

NO. 47812-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

DREW OTA, CRAIG GARDNER, et al., Plaintiffs/Appelles

v.

PIERCE COUNTY, Respondent/Appellant

BRIEF OF RESPONDENT PIERCE COUNTY

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I. INTRODUCTION

Appellants are two Pierce County Corrections Officers who claim Pierce County (County) willfully underpaid them and purport to be representative of a class of similarly situated employees. Their wages are contractually determined by their collective bargaining agreement (CBA). Public employees are entitled to seek judicial relief for a claim arising under a CBA only after exhausting their contractual grievance remedies, or the administrative remedies available to them before the Washington Public Employees Relations Commission (PERC). The only exception to this rule is if an employee's claim is brought pursuant to an independent non-contractual, constitutional, or statutory right.

Appellants have no right to any particular wage other than the wage set forth in the CBA. Appellants are bound under the explicit terms of the CBA to pursue their wage dispute in accordance with the binding contractual grievance procedures set forth in the CBA, or to file an unfair labor practice complaint at PERC against either their employer or their union, if their union failed to fairly represent them.

These points are indisputable under Washington law and it was upon these indisputable points that the trial court granted Defendant Pierce County's Motion for Summary Judgment.

Respondent Pierce County also moved the trial court for summary judgment based upon Appellants' failure to raise any material facts upon which judgment could be rendered pursuant to the essential elements of their wage recovery claim filed under RCW 49.52.050. That statute requires the existence of some material fact that wages were willfully and intentionally withheld and are not merely subject to a bona fide dispute.

The trial court declined to rule that this lawsuit should be dismissed for failure to state a claim as Respondent urged. But, the court's ruling was well reasoned on the issue upon which it granted summary judgment: that these employees were bound by, and failed to exhaust, the mandatory contract grievance procedures set forth in the CBA. Respondent has not cross-appealed and seeks no further affirmative relief or modification of the trial court's ruling and therefore makes no Assignment of Error. Respondent addresses facts and asserts argument in this responsive brief, pursuant to RAP 2.4(a), related to all the issues of the case as presented to the trial court to allow this Court to review those acts in the proceedings below which if repeated on remand would constitute error prejudicial to Respondent. In the alternative, Respondent urges this Court to exercise its inherent authority to uphold summary judgment on any grounds briefed below.¹

¹ c.f., *Bernal v. American Honda Motor Co.*, 87 Wsh.2d. 406, 414, 533 P.2d 107 (1976).

II. STATEMENT OF THE CASE

1. This is a Collective Bargaining Case

There is nothing complicated about this case. The County has not failed to pay any wage owed. This lawsuit is merely a belated and groundless collateral attack on a lawful CBA that two individual employees do not like.

Appellants brought this claim pursuant to RCW 49.52. That statute renders an employer liable if that employer "willfully and with intent ...shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract." Any employer found to have unlawfully withheld wages under that statute shall be liable for twice the amount of wages withheld together with a reasonable sum for attorney fees.

There is no statute, ordinance, or contract requiring any specific salary for the Appellants other than the successive CBA's negotiated by their unions and adopted as formal ordinances by the Pierce County Council. The parties to these biennial CBA's are Pierce County and the union certified by PERC as the exclusive bargaining agent for these employees in accordance with RCW 41.56. Represented employees do not negotiate their wages and working conditions individually and are not parties to the CBA in their individual capacity. Individual employees are bound by the bargain reached by their exclusive bargaining agent as expressed in the CBA.

2. The Facts of the Case

During the negotiation of the 2007-2009 CBA between Pierce County and Appellant's union,² both parties sought a means to improve employee retention and provide a recruiting incentive to attract new applicants.³ The expiring CBA provided for a six step base salary range. That is, a new employee was hired at "Step 1," advanced in a year to "Step 2," then "Step 3" the following year, and so on, through his or her first six years of employment. In 2007, the parties agreed to abolish the entry level "Step 1" salary effective January 1, 2008. The new entry level salary would still be called "Step 1" (otherwise new employees would be confusingly hired at a "Step 2" salary, etc.) but would be the old "Step 2" salary. Everyone's step designations labels were correspondingly changed by one numerical designation. Thus, employees who had been designated "Step 2" were re-designated as "Step 1"; those in "Step 3" were re-designated as "Step 2"; those in "Step 4" re-designated as "Step 3"; those in "Step 5" as "Step 4"; and those in "Step 6" as "Step 5". The revised CBA then added a new "Step

² In 2007, the employee union representing most of Pierce County's corrections officers was the Washington State Council of County and City Employees. American Federation of State, County, and Municipal Employees (AFSCME), AFL-CIO Local 3752 CD – Corrections and Detentions. See Declarations of Mr. Joe Carrillo at C.P 183-187; Ms. Deborah Young C.P. 178-182; and, Mr. Brock Logan, Clerks Papers at 266-268.

³ See Carrillo Declaration at C.P 85 and Logan Declaration at 189.

6" salary, higher than the old "step 6" (essentially creating a "Step 7.")

No employees' salary, or next expected step increase, was impacted in any way. Nor did any other attribute of these employees' seniority change for any other purpose or with any other ramification.⁴ All that changed was the label associated with the steps attached to current employees. That was all that was intended and that was all that was accomplished. Apparently at least two of those employees, the Appellants in this case, did not like having their step designation called something other than by the numeral that matched their actual years of service. Or they resented the fact that newly hired employees would be hired at higher salary than they had. Regardless, there was no diminishment of wages; no lost expectation of the annual wage increase; no impact on these employees whatsoever. Again, while each step

⁴ Appellants in their Opening Brief at page 4 assert that "...what actually happened was that the county together with a union representative, agreed to shift down each officer's years of service." That is not true. Nothing in the revised CBA had anything to do with "years of service." Years of service for a public employee is related to retirement eligibility, seniority per reductions in force, awards and recognition, etc. None of this changed for any of these employees. Years of service is not related to wages unless some employment contract or other binding authority creates such a connection. Nothing in the revised CBA language affected any employees "years of service." Moreover, the parties could have agreed to pay different employees with varying years of service all sorts of varying salaries upwards or downwards if they had chosen to do so. No law of general application connects "years of service" to public employee salaries nor does this CBA. Likewise, the parties were free to revise how employees step designations were labeled however they wished. The parties could have labeled newly hired employees "Step 9", second year employees "Step 21", third year employees "Step 107", etc., or rename the steps to the names of colors, famous mountain peaks, or anything else they might have chosen. The salary steps under the unrevised CBA corresponded, for most employees, to their years of service. The salary steps under the revised CBA no longer bore any connection to "years of service" and no law or other terms of the agreement required any such connection.

designation changed, the salary for that re-designated step stayed the same. The step designations were just re-labeled as a mechanism to do away with the old entry level salary thereby establishing a higher starting salary; and to establish one more annual increase for current employees.

Just as no employee lost any salary or any step salary increase at the regular rate of progression, neither was the time lengthened in relation to how long it took an employee to advance upward to the next salary step. Every anniversary every one of these employees continued to move up to a higher salary until they were in the top salary step.

Again, it is true that as of January 2008 new employees started at a higher salary than their predecessors had started at when they were hired. That is because as of January 2008 new employees started at the old "Step 2" salary rather than the "old Step 1" salary (which was abolished). That is exactly what both parties to the CBA intended. No one intended for Appellants to get a base salary increase and they did not.

The parties to a CBA may bargain for and revise wages upwards or downwards. The parties to a CBA may change the terms of a CBA however, they choose to so long as the CBA is lawfully entered by contracting entities with the authority to contract. Appellants allege intentions and consequences that did not exist, or actually occur, in relation to the 2008 CBA language revisions. Appellants do not cite to any authority whatsoever

in support of their proposition that, even if those consequences had occurred, that such consequences would have been unlawful.

Illustrative of the actual consequences of the CBA revisions is the following table submitted to the trial court showing the actual step increase history of Appellant Mr. Craig Gardner (C.P. at 244):

	Date	Step Label	Paid
	10/23/06	"Step 1"	Salary #1 (\$19.51)
1 st Anniversary	10/22/07	"Step 2"	Salary #2 (\$21.35)
2 nd Anniversary	10/20/08	"Step 2"	Salary #3 (\$24.21)
3 rd Anniversary	10/19/09	"Step 3"	Salary #4 (\$26.77)
4 th Anniversary	10/18/10	"Step 4"	Salary #5 (\$28.79)
5 th Anniversary	10/17/11	"Step 5"	Salary #6 (\$30.23)
6 th Anniversary	10/15/12	"Step 6"	Salary #7 (\$31.76)

Under the revised CBA, Mr. Gardner was still called a "Step 2" employee on both his 1st and 2nd anniversaries, but his salary was stepped up one step increase on both dates, and he lost no wages or step increases. He received an additional salary step increase (salary #7) that he would not have otherwise received but for the revised 2007-2009 CBA.

Thus, but for the revisionary language of the 2007-2009 CBA, on Mr. Gardner's second anniversary he would have stepped from "Step 2" to "Step 3" or from \$21.35 to \$24.21 an hour. Under the revised CBA he stepped from old "Step 2" to new "Step 2" (the same as the old "Step 3"), from \$21.35 to \$24.21. There was no impact on his salary just as was intended and set forth in the revised CBA.

Likewise, Appellant Mr. Ota admitted in the declaration he filed in this case that he never suffered any wage diminishment and that he received a step increase every year of employment.⁵ But he also stated "...just because I'm getting paid more every year doesn't mean that the county is paying what was agreed to in the contract. Yes it's more every year, but not as much more as they agreed to pay and not as much as what was negotiated in the contract." ⁶

Mr. Ota seems to be saying that: (1) he had a legally unalterable right to not have his numerical step designation changed from the numeral that matched his actual years of service despite what his union and his employer contracted to in the 2007-2009 CBA; and (2) because he held this unalterable legal right he was entitled to more money because when he reached his third year of service he should have moved into the new "Step 3" salary (the old "Step 4" salary) not merely into the next sequential step in salary which was the old "Step 3" salary but was now called "Step 2." From where this supposed legal right emanated to forever have his step designation numerical label match his actual years of service is not set forth either in any pleading below, or Appellant's Opening Brief to this Court. Nonetheless, this is the sum total of the logic behind this lawsuit.

⁵ See Declaration of Drew Ota C.P 338-349.

⁶ Ota Declaration C.P. at 341.

Of course, under Appellant's logic, Mr. Ota and Mr. Gardner and every other employee similarly situated, would have skipped over their third salary in their third year of service (salary #3 in the chart above), and gone straight to their fourth salary in their third year of service (salary #4 in the chart above) because they would have been stepping up to the new "Step 3" which was the old "Step 4" salary - in their third year of employment.⁷ Therefore they now seek a windfall that was never intended and would be contrary to the language of the CBA.

3. Appellants Statement of Facts is Misleading

Appellants Statement of the Case in their Opening Brief asserts, both explicitly and implicitly, that Pierce County has denied Appellants some bargained for wage increase. For example, Appellants state on page 8 of their Opening Brief that "[i]t seems unlikely that anyone bargained for a

⁷ Also Appellants in their Opening Brief, at pages 5 – 7, as they did in the trial court, assert untruths in an attempt to establish that under the revised CBA some newer employees lapped or passed senior employees in the step increases. On page 5 Appellants state: "after January 2008 some officers with less service time began to lap officers with more service time and get paid more" and on page 6 "[s]o between February of 2008 and May of 2008, the officer hired in February of 2007 got more pay than the officer hired in May of 2006." None of this is true. It is true, and it is completely addressed in the record in the Declarations of both Ms. Debbie Young and Mr. Brock Logan that there was a potential for this problem to occur but when that potentiality surfaced it was addressed and fixed. This problem would have occurred if a person hired in 2007 got their annual increase by virtue of the January 2008 change in steps rather than having to wait for their actual anniversary to arrive. When the concern was fixed by oral agreement between the parties salaries were adjusted so this did not occur, and the entire assertion that this did occur is untrue and pointless. It is pointless because while this did not occur as Appellants suggest, even if this had occurred - so what? This occurrence would not give rise to any legal right or colorable claim for these Appellants, and it would not in any way support, enhance, or substantiate the claims made in this lawsuit.

whole range of increase 'step' pay rates that were essentially illusory [sic], which is what would be the case if the county simply rolls back years of service on employees at the same time 'step rates' are increased, so that there isn't any actual change in base pay rate." There was no increased pay rates illusory or otherwise. The CBA did not roll back years or increase step rates. The CBA merely eliminated the first step salary and added one more new step salary at the top. This is exactly what both the County and the employee union intended and what the contract language says. Appellant's Statement of the Case is entirely misleading. Moreover, there is absolutely nothing inartful or unclear about the contract.

4. The 2007-2009 CBA Language

Following is the contract language from the contract (C.P. at 234-235) described above covering January 1, 2007, through December 31, 2009, that effectuated the altered step designations:

ARTICLE 6 – WAGES

Section 1 - Wages.

2007. Employees shall be granted a 4.2% wage adjustment effective January 1, 2007.

2008. Employees shall be granted a wage adjustment equal to 100% of the bi-monthly Seattle-Tacoma-Bremerton CPI-U increase reported in July 2007, (for information from June 2007 compared to the 12 months beginning June 2006), but not less than 2.5% nor greater than 5.5%, effective January 1, 2008.

In addition to and after the cost-of-living increase above has been applied, effective January 1, 2008, the pay range for the classification of Correctional Officer shall be adjusted as follows: Step 1 shall be dropped and the existing Steps 2 through 6 shall be moved down one step each, to Steps 1 through 5. A new Step 6 will be added which is approximately 2.5% higher than the existing top step. Employees shall each be moved to the corresponding new step number so that their pay rate will not be impacted by this change and step increase counters will continue. However, employees who have been at the top step of the range for a minimum of 26 accruable pay cycles will be advanced to the new Step 6.

2009. Employees shall be granted a wage adjustment equal to 100% of the bi-monthly Seattle-Tacoma-Bremerton CPI-U increase reported in July 2008 (for information from June 2008 compared to the 12 months beginning June 2007), but not less than 2.5% nor greater than 5.5%, effective January 1, 2009.

There is nothing confusing or ambiguous about this language. The CBA merely states that employee's step labels would be re-designated to the new step number, but without loss of salary "so that their pay rate will not be impacted by this change and step increase counters will continue."⁸

⁸ Appellants in their statement of the case really do not seem to care what the CBA says or what the parties to the CBA have put into the record stating their intent regarding this language. For example, at page 3 of their Opening Brief Appellants blithely assert that these CBA revisions created a "new pay scale" and that "[t]his new scale, essentially shifting everyone up a pay grade beginning January of 2008 would constitute a significant pay raise in county pay." But there was no such shifting up a pay grade and no intended pay raises and no such thing was intended or expressed in this contract. The only change in pay was for new hires and for those at the top end of the step scale who would get one more annual step increase. Likewise at pages 7-8 of their Opening Brief Appellants offer what they suggest would have been clearer language that would have better assured: "...that everyone gets the increase in pay bargained for..." There was no such language because there was no such intent and no such bargain. What was bargained for was a

Every subsequent CBA with each successive union representing Pierce County Corrections Deputies has included language as to the continued implementation of the 2008 step designation adjustments with this language: "Step Plan. Employees in Step '1' through '5' of the pay plan shall be provided a step increase on their anniversary date after completion of 26 accruable pay cycles **computed in present classification.**" (emphasis added). Thus each successive contract perpetuated the employee's present step number as altered in 2008 by explicitly noting that future step increases were computed per that employee's "present classification."

Article 1 of the 2007-2009 CBA referenced above identifies the contracting parties as solely Pierce County and the union. Article 3 designates the union as the sole and exclusive bargaining agent. Article 29 established a Labor Management Relations Committee for the purpose of providing a forum to discuss matters of interest to either party. Article 25 provided that the written contract contained the full and complete agreement on all issues between the parties hereto **and for all whose benefit this agreement is made** (emphasis added).

mechanism to increase starting salaries and add a new top-end step with no impact on the base salary of any other employee. That is what the contract says. Appellants' entire lawsuit is based on a false accusation that the parties to the CBA intended to give Appellants a pay raise that their employer then willfully failed to pay them. There was no such intent and no such failure, willful or otherwise.

Article 18 of the 2007-2009 CBA, and a similar article of each successive contract between the County and the unions representing is Corrections Officers, provides for mandatory binding arbitration as the sole and exclusive remedy available under those contracts. Each of these contracts contains the same, or substantially similar language: "the grievance and arbitration procedures provided herein shall constitute the sole and exclusive method of adjusting all complaints or disputes arising from the Agreement which the Guild or employee may have and which relate to or concern the employee and the Employer[.]"

5. No Union Grieved or Filed any Complaint in Support of Appellants' Claims

Appellant Ota filed internal complaints and attempted to initiate grievances with his managers, the County Human Resources Office, and his unions, alleging that these step re-designations somehow penalized him personally. Neither his managers, the County Human Resources Office nor his own union representatives understood or accepted his complaints. None of these grievances were ever advanced as union grievances under the CBA. By the terms of the CBA only the union can advance a grievance to binding arbitration

Neither the union that ratified the 2007-2009 CBA that this lawsuit is premised upon, nor any subsequent union that represented Appellants and

declined to file a grievance on this issue, is a party to this lawsuit. Moreover, the union representative who negotiated the CBA language in question on behalf of the Corrections Officers in the 2007-2009 CBA submitted a declaration in this lawsuit in support of Respondent's motions below. That declaration confirms and supports the Declarations submitted by Pierce County asserting that there has been no misinterpretation of the CBA, and no unlawful wage withholding.⁹

Appellants never filed an unfair labor practice complaint with PERC against any union that rejected their complaints, or filed any lawsuit against those unions for failing to fairly represent their interests before bringing this lawsuit.

III. ARGUMENT

1. Standard of Review and Summary Argument

A party moving for summary judgment meets its burden by showing that there is an absence of evidence supporting the non-moving party's case. *Young v. Key Pharmaceuticals*, 112 Wn. 2d 216, 225 n.1, 770 P.2d 182 (1989), (citing, *Celotex Corp v. Cattrett*, 477 U.S. 317. 325, (1986).

In order to prevail on a wage recovery claim under RCW 49.52.050, willfulness and intent are essential elements of the statutory cause of action.

⁹ See Declaration of Brock Logan at C.P at 266-268.

Any possible measure of damages and any opportunity to recover attorney fees will be dependent on a clear and convincing showing of something more than a bona fide dispute between the County and these two employees. To prevail, Appellants would have to establish some material fact proving that Pierce County intended to deprive these employees of wages lawfully owed and not subject to dispute. Appellants raised no suggestion of the existence of any such material fact that might establish this necessary element of their cause of action under the statute they rely on.

Neither Appellants, nor their exclusive bargaining representative, have exhausted their contractual grievance remedies under the applicable CBA, and there is no suggestion whatsoever of any evidence that Appellants ever challenged their unions' refusal to do so. Without such evidence Pierce County's Motion for Summary Judgment was granted as a matter of law.

A trial court should grant summary judgment where a plaintiff "fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Young*, 112 Wn. 2d at 225 (*citing Celotex*, 477 U.S. at 322). Moreover the test is not met by plaintiff presenting only some meager scintilla of evidence on a claim because a "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be some evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 252 (1986). See also *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736, 150 P.2d 633 (2007). A defendant's burden on summary judgment "may be met by pointing out that there is an absence of evidence in support of the non-moving party's case." *Tender v. Nordstrom*, 84 Wn.App. 787, 791, 921 P.2d 1209 (1997).

2. Appellants Cannot Prove Willfulness.

RCW 49.52.050 not only renders an employer liable for willfully and intentionally depriving any employee of lawfully owed wages; this statute actually provides that an employer who so willfully withholds an employee's wages could be guilty of a misdemeanor.¹⁰ That employer shall also be liable for judgment for twice the amount of wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum of attorney fees. RCW 49.52.070. This is as serious a claim as can be brought against a county government.

However, the Washington Supreme Court has repeatedly ruled that nonpayment of wages is willful only when it is the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment. *Chelan County Deputy Sheriffs Ass'n v. Chelan County*, 109 Wash. 2d 282, 301, 745 P.2d 1 (1987), *Lillig v. Becton-*

¹⁰ RCW 42.52.050(5).

Dickenson, 105 Wash. 2d 653, 660, 717 P.2d 1371 (1986). The plaintiff bears the burden of proof regarding a question of fact regarding willfulness in the context of withheld wages, and that burden is reviewed under the substantial evidence standard. *Pope v. Univ. of Washington*, 121 Wash. 2d 479, 490, 852 P.2d 1055, 871 P.2d 590 (1993). A bona fide dispute is a fairly debatable dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid. *Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152, 161-62, 961 P.2d 371 (1998).

In 2009, the Washington Supreme Court reiterated, in *Morgan v. Kingen*, 166 Wash. 2d 526, 210 P.2d 995 that in any claim brought under RCW 49.52.050, there are at least two instances that always negate a finding of willfulness "the employer was careless or erred in failing to pay, or a 'bona fide' dispute existed between the employer and the employee regarding the payment of wages." *Morgan*, Id. at 534, citing: *Schilling* and *Pope v. Univ. of Wash., supra*. And while the *Morgan* court upheld a finding in summary judgment as to willfulness in that case (the defendants in that case did not contend a lack of willfulness on their part. In that case the defendants conceded that their withholding was willful but asserted that they were unable to pay the wages under the circumstances of a pending bankruptcy proceeding).

Pierce County has not withheld, and indisputably has not willfully and

intentionally withheld, any wages owing to any Pierce County Corrections Officer including Appellants. There is, obviously, a bona fide dispute regarding any claim for unpaid wages, not between the parties to the CBA, but between the County these two Appellants.

Willfulness and intent is the essential element of the statutory cause of action asserted in this lawsuit. Any possible measure of damages and any opportunity to recover attorney fees will be dependent on a clear and convincing showing of more than a mere contract interpretation disagreement between the County and these employees. Plaintiff must prove that the County intended to deprive these employees of wages. They cannot do that. The pleadings and declarations on file in this matter facially and indisputably establish that there is a bona fide wage dispute between these employees and the County.

3. Appellants Failed to Exhaust Grievance Remedies

There is simply no authority under Washington law for an individual employee to seek judicial re-interpretation of a CBA without either joining the union that was the real party in interest, or simultaneously seeking redress from that union under a duty of fair representation action.

Granted, not all represented employee claims must be arbitrated under grievance clauses, but a failure to arbitrate under the CBA is only excused when the rights forming the basis of the claim do not depend upon the CBA

itself. Thus, an employee may only escape the duty to arbitrate a mandatory arbitration clause if a claim is based on some non-contractual substantive right. If this case involved a claim under the minimum wage act, or an action by some qualifying individual under the Washington Law Against Discrimination, etc., then an independent non-contractual, statutory right would exist that would, arguably, obviate the necessity of pursuing the contract arbitration remedy or filing an unfair labor complaint at PERC. But this is not a claim under the minimum wage act, or the Washington Law Against Discrimination, or any other statute establishing some non-contractual right. There is no law that prohibits an employer and an employee union from contractually altering an employee's wage step designation, or from contractually altering an employee's wages, or from contractually altering any other condition of employment as agreed to in the CBA so long as those agreements do not violate some inalienable right.

The "wage recovery" or "wage rebate" act, RCW 49.52 does not establish an independent substantive statutory right. That statute only provides a right to bring an action to recover an otherwise definitive wage that "such employer is obligated to pay such employee by any statute, ordinance, or contract." There is no statute requiring any specific wage for Pierce County Corrections employees except their CBA. The language of that CBA is neither ambiguous nor in dispute between the parties who

drafted that language. That CBA has a mandatory arbitration clause that is binding upon individual employees benefitted under the CBA.

If the employee's union unlawfully fails to process a grievance or otherwise demonstrably fails to fairly represent the employee's interests that might excuse a failure to exhaust the contract grievance remedy but not unless the employee also sues the union. Otherwise the employee is, as in this case, seeking to enforce his or her own interpretation of the contract as a non-party, against one party to the contract, the employer, without also seeking to enforce the contract against the other party to the contract, the union.

A. What is the Controlling Law?

The controlling law regarding grievance clauses in public employment collective bargaining is set forth in *Lew v. Seattle School Dist.*, 47 Wash. App 575, 736 P.2d 690 (1987). That law is:

[W]here a collective bargaining agreement establishes grievance and arbitration procedures for the redress of employee grievances, an employee must exhaust those procedures before resorting to judicial remedies. *Moran v. Stowell*, 45 Wash. App. 70, 724 P.2d 396 (1986), (internal citations omitted). However, federal and state courts have held that an employee's failure to exhaust contractual grievance procedures does not bar an action by the employee for breach of contract if the employee has been prevented from exhausting his or her contractual remedy by his union's wrongful refusal to process the grievance. In this regard the courts have generally held that where a grievance procedure has not been exhausted due to the union's refusal to press the

matter on to arbitration a 'prerequisite to maintaining a lawsuit against the [employer] is an allegation that the union acted arbitrarily, discriminatorily, or in bad faith in failing to exhaust the contractual procedures for settling disputes.' (Quoting *Vaca v. Sipes*, 386 U.S. 451, at 184 n.9, 185, 87 S. Ct. 903, 913 n. 9, 914 (1967)) citing *Ploof v. Village of Enosburg Falls*, 514 A.2d 1039, 1043 (Vt.1986); *Lomax v. Armstrong Cork Co.*, 433 F.2d 1277, 1280 (5th Cir. 1970); *Hardwick v. United States Postal Service*, 391 F. Supp. 20, 22 (E.D. Tenn. 1974)). In part, this requirement arises out of the fact that the union is the agent of the aggrieved employee, and in the absence of evidence showing bad faith, discrimination, or arbitrary conduct on the part of the union, its decision to forego exhaustion of the grievance procedures binds the employee and forecloses judicial action on the contract.
Id. at 47 Wash. App 575 at 577-78.

The *Lew* precedent establishes that an employee must exhaust the grievance and arbitration procedure if the dispute arises under a CBA. Appellant does not address *Lew v. Seattle School Dist.* in their Opening Brief to this Court. Instead Appellant suggests that the County mistakenly relied below only upon *Davis v. State Department of Transportation*, 138 Wash App 811, 159 P.3d 427 (2007).¹¹

In *Davis* a group of Washington State Ferry (WSF) officers and engine room employees brought a class action lawsuit against the Washington State Department of Transportation (WSDOT) under RCW 49.52.050. This lawsuit alleged that these employees had gone uncompensated for some or all of their time for watch changes that extended beyond their regular

¹¹ Appellants Opening Brief at page 13.

working hours. Both the trial court and the appellate court ultimately agreed that the controlling CBA supported the employee's claim. However, the ruling in *Davis* was that regardless of the merits of their claim the employees failed to exhaust their contractual remedies under the CBA or their administrative remedies before the Marine Employees Commission (MEC) and thus the trial court should have granted summary judgment in favor of WSDOT.

In the *Davis* case, unlike this case, there was not even a particular CBA provision addressing the precise issue before the court (payment for shift changes), hence the employee's argument that pursuing their arbitration remedy would have been fruitless, but nonetheless the court ruled that the CBA addressed wages generally, and that therefore no cause of action can be pursued under RCW 42.52.050 without first "applying the CBA, its grievance procedures, and its remedies." *Davis*, at 138 Wash App 811, 820.

Moreover, the *Davis* court unlike the *Lew* court, explicitly addressed the relationship between the wage-claim statute and collective bargaining beyond just the question of whether the former gave rise to an independent statutory claim that took it out of the realm of the latter. The court noted that "the policy of the legislature in originally enacting RCW 42.52.050 and RCW 42.52.070 in 1939 was to prevent employers from coercing employees into making secret rebates from their wages." Citing *McDonald*

v. Wockner, 44 Wash 2d. 261, 269-71, 267 P.2d 97 (1954), and Laws of 1939, ch. 195 sections 1-5. The court went on to note that the WSF employees collective bargaining statute was designed for the much larger purpose to "promote harmonious and cooperative relationships between the ferry system and its employees to organize and bargain collectively;...promote just and fair compensation, benefits, and working conditions for ferry system employees." *Id.* at 823.

The *Davis* court stated "in the event of a dispute involving the interpretation, application, or alleged violation of the CBA the [employees] are to use the exclusive CBA grievance procedures, in fact no other remedies may be utilized by any person" until the grievance procedures have been exhausted. *Id.* at 824, citing *Hill v. Department of Transp.*, 76 Wash. App 631, 645, 887 P.2d 476, *review denied*, 126 Wash. 2d 1023, 896 P.2d 63 (1995). The court further ruled that "even assuming, *arguendo*, that the employee's claim was not a grievance for purposes of the CBA, and the employees had no grievance procedures available to them, the employees nevertheless were obligated to pursue a remedy from the MEC ...before seeking a remedy at law." *Davis* at 824-825.

Appellants attempt to distinguish *Davis* as having "turned on a very special statute applicable to ferry employees..."¹² It did not. The *Davis* court was merely trying to determine whether the wage recovery statute provided an independent statutory cause of action such to allow for the circumvention of the statute, RCW 47.64.150, that specifically required that "ferry system employees shall follow either the grievance procedures provided in a collective bargaining agreement, or if no such procedures are so provided, shall submit the grievances to the marine employees commission as provided in RCW 47.64.280"¹³ These statutes were merely the statutes that governed collective bargaining for ferry employees, like RCW 41.56 governs collective bargaining for County employees. In 2011, the legislature repealed these statutes and abolished the MEC. Now WSF employees' collective bargaining comes under the purview of PERC just like other state employees, and just like county employees. (RCW 47.64.130).

It is true that the now-repealed WSF grievance statute, RCW 47.64.150, was differently worded than the statutes that apply to County employees, RCW 41.56.122 *et seq.*, because the MEC statute made exhaustion of the

¹² Opening Brief of Appellant at page 13.

¹³ Chapter RCW 47.64.150 [1983 c 15 § 6]; Repealed by 2011 1st sp. S. c 16 § 28, effective July 1, 2013.

grievance procedures before the MEC mandatory even if there was no binding arbitration clauses in the CBA. No similar mandatory grievance procedure exists at PERC under RCW 41.56, if a CBA does not have a mandatory grievance arbitration clause. However, this does not change the rule as enunciated in both *Lew* and *Davis* (and every other applicable case of which Respondent is aware) that if a binding grievance arbitration is set forth in a CBA, that binding grievance arbitration must be exhausted before seeking judicial relief. And in *Davis* this distinguishing element of the statute was not even at play because in that case, as in this case, the court was presented with a CBA that contained a mandatory grievance clause. *Davis, supra*. 138 Wash App 811 at 824. Ultimately the issue was the same in *Davis* as in this case – does RCW 42.52.050 provide a statutory remedy that relieves the employees from exhausting the contractual grievance process before seeking a remedy at law? The *Davis* court said it did not. There is nothing about the *Davis* holding that meaningfully distinguishes it from this case.

B. Did Grievance Procedure Apply to Appellants?

The 2007-2009 CBA , like each of the successive contracts between the County and its Corrections Officers, contained a grievance clause at Article 17 that defined "grievance" as a "dispute arising from management interpretation or application of the provisions of this agreement which

adversely affects an employee's wages, hours or conditions of employment and is contrary to the terms of this agreement" and a mandatory arbitration clause that stated "the grievance and arbitration procedures provided herein shall constitute the sole and exclusive method of adjusting all complaints or disputes arising from the Agreement which the Guild or employee may have and which relate to or concern the employee and the Employer[.]"

Appellants have argued both to the trial court and to this Court in their Opening Brief that Appellants complaint did not amount to a contract grievance requiring mandatory arbitration because the County's unlawful revision of the step designations, or the County's subsequent mistaken interpretation of that CBA language, did not affect employee wages, but merely their "paychecks." Appellants have cited to no authority that might support or elucidate this distinction. The trial court's Order Granting Summary Judgment succinctly responded to this novel theory by stating that there "would be no cause of action in this lawsuit for violation of RCW 49.52 but for the CBA's structure of entitlement to wages." ¹⁴

Throughout the rest of Appellant's entire case Appellant has alleged that the County's willful withholding of wages is inexorably linked to the County's willful misinterpretation or willful misapplication of the salary

¹⁴ Order Granting Pierce County's Motion for Summary Judgment page 3, C.P. at 365-368.

step revisions in the 2007-2009 CBA. In fact, in Appellant's Complaint they asserted that "Pierce County's plan and payment of wages at the improperly reduced level of seniority resulted in employees being paid a wage that was significantly reduced from the agreed upon contract rate of pay and therefore violated RCW 49.52.050 and RCW 49.52.070."¹⁵

This lawsuit is a wage claim recovery action. The wage is determined by the terms of a CBA. The CBA requires mandatory grievance arbitration and applies not just to the union that enters into that CBA but to for "all whose benefit this agreement is made".¹⁶

Besides the pay versus paycheck argument, Appellants also argue that the case of *Champagne v. Thurston County*, 163 Wn. 2d 69, 178 P.3d 936 (2008) suggests, at least tacitly (in that it does not directly address the issue of CBA grievance exhaustion in a wage claim brought by public employees) that individual employees, unlike their representative unions, are not bound by CBA mandatory grievance requirements.

Champagne v. Thurston County involved a claim brought under RCW 49.52.010 (what that court referred to as the "Wage Rebate Act or "WRA"), the Minimum Wage Act, RCW 49.46, and the Wage Payment Act RCW 49.48. The claim was that one or all of these laws rendered a delayed

¹⁵ Complaint page 5 of 12 C.P. at 10.

¹⁶ 2007-2009 CBA Article 25 C.P. at 228.

payment of a wage to be essentially a non-payment of the wage. The lawsuit was premised on superseded provision of the Washington Administrative Code (WAC) promulgated pursuant to the wage and hour laws, regarding how long employers could take to pay overtime. The CBA that the plaintiff's union had entered with Thurston County provided that payment for overtime would be made in the month after the work was performed. As it turned out that agreement violated the aforementioned WAC. Plaintiffs brought an action for retroactive recovery of the wages that had been untimely paid. The plaintiffs had, apparently, not filed any grievance under the CBA, but neither had they complied with the county's statutory claim filing requirements before bringing their lawsuit.

Thus, in *Champagne* there was no dispute over what the CBA provided for, and no dispute regarding whether the county was properly implementing that CBA. The only dispute in *Champagne* was whether in complying with that CBA the county and the union had (unwittingly) violated a superseded Department of Labor and Industries WAC. There was no dispute arising out of any disagreement about the CBA or what it intended. Unlike this case *Champagne* was not a collective bargaining case.

Also the *Champagne* ruling otherwise fully supports the County's argument in this case regarding the application of RCW 42.52.050's willfulness element to this lawsuit. In *Champagne* the county disputed that

the superseded WAC was applicable to its payment schedule as set forth in the CBA (the county argued that the new WAC, with which it was compliant, was intended to operate retroactively). But, even though the county had withheld lawful wages and that withholding was deliberate, the withholding was still not "willful" the court held for purposes of RCW 42.52.050 because the county "did not act willfully since the disagreement over payment of wages is a bona fide dispute." *Champagne*, 163 Wash 2d 69 at 83.

C. Did Appellants have an Independent Right that Excused Exhaustion the Grievance Procedures?

Employees may only escape the duty to arbitrate a mandatory arbitration clause if a claim is based on a state or federal law that grants employees non-contractual independent substantive rights. There is no such right at issue in this case. Appellants conflate their right under RCW 42.52 to bring an action to recover an otherwise determinable wage with a right to use that statute to actually determine the wage.

The United States Supreme Court has long held that whether a state law claim is preempted by a CBA depends on whether the claim is independent in the sense that resolution of the state law claim does not require construing the collective bargaining agreement, *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877, 486 U.S. 399, 100 L. Ed.2d 410 (1988). An oft quoted

rule from *Lingle* is that "notwithstanding the strong policies encouraging arbitration, different considerations apply where the employees claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Id.* 108 S. Ct. 1877 at 1884.

The Washington Supreme Court has explicitly adopted the *Lingle* rule in the private sector collective bargaining context where federal preemption under National Labor Relations Act is at issue. The Supreme Court reiterated the test to be "whether resolution of the state law claim does not require construing the collective bargaining agreement." *Commodore v. University Mechanical Contractors Inc.*, 120 Wash 2d. 120, 128, 839 P.2d 120 (1992). The *Commodore* court held in that case that the litigant's claim of racial discrimination was based on an independent state right codified at RCW 49.60 and "could have been brought in the absence of a CBA." *Id.* at 132.

Appellants assert in their Opening Brief that this issue has "essentially been resolved" in *Wingert v. Yellow Freight Sys., Inc.* 146 Wash. 2d 841, 50 P.3d 256 (2002). In this case employees of a trucking firm complained that they were given less break time than state law (regulations promulgated by the state Department of Labor and Industries) required. The wage recovery act, RCW 42.52.070, came into play based on an implied cause of action theory for unpaid wages when forced to work through all, or portions,

of breaks. The Court held that the employees had an implied cause of action under the wage recovery act but that the case required remand on that claim to determine RCW 42.52's required showing of willfulness. *Id.* at 850.

Defendants in *Wingert* asserted that that the employee break schedules were consistent with the terms of their nationally bargained CBA. To support this claim these defendants could have argued federal preemption under section 301 of the National Labor Relations Act (NLRA), and in fact tried to do that on appeal. However, they had failed to make those arguments to the trial court and so were foreclosed from doing so on appeal. *Wingert* 146 Wash 2d 841 at 852-53. Thus the court was left examining a private sector CBA without a claim of federal (NLRA) preemption properly before the court. The defendants still argued, (based merely on language in the state labor statute indicating that it should not be construed to infringe on collective bargaining rights) that the CBA superseded the state labor regulation that substantively established minimal break-time for Washington employees.

Ultimately, the *Wingert* court merely weighed the balance between the two competing provisions within the state statute, one, the specific language that that statute was "not to be construed to interfere, impede, or in any way diminish the right of employees to bargain collectively...", against, two, the more compelling language in the same statutory scheme that provided "it

shall be unlawful to employ any person in an any industry or occupation within the State of Washington under conditions of labor detrimental to their health; and it shall be unlawful to employ workers in any industry within the state of Washington at wages that are not adequate for their maintenance." *Id.* at 851.

Thus, *Wingert* was not an exhaustion of remedies case, nor was *Wingert* a public employment case or even a collective bargaining case. There was no dispute regarding the proper wages owed to these employees under the CBA. The only question was whether they were receiving the break-time that they were entitled as definitively established pursuant to an independent statute. Moreover, the *Wingert* court was not even tasked with applying the federal preemption analysis addressed in *Commodore*, etc. above regarding federal labor law preemption, because of the defendant's failure to raise that issue in the trial court.

Wingert is not the case that "essentially resolves" the issue presented in this case regarding whether a cause of action filed pursuant to the wage recovery statute, RCW 42.52 suffices to release public employees from exhausting their contractual grievance remedies under a CBA. The case that "essentially resolves" this issue is the *Davis* case discussed above. But practically speaking there is no difference in the logical underpinnings of these two cases. All of the case law is consistent on this point - employees

may only be excused from pursuing contract grievance under a lawful CBA if the employee can point to an independent, non-contractual, substantive right. In *Wingert* it was the right to statutorily prescribed rest breaks. If the trucking company had been failing to pay the minimum wage, the minimum wage law would have sufficed. If there had been racial discrimination, as in the *Commodore* case, independent anti-discrimination statutes would have sufficed. As the *Davis* court held, and as the trial court ruled in this case, under Washington law, merely pursuing a claim for disputable wages pursuant to RCW 42.52 does not suffice to circumvent mandatory grievance arbitration.

D. Would Applying the Law Violate Public Policy?

Appellants in their Opening Brief keep referring to the mandatory arbitration required under collective bargaining as mere "alternative dispute resolution."¹⁷ Be they private sector agreements subject to federal law, or public-sector agreements subject to state law, every CBA contains some self-governing arbitration clause, the power of which emanates from the logic and purpose first enshrined in the Federal Arbitration Act (the Act), 9 U.S.C. sections 1-16 (2012). The Act passed in 1925 and predates the NLRA. As a result from the Act, there is 90 years of jurisprudence regarding

¹⁷ Appellant's Opening Brief at pg. 12, etc.

the sanctity of labor arbitration agreements in CBA's. The simple premise of the Act, and the labor arbitration clause, is that parties to a labor contract may use arbitration agreements to require that disputes be arbitrated on an individual basis under the terms of those agreements rather than be subject to class actions or other collective litigation. See e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). This independent and self-governing authority between the parties to a labor agreement is, generally inviolable, either under a doctrine of jurisdictional preclusion or judicial deference, unless the enforcement of an arbitration clause would compel an individual employee to forego some independent legal right not emanating from the CBA itself. See e.g. *Mitsubishi Motor Corp v. Soler-Chrysler Plymouth Inc.*, 473 U.S. 614, 628 (1985).

Requiring these two Appellants to abide by these laws does not offend any contravening public policy or any equity. They were ably represented by their unions and there is no reason to suspect that their union's refusal to adopt their complaint regarding the revisions to the CBA in 2008 was based on anything other than the fact that it is a bogus complaint. The union is the agent of the aggrieved employees and in the absence of evidence demonstrating bad faith, discrimination, or arbitrary conduct on the part of the union, the decision was made by the union to forego exhaustion of a

grievance procedure binds the employees and forecloses judicial action on the contract.

Moreover, if anything would violate public policy, and undermine the entire framework of collective bargaining, it would be to allow two individual employees, eight years after the fact, to overturn the execution and implementation of a lawfully bargained CBA that is not in dispute by either the union that bargained the CBA, or any subsequent union representing those employees. As noted above Washington law requires that if a union declines to pursue a grievance on the employee's behalf the employee must assert a claim against the union for a failure to fulfill the duty to represent as prerequisite to filing a lawsuit against the employer under the CBA.

E. Was There Substantial Contract Compliance?

As set forth above it does not matter that Appellant Ota tried several times to get his union to advance a grievance on his behalf. The union did not do so. Probably because his complaint lacked merit. Only the union was capable of substantial compliance in regard to the grievance arbitration requirements under the law. Mr. Ota, or any other Correction Officer could have accomplished substantial compliance by filing an unfair labor practice complaint with PERC, suing his union, joining his union in this lawsuit, or asking his current union to initiate a grievance on behalf of some employee

still in their first six years of service under the perpetuation clause of the step increase system that mandates that employee's step level be computed in the present classification. As The *Davis* Court stated: "in the event of a dispute involving the interpretation, application, or alleged violation of the CBA the [employees] are to use the exclusive CBA grievance procedures, in fact no other remedies may be utilized by any person until the grievance procedures have been exhausted." *Davis, supra*, 138 Wash App at 824.

IV. CONCLUSION

It begs credulity to suggest that sophisticated, well financed, and properly aggressive public labor unions, with ample access to their own legal counsel, would simply sit by over the past eight years and acquiesce to a deliberate, willful, and intentional denial of lawfully owed wages to any of its members without raising a single objection; in terms of this lawsuit and this appeal, it is both unprecedented and contrary to public policy for one party to a CBA, and only one party to that CBA, to have to answer to a court of general jurisdiction regarding the proper interpretation of that CBA without joining the other party to that agreement, bringing an unfair representation claim against their union, or exhausting the contract grievance procedures.

Appellants close their Opening Brief with several arguments, regarding how and why it would be impractical, or perhaps futile, for Appellants to

try now, eight years later, to either get their current representative union to file a grievance; or PERC to entertain an unfair labor practice claim against either the County or their union, or to otherwise seek non-judicial redress to their supposed wage claim. These practical obstacles may exist now, eight years after the revisions to the CBA that they seek to undo. But these practical obstacles did not exist then and practical obstacles did not then, and do not now, change the law that applied to any dispute arising under a lawful CBA.

As pointed out above, the 2007-2009 CBA, like each of the successive contracts between the County and its Corrections Officers, contained a grievance clause at Article 17 that defined "grievance" as a "dispute arising from management interpretation or application of the provisions of this agreement which adversely affects an employee's wages, hours or conditions of employment and is contrary to the terms of this agreement" and a mandatory arbitration clause that stated "the grievance and arbitration procedures provided herein shall constitute the sole and exclusive method of adjusting all complaints or disputes arising from the Agreement which the Guild or employee may have and which relate to or concern the employee and the Employer[.]"

More importantly, if individual employees can be allowed to, eight years after the fact, impose their own individual retroactive interpretation

of a CBA, that was negotiated in good faith and lawfully executed between the employer and the certified union pursuant to RCW 41.56.020, then any CBA negotiated by any public employer is likewise subject to perpetual litigation and reinterpretation by non-party third party beneficiaries (the individual employees) regardless of the meeting of the minds that occurred between the parties at the time the CBA was negotiated.

Whatever the practical obstacles that may exist now for these particular employees to retroactively re-write an eight year old CBA, those obstacles exist for a reason. The law provides ample redress for employees to insure that they receive fair representation from their unions and that their employer's respect the obligation to bargain fairly with those unions. This is the whole point to collective bargaining and collective bargaining law. Appellants ignored that law prior to filing this lawsuit and now seek to set aside that law in the arguments advanced to this Court.

There is no law that prohibits an employer and an employee union from contractually altering an employee's wage step designation, or from contractually altering an employee's wages for that matter, or from contractually altering any other condition of employment as agreed to in the CBA so long as those agreements do not violate some non-contractual inalienable right. No such independent and inalienable right of Appellants was affected in the revisions to their employment CBA that occurred in

2008. In fact these revisions did not impact them at all, except to give them one more annual salary increase that they would not have gotten otherwise. Because there was no independent non-contractual right impaired by any revision to any CBA affecting these Appellants they were bound to seek redress under the CBA grievances procedures; or seek administrative relief at PERC, and without exhausting those procedures they have no right to bring this lawsuit.

Pierce County has been wrongfully sued in this matter. The County did nothing wrong and this case was properly disposed of in Summary Judgment by the Thurston County Superior Court.

DATED: February 1, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **BRIEF OF RESPONDENT PIERCE COUNTY** was electronically filed with the clerk of the court and delivered this 1st day of February, 2016, via electronic delivery pursuant to the agreement of parties to:

- J. Mills: jmills@jmills.pro; michelle@jmills.pro
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PIERCE COUNTY PROSECUTOR

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