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COURT OF APPEALS DIV. I
STATE OF WASHINGTON
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NO. 62380-0-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

DOYLE MUIR,

Plaintiff/Respondent,

v.

COUNCIL 2 WASHINGTON STATE COUNCIL
OF COUNTY & CITY EMPLOYEES and LOCAL
1849, AFSME, AFL-CIO,

Defendant/Petitioner

DEFENDANT/PETITIONER'S REPLY BRIEF

San Juan County Superior Court Case No. 07-2-05041-9

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I. INTRODUCTION

For its reply to Mr. Muir's response to its opening brief, Council 2 relies on that opening brief, its Motion for Discretionary Review, its Reply Re: Motion for Discretionary Review, its Response to Mr. Muir's Motion to Modify the Commissioner's Ruling Granting Discretionary Review, and its argument below.

II. ARGUMENT

As to a few specific portions of Mr. Muir's response, Council 2 replies as follows:

Prior to reinstatement Muir was a good supervisor. (Muir's responsive brief at 6.)

Mr. Muir omits from the excerpts of the arbitrator's decision from which he quotes the sentence "[t]he arbitrator has previously concluded that the County had just cause to initiate disciplinary action against Muir based on his unacceptable attitude towards his co-workers and management." CP 455.

Further, earlier in his decision in his Summary of Facts, the arbitrator found that:

approximately one year after his appointment as road maintenance supervisor for San Juan Island, Russ Harvey, the road maintenance manager, began a series of discussions with Muir regarding his management style and his lack of

effectiveness in dealing with personnel issues with his road crew. These discussions culminated in a meeting on September 16, 2002, with Harvey, Muir and Lou Haff, interim public works director. A memo of the meeting was sent to Muir outlining management's concerns and the need for improvement by Muir.

CP 405.

The arbitrator then went on to describe the facts surrounding the decision to terminate Mr. Muir.

On August 6, 2003, Mr. Muir was terminated for an incident occurring on June 11, 2003, in which Muir assigned a crew member to take a Kenworth truck to the mainland to obtain a load of dust oil. The crew member, as a result of a cancer operation, requires the use of a colostomy bag. The County contends Muir failed to take into consideration the crew member's medical condition when he made the assignment. Based on this incident, and Muir's prior disciplinary record over the preceding nine months, the County determined that it had just cause to terminate Muir's employment. A letter of termination was prepared dated August 6, 2003. A meeting was held with Muir, his Union representative, the Road Maintenance Manager, the Director of Public Works and the Human Resource Manager at which time Muir was given the letter of termination and provided an opportunity to respond to the allegations set forth in the termination letter. Muir indicated that he had nothing to say and left the meeting. Thereafter, the Union, on behalf of Muir, filed a grievance contending the termination was made without just cause.

CP 405-406.

Contrary to Mr. Muir's unsubstantiated representation, the arbitrator recognized several instances where he displayed unsatisfactory behavior as a supervisor. For example,

Muir, in the arbitrator's view, instigated the conflict when he assigned Cale's pickup to another worker knowing this assignment would antagonize Cale. . . . Muir testified that he did not raise his voice in dealing with Cale . . . , and attempted to avoid the conflict. The evidence, however, is to the contrary. Mark Rice was in the crew room and witnessed the argument between Muir and Cale. Rice testified that both men were engaged in a heated argument.

CP 411. See also, Arbitrator's Findings at CP 412-14 on this issue.

A general sense of the arbitrator's opinion of Mr. Muir's behavior on the job and his credibility at the hearing is readily apparent in his Findings of Fact and Conclusions regarding whether the County's three day disciplinary suspension of Muir was "with cause." In concluding that the County did have cause, the arbitrator stated that he did not find Muir's explanation "to be credible," that

common sense dictates that it is irresponsible to assign a crew member to operate a complicated piece of equipment without any training," and "as a supervisor, Muir was responsible for the work assignment and in this instance he made the assignment knowing the employee had not been trained on the use of the equipment. Such assignment violated the County's safety policies and demonstrated a serious lack of judgment on Muir's part.

CP 415-24.¹

Finally, in discussing the allegations of the County enumerated in its termination notice to Muir, the arbitrator concluded “that Muir’s unsatisfactory working relationship with his crew and management, in the aggregate, constituted just cause to disciplinary action,” CP 445, and despite management’s best efforts

Muir continued to demonstrate an unacceptable attitude towards the members of his road crew and management. . . . However, in the final analysis it is evident to the arbitrator that Muir’s attitude towards his crew and management is both unacceptable and irreconcilable.

CP 446.

Muir was not demoted despite the remedy of reinstatement being similar to a demotion. (Muir’s brief at 7.)

Muir’s refrain that the arbitrator did not intend to demote him when he reinstated him to the non-supervisory equipment operation position is beyond credulity and is belied by the several references to demotion in the arbitrator’s amended opinion and awards. See Opening Brief at p.5. See also CP 465-68 and, especially, 472 (“It was the Arbitrator’s intent to demote Doyle Muir from Road Maintenance Supervisor to Equipment Operator.”)

¹ It should be noted that page 415 is out of order and should be read between pages 417

Muir is contorting the manner in which the parties agreed that Muir's demotion would be treated for pay purposes. By utilizing the involuntary transfer provision of the agreement the County and the Union arranged that even though performing the work of an equipment operator Muir could maintain his supervisor salary for the twelve months subsequent to his reinstatement.

Muir's wage rate was never reduced by either of Arbitrator Lindauer's decisions or the involuntary transfer clause. Rather, the involuntary transfer clause really states that one's wage will either stay the same as it was prior to the reinstatement or be frozen for twelve months.

(Muir brief at 9.)

Article XIX, Section C is clear, despite Mr. Muir's protestations. To conclude, as he does, that an individual who is involuntarily transferred to a lower paying job, let alone one whose involuntary transfer is due to a disciplinary demotion, retains his or her pay level at the higher rate indefinitely is absurd. If that was the case there would have been no need for the parties to have added the language "or until the expiration of twelve months, whichever occurs first." Following Mr. Muir's interpretation of the

and 418. The correct order is found at CP 86-95.

section, all it had to say is “If no such step exists, the employee shall be redlined until the lower pay range catches up.” But it does not.

Muir is correct when he states that collective bargaining agreements are interpreted in the same manner as other contracts. It is a black letter law when interpreting contracts that the court is to avoid an absurd result. *Causten v. Barnette*, 49 Wash. 659, 665, 96 P. 225 (1908); *Gaddis v. Safeco Inc. Co.*, 58 Wn. App. 537, 540 (Div. 1, 1990). Also, when interpreting a contract each word must be considered. *Hansen Services, Inc. v. Lunn*, 155 Wash. 182, 190, 283 P. 695 (1930).

Ultimately, Muir’s argument as to what the contract “could” mean is irrelevant. The only relevance is what the parties who negotiated it intended. Here, there is no disagreement at all between the County and Council 2 regarding the right of the County to reduce Muir’s pay to the equipment operator position in which he was employed at the end of the twelve month redline period. Their agreement as to what Section XIX.C means is entirely consistent with the language they chose to use.

III. CONCLUSION

Based on the considerable body of law set forth in the prior briefing defining the contours of the duty of fair representation, even if Council 2

could have been wrong in its reasoning behind its decision not to arbitrate the dispute, it is entitled to substantial deference unless it can be said that that decision was wholly irrational.

Since there are no issues of material fact that even hint that its actions were irrational when construed in a light most favorable to Muir, the trial court erred when it denied Council 2's Motion for Summary Judgment. It should be reversed, Council 2 granted summary judgment, and Muir's claim dismissed with prejudice.

Respectfully submitted this 3rd day of August, 2009.

THE ROSEN LAW FIRM

By:

A handwritten signature in black ink, appearing to read "Jon Howard Rosen", written over a horizontal line.

Jon Howard Rosen, WSBA #7543
Attorney for Defendant/Petitioner

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DECLARATION OF SERVICE

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The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

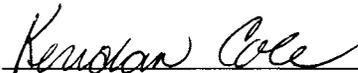
On this date I caused to be served in the manner noted below a copy of:

- DEFENDANT/PETITIONER'S REPLY BRIEF

Attorney for Plaintiff/Respondent (via facsimile and ABC Legal Messengers)
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The original and one copy were filed with the Court of Appeals, Division I.

DATED at Seattle, Washington this 3rd day of August, 2009.



Keridan Cole