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No. 66033-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SNOQUALMIE POLICE ASSOCIATION,
Appellant

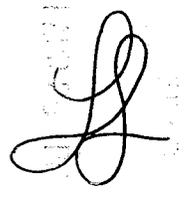
v.

CITY OF SNOQUALMIE,
Respondent

RESPONDENT'S BRIEF

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I. INTRODUCTION

The City of Snoqualmie (the “City”), terminated Sergeant Derek Kasel’s employment after an investigation confirmed that Kasel had: (1) used his position to obtain for his personal vehicle a free set of tires valued at more than \$600 and (2) used his supervisory position to try to get a subordinate police officer to lie to cover up for him during the internal investigation.¹

While the Arbitrator ruled that the City did not have just cause to terminate Kasel with respect to the tires issue, the Arbitrator found that the City did have just cause to (1) suspend Kasel for 60 calendar days and (2) reduce him in rank from Sergeant to Police Officer on his return to duty.² The Arbitrator held that a demotion was necessary because Kasel had “compromised his ability to hold a supervisory position” due to his “attempts to influence his subordinate officer’s testimony during the investigation” which the Arbitrator characterized as “serious offenses.”³

In accordance with the Arbitrator’s award, the City reinstated Kasel as a Police Officer on April 1, 2008. Since the plain language of the Arbitrator’s award provided that the City had just cause to suspend

¹ CP 101-02.

² CP 132.

³ CP 130.

Kasel for 60 days as a result of his misconduct, the City designated Kasel's 60 day suspension period from April 17, 2007, (Kasel's termination date) until June 17, 2007. Since the Arbitration award also provided that the City had just cause to demote Kasel from Sergeant to Police Officer on his "return to duty," the City calculated Kasel's back pay at a Police Officer's rate from the end of the 60 day suspension, on June 17, 2007, until Kasel's reinstatement on April 1, 2008. The Snoqualmie Police Association (the "Association") objected to this back pay calculation, arguing that Kasel should be compensated at a Sergeant's rate from June 17, 2007 to April 1, 2008. The Association's argument essentially ignores the fact that the Arbitrator held that the City had just cause to demote him.

The Honorable Carol Schapira heard the parties' cross motions for summary judgment on May 28, 2010. Judge Schapira ruled that based on the plain language of the Arbitration award, the City properly calculated Kasel's back pay at a Police Officer's rate from June 17, 2007 to April 1, 2008:

Based on the plain language of the arbitration award in the underlying arbitration the appropriate make whole remedy required [the City] to compensate Officer Kasel at a police officer's rate of pay from the conclusion of the sixty day

suspension period until his reinstatement date.⁴

Contrary to the Association's argument, Judge Schapira properly construed the Arbitration award. Back pay at a Police Officer's rate starting on June 17, 2007 placed Kasel in the same economic position he would have been had the City taken the disciplinary action ruled lawful by the Arbitrator. The Association's interpretation of the award constitutes an unlawful penalty to the City because it would place Kasel in a *better* economic position. The Association's position would result not in Kasel being made whole, but receiving an unwarranted windfall.

Furthermore, the Association's contention that Judge Schapira abused her discretion in discounting the Association's attorney's fees related to the underlying arbitration is without merit. Judge Schapira carefully considered the Association's fee request and segregated out fees based on the Association's failure to prevail on its argument that Kasel should be fully reinstated to Sergeant.⁵ Judge Schapira's ruling is in accordance with Washington law which holds that a trial court must segregate out attorney's fees related to the prosecution of

⁴ CP 586-587. Because Judge Schapira ruled that Kasel had been properly compensated at a Police Officer's rate, she denied the Association's claims for back pay, double damages, and attorney's fees and granted summary judgment to the City on these issues. *Id.*

⁵ CP 587.

unsuccessful claims.⁶ The Association cannot establish that her determination was an abuse of discretion.

Finally, the Association's argument that Judge Schapira erred in declining to remand the matter to the Arbitrator for clarification is not supported by Washington law, but perhaps more importantly, it was also not properly preserved for appeal. The Association did not raise this argument in its summary judgment briefing or in response to the City's motion for summary judgment. Rather, the Association *raised this argument for the first time in its motion for reconsideration filed after the summary judgment ruling.*⁷ Judge Schapira denied the Association's motion for reconsideration without requiring a response from the City pursuant to KCLR 59(b). Washington law is clear that a party is prohibited from raising new legal theories or arguments in a motion for reconsideration filed after entry of an adverse decision.⁸ Under controlling authority, the Association has not preserved this issue for appeal and, even if this issue had been preserved, remand was not required under either Washington or federal law. Accordingly,

⁶ *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994).

⁷ CP 538, 584. In its Motion for Reconsideration, the Association expressly conceded that this was the first time it was raising the argument that remand was required. CP 547.

⁸ See, e.g., *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005), *rev. den.*, 857 Wn.2d 1022, 142 P.3d 609 (2006).

the City respectfully requests that Judge Schapira's summary judgment Order be affirmed by the Court in its entirety.

II. STATEMENT OF ISSUES

1. Did the trial court err in ruling that the plain language of the Arbitrator's award required that Kasel be compensated at a Police Officer's rate of pay from the conclusion of the 60 day suspension to the time Kasel was reinstated when that back pay calculation places Kasel in the same economic position had the City taken the disciplinary action ruled lawful by the Arbitrator? (Appellant's Assignment of Errors 1 and 4.) The City believes she did not.

2. Did the trial court abuse its discretion by declining to remand the case to the Arbitrator for clarification when the Association raised the argument that remand was appropriate for the first time in its motion for reconsideration and when remand is not required under Washington law? (Appellant's Assignment of Errors 1 and 4.) The City believes she did not.

3. Did the trial court err in ruling that the Association was not entitled to double damages based on the willful withholding of wages when the trial court held that the City properly calculated Kasel's back pay at a Police Officer's rate based on the plain language of the Arbitration award and when the Association now contends the

Arbitration award is ambiguous and that there is therefore a bona fide dispute regarding the obligation of payment? (Appellant's Assignment of Errors 2 and 5.) The City believes she did not.

4. Did the trial court abuse its discretion in reducing the Association's attorney fee request by 25% when the Association failed to substantially prevail on many of its claims at the underlying arbitration, including the Arbitrator's decision that Kasel should be demoted to Police Officer for attempting to obstruct an internal investigation? (Appellant's Assignment of Error 3.) The City believes she did not.

III. STATEMENT OF THE CASE

A. Facts Regarding Termination⁹

Derek Kasel was hired by the City as a Police Officer in 1999.¹⁰ Shortly after he was hired, he was promoted to the rank of Sergeant.¹¹

In the fall of 2005, Les Schwab installed a new set of Toyo tires on Kasel's police vehicle, a Ford Expedition.¹² A year later, Kasel took

⁹ A detailed factual record regarding the circumstances leading to Kasel's termination is contained in the Arbitrator's Decision. CP 96-132. The City will provide the following summary of facts relevant to the present appeal.

¹⁰ CP 98.

¹¹ *Id.*

¹² *Id.*

his police vehicle back to Les Schwab to have snow tires installed.¹³ Les Schwab had a practice of storing seasonal tires for some of its customers, including the Police Department.¹⁴ Les Schwab took the new Toyo tires off Kasel's police vehicle, stored them at the store, and replaced them with older snow tires.¹⁵

In the spring of 2006, Kasel and Officer Jason Weiss went back to Les Schwab to retrieve the stored off-season tires.¹⁶ Officer Weiss was the officer in charge of taking care of tires for police vehicles and was Kasel's subordinate.¹⁷ The Assistant Manager of Les Schwab, Mike Wall, could not locate Kasel's police vehicle Toyo tires and offered Kasel two sets of tires to replace the tires Les Schwab had lost.¹⁸ Kasel informed Wall that he needed a new set of tires for his personal vehicle, a Chevy Suburban.¹⁹ Kasel was given a new set of tires for his personal vehicle at no charge, and a used set of replacement tires were put on his police vehicle.²⁰

¹³ *Id.*

¹⁴ CP 98 – 99.

¹⁵ *Id.*

¹⁶ CP 99.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

At the arbitration, Kasel claimed that he intended to “repay” the City for the new tires put on his personal vehicle by transferring a personal credit of \$500 with Financial Consultants International, Inc. (“FCI”) to the City.²¹ Kasel testified that although he “attempted” to contact FCI about the transaction, he was unsuccessful and ultimately “forgot” to make the payment to the City.²²

In August or September 2006, Chief Schaffer discussed the missing Toyo tires with Kasel.²³ Kasel initially told Chief Schaffer that Les Schwab had replaced the tires on his police vehicle, but later admitted to Chief Schaffer that Les Schwab had also provided new Toyo tires for his personal vehicle free of charge.²⁴ Chief Schaffer directed Kasel to pay for the tires, which he did.²⁵

In October 2006, Chief Schaffer notified the City of Kasel's alleged misconduct.²⁶ Chief Schaffer obtained the services of

²¹ FCI is a company that customizes police vehicles with specialized equipment. CP 98. City of Snoqualmie Police Chief James Schaffer and FCI had previously entered into an understanding whereby the Snoqualmie Police Department earned credits with FCI that could be used to purchase and maintain police equipment. *Id.* Individual law enforcement officers were also allowed to accrue credits with FCI that could be used for personal purposes. CP 121. This agreement was not part of the City's budgetary process and was unknown to the City. CP 98. The City cancelled the FCI arrangement after the circumstances arose involving Kasel. *Id.*

²² CP 105.

²³ CP 99.

²⁴ *Id.*

²⁵ *Id.*

²⁶ CP 100.

Lieutenant Carey Hert of the Duvall Police Department to conduct an investigation into Kasel's conduct during the May 2006 Les Schwab tire transaction.²⁷

During Lt. Hert's investigation, Kasel approached Officer Weiss, who was with Kasel at Les Schwab during the tire transaction.²⁸ Kasel asked Officer Weiss, a subordinate officer, "not to remember" what had transpired at Les Schwab and that he "owed him something for the times Kasel let Weiss leave early to attend school functions for his children."²⁹ While Kasel did not specifically tell Weiss to "lie," it was clearly the message he communicated.³⁰

While Kasel denied making these statements or claimed that Weiss took the statements out of context, the Arbitrator specifically noted in his ruling that he credited "the testimony of Officer Weiss as to what was said by Kasel" and held that Kasel's statement to Weiss "not to remember" was "clearly an attempt on the part of Kasel to influence his subordinate officer not to cooperate fully and completely with the investigation."³¹

²⁷ *Id.*

²⁸ CP 129.

²⁹ *Id.*

³⁰ *Id.*

³¹ CP 129.

In a report dated November 15, 2006, Lt. Hert concluded that Kasel had violated Washington law, had committed felony theft, and was in violation of provisions of the Snoqualmie Police Policy as a result of his transaction with Les Schwab.³²

On November 17, 2006, City Administrator Bob Larson placed Kasel on administrative leave and requested that the King County Sheriff's office conduct a criminal investigation.³³ Following a criminal investigation by the King County Sheriff's office, King County declined to prosecute the allegations against Kasel. City Administrator Larson forwarded a copy of the King County Sheriff's report to Lieutenant Hert and instructed him to interview Kasel. Kasel was interviewed by Hert on March 20, 2007 about the tire transaction.³⁴

By letter dated March 26, 2007, City Administrator Larson notified Kasel that as a result of the investigation into the tire transaction, Larson determined Kasel's conduct violated several City policies and scheduled a pre-disciplinary hearing on April 6, 2007.³⁵

³² CP 100.

³³ *Id.*

³⁴ *Id.*

³⁵ CP 101. In his letter, City Administrator Larson notified Kasel that his conduct violated the following City policies: (1) Snoqualmie Police Department Policies and Procedures Manual §04.140 prohibiting officers from "directly or indirectly soliciting or accepting any gratuities, loans, gifts, merchandise, meals, beverages, or any other thing of value in connection with, or resulting from their official position."; (2) §2.30 of the Personnel Policies providing that "misuse of City services, telephone,

Following the pre-disciplinary hearing, Kasel was notified by Mayor Matt Larson of his termination of employment effective April 17, 2007 based on his violation of City policies as found by City Administrator Bob Larson and his “demonstrated attitude that self-dealing in City property by a police officer is an acceptable practice.”³⁶ Mayor Larson also noted that “what persuaded me most that termination is the only appropriate remedy” was Kasel’s conduct of attempting to influence the testimony of Officer Weiss, and have him cover up Kasel’s misconduct.³⁷

On April 26, 2007, the Association filed a grievance alleging that Kasel’s termination violated “the just cause provisions as stated in the Police Contract, Art. 16, §14.1.”³⁸ City Administrator Larson denied the grievance as without merit and the Association advanced the case to arbitration.³⁹

computers, vehicles, equipment, or supplies can result in disciplinary action including termination.”; (3) §3.3.2 of the Personnel Policies providing that “employees shall not accept or seek from others, any service, information, or thing of value on more favorable terms than those granted to the public generally, from any person, firm or corporation having dealings with the City ...”; (4) City Personnel Policies 7.1.3(E) prohibiting “improper use or care of City equipment, materials, funds or other resources funded with public monies” or “use of City property or time for personal financial gain”; and (5) City Personnel Policy 7.1.2 prohibiting “acts, errors, or omissions that discredit the public service.” CP 101-102.

³⁶ CP 103-104.

³⁷ *Id.*

³⁸ CP 104.

³⁹ *Id.*

B. Arbitration Decision

The arbitration was held on December 6 and 7, 2007. On March 26, 2008, Arbitrator Axon issued his decision finding that the City “failed to prove by clear and convincing evidence” that there was just cause to dismiss Kasel for a “demonstrated attitude that self-dealing in City property by police officers is an acceptable practice.”⁴⁰ The Arbitrator held that Kasel violated Section 04.140 of the Snoqualmie Police Policy by soliciting and accepting a new set of tires from Les Schwab in connection with his official position and Section 7.1.2 of the City’s Personnel Policy by attempting to obstruct a police investigation into internal misconduct.⁴¹ The Arbitrator noted that although the FCI credit arrangement and deficiencies in the investigation mitigated against termination, Kasel’s attempts to influence the testimony of a subordinate officer was a “serious offense” that “often will result in termination or major discipline.”⁴²

The Arbitrator then entered the following award:

Having reviewed all of the evidence and argument, and having observed the demeanor of the witnesses during their testimony, I find the City did not have just cause to summarily discharge Grievant

⁴⁰ CP 118.

⁴¹ CP 130.

⁴² *Id.*

Derek Kasel from his employment with the City of Snoqualmie. The City did establish there was just cause to suspend Kasel for a period of sixty (60) calendar days and to reduce him in rank from Sergeant to Police Officer on his return to duty. The City is ordered to reinstate Grievant Kasel and to make him whole for all wages and benefits lost minus the 60 calendar day suspension. Grievant Kasel shall be demoted from the position of Sergeant to Police Officer effective with his return to duty.⁴³

The Arbitrator's Award specified that the Arbitrator would "retain jurisdiction for a period of 60 days from the date of this Award to resolve any disputes arising out of the remedy so ordered."⁴⁴ The Arbitrator's jurisdiction to resolve any issues regarding back pay or other remedies expired on May 26, 2008.

C. Payment of Back Pay

In accordance with the Arbitrator's award, Kasel was reinstated to active service by the City on April 1, 2008. The day following the arbitration award, the City's lawyer sent a letter to the Association's attorney requesting the Association provide the City with information regarding Kasel's back pay claim.⁴⁵ On May 9, 2008, 43 days later, the Association's attorney wrote back to counsel for the City requesting

⁴³ CP 132.

⁴⁴ *Id.*

⁴⁵ CP at 471.

that the City pay medical costs incurred by Kasel during his period of unemployment and advising the City that it was demanding back wages based on a Sergeant's wage rate.⁴⁶ On May 22, 2008, the City responded, reflecting that back wages would be calculated at "a police officer rate following the date of demotion."⁴⁷ After receiving this letter, the Association did not contact the Arbitrator regarding the parties back pay dispute, even though the Association knew the Arbitrator's jurisdiction to resolve back pay disputes expired on May 26, 2008.⁴⁸

On June 23, 2008, the City provided the Association with a back pay check for Officer Kasel in the amount of \$27,393.16, representing back wages owed from the period of April 17, 2007 to April 1, 2008 based on a Police Officer's rate of pay, minus the 60 day suspension period.⁴⁹ Since the Arbitrator's jurisdiction had by that point expired, the City advised the Association that it would prefer that any dispute regarding back pay be resolved in Superior Court.⁵⁰

⁴⁶ CP 473-474.

⁴⁷ CP 476-477.

⁴⁸ CP 132.

⁴⁹ CP 480-481.

⁵⁰ *Id.* In the City's June 23, 2008 letter, the City also addressed the Association's request that the City compensate Kasel for COBRA premiums paid during his period of unemployment. *Id.* The City explained that since Kasel had made the COBRA payments directly to the third-party administrator, Northwest Administrators, Kasel should seek reimbursement for these expenses from that entity. *Id.* The City also

On January 22, 2009, the City responded to the Association's demand for approximately \$30,000 in attorney's fees for the underlying arbitration.⁵¹ The City objected to this amount on the basis that it was not reasonable given the nature and complexity of the two day grievance arbitration and because the Arbitrator had specifically rejected many of the Association's claims, and ruled that Kasel should be reduced in rank and given a 60 day suspension.⁵² To resolve any further dispute, the City offered to pay the Association \$15,000 in attorney's fees, which the Association rejected.⁵³

D. Procedural History

On April 22, 2009, the Association commenced this action, contending that the City was required to calculate Kasel's back wages

advised the Association that Kasel's medical insurance with Regence had been retroactively reinstated to April 1, 2007, the date of termination, and that any unpaid medical expenses could be submitted directly to Regence for coverage. *Id.* For reasons unknown to the City, Kasel did not obtain reimbursement of his COBRA expenses from Northwest Administrators and on March 15, 2010 the City fully reimbursed Kasel for these expenses. CP 486. The Association devotes a substantial section of its brief discussing these medical expenses, however, this is not an issue relevant to the present appeal.

⁵¹ CP 483-484.

⁵² *Id.*

⁵³ CP 54. In the City's January 22, 2009 letter, the City's attorney, Mr. Ellsworth, also advised the Association that he had spoken with several respected Union lawyers who all believed that the \$30,000 in attorney's fees requested by the Association was excessive. CP 483-484. The Association subsequently requested that the City identify these lawyers but the City objected to this request on the basis that it called for the identity of consulting experts. CP 173. The City subsequently identified Union attorney Lawrence Schwerin as an expert witness. CP 205. Mr. Schwerin testified that a reasonable attorney's fees award was \$17,000 before segregation for unsuccessful claims and that after discounting the amount based upon the Association's failure to prevail on all of its claims, a reasonable attorney's fee award would be in the range of \$10,000 to \$13,000. CP 205-206.

based on a Sergeant's rate of pay, and also seeking double damages, prejudgment interest and attorney's fee under RCW 49.52.070, and an award of attorney's fees for the underlying arbitration under RCW 49.48.030.⁵⁴

On May 28, 2010, Judge Schapira heard the parties' cross-motions for summary judgment, ruling that based on the plain language of the Arbitration award, the City properly calculated Kasel's back pay at a Police Officers' rate, and denied the Association's claims for back pay, double damages and attorney's fees, and granted summary judgment to the City on these issues.⁵⁵ Judge Schapira also held that the Association's attorney fee request should be discounted by 25% due to the Association's failure to substantially prevail on all its claims in the underlying arbitration.⁵⁶

On June 7, 2010, the Association filed a motion for reconsideration, arguing *for the first time* that the Arbitration award was ambiguous and that under federal law Judge Schapira was required to remand the matter to Arbitrator Axon for clarification.⁵⁷

⁵⁴ CP 1-3.

⁵⁵ CP 586-597.

⁵⁶ CP 587

⁵⁷ CP 547.

On June 22, 2010, Judge Schapira denied the Association's motion for reconsideration without requiring a response from the City pursuant to KCLR 59(b).⁵⁸ This appeal followed.

IV. ARGUMENT

A. Standard of Review

Two different standards of review apply to the issues raised on appeal by the Association.

Questions of law on appeal from a trial court's order on summary judgment are reviewed *de novo*.⁵⁹ The *de novo* standard of review applies to the trial court's rulings (1) denying the Association's motion for summary judgment for back pay based on a Sergeant's rate of pay, prejudgment interest, double damages, and attorney's fees; and (2) granting the City's motion for summary judgment regarding back pay, double damages, attorney's fees and prejudgment interest.

The trial court's order denying the Association's motion for reconsideration requesting that the matter be remanded to the Arbitrator is reviewed by the appellate court under a showing of manifest abuse of discretion.⁶⁰ The trial court's order reducing the

⁵⁸ CP 584.

⁵⁹ *Ultman v. Holland Am. Lines USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008).

⁶⁰ *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005), rev. den., 857 Wn.2d 1022, 142 P.2d 609 (2006).

Association's attorney's fees request by 25% is also reviewable under the abuse of discretion standard.⁶¹

B. The Trial Court Properly Construed the Plain Language of the Arbitration Award.

1. The Plain Language of the Arbitration Award Requires Back Pay at a Police Officer Rate.

The proper calculation of Kasel's back pay turns upon how the Arbitrator framed his ruling. While the Arbitrator held that the City did not have just cause to terminate Kasel's employment, the Arbitrator also held that at the time the City considered disciplinary action, it had just cause to (1) suspend Kasel for 60 days and (2) reduce him in rank from Sergeant to Police Officer upon his "return to duty." The Arbitration award provides:

The City did establish there was just cause to suspend Kasel for a period of sixty (60) calendar days and reduce him in rank from Sergeant to Police Officer on his return to duty. The City is ordered to reinstate Grievant Kasel and make him whole for all wages and benefits lost minus the sixty (60) calendar day suspension.⁶²

Had the City taken the action ruled lawful by the Arbitrator, the City would have suspended Kasel on April 17, 2007 for 60 days and

⁶¹ *Boeing v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987).

⁶² CP 132.

returned him to duty on June 17, 2007 at a reduced rank of Police Officer. From there forward, Kasel would have earned Police Officer wages. Thus, a back pay award at a Police Officer's rate from June 17, 2007 until Kasel was reinstated on April 1, 2008, fully restores the economic status quo because it places Kasel in the same position he would have been had the City taken the action ruled lawful by the Arbitrator. As found by the trial court, it is the correct make whole remedy compelled by the plain language of the arbitration award.

Contrary to the Association's argument, Judge Schapira did not find that the language of the Arbitration award was ambiguous requiring her to determine Arbitrator Axon's subjective intent. Rather, Judge Schapira clearly held that her decision was based on the plain language of the Arbitration award. At oral argument, Judge Schapira noted that although it may "have been helpful to know what [Arbitrator Axon] was thinking" she was required to decide the case on the plain language of the Arbitration award.⁶³ During her oral ruling Judge Schapira stated:

We do have to rely on the language. This is a make-whole situation.⁶⁴

⁶³ RP 2.

⁶⁴ *Id.*

Judge Schapira also made clear in her written Order that her interpretation was based upon the plain language contained in the Arbitrator's award:

Based on the *plain language* of the arbitration award in the underlying arbitration the appropriate make whole remedy required [the City] to compensate Officer Kasel at a police officer's rate of pay from the conclusion of the sixty day suspension period until his reinstatement date.⁶⁵

Judge Schapira correctly interpreted the plain language of the award, emphasizing that back pay at a Police Officer's rate was the correct make whole remedy because it places Kasel in the same economic position had the City taken the position ruled lawful by the Arbitrator. Judge Schapira noted:

Because, again, effective with his return to duty doesn't mean the first day he goes back to work as an officer ... rather what the arbitrator ruled is his effective return to duty is the day after the ... end of the suspension.⁶⁶

2. The Plain Language of the Arbitration Award Requires a Make Whole Remedy.

To do as the Association argues and pay Kasel back pay at a Sergeant's rate of pay does not implement a make whole remedy as

⁶⁵ CP 586 (emphasis added).

⁶⁶ RP 3.

required by the Arbitration award. Back pay at a Sergeant's rate places Kasel in a *better* economic position than he would have been had the City taken the disciplinary action ruled lawful by the Arbitrator. This is inconsistent with the purpose of a make whole remedy.

Case law is clear that a back pay remedy that awards an employee more than he or she would have received but for the wrongful act does not constitute a make whole remedy – but is punitive in nature. *See, e.g., Bowen v. United States Postal Service*, 459 U.S. 212, 223, 103 S. Ct. 588, 595, 74 L.Ed.2d 402 (1983) (“Remedies that award employees more than they would have received but for the violations are punitive and thus improper.”); *Bon Hennings Logging Co. v. NLRB*, 308 F.2d 548, 556 (9th Cir. 1962) (“Back pay is a remedy which has for one of its purposes the making of employees whole for losses and pay occasioned by unfair labor practices. Employees cannot be made more than whole.”)

A back pay remedy should place the employee in the *same economic position* that the employee would have been in had the employer acted lawfully. *See e.g., Aguinaga v. United Food and Commercial Workers Int'l Union*, 854 F. Supp. 757, 761 (D. Kan. 1994) (“the purpose of an award of back pay is to make employees whole for the losses suffered.”) Thus, a back pay award that provides

an employee with more than he or she would have received if the employer had acted lawfully is improper. *NLRB v. Ft. Vancouver Plywood Co.*, 604 F.2d 596, 602 (9th Cir. 1979), *cert. den.*, 445 U.S. 915, 100 S. Ct. 1275, 63 L.Ed.2d 599 (1980) (“remedies that award employees more than they would have obtained but for the violations are punitive, not compensatory and are thus improper.”); *Aneco Inc. v. NLRB*, 285 F.3d 326, 329 (9th Cir. 2002) (“a back pay order may only serve as a compensatory, make whole remedy, not a punitive sanction or deterrent.”)

Paying Kasel back pay at a Sergeant’s rate as urged by the Association is not a make whole remedy, but is a non-compensatory punitive remedy. It does not place Kasel in the same economic position he would have been had the City taken the action ruled lawful by the Arbitrator. This point is best illustrated by the following factual scenarios.

First, back pay at a Sergeant’s rate would be appropriate if the Arbitrator had ruled that the City was without just cause to take *any* disciplinary action Kasel. If that were the Arbitrator’s ruling, the City would be required to reinstate Kasel as a Sergeant and pay him back wages *at a Sergeant’s rate of pay* from the time of his discharge until the date of his reinstatement.

Similarly, if the Arbitrator had ruled that the City had just cause to suspend Kasel for sixty days due to his misconduct, but was required to return him to duty as a Sergeant at the conclusion of the sixty day period, a “make whole” remedy would have required the City to reinstate Kasel *and pay him at a Sergeant’s rate of pay* from the conclusion of the sixty day period until the date of his reinstatement. Significantly, this was not the Arbitrator’s ruling but it is the remedy sought by the Association. The Association is attempting the rewrite the plain language of the Arbitrator’s award by seeking a back pay award which does not effectuate the Arbitrator’s decision. Judge Schapira applied the correct make whole remedy.

3. The Association’s Interpretation Is Not Consistent with the Plain Language of the Arbitrator’s Award.

The Association bases its entire argument on a single phrase in the Arbitrator’s award stating that Kasel shall be demoted from the position of Sergeant to Police Officer “effective with his return to duty.” The Association argues that Kasel’s “return to duty” occurred when he reinstated on April 1, 2008. The Association argues that Kasel was therefore not “officially” demoted until his actual return to work.

This interpretation of the Arbitrator’s award is illogical and absurd. The Association is attempting to re-write the Arbitrator’s award to state that Kasel’s demotion is “effective on his reinstatement.” That

is not what the award says. Rather, the Arbitration award states that the demotion shall be effective on Kasel's "return to duty" which, as found by the trial court, must occur at the end of his suspension period when the City's wage obligation is triggered.⁶⁷

The Association's interpretation of the award would result in the Arbitrator ruling that (1) the City had just cause to suspend Kasel for sixty days (2) was required to employ Kasel as a Sergeant for approximately a year and then (3) "demote" him to Police Officer at the time of his reinstatement following the arbitration hearing. This was not, however, what the Arbitrator ruled. The Arbitrator ruled that due to Kasel's misconduct, the City had just cause to (1) suspend Kasel for 60 days and (2) reduce him in rank to a Police Officer. As found by the trial court, the phrase "upon his return to duty" in the Arbitration award simply signifies when the sixty day suspension period ended and the City's wage obligation was triggered.⁶⁸ If Kasel's "return to duty" did not occur until the time he was reinstated, he would not be entitled to any back wages at all as a back pay obligation *only* exists during the period that an employee is "returned to duty."

⁶⁷ RP 3.

⁶⁸ RP 3.

4. The Cases Cited by the Association Do Not Support Its Position.

The cases cited by the Association do not support its position. In *NLRB v. Master Slack and/or Master Trousers Corp.*, 773 F.2d 77, 83 (6th Cir. 1985), the Sixth Circuit refused to enforce an NLRB order requiring a company to pay back pay to employees terminated as a result of their union affiliation beyond the date the plant's operations were shut down. *Id.* at 84. The court held that back pay awards must not be punitive in nature but are intended to place the employees in the same position they would have been had the employer acted lawfully. *Id.* Because the employees would have been terminated at the time the plant closed, cutting off back pay awards at that time period fully restored the economic status quo. *Id.*

Like in *NLRB v. Master Slacker*, calculating Kasel's back pay at a Police Officer's rate fully restores the economic status quo because it puts him in the same position he would have been had the City taken the disciplinary action ruled lawful by the Arbitrator. The Association's claim that Kasel is entitled to a Sergeant's rate of pay is exactly the type of punitive remedy disapproved of by the court in *NLRB v. Master Slack*.

In addition, the other two cases relied upon by the Association, *Hanson v. City of Tacoma*, 105 Wn.2d 864, 719 P.2d 104 (1986) and

Allstot v. Edwards, 114 Wn. App. 625, 60 P.3d 601 (2002) do not support the Association's argument. In these cases, the employees were both *fully reinstated* to their prior positions and therefore back pay was calculated at the salary level they received at the time of disciplinary action. Here, Kasel was not fully reinstated, but was demoted, and these cases are not analogous.

C. The Trial Court Did Not Abuse Its Discretion in Denying the Association's Motion for Reconsideration.

Motions for reconsideration are governed by CR 59, which provides:

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct or any other decision or order may be vacated and reconsideration granted.

CR 59.⁶⁹

⁶⁹ CR 59 specifies nine grounds upon which a motion for reconsideration or new trial may be based: (1) irregularities in the proceedings preventing a party from receiving a fair trial; (2) misconduct of the prevailing party or jury; (3) accident or surprise, which ordinary prudence could not have guarded against; (4) newly discovered evidence which could not with reasonable diligence have been discovered and produced at trial; (5) excessive or inadequate damages indicating that the verdict must have been a result of passion or prejudice; (6) error in the assessment of the amount of recovery when the action is upon a contract, or for the injury or detention of property; (7) that there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law; (8) error in law occurring at the trial and objected to at the time by the party making the application; or (9) that substantial justice has not been done. CR 59(a). None of those circumstances are present here.

Case law is clear that under CR 59 a party is prohibited from raising new legal theories or arguments in a motion for reconsideration that were not raised before entry of the adverse decision. *See, e.g., Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005), *rev. den.*, 857 Wn.2d 1022, 142 P.3d 609 (2006) (“CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of the adverse decision.”); *Ducote v. State Dept of Social & Health Services*, 144 Wn. App. 531, 537, 186 P.3d 1081 (2008) (“Civil Rule 59 does not permit a plaintiff who finds a judgment unsatisfactory to suddenly propose a new theory of the case when that theory could have been raised before entry of the adverse decision.”)

Under this authority, when a party asserts a new legal theory for the first time in a motion for reconsideration, the issue is not properly preserved for appeal. *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637 (1997). In addition, the trial court’s decision to deny a motion for reconsideration is reviewed under the standard of manifest abuse of discretion. *Wilcox*, at 241.

For example, in *Wilcox v. Lexington Eye Institute*, *supra*, the plaintiff filed suit in King County Superior Court against a Canadian surgical facility arising from complications from LASIK surgery. *Id.* at

236. The defendants moved to dismiss for lack of jurisdiction and improper venue. *Id.* In opposition to the motion to dismiss, the plaintiff relied exclusively on the doctrine of mutual mistake to argue that the forum selection provision in the surgical consent form was unenforceable. *Id.* at 240. The trial court ruled that the forum selection provision was enforceable and dismissed the plaintiff's claims. *Id.*

The plaintiff then filed a motion for reconsideration, raising new arguments that the forum selection clause was unenforceable based on fraud, undue influence, and that no consideration existed to support the agreement. *Id.* at 240-241. The trial court denied the plaintiff's motion to reconsider. *Id.*

On appeal, the plaintiff relied exclusively on the new arguments she raised for the first time in her CR 59 motion for reconsideration. *Id.* The Court of Appeals refused to consider the plaintiff's arguments, holding:

The motion for reconsideration arguments were based on new legal theories with new and different citations to the record. Wilcox offered no explanation as to why these arguments were not timely presented. CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.

Id. (citations omitted).

Here, the Association is likewise barred from raising the claim on appeal that the trial court erred in refusing to remand the case to the Arbitrator. Like in *Wilcox*, the Association raised the argument for the first time in its motion for reconsideration.⁷⁰ Like in *Wilcox*, the Association's motion for reconsideration contained an entirely new legal theory based on case law not cited or argued in the Association's summary judgment pleadings.⁷¹ Like in *Wilcox*, the Association cannot establish that the trial court manifestly abused its discretion in denying the Association's motion for reconsideration. The Association has therefore not properly preserved this argument for appeal, and the Association's argument that the case should have been remanded to the Arbitrator should not be considered by this Court.

D. The Trial Court Had the Authority to Interpret the Plain Language of the Arbitrator's Award.

Moreover, even if the Association had properly preserved the issue for appeal, which it did not, the Association's argument that the trial court was required to remand the matter to the Arbitrator for "clarification" is not supported by Washington law. This case arises under RCW 46.56, the Public Employees Collective Bargaining Act.

⁷⁰ CP 547.

⁷¹ *Id.*

This statute regulates the collective bargaining rights of uniformed personnel in the State of Washington. RCW 41.56.430. Issues pertaining to arbitration proceedings involving uniformed personnel are controlled by Washington state law, not federal law under the National Labor Relations Act, 29 U.S.C. §185.

The Association concedes that there is no Washington case law which holds that a trial court is required to remand a case involving the interpretation of an Arbitration award to the arbitrator for clarification.⁷² On appeal, the Association relies solely on *Hanford Atomic Metal Trades Council*, 335 F.2d 302 (9th Cir. 1965), for the proposition that “ambiguous” arbitration awards must be remanded to the arbitrator for clarification. *Hanford*, however, involves a very different set of facts from the case bar. In *Hanford*, the arbitration award failed to specify the class of employees who were entitled to back pay under the arbitration award and the Ninth Circuit affirmed the District’s Court’s decision to remand the case to the Arbitration panel to determine which employees were entitled to back pay. *Id.* at 308.⁷³

⁷² CP 548.

⁷³ In *Hanford*, the union, a collective bargaining representative for certain production and maintenance employees at Hanford Atomic Products, filed a grievance under the parties’ collective bargaining agreement (“CBA”) alleging that the company had improperly furloughed certain bargaining unit employees without proper regard to seniority. *Id.* at 303. The union sought full back pay for all employees furloughed and for those employees who vacations had been rescheduled in lieu of furlough. *Id.*

Hanford is very different from the present case because in this case there is no ambiguity with respect to how the arbitration award should be applied. As found by the trial court, the proper calculation of Kasel's back pay can be determined by the plain language of the award itself.⁷⁴

Moreover, the federal cases which have held that a trial court has the authority to remand an ambiguous arbitration award to the arbitrator have done so when the award is "patently" ambiguous. *See, e.g., Automotive, Petroleum & Allied Indust. Employees Union, Local 618 v. Sears Roebuck & Co.*, 581 F. Supp. 672, 677 (E.D. Missouri 1984) ("Where an ambiguity is the alleged basis for remanding an arbitration award, the ambiguity must be patent, glaring or appear on the face of the award.") *Id.* at 677, citing *IBEW v. Teletype Corp.*, 551 F. Supp. 676, 650 (E.D. Ark. 1982); *United Steel Workers of America v.*

Following the arbitration, the arbitration panel issued an award holding that the company had violated the terms of the CBA by furloughing the workers and ordered that the employees should be "made whole by reimbursement for regular wages lost." *Id.* at 304. When a dispute arose over which employees were covered by the terms of the arbitrators' award, the union filed an action in United States District Court for enforcement of the arbitration award. *Id.* at 305. At trial, the union contended that all employees furloughed were entitled to back wages, while the company contended that it was only required to pay back pay to those employees who would have worked during the shutdown period if the company had followed the contract layoff provisions contained in the collective bargaining agreement. *Id.* Since the arbitration award did not address this issue, the District Court remanded the matter to the arbitration panel for clarification. *Id.* The Ninth Circuit affirmed the District's Court's decision. *Id.* at 308.

⁷⁴ CP 586.

ICI Americas Inc., 545 F. Supp. 152, 155 (D. Del. 1982); *United Steel Workers of America v. Interpace Corp.*, 447 F. Supp. 387, 391 (W.D. Pa. 1978).

In this case, there is no patent or glaring ambiguity in the Arbitrator's award. Rather, as noted above, the trial court specifically held that the plain language of the Arbitration award required back pay to Kasel at a Police Officer's rate of pay.⁷⁵ There is no basis for finding that the Arbitration award contained a patent or glaring ambiguity requiring that the matter be remanded to the Arbitrator. Even under the federal law cited by the Association, the trial court was not required to remand the case to the Arbitrator for clarification.

E. The Trial Court Properly Denied the Association's Claim for Double Damages.

The trial court did not err in denying the Association's claim for double damages under RCW 49.52.070. It is well established under Washington law that double damages are not recoverable if there is a "bona fide dispute" as to the obligation to pay. *Pope v. Univ. of Wash.*, 121 Wn.2d 479, 852 P.2d 1055 (1993). "Nonpayment of wages is willful and made with intent when it is a result of a knowing and intentional act and *not the result of a bona fide dispute as to the*

⁷⁵ CP 586.

obligation of payment.” Id. at 490 (emphasis added). *See, also, Bates v. City of Richland*, 112 Wn. App. 919, 51 P.3d 816 (2002) (fact that bona fide dispute existed over amount of city police department pensions precluded finding of willfulness); *McAnulty v. Snohomish School District*, 9 Wn. App. 834, 838, 515 P.2d 523 (1973) (claim for double damages dismissed when evidence demonstrated that school district had “genuine belief” that the plaintiff had been legitimately discharged and that his wages could be properly discontinued).

While the issue of whether an employer has acted willfully is generally a question of fact, a trial court may decide the issue of willfulness as a matter of law if substantial evidence does not exist from which a jury could conclude that the employer acted willfully. *Pope*, at 490 (“whether an employer acts willfully and with intent is a question of fact reviewed under the substantial evidence standard”). For example, in *Pope*, the Supreme Court held that the University’s deduction of social security taxes from class members’ wages was not willful as a matter of law when it was unclear to University officials whether the plaintiffs’ specific job positions were eligible for social security and therefore subject to social security deductions. *Id.*

Similarly, in *Cannon v. City of Moses Lake*, 35 Wn. App. 120, 663 P.2d 865 (1983), the Court of Appeals held as a matter of law

that the willfulness standard was not met and double damages were not recoverable under RCW 49.52.070. In *Cannon*, the plaintiffs, two police officers, brought an action against the City of Moses Lake for unpaid sick leave they accumulated prior to joining the Law Enforcement Officers' and Firefighters' Retirement System (LEOFF) and for vacation pay they accumulated during their 6 month disability leave. *Id.* at 122. The City contended that it was not legally required to pay sick leave accumulated prior the LEOFF's effective date, and that the officers were not entitled to vacation leave accumulated when they were disabled because they were not actively employed. *Id.* at 123-124.

The Court of Appeals rejected the City's arguments and held that the City was required to pay the plaintiffs' their accumulated sick leave and vacation pay. *Id.* Despite holding that the City was required to pay the wages sought by plaintiffs, the Court held that the plaintiffs were *not* entitled to double damages under RCW 49.52.070 because there was a "bona fide dispute" regarding the obligation of payment. *Id.* at 125. The Court held that double damages were not recoverable under RCW 49.52.070 because "the issues in the case were fairly debatable and there is no evidence that the City acted willfully." *Id.*

Like in *Pope and Cannon*, there is no evidence in the present case to support the Association's claim that the City "willfully and intentionally" deprived Kasel of wages owed. Rather, as demonstrated above, back pay calculated at a Police officer's rate is compelled by the plain language of the Arbitrator's award. Based on the Arbitrator's award, the City certainly had a reasonable basis to calculate Kasel's wages at a Police Officer's rate of pay. Under the case law cited above, there is no evidentiary basis supporting a claim for double damages under RCW 49.52.070 and the trial court correctly dismissed this claim as a matter of law.

The Association attempts to avoid application of the "bona fide dispute" exception by arguing that the City's failure to return to the Arbitrator for a ruling on the back pay issue establishes "willfulness." This argument has no merit. The Arbitrator issued his decision on March 26, 2008 and the parties agreed he would retain jurisdiction to resolve any disputes arising out of the award for a period of 60 days.⁷⁶ The day following the arbitration award, the City's lawyer sent a letter to the Association's attorney requesting that the Association provide the City with information regarding Kasel's back pay claim.⁷⁷ Despite

⁷⁶ CP 132.

⁷⁷ CP 471.

knowing that it had 60 days to resolve any disputes regarding back pay with the Arbitrator, the Association waited 44 days to advise the City that it was demanding back pay at a Sergeant's rate of pay.⁷⁸ The City responded to the Association promptly, within two weeks, on May 22, 2008 advising the Association that it disagreed with its back pay calculations.⁷⁹ By the time the Association requested that the issue be taken back to the Arbitrator, the Arbitrator's jurisdiction had expired and the City was well aware that there would be a dispute with the Association regarding the reasonableness of its attorney's fees.⁸⁰ At that point, the City decided it would prefer to have both issues addressed together in Superior Court, but that decision cannot be a basis to find that the City "willfully withheld wages." The "willfulness" analysis under RCW 49.52.070 focuses on whether the employer had a reasonable basis to not pay the wages claimed – it is not dependant on what forum the employer selects to resolve the issue.

Finally, the Association's claim that there is not a bona fide dispute regarding the proper interpretation of the Arbitration award is contradicted by the Association's argument that the award is "ambiguous" such that the trial court was required to remand the

⁷⁸ CP 473-474.

⁷⁹ CP 476.

⁸⁰ CP 230.

matter to the Arbitrator for clarification. The Association cannot on one hand claim that the award is ambiguous, requiring remand to the Arbitrator, and at the same time claim that the award is not subject to a “bona fide” dispute over its proper interpretation. The trial court did not err in dismissing the Association’s claim for double damages under RCW 49.52.070.

F. The Trial Court Did Not Abuse Its Discretion in Discounting the Association’s Fee Request.

In order to reverse the trial court’s fee award, the Association must show that the trial court manifestly abused its discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). The reasonableness of an award of attorney’s fees is reviewed by an appellate court by an abuse of discretion standard. *Rettkowski v. Dept. of Ecology*, 128 Wn.2d 508, 518, 910 P.2d 462 (1996). The trial court abuses its discretion only when the exercise of its discretion is “manifestly unreasonable.” *Progressive Animal Welfare Society*, 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990). “The trial judge is given broad discretion in determining the reasonableness of an attorney fee award, and in order to review that award, it must be shown that the trial court manifestly abused its discretion.” *Ethridge v. Hwang*, 105 Wn. App. 447, 459, 20 P.3d 958 (2001), citing *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993); *Rock v. Tarrant*,

57 Wn. App. 562, 573, 789 P.2d 112 (1990) (reasonableness of attorney's fee award is subject to appellate review for abuse of discretion, and trial court abuses its discretion only when no reasonable person would take position and adopt it).

Here, Judge Schapira determined that the Association's attorney's fees request should be discounted by 25% due to the Association's failure to prevail on all of its claims at the underlying arbitration.⁸¹ During her oral ruling, Judge Schapira noted that there were "significant ways" in which Kasel did not prevail on his claims, including the Arbitrator's ruling that Kasel had committed specific acts of misconduct including taking the tires without compensation and attempting to "change the testimony of one of his fellow officers."⁸² Judge Schapira reasoned that given that there were a number of claims that the Association failed to prevail upon, a 25% reduction in its attorney's fees request was appropriate.⁸³

Judge Schapira's analysis is consistent with Washington law which holds that trial courts must take an active role in assessing the reasonableness of a fee request. "The trial court, instead of merely relying on the billing records of the attorney, should make an

⁸¹ CP 587.

⁸² RP 4.

⁸³ RP 3-4.

independent decision as to what represents a reasonable amount of attorney's fees." *Scott Fetzer Co. v Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). "The determination of what constitutes reasonable attorney's fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful [party] can bill." *Nordstrom, Inc. v. Tampourlous*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).

Judge Schapira's analysis is also consistent with Washington law which holds that the trial court must discount an attorney's fees request to reflect the results achieved and segregate out fees incurred in the prosecution of unsuccessful claims. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994) (reversed trial court's fee award due to the court's failure to segregate out claims related to unsuccessful discrimination claims); *Kastansas v. Educational Employees Credit Union*, 122 Wn.2d 483, 502, 859 P.2d 26 (1994) (trial court erred in refusing to segregate out plaintiff's attorney's fees for unsuccessful claims). The trial court carefully considered the Association's request for attorney's fees and properly applied Washington law in making her determination that the Association's attorney's fees request should be discounted by 25%. The Association

cannot establish that the trial court's decision was an abuse of discretion.

G. The Association Should Not Be Awarded Fees on Appeal.

The Association's claim for attorney's fees and costs on appeal should be denied. The Association bases its request on RAP 18.1 and RCW 49.48.030, the statute which provides for an award of attorney's fees to a litigant successful at recovering wages. Because the trial court did not err in calculating Kasel's back pay at a Police Officer's rate, the Association is not entitled to attorney's fees under RCW 49.48.030.

V. CONCLUSION

Officer Kasel engaged in serious misconduct when he attempted to obstruct an internal investigation. The Arbitrator ruled that based on this misconduct the City had just cause to suspend Kasel and demote him from Sergeant to Police Officer. The trial court correctly ruled that the City's back pay calculation fully restores the status quo and is the correct make whole remedy. The trial court did not abuse its discretion in denying the Association's motion for reconsideration requesting that the case be remanded to the Arbitrator when this argument was raised for the first time after summary judgment and also did not abuse its discretion in discounting the

Association's attorney's fees for the underlying arbitration when the Association failed to fully prevail on its claims. The City respectfully requests that the trial court's summary judgment Order be affirmed in its entirety.

Dated this 25th day of April, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer Milsten-Holder, legal secretary to Lewis L. Ellsworth,
declare that I caused to be served not later than April 28, 2011
Respondent's Brief to which this Certificate of Service is attached in
the following manner to each of the entities below listed:

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Dated this 25th day of April, 2011.



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