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No. 66033-1

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

SNOQUALMIE POLICE
ASSOCIATION,

Appellant,

vs.

CITY OF SNOQUALMIE,

Respondent.

APPELLANT'S BRIEF

APPELLANT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

The Snoqualmie Police Association represents the commissioned law enforcement officers employed by the City of Snoqualmie Police Department. Derek Kasel was a Sergeant with the Snoqualmie Police Department. He was fired for alleged misconduct. The Association grieved his discharge and, under the parties Collective Bargaining Agreement (CBA), the matter was submitted to “final and binding” arbitration before Arbitrator Gary Axon.

The CBA requires the City to have “just cause” to discharge an employee. Axon found that the City did not have “just cause and that the discharge was improper. He found that the City had not proven the most serious of the misconduct alleged against Kasel. He did find that Kasel had committed some misconduct but not enough to warrant his discharge.

Axon determined that the appropriate discipline was a 60-day suspension and demotion from sergeant to police officer effective with Kasel’s “return to duty.” [CP 132]. He also ordered the City to “make him whole for all wages and benefits lost minus the sixty (60) calendar day suspension.”

The City followed Axon’s award in reinstating Kasel but declined to make him whole for all wages lost. The City claimed that Kasel was only entitled to back wages at the rate of a patrol officer, arguing that Axon intended for Kasel to be demoted *prior to* his reinstatement. The Association, citing Axon’s language that the demotion was to take effect

1 only “with” Kasel’s “return to duty” strongly disagreed. Nonetheless, as
2 a compromise offer to resolve the disagreement, it offered to return the
3 matter to Axon. The City declined, indicating it would only pay for
4 Kasel’s wages at the Sargent rate if the Association successfully sued it in
5 court.

6 Kasel’s discharge occurred on April 17, 2007. Axon issued his
7 order on March 26, 2008, and Kasel was reinstated April 9, 2008 so that
8 less the 60-day suspension, Kasel was entitled to nearly 10 months of back
9 wages. The Association, asserting that it had recovered wages for Kasel,
10 presented the City with a request for reimbursement of attorney’s fees.
11 The City acknowledged that the Association was entitled to fee recovery
12 under state wage withholding law but offered to pay the Association only
13 about half of its incurred fees.

14 The Association filed a complaint in King County Superior Court.
15 The matter was assigned to the Honorable Carol Schapira. The parties
16 presented cross motions for Summary Judgment. Shapira ruled that
17 Axon’s award was intended to cause Kasel’s demotion before his
18 reinstatement and denied the Association’s relief for full back wages less
19 the 60 day suspension. She then ruled that the Association had only been
20 partially successful on its wage recovery for Kasel and so reduced its fee
21 request by 25%. The Association appealed those rulings to this Court.

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1 **II. ASSIGNMENTS OF ERROR**

2 **A. Assignment of Errors**

3 The Appellant, Snoqualmie Police Association, asserts that the
4 King County Superior Court made the following errors:

5 1. Denying the Association summary judgment on its motion
6 granting Derek Kasel back pay based upon a Sergeant's rate of pay rather
7 than an Officer's rate of pay and prejudgment interest on the withheld
8 wage payment;

9 2. Denying the Association summary judgment on its motion
10 for liquidated (double) damages for the wrongful withholding of wages,
11 per RCW 49.52.070;

12 3. Reducing the Association's attorney fee award accrued in
13 the underlying arbitration by 25%;

14 4. Granting the City's motion for summary judgment
15 regarding back pay and prejudgment interest;

16 5. Granting the City's motion for summary judgment
17 regarding double damages.

18 **B. Issues Presented**

19 The Association presents the following issues relating to these
20 assigned errors:

1 Issue 1: Arbitrator Axon ordered the City to reinstate Kasel but
2 with a demotion from Sergeant to Officer “effective with his return to
3 duty” and also ordered a 60 day suspension. He ordered the City to make
4 Kasel “whole for all wage and benefits lost minus” the 60 day suspension.
5 Did the court err by failing to apply the “plain meaning” of the order in
6 ruling that Axon’s Award required that Kasel’s demotion became effective
7 *before* his return to duty, while he remained discharged and was barred
8 from reporting to duty? (Assignment of Errors No. 1, 4)

9 Issue 2: If the “plain meaning” of Axon’s Award was ambiguous,
10 by being susceptible to differing interpretations, did the court err by
11 declining to remand the matter to Axon to clarify his award? (Assignment
12 of Errors No. 1, 4)

13 Issue 3: The City refused to pay Kasel his back wages at his
14 Sergeant rate of pay despite Axon’s award that he be made whole for all
15 wages lost and that his demotion to Sergeant was only to be “effective
16 with his return to duty.” The Association contends this withholding was a
17 willful withholding of wages due, entitling Kasel to liquidated (double)
18 damages for the wrongful withholding of wages, per RCW 49.52.070.
19 Did the court err in denying the Association summary judgment on its
20 motion for liquidated damages? (Assignment of Error 2, 5.)

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1 Issue 4: The Association achieved a make whole remedy of nearly
2 12 months of back wages for Kasel minus a 60 day suspension for a net of
3 nearly 10 months of back pay. The City contends, and the Association
4 disputes, that Kasel's nearly 10 of months of back wages are to be paid at
5 the lesser patrol officer rate. Did the Court err in reducing the
6 Association's attorney fee award by 25%? (Assignment of Error 3)

7 **III. STATEMENT OF THE CASE**

8 Appellant Association is the union that represents all full time
9 police officers employed by the City who are of the rank of Sergeant or
10 below.¹ Derek Kasel was a sergeant with the Snoqualmie Police
11 Department from 1999 until April 17, 2007, when the City terminated his
12 employment.² Until his termination, Kasel was considered a good
13 employee who had received numerous commendations for his work.³ The
14 Association filed a grievance with the City protesting that Kasel's
15 termination was without just cause.⁴ The matter went to an arbitration
16 hearing before Arbitrator Axon who issued his award on March 26, 2008.⁵

17 The facts underlying the termination are long and complex. In
18 sum, the Snoqualmie Police Chief and Assistant Chief had established a

19 _____
20 ¹ CP 1.

² CP 2, 98.

³ CP 98.

⁴ CP 2.

⁵CP 96-132.

1 relationship with a company, Financial Consultants International, Inc.
2 (FCI) whereby members of the Department earned credits with FCI.⁶ FCI
3 customized police vehicles with specialized equipment and a system of
4 credits were used to purchase and maintain police equipment.⁷ Sgt. Kasel
5 had switched a set of his old tires for new tires, which he intended to pay
6 for through the use of FCI credits.⁸ In fact, the FCI credits were never
7 transferred and thus, Kasel unknowingly obtained the tires for free.⁹
8 When the police Chief questioned Kasel about the tires, Kasel promptly
9 paid for them.¹⁰

10 Kasel believed that his payment resolved this issue but later the
11 Chief, at the direction of the City Manager, started an internal
12 investigation into the matter.¹¹ (Later the City Manager actually removed
13 the Chief from the investigation and took it over himself.¹² On November
14 17, 2006, Kasel was placed on administrative leave pending the results of
15 the investigation.¹³ A parallel criminal investigation was conducted at the
16 City's request by the King County Sheriff's Office and it found that Kasel

18 ⁶ CP 98.

19 ⁷ Id.

⁸ CP 98-99.

20 ⁹ CP 99.

¹⁰ Id.

¹¹ CP 100.

21 ¹² Id.

¹³ CP 100.

1 had not committed any crime.¹⁴ Approximately five months later, the City
2 terminated Kasel and the Association timely filed its grievance.¹⁵

3 Arbitrator Axon issued a lengthy and detailed order finding that the
4 City had conducted a flawed investigation and that it did not have just
5 cause to terminate Kasel.¹⁶ The Arbitrator also ruled that the appropriate
6 sanction was a 60-day suspension and demotion from sergeant to police
7 officer effective upon Kasel's return to duty.¹⁷ Specifically, the arbitrator
8 ordered that the City,

9 [R]einstate Grievant Kasel and to make him whole for all
10 wages and benefits lost minus the sixty (60) calendar day
11 suspension. Grievant Kasel shall be demoted from the
12 position of Sergeant to police officer effective with his
13 return to duty.¹⁸

14 Some key excerpts from Arbitrator Axon's Order include:

- 15 ➤ The Arbitrator holds the City failed to prove by
16 clear and convincing evidence there was just cause
17 to summarily discharge Derek Kasel for an alleged
18 "demonstrated attitude that self-dealing in City
19 property by a police officer is an acceptable
20 practice. . ." The City did prove Grievant violated
21 Section 04.140 of the Snoqualmie Police Policy by
22 soliciting and accepting a new set of tires from Les
23 Schwab in connection with his official position.
The City also proved Grievant violated Section 2.30
and Section 7.1.2 of the City's Personnel Policy.
The Arbitrator will enter an order reducing the

20 ¹⁴ Id.

¹⁵ CP 103-04.

¹⁶ CP 125, 130.

¹⁷ CP 132.

¹⁸ Id.

1 discharge to a sixty (60) calendar day suspension. I
2 will also order Kasel be reduced in rank from
3 Sergeant to police officer **effective with his return**
4 **to service.** Accordingly, the grievance will be
denied in part and sustained in part. The reasoning
of the Arbitrator is set forth in the discussion that
follows.¹⁹

5 ➤ Your Arbitrator cannot ignore the fact that Kasel
6 was operating within the confines of an unlawful
7 credit system constructed by the Chief of Police and
8 Assistant Chief Crosson. The evidence also showed
9 the credit system at FCI expanded to include
10 individual law enforcement officers and enabled
11 them to purchase equipment for their personal
12 vehicles and police vehicles. While Grievant's use
13 of the credit system does not represent a total
14 vindication of his conduct, the credit system does
15 argue strongly against the Employer's claim Kasel's
16 conduct was an "intentional" violation of City
17 policies. As characterized by the City's Financial
18 Officer, the credit system "is a serious institutional
19 problem." Given the Employer does not come into
20 this case with clean hands, I find the City's position
that summary discharge of Kasel was the
appropriate penalty is substantially undermined by
the unlawful and institutional problems inherent in
the credit system.²⁰

21 ➤ The just cause standard requires the Employer to
22 conduct a thorough and fair investigation.
23 According to the Association, investigator Hert
failed to conduct a thorough and fair investigation
in three primary ways. First, the investigator failed
to collect readily available evidence. Second,
instead of taping and transcribing any of the
interviews, Hert drafted summaries, sometimes
written days after the interview. Third, Association
contends that before interviewing Kasel, Hert issued

21 ¹⁹CP 118, *emphasis supplied*.

22 ²⁰CP 122.

1 facts and findings that prematurely concluded Kasel
2 engaged in misconduct and criminal behavior. I
3 concur with the Association. Hert failed to secure
4 written statements from FCI employees Alan
5 Bateman or Dan Damson. The evidence Hert did
6 collect from Bateman conflicted with the
7 information Bateman later supplied to the City and
8 to the King County Sheriff's Office.²¹

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➤ The Employer's case against Kasel was further
undercut by the City's failure to call Lieutenant
Hert to testify at the arbitration hearing about his
investigation and findings. Your Arbitrator is
compelled to conclude that the City failed to
provide Grievant with a thorough and fair
investigation.²²

➤ The City's case against Kasel is further tainted by
the conduct of Chief Schaffer in August of 2006
when Chief Schaffer inquired of Kasel about the tire
transaction without explaining the true nature of his
intent. ...I agree with the Association that Chief
Schaffer misrepresented the nature of his questions
to Kasel and by doing so denied Kasel the
opportunity to exert his *Weingarten* rights and those
rights accorded to him under Article 19 of the
Collective Bargaining Agreement. . . .Thus, I hold
the City violated Grievant's *Weingarten* rights and
Article 19 of the Collective Bargaining Agreement
by telling Kasel he was not in trouble when, in fact,
Chief Schaffer sought information that was later
used to uphold the termination.²³

➤ Mayor Larson did not testify at the arbitration
hearing. Absent direct testimony from Mayor
Larson your Arbitrator was unable to discern the
basis of the Mayor's conclusion that Kasel had a
subjective belief that self-dealing in City property
by a police officer was an acceptable practice. The

²¹ CP 124-25.

²² CP 125.

²³ CP 126-27.

1 failure of the City to call Mayor Larson to testify
2 regarding his conclusion that immediate termination
3 was necessary because Kasel had an attitude that
4 self-dealing in City property was an acceptable
practice constitutes a failure on the part of the City
to prove that the summary termination was for just
cause.²⁴

5 ➤ Given the record in this case, I am persuaded that
6 Grievant Kasel has compromised his ability to hold
7 a supervisory position. Therefore, I will enter an
Award that Grievant will be reduced in rank and
returned to duty as a police officer.²⁵

8 ➤ Having reviewed all of the evidence and argument,
9 and having observed the demeanor of the witnesses
10 during their testimony, I find the City did not have
11 just cause to summarily discharge Grievant Derek
12 Kasel from his employment with the City of
13 Snoqualmie. The City did establish there was just
14 cause to suspend Kasel for a period of sixty (60)
15 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 sixty (60) calendar day suspension.
**Grievant Kasel shall be demoted from the
position of Sergeant to police officer effective
with his return to duty.**²⁶

16 On May 9, 2008, the Association sent a letter to the City detailing
17 the calculations of back wages and benefits that the City owed Kasel
18 pursuant to the arbitrator's order.²⁷ The Association's letter specifically
19

20 ²⁴ CP 128.

²⁵ CP 130.

21 ²⁶ CP 132, emphasis supplied.

²⁷ CP 145.

1 stated that the calculation of back wages was based upon the “top step
2 Sergeant wages”.²⁸

3 On May 22, 2008, the City sent the Association a letter with an
4 attachment setting forth its calculation of Kasel’s back pay *based upon a*
5 *police officer’s salary rate rather than a sergeant’s salary rate.*²⁹ This
6 was the first indication that there was a dispute between the parties
7 regarding the correct salary rate upon which to base Kasel’s back pay.³⁰

8 On June 23, 2008, the City tendered payment of \$27,393.16 to the
9 Association for “net back pay.”³¹ (The parties agreed the City was entitled
10 to offsets for some of Kasel’s interim earnings.) The letter from the City’s
11 attorney stated:

12 As I previously told you, his back pay was computed using
13 the Top Step Patrol Officer rate and not the Top Step
14 Sergeant’s rate. . . . If we are going to dispute the
15 appropriate rate for back pay computation purposes, the
16 City would prefer to have that discussion with a Superior
17 Court Judge instead of Mr. Axon.³²

18 On December 3, 2008, the Association responded to the City by
19 letter disputing its calculation of back wages based upon a police officer’s
20 rate rather than the sergeant’s rate that Kasel held when he was wrongfully

21 ²⁸ CP 145, n.1.

22 ²⁹ CP 148-50.

23 ³⁰ Id.

³¹ CP 152-53.

³² CP 152.

1 terminated.³³ The Association indicated that the difference between the
2 two rates was about \$15,000.³⁴ The Association also set forth a demand
3 for \$3,709.67 for reimbursement of insurance premiums and COBRA
4 payments made by Mr. Kasel during the period he was terminated.³⁵
5 Finally, the Association made a demand for payment of its attorney fees
6 totaling \$29,437.63, supported by billing statements.³⁶ The Association
7 advised that, if the matter had to be resolved in Superior Court, it would be
8 seeking double damages since there could be no “bona fide dispute”
9 regarding the appropriate rate of Kasel’s wages given what it argued was
10 the clarity of the order, combined with its compromise offer “to submit the
11 issue to the arbitrator.”³⁷

12 On December 9, 2008, the City responded to the Association
13 requesting further documentation of the COBRA and insurance premium
14 reimbursement request, disputing the sergeant rate of pay and contesting
15 the Association’s attorney fee calculation.³⁸

16 On January 22, 2009, the City sent another letter again disputing
17 its responsibility to reimburse Kasel for his medical premium expenses,
18

19 ³³ CP 155-56.

20 ³⁴ CP 155.

21 ³⁵ CP 155.

22 ³⁶ Id.

23 ³⁷ CP 156.

³⁸ CP 163-64.

1 back wages and attorney fees.³⁹ Regarding the attorney fees, the City
2 stated:

3 I have talked with several respected union lawyers
4 regarding this case. I have described the general
5 complexity of the case, the number of witnesses and that it
6 was a two-day hearing followed by post-hearing briefs. All
of the union attorneys I have spoken with believe that
\$30,000 in attorney's fees for this arbitration is excessive...
40

7 The City offered to pay one-half of the Association's attorney fees, or
8 \$15,000.⁴¹ Despite repeated requests, the City refused to identify the
9 "several respected union lawyers" that it allegedly spoke with referenced
10 in this letter.⁴²

11 In its letter dated July 1, 2009, the Association asked the City to
12 identify each of the "several respected union lawyers" who allegedly
13 opined about attorney fees.⁴³ The City did not respond to this request.
14 The Association's interrogatories requested that the City identify these
15 "union lawyers", but the City again refused to identify them.⁴⁴ The City
16 also continued to refuse to pay Kasel back pay based upon the sergeant's
17 rate of pay as well as the \$3,709.67 for out of pocket medical expenses.

19 ³⁹ CP 166-67.

20 ⁴⁰ CP 166-67.

⁴¹ CP 167.

⁴² CP 169-70.

⁴³ Id.

⁴⁴ CP 173.

1 The lawsuit, filed in April 2009, became necessary to
2 recover:

3 1. Kasel's back wages based upon his rate of pay at the time
4 he was wrongfully terminated, i.e., sergeant's rate of pay;

5 2. The \$3,709.67 for out of pocket benefit expenses that the
6 City refused to pay⁴⁵;

7 3. Attorney's fees owed for the underlying arbitration action;

8 4. Liquidated (or double) damages and prejudgment interest
9 for wrongfully withheld wages; and

10 5. Attorney's fees, costs and prejudgment interest for the
11 lawsuit which became necessary to recoup wrongfully withheld wages.

12 6. Long after the lawsuit was filed, on March 15, 2010, the
13 City unexpectedly issued payment of \$3,710.17 "to reimburse Derek
14 Kasel for insurance premiums paid for the period September 2007 to
15 October 2007, and COBRA premiums for the period of November 2007 to
16 January 2008."⁴⁶ This payment arrived almost two years after the
17 Arbitrator's order was issued and about fifteen months after the
18 Association made a direct demand for payment.⁴⁷

19

20 ⁴⁵ However, the City did pay the benefit expenses in March 2010, while the lawsuit was
pending.

21 ⁴⁶ CP 177.

22 ⁴⁷ CP 155.

23

1 The matter was assigned to the Honorable Carol Schapira. The
2 parties presented cross motions for Summary Judgment Judge Schapira
3 ordered reimbursement of Kasel's out of pocket benefit expenses and
4 prejudgment interest on the reimbursed amount.⁴⁸ However, she denied
5 the Association's motion for back pay at a Sergeant's rate of pay, double
6 damages, attorney fees, costs and prejudgment interest for the recovery of
7 wrongfully withheld wages.⁴⁹

8 Judge Schapira explained her reasoning:

9 The Court, uh, appreciates, uh, again having, uh, time to
10 think about the arbitrator's ruling. I, for the same reasons
11 probably, uh, each of you made whatever decision you did,
12 uh, I think it would have been helpful to know what, uh, he
13 was thinking, uh, at that time. We don't know that. Uh,
14 I'm not necessarily better at knowing what somebody else
15 thinks or means than anybody else. But, so we do have to
16 rely on the language. This is a make-whole situation.
17 Giving that, uh, its uh, fair meaning as well as the meaning
18 of the language the Court is going to, uh, say that there, he
19 received officer wages from the point of reinstatement.
20 That is the effective date of, uh, his return to duty. And I
21 have a number of reasons. If you don't mind my unpacking
22 my thinking process just a little bit. Um, the city had a
23 couple of examples what if this, what if that. My thinking
is similar to that. If for example, um, uh, uh, Sergeant
Castle, Officer Castle had taken a job whether as an officer,
you know, maybe he becomes a security guy, maybe he
opens a software company, if he never goes back to work
does that mean he gets no back pay? Well, of course not.
So I think, uh, words, uh, "upon return to duty" have to
mean when should he have been returned to duty. If this
had never happened, uh, that is if there had not been

21 ⁴⁸ CP 587.

22 ⁴⁹ CP 585-88.

1 improper dismissal, but rather the appropriate sanction had
2 been imposed, namely a 60 day, um, suspension, he would
3 have been returned to duty June 1st of 2007. So I think the
4 effective, uh, with the return to duty has to be the date
5 contemplated in this, uh, again, we determine the amount of
6 back pay, but not the rate of back pay, uh, under a make-
whole analysis. So, that is the basis of my reasoning.
Again, each of you had good arguments to argue that
opposite that slight change in language perhaps would have
made everything more clear, but maybe even your, you're
wrinkling your brows, is something?

7 Attorney O'Halloran: Well, I was just, I was just wanted to
8 clarify-is your ruling that then the back pay was properly
calculated at a police officer's rate?

9 Judge Schapiro: That is correct.

10 Attorney O'Halloran: Thank you, your Honor. I just
11 wanted to clarify.

12 Judge Schapiro: Because, again, effective with his return
13 to duty doesn't mean the first day that he goes back to work
14 as an officer, uh, rather what has the arbitrator rules is his
effective return to duty which is the day after the, or the
day of the end of the suspension.⁵⁰

15 IV. SUMMARY OF ARGUMENT

16 Final and binding labor arbitration awards are to be treated as final
17 and binding. Judicial review is applicable only to the "arbitrability"
18 questions concerning whether an arbitrator acted within their contractual
19 authority. Assuming the labor arbitrator acted within his or her assigned
20

21 ⁵⁰ RP 2-3.

1 jurisdiction, further judicial action is limited to enforcement of the
2 arbitrator award in accordance with its plain meaning.

3 Awards that are deemed ambiguous or otherwise susceptible of
4 differing interpretations are not to be judicially clarified. Such awards are
5 treated in case law as “incomplete” and must be remanded to the arbitrator
6 for clarification.

7 The plain meaning of Axon’s Award is clear in accordance with
8 his *express* words — Kasel was entitled to full back wages and was only
9 to be demoted upon his return to duty. Kasel could not be returned to
10 “duty” while he was in a discharged status. While he was discharged he
11 was restricted from performing his duties — as a Sergeant or otherwise.

12 The City contends that what Axon actually intended was to deem
13 his demotion to be effective retroactively before he was returned to duty.
14 Such an interpretation cannot be squared with the plain terms Axon
15 employed. Assuming arguendo that Axon’s award is even capable of such
16 a strained interpretation, the role of the Superior Court would not be to
17 apply this strained interpretation. The sole option available to the court
18 would be to remand the matter to Arbitrator Axon.

19 The trial court erred in applying this interpretation. It also erred by
20 not acknowledging that the plain meaning was so clear that there was no
21 “bona fide” dispute within the meaning of the wage recovery statute and
22 that the Association was entitled to the presumptive liquidated damages
23 under the statute.

1 By finding that the Association had only partially prevailed with
2 Axon on the back wage issue, the trial court then improperly concluded
3 that a 25% reduction in the Association's attorney fees was warranted.
4 Because the court erred on the demotion issue, its determination on the
5 attorney fee issue should also be reversed.

6 V. ARGUMENT

7 A. Standard of Review.

8 The rule on Summary Judgment, Civil Rule 56(c) provides in
9 pertinent part:

10 The judgment sought shall be rendered forthwith if the
11 pleadings, depositions, answers to interrogatories, and
12 admissions on file, together with the affidavits, if any, show
13 that there is no genuine issue as to any material fact and
14 that the moving party is entitled to a judgment as a matter
15 of law.

16 Questions of law on appeal from summary judgment are reviewed *de*
17 *novo*.⁵¹ This standard applies as well to review actions involving labor
18 arbitration decisions.⁵²

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21 ⁵¹ *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008).

22 ⁵² *Yakima County v. Yakima County Law Enforcement Officer's Guild*, 157 Wn. App.
23 304, 237 P.3d 316 (2010).

1 **B. Where The Arbitrator Ordered The Grievant To Be**
2 **Reinstated But Demoted From Sergeant To Officer “Effective**
3 **With His Return To Duty”, The Lower Court Erred in**
4 **Ordering That The Demotion Was Effective Retroactively.**

5 **1. Arbitrator Axon’s Order was Clear on its Face, but the**
6 **Court Misconstrued its Meaning and Effect.**

7 The plain meaning of Arbitrator Axon’s Order is clear: because the
8 City wrongfully terminated Kasel, they must make him “whole” by paying
9 him back wages based upon the wage he was earning at the time of his
10 wrongful termination. Arbitrator Axon *also* ordered that Kasel be
11 reinstated, but at a police officer rank instead of the sergeant’s rank.
12 Therefore, he ordered that Kasel be demoted to police officer “effective
13 with his return to duty.”

14 The City misconstrues the phrase “effective with his return to
15 duty” as the date they began paying him back pay. The City’s
16 construction of the award is strained and absurd. Arbitrator Axon ordered
17 the City “to reinstate Grievant Kasel and to make him whole for all wages
18 and benefits lost.” “The purpose of an award of back pay (including
19 fringe benefits) is to make employees whole for the losses suffered.”⁵³
20 The purpose is to "restor[e] the economic status quo that would have
21 obtained but for the company's wrongful [act].”⁵⁴

22 ⁵³ *Bowen v. United States Postal Service*, 459 U.S. 212, 223, 74 L.Ed.2d 402, 103 S.Ct.
23 588 (1983); *Aguinaga v. United Food & Commercial Workers Int’l Union*, 854 F.Supp.
757, 761 (D. Kan. 1994).

⁵⁴ *NLRB v. Master Slack and/or Master Trousers Corp.*, 773 F.2d 77, 83 (6th Cir. 1985).

1 As Arbitrator Axon stated at least four times in his opinion award,
2 the City's wrongful act was terminating Sgt. Kasel without just cause.
3 Therefore, to make Kasel "whole" and to restore the economic status quo
4 that would have obtained *but for* the City's wrongful act, Arbitrator Axon
5 ordered the City to pay Kasel his back pay from the date of his
6 termination, April 17, 2007, to the date he returned to duty as a police
7 officer, April 9, 2008. *But for the City's wrongful act of terminating*
8 *Kasel*, who was a sergeant at the time of his termination, Kasel would
9 have continued to earn his wages *at a sergeant's rate of pay*.

10 A case on point is *Hanson v. City of Tacoma*, 105 Wn.2d 864, 719
11 P.2d 104 (1986).⁵⁵ In *Hanson*, a civil service employee was suspended
12 from his job as a yardmaster. During part of the suspension, Hanson was
13 permitted to work as a switchman, a lower classification position with
14 lesser pay. Hanson sued and the trial court awarded Hanson back pay,
15 calculated to be the differential between his regular salary and that paid to
16 him during his suspension when he worked as a switchman.⁵⁶ The
17 Supreme Court affirmed. This decision clearly illustrates the purpose of a
18 back pay award, i.e., to make Kasel whole by compensating him for what
19 he would have earned had the wrongful act not been committed. Applying

21 ⁵⁵ 105 Wn.2d 864, 719 P.2d 104 (1986).

22 ⁵⁶ *Id.* at 867.

1 the principles of *Hanson* to this case, the City should have paid Kasel at a
2 sergeant's rate of pay, not the lesser police officer's rate, until he actually
3 returned to duty.

4 In *Allstot v. Edwards*,⁵⁷ the plaintiff was a police officer who was
5 fired for cause, appealed the termination and was reinstated almost three
6 years later. He demanded payment of back wages which the defendant
7 refused to pay. Allstot filed suit and the case proceeded to trial. He
8 requested that the jury be instructed that double damages were awardable
9 for back wages that had been willfully withheld, pursuant to RCW
10 49.52.050(2), .070. The trial court refused to so instruct the jury finding
11 that the double damages statute did not apply to back wages.

12 Division III of the Court of Appeals reversed and remanded for
13 retrial:

14 In this case, the trial court ruled that double damages are
15 not applicable to a suit for back wages as a matter of law.
16 The court's reasoning was that back wages did not
17 constitute pay for work actually done and therefore were
18 not within the scope of *RCW 49.52.050*. Nothing in the
19 statute indicates such a limited reading. Moreover, we are
20 directed to liberally construe the statute to advance the
legislative intent to protect employee wages and assure
payment. In the context of another statute, *RCW 49.48.030*
(attorney fees for successful recovery of wages or salary),
"wages" has been construed to include back pay. The basic
requirements in *RCW 49.52.050* are that the employer is
obligated to pay a certain wage and intentionally pays a

21 _____
22 ⁵⁷ 114 Wn. App. 625, 60 P.3d 601 (2002), *rev. den.* 149 Wn.2d 1028 (2003).

1 lower wage. Accordingly, protection of wrongfully
2 withheld back wages is within the ambit of *RCW*
3 *49.52.050*.⁵⁸

4 The appellate court found that the town's obligation to pay Allstot
5 arose in part from its violation of *RCW 41.12.080*, which provides that a
6 city police officer may be discharged for several enumerated reasons,
7 including any act that shows the offender is an unfit person to be
8 employed in public service. *RCW 41.12.080(7)*.⁵⁹

9 Mr. Allstot was terminated for alleged misconduct. This
10 court, in the first appeal of the civil service commission's
11 ruling upholding his termination, reversed, finding
12 insufficient evidence of misconduct. Because the Town
13 terminated Mr. Allstot without proper grounds under *RCW*
14 *41.12.080*, and without cause under *RCW 41.12.090*, we
15 ordered him reinstated. **According to *RCW 41.12.090*, if it**

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18 ⁵⁸ *Id.* at 632-33 (*citations omitted*).

19 ⁵⁹ *RCW 41.12.080* provides, in pertinent part:

20 The tenure of everyone holding an office, place, position or employment under the
21 provisions of this chapter shall be only during good behavior, and any such person may
22 be removed or discharged, suspended without pay, demoted, or reduced in rank, or
23 deprived of vacation privileges or other special privileges for any of the following
reasons:

(7) Any other act or failure to act which in the judgment of the civil service
commissioners is sufficient to show the offender to be an unsuitable and unfit person to
be employed in the public service.

1 The arbitrator suspended Kasel for sixty (60) days, far less than the time
2 he was unemployed due to termination, and ordered back pay. The City,
3 by refusing to pay Kasel his back pay based upon the wages he was
4 earning at the time he was wrongfully terminated as a sergeant, is in
5 blatant violation of the arbitrator's order and of the wrongful wage
6 withholding statutes.

7 **2. The Court Order Conflicts with Case Law that**
8 **Restricts Court Revision of Final Binding Labor**
9 **Arbitration.**

10 The trial court erred by not properly applying the plain meaning
11 doctrine to a "final and binding" labor arbitration award. In this case, the
12 parties agreed to be subject to "final and binding" arbitration. Court cases
13 on labor arbitrations indicate that, for the most part, "final and binding"
14 truly means "final and binding." The Award is to be enforced as written
15 and is not subject to revision in any subsequent court action. Both
16 Washington and federal courts have a strong policy of refusing to revisit
17 the terms of an arbitration decision.⁶¹ The policy favoring arbitration
18 awards is so strong that arbitration awards are deemed non-reviewable not
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20 ⁶¹ See *Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596
21 (1960); *Firefighters Local 1433 v. City of Pasco*, 53 Wn. App. 547, 550-551, 768 P.2d
22 524 (1989) (adopting the federal judicial standard that an arbitrator's award will stand
23 provided it "draws its essence from the collective bargaining agreement.")

1 simply as to errors of fact but also as to errors of law.⁶² Washington
2 courts have repeatedly stated that they follow the federal approach to defer
3 to arbitration decisions.⁶³ The federal body of case law mandates a strict
4 policy of deferral.

5 The U.S. Supreme Court outlined reasons for this strict deference
6 to labor arbitration awards in what has become known as the
7 "Steelworkers Trilogy" cases.⁶⁴ The Court indicated that the judiciary
8 should *not* revise labor arbitration awards. It reasoned that the federal
9 policy of settling labor disputes by arbitration would be undermined if the
10 courts rather than arbitrators had the final say on the awards. As it
11 explained in *Steelworkers of America v. Enterprise Wheel & Car Corp.*:

12 When an arbitrator is commissioned to interpret and apply
13 the collective bargaining agreement, he is to bring his
14 informed judgment to bear in order to reach a fair solution
15 of a problem. This is especially true when it comes to
16 formulating remedies. There the need is for flexibility in
17 meeting a wide variety of situation.⁶⁵

18 ⁶² See *George Day Construction Co., Inc. v. United Brotherhood of Carpenters, Local*
19 *354*, 722 F.2d 1471 (9th Cir. 1984) (provided arbitration decision "draws its essence from
20 the agreement" award must be enforced "notwithstanding the erroneousness of any
21 factual findings or legal conclusions, absent a manifest disregard of the law"); *Northrop*
Corp. v. Triad Intern'l. Marketing SA, 811 F.2d 1265 (9th Cir. 1987) (same effect).

20 ⁶³ See e.g. *Firefighters Local 1433*, *supra*.

21 ⁶⁴ *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, (1960); *Steelworkers v. Warrior &*
Gulf Navigation, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel*, 363 U.S. 593
(1960).

22 ⁶⁵ *Enterprise Wheel*, *supra*, 363 U.S. at 597.

1 The *only* judicial inquiry the Court permitted was to determine whether
2 the award was confined to an interpretation of the CBA, indicating the
3 award must "draw its essence" from the CBA.⁶⁶

4 Almost 30 years after the *Steelworker Trilogy* cases, in *United*
5 *Paperworkers v. Misco*, the U.S. Supreme Court elaborated on the
6 "essence" test:

7 But as long as the arbitrator is even arguably constructing or
8 applying the contract and acting within the scope of his authority,
9 *that a court is convinced he committed a serious error does not*
10 *suffice to overturn his decision.* Of course, decisions procured by
11 the parties through fraud or through the arbitrator's dishonesty need
12 not be enforced.⁶⁷

13 The Court added: "The courts, therefore, have no business weighing the
14 merits of the grievance, considering whether there is equity in a particular
15 claim, or determining whether there is particular language in the written
16 instrument which will support the claim."⁶⁸

17 The Washington Courts apply a similarly high deference to
18 arbitration awards. For example, in *Firefighters Local 1433 v. City of*
19 *Pasco*, the Court adopted the *Trilogy* reasoning, and held that as long as
20 the award "draws its essence from the CBA," and is not the arbitrators

21 ⁶⁶ *Id.*, at 597.

22 ⁶⁷ *United Paperworkers v. Misco*, 484 U.S. 29, 38 (1987). (*Emphasis supplied.*)

23 ⁶⁸ *Id.*, at 37, citing *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-568 (1960).

1 "own brand of industrial justice," the award must stand.⁶⁹ Other
2 Washington cases are in accord.⁷⁰

3 As recently as 2003, *Clark County PUD v. Wilkinson*,⁷¹ the State
4 Supreme Court overturned the Court of Appeals Division II, because it
5 had delved into the merits of the arbitrator's decision. In overturning the
6 Court of Appeals in a lengthy and strongly worded explanation, the court
7 restated the long-established acceptance of the *Steelworkers Trilogy*:

8 When reviewing an arbitration proceeding, an appellate
9 court does not reach the merits of the case. The common
10 law arbitration standard, applicable when judicial review is
11 sought outside of any statutory scheme or any provision in
12 the parties' agreement, requires this extremely limited
13 review. *See DSHS*, 61 Wn. App. at 792-94 (common law
14 arbitration doctrine persists, despite the enactments of
arbitration statutes, to "fill interstices that legislative
enactments do not cover"). The doctrine of common law
arbitration states that the arbitrator is the final judge of both
the facts and the law, and "no review will lie for a mistake
in either." *DSHS*, 61 Wn. App. At 785 (quoting *Carey v.*
Herrick, 146 Wash. 283, 292, 263 P. 190 (1928).

15 This understanding of the extremely limited standard of review for
16 arbitration awards is supported by federal case law. "The federal policy of
17 settling labor disputes by arbitration would be undermined if courts had
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19

20 ⁶⁹ 53 Wn. App 547, 550-551 (1989).

21 ⁷⁰ See, e.g. *Meatcutters Local 494 v. Rosauer Super Markets, Inc.*, 29 Wn. App. 150, 154,
627 P.2d 1330 (1991); *D.S.H.S. v. State Personnel Board*, 65 Wn. App. 508, 513-14, 828
P.2d 1145 (1992).

22 ⁷¹ 150 Wn. 2d 237, 76 P.3d 248 (2003).

1 the final say on the merits of the awards.”⁷² In short, courts have applied
2 an extremely deferential standard of review to labor arbitration decisions.
3 The standard of review is exceedingly narrow. It is even narrower than
4 would be exercised concerning an administrative law decision and
5 certainly does *not* involve a review of the merits.

6 Any review of this case, therefore, must be restricted to applying
7 the plain meaning of the Arbitrator’s award *as written*. The “plain
8 meaning” doctrine is the general standard for interpretation but, in the
9 context of enforcing labor arbitration decisions, this doctrine has a special
10 force. Labor arbitration awards cannot permissibly be subject to revision
11 or reinterpretation so they can only be enforced consistent with their plain
12 terms.

13 Under the plain meaning rule, courts construe language consistent
14 with the face of the words, without resort to judicial construction of the

15 ⁷² *United Steelworkers of Am. vs. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.
16 Ct. 1358, 4 L. Ed. 2d 1424 (1960), *see also E. Associated Coal Corp. v. United Mine*
17 *Workers of Am., Dist. 17*, 531 U.S. 57, 62, 69, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000),
18 (“But as long as [an honest] arbitrator is even arguably construing or applying the
19 contract and acting within the scope of his authority,’ the fact that ‘a court is convinced he
20 committed serious error does not suffice to overturn his decision.”) (quoting *United*
21 *Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d
22 286 (1987); *Nat’l Wrecking Co. v. Int’l Bhd. Of Teamsters*, 990 F.2d 957 (7th Cir. 1993)
23 (“Arbitrators do not act as junior varsity trial courts where subsequent appellate review is
readily available to the losing party. Rather, reviewing courts ask only if the arbitrator’s
award ‘draws its essence from the collective bargaining agreement.’”) (quoting *United*
Steelworkers of Am., 363 U.S. at 597; *Richmond, F. & P. R.R. v. Transp.*
Communications Int’l Union, 973 F.2d 276, 282-83 (4th Cir. 1992) “Nothing would be
more destructive to arbitration than the perception that its finality depended upon the
particular perspectives of the judges who review the award.”)

1 underlying intention behind the words.⁷³ Applying the plain meaning of
2 the words of Arbitrator Axon's award can only lead to a conclusion that
3 the demotion was not to take effect *until he was reinstated to his duties* as
4 a Snoqualmie Police Officer, something that Axon clearly described as a
5 *future event*.

6 While Arbitrator Axon's written decision provides some insight
7 into his underlying rationale for his decision, it is ultimately the *express*
8 *terms* of Award at the end of his written decision that is before this Court
9 on a request for enforcement. The language issued by Axon in his Award
10 is as follows:

11 **AWARD**

12 Having reviewed all of the evidence and argument, and
13 having observed the demeanor of the witnesses during their
14 testimony, I find the City did not have just cause to
15 summarily discharge Grievant Derek Kasel from his
16 employment with the City of Snoqualmie. The City did
17 establish there was just cause to suspend Kasel for a period
18 of sixty (60) calendar days and to reduce him in rank from
19 Sergeant to police officer on his return to duty. The City is
20 ordered to reinstate Grievant Kasel and to make him whole
21 for all wages and benefits lost minus the sixty (60) calendar
22 day suspension. Grievant Kasel ***shall be demoted*** from the
23 position of Sergeant to police officer ***effective with his
return to duty. (Emphasis supplied.)***

24 Axon clearly stated the event of demotion as something that would
25 happen *in the future*. That triggering *future* event was Kasel's restoration

26 ⁷³ *State v. Barnett*, 139 Wn.2d 462, 469, 987 P.2d 626 (1999).

1 to “duty.” *As a discharged officer, Kasel had no duties with Snoqualmie*
2 *Police Department.* The only “duty” that Kasel was being restored to was
3 as a commissioned officer with the Snoqualmie Police Department,
4 *something that could only occur as a future event upon the execution of*
5 *Axon’s award.* As point of fact, this restoration to “duty” did only occur
6 two weeks after Axon’s Award was issued.

7 Axon was *very precise and particular* in his wording of the Award.
8 He used the future tense in the sentence reinstating Kasel as he logically
9 recognized that this reinstatement was to be a future event. He used past
10 and present tense in discussing whether there was just cause to summarily
11 discharge Grievant Kasel. Given the precision in his use of language, had
12 he intended a retroactive demotion, he would have employed a different
13 verb tense in the sentence commanding the act.

14 **3. The Court Order Conflicts with Case Law that**
15 **Requires any Ambiguity in the Order to be Clarified by**
 the Assigned Arbitrator.

16 Normally, it is the job of courts to interpret ambiguous contracts,
17 orders, and laws. Courts do that by using various rules and principles of
18 construction to determine the ultimate intent and best plausible meaning of
19 the disputed language. But, as indicated above, the proper scope of
20 judicial review of labor arbitration decisions is *quite different.* Courts *do*

1 *not* involve themselves in interpreting ambiguous labor arbitration award
2 language. This limitation on a judicial role stems directly from the narrow
3 judicial jurisdiction described above concerning the narrow permissible
4 interpretation of final and binding labor arbitration awards.

5 *Even if* a court believes an arbitrator's award is ambiguous and
6 susceptible to competing interpretations, the typical judicial remedy of
7 using other rules of construction and interpretative principles is *not*
8 administered. Instead, where an arbitrator's award is ambiguous, *it is to*
9 *be treated as incomplete, and the matter is to be remanded to the*
10 *arbitrator to complete the award by clarifying the ambiguity.*

11 If the Court finds that the award language is susceptible to
12 *competing interpretations*, including one in which Axon intended the
13 suspension to be retroactively applied, this results in an ambiguity that
14 should be remanded to Arbitrator Axon. It is black letter labor arbitration
15 law that once an arbitrator issues an award, except for a period of retained
16 jurisdiction for limited purposes such as Axon's 60-day remedy
17 jurisdiction retained in this case,⁷⁴ there is no further jurisdiction of the
18 case. The arbitrator is deemed entirely stripped of authority over the case

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20 ⁷⁴ In this case the Association did not recognize the full extent of the parties' dispute over
21 the meaning of Axon's Award until after this 60 day period expired. To resolve the
22 lingering dispute, the Association offered to return the matter to Axon but the City
23 refused.

1 and cannot consider arguments for reconsideration. This is known as the
2 doctrine of “*functus officio*.”

3 But another competing principle of labor law is that upon
4 execution of an ambiguous, flawed or incomplete arbitration award, a
5 court not only has the authority, but the duty, to reinstate the arbitrator’s
6 jurisdiction to address and repair the identified defects. While no
7 Washington appellate court has had occasion to consider how to interpret
8 ambiguous labor arbitration awards, this issue has been addressed
9 *repeatedly* in various federal courts and courts of other jurisdictions and
10 all with the same consistent holding. The clear holding of that body of
11 case law is that courts not only *can but must* remand unclear awards to the
12 original arbitrator in furtherance of the arbitrator’s jurisdiction and
13 obligation to issue a complete and enforceable award. Only an Arbitrator
14 has jurisdiction to repair a defective award.

15 Exemplifying this principle is the Ninth Circuit’s decision in
16 *Hanford Atomic Metal Trades Council v. General Electric*.⁷⁵ This case

21 ⁷⁵ 353 F.2d 302 (9th Cir. 1965).

1 actually started in Washington Superior Court but was removed to federal
2 court.⁷⁶ In *Hanford*, the arbitrator had ruled that the employer violated the
3 labor agreement by its furlough of employees. As in Kasel's grievance,
4 the arbitrator ordered back wages. But in his award, the arbitrator was
5 imprecise as to which employees were eligible for the back wages. After a
6 suit was filed contesting the meaning of the award, a federal district court
7 remanded the unclear remedy issue to the arbitration panel and one of the
8 parties challenged that remand. On appeal, The Ninth Circuit upheld the
9 lower court:

10 The award must be read in the context of the
11 opinion and the findings of the board of arbitration.
12 We share the view of the district court that the
13 opinion required clarification and interpretation.
14 We also share the view of the district court that this
15 was a task to be first performed by the arbitration
16 committee and not the court, and that the court
17 properly remanded the matter to the arbitration
18 committee for such clarification and interpretation.
19 *See United Steelworkers of America v. American*
20 *Manufacturing Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4
L. Ed. 1403 (1960); *United Steelworkers of America*
v. Warrior & Gulf Navigation Co., 363 U.S. 574, 4
L. Ed. 2d 1409, 80 S. Ct. 1347 (1960); and *United*
Steelworkers of America v. Enterprise Wheel & Car
Corp., 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct.
1358 (1960). It is appellant's position that once the
arbitrators have acted, it is the duty of the court to
interpret and enforce the award, rather than to send
the matter back to the arbitrators, to the end that the
further delay involved in sending the matter back

21 ⁷⁶ 353 F.2d at 305

1 can be avoided. *We think, however, that all of the*
2 *foregoing cases accept the philosophy that where*
3 *the parties have elected to submit their disputes to*
4 *arbitration, they should be completely resolved by*
5 *arbitration, rather than only partially resolved. In*
6 *some cases, the carrying out of this philosophy will*
7 *require remanding the matter to the arbitrators, and*
8 *we think that this is such a case.*⁷⁷

9 The principle appears well recognized and beyond reasonable dispute that
10 where the face of an award is ambiguous, rather than adopting what it
11 deems to be the more plausible or reasonable interpretation, the court
12 should remand to the labor arbitrator to issue an unambiguous decision.

13 In this case, the Superior Court misapplied this concept. Judge
14 Schapira recognized the lack of clarity of the Award when she stated: “I
15 think it would be helpful to know what, uh, he was thinking, uh at that
16 time. We don’t know that. Uh, I’m not necessarily better at knowing
17 what somebody else thinks or means than anybody else.” She then
18 proceeded to apply what she thought Axon meant.

19 She erred in doing so. Once she recognized that there would be
20 benefit to knowing what Arbitrator Axon was “thinking,” there necessarily
21 followed the conclusion that some ambiguity existed. Upon finding an
22 ambiguity, the court’s only permissible option was to remand to Axon.

23 ⁷⁷ *Id.* at 308 (*emphasis supplied*).

1 As indicated, the Association presents this argument in the
2 alternative. It does not believe the phrase returned to “duty” is ambiguous.
3 It can only mean the restoration of job duties which occurs upon
4 reinstatement. The City’s argument that “duty” means the period in which
5 back pay was to commence is not expressly contained in Axon’s award
6 and can only be extracted out of that language, if at all, as a *competing*
7 interpretation.

8 That competing interpretation certainly cannot be found to be the
9 *only* interpretation. In other words, a reasonable person could find that
10 Axon might have intended the restoration to “duty” to occur following or
11 coincidental with the event of reinstatement. As a result, even extending
12 the City its strained (if not absurd) interpretation of the word “duty”, the
13 *best possible* argument for the City is that there is an ambiguity and that its
14 interpretation is more reasonable.

15 Therefore, even if the lower court did not err in adopting the
16 Association’s plain meaning argument, it erred by selecting the City’s
17 competing interpretation. Once if found that competing plausible
18 meanings could exist, its jurisdiction was then limited to remanding the
19 dispute to Axon for final and binding resolution. It erred by declining to
20 do so.

1 **C. The City Should Pay Double Damages, Including Double The**
2 **Back Wages And Benefits Wrongfully Withheld**

3 The deliberate violation of Arbitrator Axon's order to make Kasel
4 whole for wrongfully terminating him leads to a single conclusion: that
5 the City withheld Kasel's wages with willful intent to deprive him of a
6 part of his wages. RCW 49.52.050 provides:

7 Any employer and any officer, vice principal or agent of
8 any employer who shall violate any of the provisions of
9 subdivisions (1) and (2) of RCW 49.52.050 shall be liable
10 in a civil action by the aggrieved employee or his assignee
11 to judgment for **twice the amount of the wages**
12 **unlawfully rebated or withheld by way of exemplary**
13 **damages, together with costs of suit and a reasonable**
14 **sum for attorney's fees:** PROVIDED, HOWEVER, That
15 the benefits of this section shall not be available to any
16 employee who has knowingly submitted to such violations.
17 (*Emphasis supplied*).

18 Double damages are authorized as a civil remedy under RCW
19 49.52.070 against any employer who "willfully and with intent to deprive
20 the employee of any part of his wages" pays the employee a lower wage
21 than the wage such employer is obligated to pay such employee by any
22 statute, ordinance or contract.⁷⁸ The statute provides that any employer
23 who willfully refuses to pay any part of an employee's wages is liable for
twice the wages unlawfully withheld, together with the costs of the suit

21 ⁷⁸ RCW 49.52.050(2); *Schilling v. Radio Holdings, Inc.* 136 Wn.2d 152, 158, 961 P.2d
22 371 (1998).

1 and reasonable attorney's fees.⁷⁹ In *Allstot*, the appellate court specifically
2 found that back pay is a part of wages and subject to the double damages
3 provision of RCW 49.52.050.⁸⁰

4 The double damages provision does not apply where there is a
5 bona fide dispute as to the obligation to pay.⁸¹ "A bona fide dispute is one
6 that is fairly debatable over whether all or a portion of the wages must be
7 paid."⁸² In *Allstot*, the appellate court found substantial evidence in the
8 record to support a jury instruction on double damages. "If the Town
9 could have determined soon after Mr. Allstot was reinstated that it owed
10 him at least \$30,783, then delaying payment of that amount for four years
11 might indicate willful withholding of wages."⁸³

12 With respect to the back wages, Arbitrator Axon's order was so
13 clear that it is difficult to imagine a *bona fide* dispute over the wage rate
14 for back pay. The order provides:

- 15 ➤ The Arbitrator will enter an order reducing the discharge to
16 a sixty (60) calendar day suspension. I will also order
17 Kasel be reduced in rank from Sergeant to police officer
effective with his return to service. (*Emphasis supplied*)
(CP 118).

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19 ⁷⁹ *Allstot*, 114 Wn. App. at 632.

⁸⁰ *Id.* at 632-33.

⁸¹ *Pope v. Univ. of Wash.*, 121 Wn.2d 479, 490, 852 P.2d 1055 (1993).

⁸² *Id.* at 634.

⁸³ *Id.* at 635.

- 1 ➤ Therefore, I will enter an Award that Grievant will be
2 reduced in rank and **returned to duty as a police officer.**
3 *(Emphasis supplied)* (CP 130).
- 4 ➤ The City is ordered to **reinstate Grievant Kasel and to**
5 **make him whole for all wages and benefits lost minus**
6 **the sixty (60) calendar day suspension.** Grievant Kasel
7 shall be demoted from the position of Sergeant to police
8 officer **effective with his return to duty.** *(Emphasis*
9 *supplied)*(CP 132).

6 The phrases “effective with his return to service,” “returned to duty as a
7 police officer,” and “effective with his return to duty” are plain and clear:
8 The City was ordered to bring Kasel back to work with the Snoqualmie
9 Police Department as a police officer instead of a sergeant. The phrase
10 “reinstate Grievant Kasel and to make him whole for all wages and
11 benefits lost minus the sixty (60) calendar day suspension” is also clear:
12 the City was ordered to pay Kasel back wages at the wage rate that he held
13 at the time of his termination, i.e. sergeant, less the sixty day suspension.

14 A willful withholding is “the result of knowing and intentional
15 action and not the result of a bona fide dispute.”⁸⁴ A bona fide dispute is a
16 “fairly debatable” disagreement over whether an employment relationship
17 exists or whether all or a portion of the wages must be paid.⁸⁵ Where no
18 dispute exists as to the material facts, the court may decide to award

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20 ⁸⁴ *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002).

21 ⁸⁵ *Schilling v. Radio Holding, Inc.*, 136 Wn.2d at 161(“[T]he fundamental purpose of the
22 legislation, as expressed in both the title and body of the act, is to protect the wages of an
23 employee against any diminution or deduction therefore by rebating, underpayment...of
any part of such wages”).

1 double damages on summary judgment.⁸⁶ “An employer’s failure to pay
2 wages due is willful if the employer knows what he or she is doing,
3 intends to do it, and is a free agent.”⁸⁷

4 The Arbitrator’s order is not difficult to understand – back pay is a
5 common and well understood concept in the labor and employment field.
6 The fact that the City in its Post-Hearing Brief requested that back pay not
7 be ordered, and lost on that point, reflects that they fully understood the
8 term and its implications. The City apparently did not like Arbitrator
9 Axon’s order and thus chose to disobey it with its convoluted rationale so
10 that it could only pay Kasel back wages based upon a police officer’s
11 wage rate. This reflects a willful violation of RCW 49.52.050 and thus is
12 subject to double damages.

13 The fact that the City refused to return to the arbitrator to clarify
14 his ruling on this point also evidences a willful violation.⁸⁸ The City
15 realized that it would lose on this point before Arbitrator Axon since his
16 ruling was extremely clear. The City chose instead to force the
17 Association to file the underlying lawsuit, thereby incurring additional
18 fees, costs, and delays, precisely because it knew that Arbitrator Axon

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⁸⁶ *Champagne v. Thurston County*, 163 Wn.2d 69, 81-82, 178 P.3d 936 (2008).

21 ⁸⁷ *Durand v. HIMC Corp.*, 151 Wn. App. 818, 832, 214 P.3d 189(2009).

22 ⁸⁸ CP 152.

1 would rule in favor of the Association, and not the City.⁸⁹ This is
2 indisputable evidence that the City's refusal to pay the correct back pay,
3 reimbursement of costs, and attorney's fees, was willful.

4 **D. The Lower Court erred In Reducing the Association's Fees by
5 25%.**

6 Pursuant to RCW 49.52.070 and RCW 49.48.030, the Association
7 is entitled to recover its attorney fees and costs for arbitration. The statute
8 is remedial and must be liberally construed; fee awards under the statutes
9 are mandatory.⁹⁰ Fees are recoverable even if there is a bona fide dispute
10 over the wages due.⁹¹ Significantly, the Washington Supreme Court has
11 held that the recovery of attorney fees extends to grievance arbitration
12 proceedings and an union acting on behalf of its members qualifies to
13 recover fees under the statute.⁹² The standard of review for the amount of
14 an attorney fee awarded by a trial court is abuse of discretion. The amount
15 will be overturned only for manifest abuse.⁹³

16 The City stubbornly refused to pay the Association's attorney fees

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18 ⁸⁹ It goes without saying, that had the City agreed to return to Arbitrator Axon to clarify
19 his ruling, there would have been no need to file a lawsuit.

20 ⁹⁰ *McIntyre v. State*, 135 Wn. App. 594, 141 P.3d 75 (2006); *Wise v. City of Chelan*, 133
21 Wn. App. 199, 135 P.3d 923 (2006).

22 ⁹¹ *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13 (2005), *review denied*, 156 Wn. 2d
23 1030 (2006); *Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 588 P.2d 729 (1978).

⁹² *International Ass'n of Firefighters Local 46 v. City of Everett*, 146 Wn.2d 29, *aff'd*, 42
P.3d 1265 (2002). The City did not dispute that the Association was entitled to attorney
fees, rather the amount of fees was disputed.

⁹³ *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009).

1 related to the arbitration of Kasel's wrongful termination until the lower
2 Court ordered it to do so. However, the Court erred in reducing the
3 Association's attorney fees by twenty five percent (25%).

4 The Association's counsel succeeded in getting Kasel reinstated,
5 albeit as a police officer rather than a sergeant. Less a 60 day suspension,
6 Axon ordered Kasel to be made whole for back wages. The City had
7 argued below that the time expended by the Association was excessive
8 relative to the complexity of the case. The court did not adopt that
9 argument. The court simply found that the Association had not prevailed
10 on the Sergeant wage issue and then reduced the fee by 25%. The 60 day
11 suspension did not warrant a 25% reduction in fees. Because the
12 Association, as indicated above, properly argued that the demotion was
13 not to occur until reinstatement, it was much more successful than the city
14 maintained. The City should have been ordered to pay the Association's
15 attorney fees for the arbitration, \$29,437.63, in full.⁹⁴ Because the trial
16 court erred on the Sergeant issue, it also erred on the fee reduction issue.
17 If this Court agrees with the Association's appeal on the wage issue, it
18 should then also order that it be awarded its full fees.

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⁹⁴ The Association's counsel had already reduced his fees by \$2,268. CP 184.

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1 **E. The Association Requests that it be Awarded Attorney's Fees**
2 **for this Appeal.**

3 Pursuant to RAP 18.1, the Association respectfully requests that
4 this court grant it attorney's fees and costs on appeal. This request is
5 supported by RCW 49.48.030, the statute that provides for the award of
6 attorney's fees in a wage recovery case.

7 **VI. CONCLUSION**

8 For all of the above reasons, the Association respectfully requests
9 that this court reverse the lower court's order granting partial summary
10 judgment to the City and denying summary judgment, in part, to the
11 Association.

12 **RESPECTFULLY SUBMITTED** this 28th day of February,
13 2011, at Seattle, Washington.

14 CLINE & ASSOCIATES

15 

16 Reba Weiss, WSBA#12876
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18 Attorneys for Appellant
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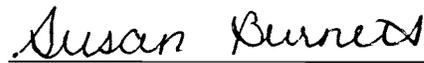
DECLARATION OF SERVICE

I, Susan Burnett, Legal Assistant at Cline & Associates, acknowledge that on the below date, I served the foregoing Appellant's Brief and this Declaration of Service in the above-referenced matter in the following manner to the entities below listed.

COURT OF APPEALS, Div. I	<input checked="" type="checkbox"/> Filing
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I certify and acknowledge under the laws of the State of Washington that the foregoing is true.

DATED at Seattle, Washington, this 28th day of February, 2011.



Susan Burnett