434.

⁴ In the proceedings before the Superior Court, the County offered evidence to rebut evidence offered by the Guild in support of its motion for summary judgment. CP 334-386.

⁵ RCW 41.56.165; RCW 41.56.452; RCW 34.05.476; RCW 34.05.514; RCW 34.05.558.

Both parties acknowledge that interest arbitration awards are reviewed solely upon the question of whether the decision of the panel was arbitrary or capricious. “The party asserting invalidity bears the burden of establishing it.” *Point Allen Service Area*, 128 Wn.App. 290, 297, 115 P.3d 373 (2005); *citing* RCW 34.05.570(1) and *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998).

The arbitrary or capricious standard is applied to the record before the interest arbitration panel.⁶ Although the Guild failed to follow the procedures for obtaining review of the arbitration panel’s Award and the complete administrative record was not before the Superior Court, an examination of the decision, on its face, is sufficient for this Court to render a decision that, as a matter of law, the Award it is not arbitrary or capricious. Indeed, the fundamental issues of broad public import, and the urgency for resolution considering that the County and its employees still have no collective bargaining agreement establishing wages or benefits for 2010 though 2012, warrant the Court reviewing the Award and determining whether it was arbitrary or capricious.

⁶ *Union Local 1296, Intern. Ass’n of Firefighters v. City of Kennewick*, 86 Wn.2d 156, 162, 542 P.2d 1252 (1975); *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn.App. 444, 204 P.3d 928 (2009) (A court considering a petition for judicial review of an administrative decision may not generally admit new evidence or decide disputed factual issues); *review denied* 166 Wn.2d 1029.

B. Review Under the Arbitrary or Capricious Standard is Narrow and Deferential.

Despite the Guild's contention otherwise, the arbitrary or capricious standard is a narrow, deferential standard of review. We agree that courts have inherent power "to review administrative decisions for illegal or manifestly arbitrary acts." *Freeman v. State*, 178 Wn.2d 387, 403, 309 P.3d 437, 445 (2013); quoting *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998) ("The superior court has inherent power provided in article IV, section 6 of the Washington State Constitution to review administrative decisions for illegal or manifestly arbitrary acts.").

However, "[i]f the administrative agency has acted honestly, with due deliberation, within the scope of and to carry out its statutory and constitutional functions, and been neither arbitrary, nor capricious, nor unreasonable, there is nothing left for the courts to review." *Freeman v. State*, 178 Wn.2d at 403; quoting *Deaconess Hospital v. Washington State Highway Commission*, 66 Wn.2d 378, 406, 403 P.2d 54 (1965). "This court also observed, '[t]hat the courts may have reached a decision, made a choice or a conclusion different from that of the administrative agency, or taken wiser or more sensible action, does not empower them to do so.'"

Freeman v. State, 178 Wn.2d at 403-404; quoting *Deaconess Hospital v. Washington State Highway Commission*, 66 Wn.2d at 406.

Applying the arbitrary or capricious standard here, the only question is whether that portion of the Award that increased employees' share of health insurance premiums retroactively,⁷ and off-set the impact of the increase in employees' share of health insurance premiums with a 0.5 percent wage increase, was unconstitutional or in violation of the panel's statutory powers. The Award is neither unconstitutional nor contrary to any statute.

C. The Award is Not Arbitrary or Capricious.

The Guild's claims that the Award (1) constituted an unlawful taking of property in violation of the due process provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution; (2) violated Washington's wage deduction laws, RCW 49.52.050 and RCW 49.52.060; and (3) imposed terms that conflicted with the open enrollment provisions of the parties' collective bargaining agreement. All claims fail.

First, property interests are created by state law, not the U.S. Constitution, and no legitimate claim of entitlement to the property interest claimed by the Guild exists under state law. Second,

⁷ Stated alternately, the panel decreased the County's contributions for employee-only premiums from 100 percent to 90 percent and decreased the County's contributions for dependent premiums from 90 percent to 85 percent.

Washington's wage deduction laws are not applicable to the Award or its implementation. Third, neither the Award nor its implementation violates the open enrollment provisions of the parties' expired collective bargaining agreement.

1. Property Interests are Created by State Law Not the U.S. Constitution.

Even though the County was prohibited from unilaterally changing wages, benefits, or other conditions of employment during the pendency of interest arbitration proceedings, the Guild contends that compensation paid by the County after the collective bargaining agreement expired vested with employees as constitutionally protected property right.

"Property interests are created and their dimensions are defined by rules which stem, not from the constitution, but from state law." *Giles v. Department of Social and Health Services, Indian Ridge Treatment Center*, 90 Wn.2d 457, 460-461, 583 P.2d 1213 (1978); citing *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) ("[T]he claim of entitlement must be decided by reference to state law"); citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

"[P]rotected property interests include all benefits to which there is a 'legitimate claim of entitlement.' Such a claim is 'more than an abstract need or desire for' and 'more than a unilateral expectation of' the benefit.

Property interests are created by ‘state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.’” *Conard v. University of Washington*, 119 Wn.2d 519, 529, 834 P.2d 17, 22 (1992), *cert. denied*, 510 U.S. 827 (1993); *quoting Board of Regents of State Colleges v. Roth*, 408 U.S. at 577.

“‘A person’s interest in a benefit is a “property” interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.’” *Conard v. University of Washington*, 119 Wn.2d at 529; *quoting Perry v. Sindermann*, 408 U.S. 593, 601, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972).

“Protected interests also may be created if there are statutes or other rules which contain ‘substantive predicates’ or ‘particularized standards or criteria . . .’ to guide the discretion of decision makers and which contain ‘explicitly mandatory language,’ i.e., specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow . . .” *Conard v. University of Washington*, 119 Wn.2d at 529; *quoting Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462-463, 104 L.Ed.2d 506, 109 S.Ct. 1904 (1989) (Citations omitted.)

The test to determine if a property interest has been created appears in a variety of contexts. In *Conard*, the property interest at issue was athletic scholarships. *Conard*, 119 Wn.2d 530 (“Unless a legitimate claim of entitlement to the renewal of plaintiffs’ scholarships was created by the terms of the contract, by a mutually explicit understanding, or by substantive procedural restrictions on the part of the decision maker, plaintiffs have no constitutional due process protections”).

In *Gray v. Pierce County Housing Authority*, 123 Wn.App. 744, 756, 97 P.3d 26 (2004), the property interest at issue was public housing. In *Taylor v. Enumclaw School Dist. No. 216*, 132 Wn.App. 688, 696-697, 133 P.3d 492 (2006), the protected property interest at issue was the right to engage in interscholastic sports. In *Reynolds v. Kirkland Police Commission*, 62 Wn.2d 720, 724, 384 P.2d 819 (1963) and *Yantsin v. City of Aberdeen*, 54 Wn.2d 787, 788, 345 P.2d 178 (1959), the protected property rights at issue were continued public employment.

In *Gray v. Pierce County Housing Authority*, the Court of Appeals recognized that “courts have approached claims of entitlement to a government benefit with care and have generally required claimants to show explicit, written statements establishing such an entitlement.” *Gray v. Pierce County Housing Authority*, 123 Wn.App. at 756.

The Guild must establish the source of the entitlement asserted here: 100 percent employer-paid health insurance benefits for employees and 90 percent employer-paid health insurance benefits for dependents paid after the collective bargaining agreement expired and as a consequence of pending interest arbitration proceedings. The Guild has not done so.

2. RCW 41.56.470 Does Not Create a Vested Right in Wages and Benefits Maintained During the Pendency of Interest Arbitration Proceedings.

When uniformed personnel and employers of uniformed personnel are unable to reach agreement on mandatory subjects of bargaining, the Public Employment Collective Bargaining Act (PECBA) mandates that the dispute be submitted to interest arbitration proceedings. *Municipality of Metro Seattle v. Public Empl. Relations Comm'n*, 118 Wn.2d 621, 632, 826 P.2d 158 (1992) (“RCW 41.56.450 requires interest arbitration between law enforcement and fire fighter unions and their employers when contract negotiations and mediation have failed to produce a contract”).

“RCW 41.56.030(4), and the provisions of [RCW 41.56.430 through 41.56.950], dictate a conclusion that the legislature has deprived employers and unions of their usual rights in collective bargaining, including the right to strike, the right to lock out, the right to say ‘no,’ and

the right to waive the interest arbitration process itself.” *Whatcom County Deputy Sheriffs Guild v. Whatcom County*, Decision 7244-A, *19-21 (PECB, 2003). “Interest arbitration applies to any impasse on a subject of collective bargaining.” *Id.*, at *21.

“[I]nterest arbitration is not a matter of contract.” *Snohomish County Public Transp. Ben. Area v. State Public Employment Relations Com'n*, 173 Wn.App. 504, 510, 294 P.3d 803, 806 (2013). “[Interest arbitration] is used to determine the terms of the contract between the parties when they cannot negotiate an agreement, and it ‘results in a new agreement.’” *Almquist v. City of Redmond*, 140 Wn.App. 402, 404, 166 P.3d 765 (2007) quoting *City of Bellevue v. International Ass’n of Firefighters, Local 1604*, 119 Wn.2d 373, 376, 831 P.2d 738 (1992). “If parties to a CBA are unable to agree on the terms of a subject of bargaining, they are said to have reached an ‘impasse.’” *Yakima County v. Yakima County Law Enforcement Officers’ Guild*, 174 Wn.App. 171, 176 n.2, 297 P.3d 745 (2013).

Thus, when the Guild and County reached impasse in negotiations on a successor collective bargaining agreement, the interest arbitration

process prescribed in RCW 41.56.450 and the status quo obligations of RCW 41.56.470 arose.⁸

While terms and conditions contained in an expired contract are not subject to unilateral change, “those terms and conditions no longer have force by virtue of the contract.” *Litton Financial Printing Div., a Div. of Litton Business Systems, Inc. v. N.L.R.B.* 501 U.S. 190, 206, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991); citing *Office and Professional Employees Ins. Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc.*, 783 F.2d 919, 922 (CA9 1986) (“An expired [collective-bargaining agreement] . . . is no longer a ‘legally enforceable document’” (citation omitted)); cf. *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 25–27 (CA2 1988) (Section 301 of the LMRA, 29 U.S.C. §185, does not provide for federal court jurisdiction where a bargaining agreement has expired, although rights and duties under the expired agreement “retain legal significance because they define the status quo” for purposes of the prohibition on unilateral changes).

Thus, the terms and conditions of the Guild and County’s expired 2007-2009 contract continued in effect by operation of law. Unless the

⁸ The requirements of RCW 41.56.470--which prohibit either party from unilaterally changing existing wages, hours, and other conditions of employment during interest arbitration proceedings, are commonly referred to as the obligation to maintain the “status quo.”

parties' contract expressly or impliedly provided otherwise, the terms and conditions in the expired contract are no longer agreed upon terms.

3. The Parties' Expired Contract Contains No Terms Promising that the Level of Health Insurance Premiums Paid by the Employer Would Continue After Termination of the Contract.

While a complete copy of the parties' expired 2007-2009 collective bargaining agreement was a part of the record before the interest arbitration panel, it was not part of the record before the Superior Court. Only an excerpt of the parties' expired collective bargaining agreement containing the terms of the parties' agreement for health and welfare benefits for years 2008 and 2009 was offered by the Guild in support of its summary judgment motion to the Superior Court. CP 289-292.

Nothing in the 2008-2009 contract terms for health and welfare benefits evidence any right of entitlement that they would continue after the contract expired. *Id.* The Guild has pointed to no contract terms that give rise to a "legitimate claim of entitlement" to 100 percent employer-paid employee premiums and 90 percent employer-paid dependent premiums after the contract expired. The fact that the County proposed in negotiations and during interest arbitration that employees should pay a larger share of employee-only and dependent premiums is evidence that no "mutually explicit understanding" that the County's payment of

premiums at 100/90 percent levels would continue after the contract expired.

The health insurance premiums that the County paid on behalf of employees and their dependents are not a pension, deferred compensation, or contract expectancy, and the Guild's claims that pension retirement benefits cases are analytically similar should be rejected. Pension and other retirement plans are deferred compensation and as such are unique property rights.

4. The Wage Deduction Laws are Simply Inapplicable.

The Guild contends that the Award requires a rebate of wages "owed to employees" or "deprive[s] an employee of earned wages," citing RCW 49.52.050 and .060. As discussed previously, the County did not contractually agree to continue to pay 100 percent of the employee-only insurance premiums and 90 percent of dependent premiums, and the Award does not require the County to do so. Thus, the payments made by the County by operation of the obligation not to make unilateral changes during interest arbitration proceedings does not convert the amounts paid to amounts "owed to employees" or "earned by employees."

The Guild relies on RCW 49.52.050 for the contention that no deduction can be made from employees' wages without their consent. As discussed earlier in this brief, employees effectively consent to have their

compensation established by an arbitration panel when impasse is reached and the impasse is submitted to interest arbitration. *International Ass'n of Fire Fighters, Local 1445 v. Kelso*, 57 Wn.App. 721, 732, 790 P.2d 185, *rev. denied*, 115 Wn.2d 1010 (1990) (“It is axiomatic that, in bargaining, the parties retain the power of decision and are not required to agree. . . . Conversely, parties in arbitration have relinquished the power of decision to the arbitrators.”); *citing* RCW 41.56.030(4); *City of Bellevue v. International Ass'n of Fire Fighters, Local 1604, supra*, 119 Wn.2d at 384 (“Statutory interest arbitration procedures are an instance where the statute requires the parties to agree to a proposal or make a concession”).

Citing to the last sentence of RCW 49.52.050 the Guild argues that no deduction from employee wages may be made because the deduction is not “openly, clearly and in due course recorded on the books.” But, the Guild sued to prevent implementation of the Award. If an injunction prohibiting implementation of the Award had not been issued by the Superior Court, the parties would likely have used the customary process to record the applicable wages and deductions on the books. The terms of the Award would have been incorporated into a collective bargaining agreement covering 2010 through 2012, the agreement would be reviewed and executed by the parties, and the County’s payroll staff would process payments and pay stubs for each of the deputies. The processing and

payment of a government agency's payroll is about as open, clear, and recorded as any.

5. Open Enrollment Was Considered, Accounted For, and the Decision was Within the Panel's Statutory Authority.

The arbitration panel considered and accounted for the Guild's objections about deputies who might want to opt out of paying more for health insurance. The Award states:

35. The Guild argued strenuously against a retroactive premium participation change and pointed out that a Deputy who might have chosen to shift to a less expensive plan because of the participation rate change would have no opportunity to do so. The additional 0.5% pay increase that becomes effective at the same time as the insurance cost shift is the panel's answer to that concern, (even though the neutral arbitrator has no doubt of our authority to award retroactive premium shifts).

CP 278 (Award, p. 24 n. 35).

Thus, the panel offset the retroactive increase in the amount employees would pay for insurance premiums by an additional pay increase.

While the County believes that review here is limited to the Award itself, an examination of the expired contract reveals the parties agreed that employees could change plans and add dependents during open enrollment annually in November. CP 292. The Guild has failed to show that the County violated the status quo by failing to provide open

enrollment after the contract expired and during the pendency of interest arbitration proceedings.

In increasing employees' contributions toward health insurance, the panel also considered the public interest, stating that "100 percent paid premiums for health benefit plans are no longer standard nor are they sustainable." CP 278 (Award, p. 24). Nothing in the Award would lead a reasonable person to conclude that the Award was irrational or oppressive to employees.

The Guild acknowledges that the arbitration panel is "extended fairly wide berth to arrive at a conclusion of what the precise wages, benefits and terms" of a collective bargaining agreement should be. Respondent's Reply Brief, at 11. The Guild also concedes that the PECBA allows that a collective bargaining agreement may contain retroactive terms. *Id.*, at 25.

The decision is *not* outside of the panel's statutory powers. Other than the factors listed in RCW 41.56.465, nothing in the PECBA limits the authority of an arbitration panel to determine terms and conditions of agreements between counties and its law enforcement officers. And as discussed previously, RCW 41.56.950 expressly permits terms and conditions of a subsequent collective bargaining agreement to be

retroactive to the termination of the previous agreement between the same parties.

The Guild convinced the Superior Court to substitute its judgment for that of the panel, contrary to a number of decisions by the Supreme Court on this particular point.

D. The Superior Court Erred in Reforming the Award.

In the event that the Award is deemed arbitrary or capricious, the Award should be remanded back to the panel. County's Opening Brief, pp. 37-38, *citing Int'l Union of Operating Engineers*, 176 Wn.2d at 725-726 ("We also take this opportunity to clarify that a trial court that properly vacates an arbitration award does not have authority to impose its own remedy. Instead, trial courts facing such a situation should remand for further proceedings") (cited cases omitted).

The Guild argues that the severability clause in the parties' collective bargaining agreement would allow the Court to sever any invalid provision from the Award. The Guild's argument is overreaching and relies on evidence not in the record. The 2007-2009 contract has expired and no successor contract is in place. And the severability clause applies to language in the contract itself, not an interest arbitration award.

The Guild also argues that the authorities cited by the County are grievance arbitration cases and the standards applied in those cases should

not apply to interest arbitration cases. The County acknowledges that in “interest arbitration,” the arbitrator is charged with determining new terms and conditions of employment, while in “rights arbitration,” the arbitrator is asked to resolve disputes involving the interpretation or application of terms and conditions of employment already agreed to in the CBA. *Citgo Asphalt Refining Co. v. Paper, Allied-Indus., Chemical and Energy Workers Intern. Union Local No. 2-991*, 385 F.3d 809, 817 (3rd Cir. 2004); *citing Lodge 802, Int’l Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, ALF-CIO v. Pennsylvania Shipbuilding Co.*, 835 F.2d 1045, 1046-47 (3d Cir.1987).

“To the extent that Washington law is based on federal law, the Court may look to federal decisions and analysis for guidance. . . RCW 41.56 is substantially similar to the National Labor Relations Act, 29 U.S.C.” *Pasco Housing Authority v. State, Public Employment Relations Com’n*, 98 Wn.App. at 815; *citing American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 37, 499 P.2d 869 (1972); *and State ex rel. Washington Fed’n of State Employees v. Board of Trustees*, 93 Wn.2d 60, 67, 605 P.2d 1252 (1980).

Like the federal courts, this Court should adopt the grievance arbitration framework of analysis to the review of interest arbitration cases. *Local 58, Intern. Broth. of Elec. Workers, AFL-CIO v.*

Southeastern Michigan Chapter, Nat. Elec. Contractors Ass'n, Inc., 43 F.3d 1026, 1030 (6th Cir. 1995). In reviewing an interest arbitration award, the Sixth Circuit Court of Appeals adopted such an approach, reasoning as follows:

The district court analyzed this issue under the framework articulated by the Supreme Court in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S.Ct. 364, 369, 98 L.Ed.2d 286 (1987), that the CIR's award ordering the parties to execute a material handlers agreement "must draw its essence" from the Inside Agreement. Additionally, under *Misco*, an arbitration award that is contrary to public policy must not be enforced. . .

We find that this framework of analysis, formulated in the context of grievance arbitration, is applicable to interest arbitration with slight modification. Interest arbitration, unlike grievance arbitration, focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement. Thus, the arbitrator is not acting as a judicial officer, construing the terms of an existing agreement and applying them to a particular set of facts. Rather, he is acting as a legislator, fashioning new contractual obligations. Consequently we recognize that even greater deference must be paid to the arbitrator's decision, once it is established that he had the authority to resolve the issue.

Southeastern Michigan Chapter, Nat. Elec. Contractors Ass'n, Inc., 43 F.3d at 1030, citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36484 U.S. at 37-38.

If the Award needed reformation, it should have been the arbitration panel not the Superior Court that did so. The panel expressly tied the changes in wages to the changes in health insurance premiums.

To excise the health insurance changes from the Award would be engaging in legislative action.

E. An Award of Attorneys Fees in Review of Interest Arbitration Award is Improper.

The Guild seeks an award of attorney's fees, relying on RCW 49.48.030, the wage claim statute. However, attorneys fees are not recoverable in reviews of interest arbitration awards.

In *City of Moses Lake v. International Ass'n of Firefighters, Local 2052*, 68 Wn.App. 742, 748-749, 847 P.2d 16 (1993), which involved review of an interest arbitration decision, employees' request for recovery of attorneys fees was rejected. The court stated:

RCW 49.48.030 provides for the award of attorney fees to persons successful in recovering judgment for wages or salary owed. Here, the City sought review of the arbitrators' award in Superior Court, as provided in RCW 41.56.450. While the court order enforcing the award results in a salary increase to the Association's members, that effect is corollary, rather than central, to the Legislature's purpose of providing judicial review of the arbitration process. We therefore hold the wage statute does not apply to an action brought under RCW 41.56.450. The Superior Court did not err when it denied the Association's request for attorney fees under RCW 49.48.030.

Id. Like the case in *City of Moses Lake*, the Complaint here concerns review of an interest arbitration award and the Guild's request for recovery of attorneys fees is improper and should be rejected.

In addition, the wage claim statute applies only to wages to which an employee is “entitled.” RCW 49.46.090. At the moment the Award was issued it was “final and binding upon both parties . . .” RCW 41.56.450. Thus, employees are not entitled to the compensation claimed by the Guild in this action unless the Court determines that the Award is arbitrary or capricious.

IV. CONCLUSION

An enforceable expectation of a state law protected property interest can exist only if the employer, by statute or contract, has actually granted some form of guarantee. Nothing in labor law doctrine establishes a vested property right in health insurance premiums paid after a collective bargaining agreement has expired and during the period of status quo.

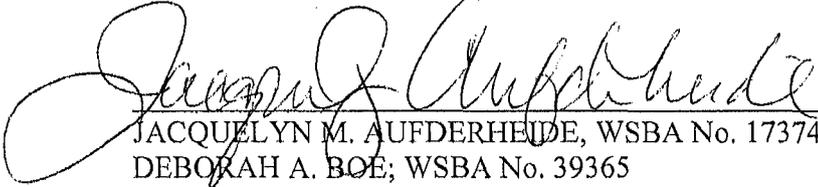
To hold that status quo payments made by an employer after the parties’ contract has expired as required by law during interest arbitration proceedings vests as a property right in employees effectively removes the employer’s power of decision which the PECBA strives to preserve. Parties to collective bargaining may agree to make increases and decreases in employee compensation retroactive, and likewise an arbitration panel may make changes in employee contributions for health insurance retroactive.

Kitsap County respectfully requests that the Supreme Court accept direct review, and render an opinion resolving this issue of state-wide significance.

The County submits that the Award is not arbitrary or capricious, it should have been upheld, and the Guild's action dismissed.

Dated this 21st day of March, 2013.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



JACQUELYN M. AUFDERHEIDE, WSBA No. 17374
DEBORAH A. BOE; WSBA No. 39365
Attorneys for Defendant Kitsap County

CERTIFICATE OF SERVICE

I, Tracy L. Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On March 21, 2014, I caused to be served in the manner noted a copy of the foregoing document upon the following:

James Cline Cline & Associates 2003 Western Avenue, Suite 550 Seattle, WA 98121 <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-mail: jcline@clinelawfirm.com	Tim Donaldson Washington State Association of Municipal Attorneys 15 North Third Avenue Walla Walla, WA 99362 <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-mail: tdonaldson@wallawallawa.gov
Diane Hess Taylor King County Sheriff's Office 516 Third Avenue, W116 Seattle, WA 98104 <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-mail: Diane.Taylor@kingcounty.gov	

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

DATED March 21, 2014, at Port Orchard, Washington.


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OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, March 21, 2014 3:00 PM
To: 'Tracy L. Osbourne'
Cc: Jacquelyn M. Aufderheide; Deborah A. Boe; jcline@clinelawfirm.com; tdonaldson@wallawallawa.gov; Diane.Taylor@kingcounty.gov
Subject: RE: Case No. 89344-6 - Appellant Kitsap County's Reply Brief

Rec'd 3-21-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Tracy L. Osbourne [<mailto:TOsbourn@co.kitsap.wa.us>]
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Cc: Jacquelyn M. Aufderheide; Deborah A. Boe; jcline@clinelawfirm.com; tdonaldson@wallawallawa.gov; Diane.Taylor@kingcounty.gov
Subject: Case No. 89344-6 - Appellant Kitsap County's Reply Brief

Case No. 89344-6
Kitsap County Deputy Sheriffs' Guild v. Kitsap County

Good afternoon,

Attached please find APPELLANT KITSAP COUNTY'S REPLY BRIEF AND BRIEF IN RESPONSE TO CROSS-APPEAL for filing in the above-referenced case number, filed by

Jacquelyn M. Aufderheide, Chief Civil Deputy Prosecuting Attorney
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Sincerely,

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