

NO. 36298-8-II

ST. JAMES COUNTY
BY *mm*
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WISHKAH VALLEY EDUCATION ASSOCIATION,

Appellant,

v.

WISHKAH VALLEY SCHOOL DISTRICT,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR GRAYS HARBOR COUNTY
HONORABLE F. MARK MCCAULEY

BRIEF OF APPELLANT

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

1) The Trial Court erred in dismissing the motion for summary judgment of plaintiff/appellant Wishkah Valley Education Association, the certified exclusive bargaining representative of certain employees of the defendant/respondent Wishkah Valley School District, that sought enforcement, or “confirmation”, of an arbitration award arising under a collective bargaining agreement between the parties, and erred in granting the School District’s cross motion for summary judgment of dismissal. As there are no material facts at issue, this issue is subject to a *de novo* review.

A. Issues Pertaining To Assignments Of Error

1) Where a Washington public employer refuses to participate in an arbitration proceeding arising under a collective bargaining agreement with its employees’ certified exclusive bargaining representative, must the collective bargaining representative obtain a judicial order prior to the arbitration hearing compelling the employer to arbitrate the dispute before an enforceable arbitration award may issue? This issue presents a question of law, subject to *de novo* review.

2) Where a Washington public employer has refused to participate in an arbitration proceeding arising under a collective

bargaining agreement with its employees' exclusive certified collective bargaining representative, and the arbitration rules incorporated into the parties' collective bargaining agreement allow for *ex parte* arbitration proceedings upon due notice to the defaulting party, is an *ex parte* award issue by the arbitrator enforceable in a court action to confirm the award? This issue presents a question of law, subject to *de novo* review.

3) Where an party to a collective bargaining agreement that provides for binding arbitration has refused, without good cause, to participate in arbitration proceedings or abide by an arbitration award issued against it, should its actions be considered to be in "bad faith, vexatious, or done for oppressive reasons," thus subjecting it to a reasonable attorneys' fee award in a subsequent action to enforce the underlying arbitration award? This issue presents a question of law, subject to *de novo* review.

II. STATEMENT OF THE CASE

A. Summary of Facts Below

Respondent/defendant Wishkah Valley School District #117 ("the District") is a Washington Common School District located in Aberdeen, Grays Harbor County, Washington. CP1; CP5. Pursuant to Chapter 41.59 RCW, Appellant/plaintiff Wishkah Valley Education

Association (“WVEA”) is a labor organization that serves as the certified exclusive bargaining representative for the bargaining unit of non-supervisory certificated employees, including teachers, of the District. CP 1; CP 5.

The parties were signatories to a collective bargaining agreement (“CBA”) in effect from September 1, 2003 to August 31, 2006. CP 1; CP 5. That collective bargaining agreement contained grievance provisions, at Article XVI, that provided, *inter alia*, that unresolved grievances would be submitted for final and binding arbitration to an American Arbitration Association (“AAA”) arbitrator, to be conducted under the AAA Labor Arbitration Rules (“AAA Rules”). CP 1; CP 5; CP 8 Ex. D. “AAA Labor Arbitration Rules.”¹

In addition to the WVEA/District collective bargaining agreement covering certificated employees such as teachers, there is a second collective bargaining agreement in existence between the District and the Wishkah Valley Activities Association (“WVAA”), covering persons employed by the District for extra-curricular assignments, not requiring

¹ Those rules provide, *inter alia*, that “parties shall be deemed to have made these rules a part of their arbitration agreement whenever, in a collective bargaining agreement or submission, they have provided for arbitration by the American Arbitration Association or under its rules. See CP 8, Ex. D (AAA Labor Arbitration Rules, Rule 1.)

certification, including the District's athletic coaches. CP 8 Ex. B. In contrast to the WVEA CBA, the Activities Association CBA does not provide for final, binding arbitration of grievances. CP 8, Ex. B (WVAA/District CBA, Article VII Grievance Procedures).

Mr. Robert Ashler is employed by the District as a teacher. CP 8, Ex. C. As such, he is a member of the bargaining unit represented by the WVEA, and his employment as a teacher is governed by the WVEA CBA. CP 8, Ex. A. At all times relevant herein, he was also separately employed by the District as an athletic coach, and thus was also a member of the bargaining unit represented by the WVAA, and his employment as a coach was thus governed by the WVAA CBA. CP 8 Ex. A "Recognition Clause of WVEA CBA"; CP 8 Ex. B "Recognition Clause of WVAA CBA".

The District imposed discipline upon Mr. Ashler for misconduct alleged to have occurred while he was coaching the school football team.² CP 1 CP 5. Specifically, the District suspended him from the remainder of his coaching contract and stopped paying him his coaches stipend, as of that date; placed a letter of reprimand in his

² Although not directly relevant to the instant action, the district alleged that Mr. Ashler had inappropriately touched a female player while conducting football practice drills. CP 8, Ex. C, at p. 4.

personnel file, while refusing to allow Mr. Ashler to insert a rebuttal into his personnel file, as provided for by the WVEA CBA; and, filed a complaint regarding his alleged misconduct with the Office of Professional Practices of the Office of the Superintendent of Public Instruction (“OPP/OSPI”), the state agency which administers teacher licensing and licensing discipline. CP 1, CP 5.

In response, WVEA filed a combined grievance with the District regarding the District’s investigation and subsequent discipline of Mr. Ashler, alleging violations of both the WVEA contract and the WVAA contract. CP 8 Ex. C. The parties were unable to resolve the grievance. CP 1 CP 5. WVEA consequently filed a demand for arbitration with American Arbitration Association pursuant to the grievance and arbitration provisions of the WVEA collective bargaining agreement. PC 1, CP 8 Ex. C.

The District refused to participate in any way in the arbitration process, maintaining that, because the conduct at issue occurred while Mr. Ashler was coaching, the dispute actually arose under the collective bargaining agreement with the Wishkah Valley Activities Association (“WVAA”), which did not contain arbitration provisions, and thus the dispute was not subject to binding arbitration. CP 1, CP 5.

Prior to the arbitration hearing, counsel for the district summarized its position as follows:

After the arbitrator rules (without the participation of the district or a court order ordering the district to participate) I believe you will have wasted resources obtaining an unenforceable piece of paper. CP 8, Ex. E.

Pursuant to the AAA Labor Arbitration Rules, which provide that an arbitration hearing may proceed in the absence of a party that has received due notice of the proceedings, but has refused to participate in, or obtain a continuation of the hearing, the matter proceeded to hearing, at which WVEA presented its case in chief. CP 8 Ex. D, "AAA Voluntary Arbitration Rules, Rule #27 Arbitration in the Absence of a Party or Representative."³

On August 10, 2006, AAA transmitted the arbitrator's Findings, Discussion and Award to the parties. That Award was in WVEA's favor, holding that the dispute was arbitrable under the WVEA collective bargaining agreement; that the District had not conducted its

³ AAA Labor Arbitration Rule 27 provides: Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the other party to submit such evidence as may be required for the making of an award. CP 8 Ex. D.

investigation of the alleged misconduct in good faith; that Mr. Ashler “had not been reasonably determined to have committed the misbehavior in question;” and, that he had been disciplined without just cause. CP 8 Ex. C, p. 21

The Arbitrator’s Award also ordered affirmative relief, including: ordering that the District allow Mr. Ashler to attach his own statement, along with a copy of the Award, to the letter of reprimand in his personnel file; ordering that the letter of reprimand be treated as a nullity in all future dealings between Mr. Ashler and the District; ordering the District to forward a copy of the Award and Opinion to OPP/OSPI; and, ordering the District to pay its one half of the fees and charges of the Arbitrator, as required by the terms of the WVEA Collective Bargaining Agreement,⁴ which WVEA had been forced to advance to AAA, along with its own one half of the fees, in order to secure the services of the arbitrator. CP 8, Ex. C. p. 21.

Following the issuance of the Arbitrator’s Award, the District repeatedly and formally refused to recognize or abide by it, and refused to comply with any of the affirmative relief ordered in it,

⁴ The AAA arbitrator had refused to hear the case unless WVEA advanced both its own, and the District’s, one half of fees for his services. CP 8 Ex. C (Award Statement (invoice)).

including the order requiring it to pay WVEA the one-half of the arbitrator's fees that WVEA had advanced to AAA to secure the arbitrator's services. CP 1, CP 5. Counsel for the District summarized its position as follows:

I received your message regarding the arbitration decision and have spoken with the district. The district does not intend to abide by the arbitrator's decision, including the payment of half his fees. The district indicated to you and the arbitrator that it would not participate in the process, including paying any fees. CP 8, Ex. F.

Consequently, the plaintiff/appellant Wishkah Valley Education Association, as signatory to the collective bargaining agreement, filed an action in the Superior Court for Grays Harbor County to "confirm" or enforce the arbitration award. CP 1.

The matter was heard on cross motions for summary judgment, with the defendant/respondent School District agreeing that no material facts were in dispute. CP 7, CP 9. Following oral argument, the Superior Court denied plaintiff/appellant Education Association's motion for summary judgment, and granted the defendant/respondent's cross motion for summary judgment of dismissal. CP 21.

B. Summary of Arguments Below

1) School District's Arguments

In the Superior Court, the District relied upon a singular argument – that, when it notified the union and the arbitration service that it did not believe the issues were subject to arbitration and that it was thus refusing to participate in the arbitration hearing or be bound by any award that might issue, it was thereafter incumbent upon the union, prior to the arbitration hearing, to secure a court order compelling the District to participate in the arbitration proceedings before any enforceable arbitration award could issue.

2) Union's Arguments

The union argued below, and advances the same arguments herein, that no such pre-arbitration court order was required for the arbitrator to have jurisdiction to hear the matter and to issue an enforceable arbitration award. Its primary argument was that all doubts surrounding arbitration are to be resolved in favor of arbitration; that issues arising under a collective bargaining agreement are strongly presumed to be arbitrable, and that only the most forceful evidence of the parties intent to exclude a particular dispute from arbitration can suffice to remove disputes from a collective bargaining agreement's arbitration provisions; and, that so long as the collective

bargaining agreement is capable of *an* interpretation covering the dispute, the dispute is subject to the arbitration provisions of the agreement.

As to the temporal issue - i.e. when a judicial action prohibiting or compelling arbitration must be brought - it further argued that where substantive arbitrability is at issue, there is no requirement that a union file a pre-arbitration court action seeking to compel arbitration. Rather, that issue can be brought before the court, by either party, either before or after the arbitration hearing, through at least four distinct procedural mechanisms. First, prior to arbitration, a union may, but is not required to, file a court action seeking an order compelling the employer to arbitrate the issue. Second, the employer can file a pre-arbitration action seeking a declaratory judgment that the matter at issue is not arbitrable, and seeking an injunction barring any pending arbitration proceedings. Third, following the arbitration hearing, the employer can file an action challenging substantive arbitrability, and seeking to vacate the arbitrator's award. Finally, as in the instant case, following arbitration the union can file an action seeking to "confirm" or enforce the arbitration award, at which time the employer can challenge the substantive arbitrability of the issue that was the subject of the arbitrator's award, and seek to vacate the award on that basis.

III. ARGUMENT

A. JUDICIAL REVIEW OF ARBITRATION DECISIONS IS *DE NOVO* AND THE SCOPE OF REVIEW OF THE DECISION OF AN ARBITRATOR IS EXTREMELY LIMITED.

Review by the Court of Appeals of the decision of an arbitrator is *de novo*, based on the record before the arbitrator. *Klickitat County v. Beck*, 104 Wn.App. 453, 460, 16 P.3d 692 (2001). A reviewing court is obligated to make its own decision regarding arbitrability and deference need not be given to the decision of the trial court. *Local Union No. 77, International Brotherhood of Electrical Workers v. Public Utility District No. 1*, 40 Wn.App. 61, 63, 696 P.2d 1264 (1985).

To determine if an arbitrator acted within the scope of his or her authority, the reviewing court considers the arbitrator's decision in light of the relevant collective bargaining agreement. *Klickitat County*, 104 Wn.App. at 461. A court's independent legal determination of arbitrability is limited to review of the arbitration clause, the intention of the parties and the face of the award itself. *ML Park Place Corporation v. Hedreen*, 71 Wn.App. 727, 739, 862 P.2d 602 (1993), review denied, 124 Wn. 2d 1005, 877 P.2d 1288 (1994).

B. ARBITRATION AWARDS ARE ENTITLED TO EXTRAORDINARY JUDICIAL DEFERENCE UPON REVIEW.

It has consistently been held that exceptional deference is given to the decision of the arbitrator, particularly in the context of labor relations. *Department of Agriculture v. State Personnel Board*, 65 Wn. App. 508, 515, 828 P.2d 1145, review denied, 120 Wn. 2d 1003, 838 P.2d 1143 (1992). *Klickitat County v. Beck*, 104 Wn. App. At 460. Even assuming ambiguity in the scope of a grievance procedure, courts follow the principle, in keeping with the strong policy in favor of arbitration, that all doubts should be resolved in favor of arbitration. Where a provision of a collective bargaining agreement is subject to two interpretations, the one which would require arbitration should be adopted. *International Brotherhood of Electrical Workers Union Local 483 v. City of Tacoma*, 20 Wn. App. 435, 582 P.2d 522 (1978). An order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute. *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). Only the most forceful evidence of a purpose to exclude the claim

from arbitration can prevail. *General Teamsters Local No. 231 v. Whatcom County*, 38 Wn.App. 715, 687 P.2d 1154, review denied, 103 Wn. 2d 1008 (1984).

In deciding whether a particular matter falls within an arbitration clause in a collective bargaining agreement, courts should also consider the fact that the strong public policy in the State of Washington favors arbitration of disputes because, among other things, arbitration eases court congestion, provides an expeditious method of resolving disputes, and is generally less expensive than litigation. *Munsey v. Walla Walla College*, 80 Wn. App. 92, 906 P.2d 988 (1995). Because of the strong policy favoring arbitration, all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication. *Council of County and City Employees v. Spokane County*, 32 Wn.App. 422, 647 P.2d 1058, review denied, 98 Wn. 2d 1002 (1982).

C. A COURT'S ROLE IN ARBITRATION CONFIRMATION CASES IS LIMITED TO DECIDING WHETHER THE PARTIES AGREED TO ARBITRATE THE PARTICULAR ISSUE IN DISPUTE.

The Washington Supreme Court recently revisited the issue of the enforcement of public sector labor arbitration agreements in

Mount Adams School District v. Cook, 150 Wn.2d 716, 81 P.3d 111 (2003). *Cook* involved a Washington school district's termination of a teacher for failing to renew his teaching certificate. Cook filed a grievance under his collective bargaining agreement seeking to arbitrate the merits of his termination. The District refused to process the grievance, and sought a declaratory judgment that his grievance was not subject to arbitration. The Superior Court granted the district's motion, and the Court of Appeals affirmed. The Washington Supreme Court reversed, stating:⁵

The principles governing arbitration of public sector labor disputes arising under a collective bargaining agreement are set forth by the United States Supreme Court in the "Steelworkers Trilogy."⁶ *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula*, 130 Wash.2d 401, 413, 924 P.2d 13 (1996); *Gen. Teamsters Local No. 231 v. Whatcom County*, 38 Wash.App. 715, 716, 687 P.2d 1154 (Div. I, 1984). In Washington those principles are framed as follows:

⁵ As the Court succinctly stated the law, it is repeated verbatim herein.

⁶ See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

“(1) Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which *on its face* is governed by the contract. (2) An order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (3) There is a strong presumption in favor of arbitrability; all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.”

Peninsula Sch. Dist., 130 Wash.2d at 413-14, 924 P.2d 13 (quoting *Council of County & City Employees v. Spokane County*, 32 Wash.App. 422, 424-25, 647 P.2d 1058 (Div. III, 1982)).

Thus, “[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective [bargaining] agreement.” *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *Peninsula Sch. Dist.*, 130 Wash.2d at 414, 924 P.2d 13.

Id., 150 Wn.2d, at 723-725.⁷

⁷ See also, *Clark County PUD v. Int'l Brhd. Electrical Workers*, 150 Wn.2d 237, 245-247, 76 P.3d 248 (2003) (“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’”); *Int'l Assoc. of Firefighters v. Spokane Airports*, 146 Wn.2d 207, 233-234, 45 P.3d 186 (2002) (J. Madsen dissenting); *Yakima County Law Enforcement Guild v. Yakima County*, 133 Wn.App. 281, 285-289, 135 P.3d 558, (Div. III, 2006);

D. A PARTY CHALLENGING THE CONFIRMATION OF AN ARBITRATION AWARD HAS AN EXTREMELY HIGH BURDEN OF PROOF.

Washington has a strong public policy favoring arbitration of disputes. *Int'l Ass'n. of Fire Fighters, Local 46 v. City of Everett*, 146 Wash.2d 29, 51, 42 P.3d 1265 (2002); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 454, 45 P.3d 594 (2002); *Perez v. Mid-Century Ins. Co.*, 85 Wash.App. 760, 765, 934 P.2d 731 (1997).

Consequently, attempts to avoid arbitration by signatories to arbitration agreements, including those encompassed in collective bargaining agreements, have met with little success in both the state (public sector), and federal, (private sector) employment context, and labor arbitration awards are routinely enforced, or “confirmed” by courts under both state and federal law.

Confirmation of an arbitration award is a “summary proceeding that merely makes what is already a final arbitration award a judgment of the court.” *Florasynth Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984). The party challenging the validity of

Int'l Brhd. Electrical Workers v. PUD No. 1, 40 Wn.App. 61, 63-66, 696 P.2d 1264 (Div. II, 1985); *AFSCME v. Spokane County*, 32 Wn.App. 422, 424-427, 647 P.2d 1058 (Div. III, 1982).

the arbitration award bears the burden of proof, and the showing required to defeat confirmation of the award is high. *Roche v. Local 32B-32J Serv. Employees Int'l Union*, 755 F.Supp. 622, 624 (S.D.N.Y., 1991); *Ottley v. Schwartberg*, 819 F.2d 373, 276 (2d Cir. 1987).

On facts similar to those here, in *Sheet Metal Workers Int'l Assoc. v. Standard Sheet Metal*, 699 F.2d 481 (9th Cir., 1983), the union submitted a dispute arising under its collective bargaining agreement to a dispute resolution board, which served in the arbitral role in that industry. The employer informed the board that it did not consider itself bound by any decision it might issue, and refused to appear before the board. The board ruled in favor of the union, and the employer refused to abide by the award. The union filed an action in U.S. District Court to confirm the award, which it did. The Ninth Circuit thereafter upheld the confirmation of the award.⁸

⁸ *Accord, United Food & Commercial Workers Union v. St. John's Mercy Health Systems*, 448 F.3d 1030, 1032 (8th Cir., 2006) (Arbitration award must be confirmed so long as the arbitrator 'is even arguably construing or applying the agreement' even if the court believes him to be in error.); *Aloha Motors Inc. v. ILWU Local#142*, 530 F.2d 848 (9th Cir. 1976) (reversing District Court's reversal of arbitration award originally in union's favor); *Holly Sugar Corp. v. Allied Workers Int'l Union*, 412 F.2d 899 (9th Cir. 1969) (affirming confirmation by District Court of arbitration award in

Washington law is in accord. In *Int'l Firefighters v. City of Pasco*, 53 Wn.App 547, 768 P.2d 524 (Div. III, 1989), the court upheld a Superior Court decision confirming an arbitration award arising under the parties' collective bargaining agreement. There, an arbitrator had ordered the city to cease assigning bargaining unit work to non-unit personnel, which it refused to do. The union filed suit to confirm the arbitration award, which the Superior Court did, "grant[ing] the union's motion for summary judgment and order[ing] the city to comply with the arbitration award in all respects." *Id.* at 548.

E. A COURT'S REVIEW OF AN ARBITRATION AWARD IS LIMITED TO A REVIEW OF THE ARBITRATION CLAUSE, THE CONTENTIONS OF THE PARTIES, AND THE FACE OF THE AWARD ITSELF.

In *ML Park Place Corp. v. Hedreen*, 71 Wn.App. 727, 862 P.2d 602 (Div. I, 1994), the court held that a dispute was within the arbitration clause of a contract. Therein, the court further articulated the courts' role in determining arbitrability, stating "because review of an arbitration award is not permitted, a court's independent legal determination of arbitrability is limited to review

union's favor); *Columbia Aluminum Corp. v. United Steelworkers of America Local 8147*, 922 F.Supp 412 (E.D. Wash. 1995) (confirming arbitration award in union's favor).

of the arbitration clause, the contentions of the parties, and the face of the award itself. . . In general, although the intentions of the parties control, “those intentions are generously construed as to the issues of arbitrability.” *Id.*, 71 Wn.App. at 739.

Hedreen, involved the same underlying issue presented here - i.e. whether a particular issue was within or without the scope of an arbitration clause of the contract.⁹ It also involved a similarly “broad and exclusive” arbitration clause. “It is undisputed that the arbitration clause of the Joint Venture Agreement contains no exclusion of any sort; in fact it is broad and inclusive, requiring arbitration of ‘any disputes. . . which may arise between or among the joint venturers in connection with this joint venture and/or rights of any joint venturers. . . .’” *Id.*, 71 Wn.App. at 739.

1) The Arbitration Clause.

The grievance and arbitration provisions of the WVEA contract are written extremely broadly, contain no express exclusions, and clearly contemplate grievances such as that

⁹ Although *Hedreen* involved a case involving a private contract, and was thus subject to the Uniform Arbitration Act, not applicable here, the principles articulated there apply with equal force herein. (See RCW 7.04A.030(4): “This chapter does not apply to any arbitration agreement between employers and employees or between employers and associations of employees.”)

presented to the arbitrator here. The relevant portions of the WVEA collective bargaining agreement provide as follows:

Article XVI. Grievance Procedure Section 1. Definition:

Grievances or complaints arising between the District and an individual employee, a group of employees, or the Wishkah Valley Education Association with respect to the interpretation or application of terms and provisions of the negotiated contract shall be resolved in compliance with this article.

Article XVI. Grievance Procedure Section 3. Powers of the Arbitrator:

It shall be the function of the arbitrator, and he/she shall be empowered except as his/her powers are limited below, after due investigation, to make a decision in cases of alleged violation of the specific articles and sections of this Agreement. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement. The arbitrator shall confine his/her inquiry and decision to the specific area of the Agreement as cited in the grievance form. Matters for which the law provides another course of review shall be excluded or exempt from this grievance procedure.

The decision of the Arbitrator will be submitted to the District and the Association and will be final and binding upon the parties.

Article XVI. Grievance Procedure Section 4.
Arbitration Costs

Each party shall bear its own costs of arbitration except that the fees and charges of the arbitrator shall be shared equally by the parties.¹⁰

It is scarcely possible to imagine a broader arbitration clause than the one at issue here. Nothing is expressly excluded from its scope. Its only qualifications require that: 1) “grievances or complaints” arise between the employer and its employees and/or their union; and 2) that they arise “with respect to the interpretation or application of terms and provisions of the negotiated contract.”

Here, even ignoring the long-settled “*Steel Workers Trilogy*” rules providing that “absent an express provision excluding a particular type of dispute, ‘only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail’ and that ‘the court must be able to say ‘with positive assurance’ that the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute” there is simply no colorable argument to be

¹⁰ The balance of the grievance and arbitration provisions deal with the procedural steps for grievances, including timeliness (Sections 2 & 5), and continuity of grievances following expiration of the contract (Section 6, of 6), neither of which were at issue below or herein.

made that the dispute below was not subject to the arbitration provisions of the contract.

2) The Contentions of the Parties.

As to the “contentions of the parties,” those again compel the same result. The district’s contentions in this regard were, simply, that as the alleged conduct occurred while the teacher was coaching football, any complaints or grievances as to the district’s investigation or subsequent discipline could only be addressed under the coaches (WVAA) collective bargaining agreement, not the teachers’ (WVEA), regardless of any negative impact upon the teacher/coach’s employment as a teacher.

The grievants’ contentions were - as ultimately held in the Arbitrator’s Award, (discussed *infra*) - that the District’s actions had a direct and substantial impact upon Mr. Ashler’s employment and certification as a teacher, *per se*, aside from its effects on his employment as a coach, and thus constituted a “grievance or complaint” between he and the District “with respect to the interpretation or application of the terms and provisions of the WVEA negotiated agreement.”

Specifically, in addition to terminating his coaching contract and its stipend,¹¹ the District took further action against Mr. Ashler in his employment as a teacher. First, it placed a letter of reprimand into his district personnel file, and then refused to allow him to attach a written response to that letter, as was specifically allowed by the WVEA contract.¹² Second, it filed an official report of professional misconduct with the Office of the Superintendent of Public Instruction, the state agency responsible for *teacher* certification and discipline.

Personnel files are the subject of a lengthy article in the WVEA collective bargaining agreement. See CP 8, Ex. A Article IV. Employee Rights Section 5. Personnel Files. In sharp contrast, the coaches' WVAA contract contains no provisions, whatsoever, regarding personnel files. See CP 8, Ex. B. As to the report of

¹¹ Actions which were ruled by the Arbitrator to arise under the coaches' WVAA contract, and thus not arbitrable, and which subsequently are not at issue herein. See CP 8 Ex. C Award at p. 20.

¹² See CP 8 Ex. A Article IV. Employee Rights - Section 5. Personnel Files - B. Employee Rights Regarding Personnel File and Other Administrative Working Files "No . . . material making reference to the employee's competence, character or manner shall be placed in the employee's personnel file without the employee's knowledge *and exclusive right to attach his/her own written statement.*"

professional misconduct filed with OSPI, employment as a coach does not require a certificate issued by OSPI, as is required for teachers. See Chapter 28A.410 RCW *Certification*; and see *Castle Rock School District*, PERC Decision 4722-B (EDUC, 1995) (holding that coaches may not be included in teachers' bargaining units as coaching positions do not require OSPI certification). Consequently, WVEA alleged, and the Arbitrator held, that those District actions adversely affected Mr. Ashler's employment as a teacher *per se* and thus were subject to the arbitration clause of the WVEA contract.

3) The Face of the Arbitration Award Itself.

Finally, the face of the Arbitration Award itself demonstrates that the issues considered by the Arbitrator, and his subsequent award, were within the scope of the WVEA CBA's arbitration provisions.¹³

In his Award, in holding the grievance to be arbitrable under the WVEA/teachers CBA, the Arbitrator considered the misconduct alleged to have occurred while the teacher was coaching to have

¹³ The evidence before the Arbitrator is not to be considered. *Westmark Properties, Inc. v. McGuire*, 53 Wn.App. 400, 402, 766 P.2d 1146 (1989).

been “off [teaching] duty conduct.” See CP 8, Ex. C Award pp. 7-10 “*Discussion of Arbitrability.*” As such, he then discussed the universal premise that employees can be disciplined for off-duty misconduct where there is a sufficient nexus between such misconduct and the employee’s employment. Specifically, the arbitrator cited *Hoagland v. Mount Vernon School District*, 95 Wn.2d 424, 623 P.2d 1156 (1981), which held that a teacher may be disciplined for off-duty misconduct, where the employer district can prove a sufficient factual nexus between such misconduct and the employee’s ability to be an effective teacher. CP 8 Ex. C at p. 8.

On its face, in short, the [district’s letter of reprimand] is a pretty good example of a well-drafted written reprimand for off duty misconduct, which is exactly how the [WVEA] Association characterized it in the written grievance. Perhaps this is straining too hard at the obvious: that letter, in Mr. Ashler’s District personnel file, is obviously a letter of reprimand to him as a teacher for alleged off-duty misconduct not as a teacher. . . .

There is no reasonable doubt that the bargainers of this contract language would have understood it [discipline] to include a letter to Mr. Ashler and to his personnel file such as the letter at issue in this case, i.e. a written reprimand for off duty misconduct. In that regard, the WVEA grievance is clearly arbitrable. . . .

Finally, the Association's grievance also alleged a violation of the Personnel Files provision of the WVEA contract. . . The Association alleges that the District has refused Mr. Ashler's repeated requests to attach his statement to the written reprimand at issue here; and that claim certainly presents an arbitrable dispute under this [the WVEA] contract. . .

In short, the letter which the Superintendent placed in Mr. Ashler's personnel file, on its face, appears [*sic*] is a written reprimand of Mr. Ashler as a teacher for alleged off-duty misconduct (i.e., in this instance, conduct as a non-teacher employee of the District). As such, the issuance of that letter was probably within the parties understanding of a disciplinary act when they bargained the just cause protection of the WVEA collective bargaining agreement; and the written reprimand is arbitrable under that contract. Similarly, the District's alleged refusal to allow Mr. Ashler to attach his own statement to that written reprimand in his personnel file would violate Subsection C of the Personnel Files provision of that same contract; and that allegation by the Association presents an arbitrable issue under that contract. . . .

AWARD

The grievance is arbitrable to the extent that it alleges that Mr. Ashler received a letter of reprimand without just cause and that the District violated the personnel files provision of the WVEA collective bargaining agreement. With respect to the written reprimand, the investigation leading to its issuance was not conducted in good faith; and Mr. Ashler has not been reasonably determined to have committed the misbehavior in question. His discipline was not for just cause. The letter of reprimand shall be a nullity in all further dealings between Mr. Ashler and the District. The District shall – and the Association may – promptly forward a copy of this Discussion and Award to OSPi in explanation of the prior report of

Mr. Ashler's misconduct which the District improperly submitted to OSPI without conducting a reasonable, good faith investigation of the charges. With respect to the personnel files provision, the District shall allow Mr. Ashler to attach his own statement to the letter of reprimand in his file (even though that letter itself is hereby rendered a nullity); and, upon his request, the District shall include a copy of this Discussion and Award in that file. Finally, the District is contractually obligated to pay an equal share of the fees and charges of the arbitrator; and is liable to the Association if the Association initially pays the District's equal share of those charges.¹⁴

CP 8 Ex. C Award, pp. 9-10, 21.

F. A PARTY'S REFUSAL TO PARTICIPATE IN AN ARBITRATION PROCEEDING HAS NO EFFECT UPON THE LEGITIMACY OF THE AWARD.

The District's primary arguments before the trial court - that *ex parte* arbitration awards are a nullity and unenforceable, and that a union must first file suit and secure an order compelling an employer to participate in an arbitration proceeding arising under the parties' collective bargaining agreement before any valid or "enforceable" arbitration award may issue - have absolutely no

¹⁴ The Arbitrator's total invoice was \$5,400, to be divided equally between the parties, per Article XVI § 4 of the CBA. As previously required by the Arbitrator to retain his services, the Association agreed to, and did pay the entire amount of the invoice, resulting in a \$2,700 debt of the District to the Association, as was confirmed by the Arbitrator in his Award. See CP 8 Ex. C, Award, p. 21, and see (Arbitrator's Statement (invoice)) thereof.

support under either state or federal law and are anathema to the collective bargaining process and to the strong public policy favoring the arbitration of disputes, all of which are designed to ensure an orderly, self governing system of labor relations.¹⁵ As one arbitrator has observed:

A general arbitration clause in a contract would be rendered meaningless if its implementation depended on the willingness of each party to the contract to present its case, as the party desiring no change in relationships could nullify arbitration simply by refusing to make an appearance.

¹⁵ Thus, in *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 55 L.Ed.2d 898 (1964), relied upon by the district and discussed *infra*, the Court specifically made note of the undesirability of the delay attendant to courts' intervention in the collective bargaining process, speaking strongly against employer actions that necessitated their involvement in what it viewed should be a self-governing system.

"In addition, the opportunities for deliberate delay and the possibility of well-intentioned but no less serious delay created by separation of the 'procedural' and 'substantive' elements of a dispute are clear. While the courts have the task of determining 'substantive arbitrability,' there will be cases in which arbitrability of the subject matter is unquestioned but a dispute arises over the procedures to be followed. In all of such cases, acceptance of Wiley's position would produce the delay attendant upon judicial proceedings preliminary to arbitration. As this case, commenced in January 1962 and not yet committed to arbitration [as of March 30 of 1964] , well illustrates, such delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy.") *Id.*, 376 U.S. at 558 .

Velvet Textile Corp., 7 LA 685, 691 (Pope, 1947); F. Elkouri & E. Elkouri, *How Arbitration Works* 323 n.155 (6th Ed. 2003).¹⁶

1) **Washington Law Has Recognized The Legitimacy Of Ex Parte Arbitration Awards For Over A Century.**

Washington law has long held that a party to an arbitration agreement cannot frustrate the process simply by refusing to participate. Thus, in *Zindorf Const. Co. v. Western American Co.*, 27 Wash. 31, 67 P. 374 (1901), the Supreme Court of Washington held squarely that an arbitration proceeding could be held where, after receiving notice of the proceedings, a party refused to participate, and further held that an enforceable arbitration award could issue from such proceedings.

There, in a commercial dispute, one party demanded arbitration pursuant to the terms of the contract between the parties. The second party, taking the position that the dispute was

¹⁶ This is all the more obvious in the collective bargaining context, when one considers that the grievance and arbitration process is usually a one way street, in that typically only unions file grievances, in response to actions taken or not taken by the employer. An employer typically has no ability, or need, to file grievances, as its right, and remedy, is to simply unilaterally implement an action, in response to which a union may demand to bargain or file a grievance. See F. Elkouri & E. Elkouri, *How Arbitration Works* 209 n.55 (6th Ed. 2003) (Of 400 CBA's examined in one survey, only 26% provided for management grievances.)

not arbitrable, as it had previously filed suit regarding it, did not appear or offer any evidence at the arbitration hearing. *Id.* at 36. No pre-arbitration motion to compel arbitration was brought. The arbitrator conducted the hearing and found against the defaulting party, which subsequently filed suit seeking to vacate the award. In dismissing its appeal, the Supreme Court held that:

Since appellant could not maintain this action [the previously filed suit on the merits]. . . it became as much its duty to participate in the arbitration it was notified to attend as if this suit had never been brought. Having had such an opportunity, and having declined to participate, it must now be bound by the result.

Id. at 41.

Thus, the controlling law in Washington has been clear for over a century that where a party defaults in an otherwise valid arbitration proceeding, it does so at its peril, and that that strategy has no effect upon either the arbitrator's ability to hold the arbitration hearing, nor upon the enforceability of any award he or she may issue.

2) **Unanimous Authority From Other Jurisdictions Is Consistent With Washington Law In Recognizing The Legitimacy Of *Ex Parte* Arbitration Awards.**

Every other jurisdiction to have considered the question, including the Ninth Circuit, has reached the same result. In *Toyota*

of Berkeley v. Automobile Salesmen's Union Local 1095, 834 F.2d 751 (9th Cir., 1987), in what was apparently an issue of first impression, the Ninth Circuit considered the effect upon a union's ability to enforce an arbitration award, where that award had been obtained following a default arbitration hearing.

This court has yet to rule on the issues presented by *ex parte* arbitration, but the general trend of authority is clear. Under a collective bargaining agreement specifically providing for designation of an arbitrator without the participation of both parties, an arbitrator may issue an enforceable default award when one party fails to attend the hearing. *Corallo v. Merrick Central Carburetor*, 733 F.2d 248, 251 n. 1 (2d Cir.1984); F. Elkouri & E. Elkouri, *How Arbitration Works* 247 (4th ed. 1985). . . . American Arbitration Association Voluntary Labor Arbitration Rule 27, 3 Lab.Rel.Rep. (BNA) (88 Lab.Arb.) 3 (June 17, 1987) ("Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment.").¹⁷

The court went on to state that "to allow a party to avoid the effect of a grievance proceeding by merely refusing to participate would destroy any incentive to peacefully negotiate labor disputes." *Id.*, at 755.

¹⁷ Significantly, the arbitration in the instant case was conducted under the same American Arbitration Association Voluntary Labor Arbitration Rules at issue in *Toyota of Berkeley*.

G. A UNION NEED NOT SECURE A PRE-ARBITRATION COURT ORDER COMPELLING ARBITRATION BEFORE AN EMPLOYER CAN BE BOUND BY AN ARBITRATION AWARD ARISING UNDER THE PARTIES' COLLECTIVE BARGAINING AGREEMENT.

Finally, the *Toyota of Berkeley* court squarely held that the union was not required to seek a pre-arbitration court order compelling arbitration. *Id.* at 755, citing *Amalgamated Meat Cutters No. 385 v. Penobscot Poultry Co.*, 200 F.Supp 879, 882-83 (N.D. Me. 1961) (listing authority that party seeking arbitration must get court order only when agreement provides arbitration may not proceed without one.). *Accord*, *Sheet Metal Workers Intern. Ass'n v. Air Systems Engineering Inc.*, 831 F.2d 1509, 1514 (9th Cir., 1987) (*ex parte* arbitration award treated no differently from an award where both parties participated); *Kanmak Mills Inc. v. Society Hat Co.*, 236 F.2d 240, 252 (8th Cir., 1956) (provision in federal arbitration act relating to action compelling arbitration is permissive only, and party was not required to obtain order compelling arbitration for valid *ex parte* arbitration award to issue); *Kentucky River Mills v. Jackson*, 206 F.2d 111 (6th Cir., 1953) (as *ex parte* arbitration awards were permitted under common law, no order compelling arbitration was necessary to obtain valid *ex parte* award); *Providence Teachers Union v. School Comm. of City of*

Providence, 113 R.I. 169, 176-177, 319 A.2d 358, (1974) (party refusing to appear at arbitration hearing does so at own peril, and valid award may issue.); *Ramonas v. Kerelis*, 102 Ill.App., 243 N.E.2d 711, 271-273 (1968) (same).

H. THE AUTHORITY RELIED UPON BY THE DISTRICT BELOW SPEAKS TO “WHO” DECIDES QUESTIONS OF SUBSTANTIVE ARBITRABILITY, NOT “WHEN” SUCH DETERMINATIONS MUST OCCUR.

The majority of decided authority holds that unless the terms of the contract expressly reserve the issue of arbitrability to the arbitrator, a court has ultimate jurisdiction, subject to the extremely circumscribed discretion explained *supra*, to determine whether a contract's arbitration clause covers the dispute at issue, a contention that is not at issue herein. However, no case holds that such a determination need be made prior to the arbitration proceeding at issue taking place.

All of the authorities relied upon by the District below speak to “who” decides the question of arbitrability, not “when” it is decided. The primary authority relied upon by the District, *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) does not support its position that a pre-arbitration order compelling arbitration must be brought by the

union. Below, the District seized upon one sentence from *Livingston* as primary support for its position that a pre-arbitration judicial determination of arbitrability is necessary before a binding arbitration award may issue, to wit:

The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.

Id., 376 U.S. 547.

However, the *Livingston* Court was not addressing the *timing* of such a determination. Rather, it was addressing *who*, between the arbitrator or the court, was authorized to make it. Thus, it held only that a court, and not an arbitrator, was normally the proper body to determine whether the employer was required by a collective bargaining agreement to arbitrate a particular dispute - i.e. the “substantive arbitrability” of the dispute.

There, the original signatory employer to the collective bargaining agreement merged with another company. An issue thus arose as to whether the successor company was bound by that agreement, which the Court held it was.

The threshold question in this controversy is **who** shall decide whether the arbitration provisions of the collective bargaining agreement survived the Wiley-Interscience merger, so as to be operative against Wiley. Both parties

urge that this question is for the courts. Past cases leave no doubt that this is correct. 'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.' . . . The problem in those cases was whether an employer, concededly party to and bound by a contract which contained an arbitration provision, had agreed to arbitrate disputes of a particular kind. Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision. The reason requiring the courts to determine the issue is the same in both situations. ***The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.*** Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.

Id., 376 U.S. at 546-47.¹⁸

In short, all the Court held was that before it could order a party to arbitration, it first had to determine whether any duty to arbitrate existed.

¹⁸ In fact, so central to labor relations is the presumption of arbitrability of disputes, that the *Wiley* Court found no impediment to compelling the employer to arbitrate, even though *it was not a signatory* to the collective bargaining agreement at issue. *Id.* 376 U.S. at 550 ("Therefore, although the duty to arbitrate, as we have said, must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.")

The other authorities relied upon below by the District are to the same effect. At issue in *Carpenters 46 v. Zcon Builders*, 96 F.3d 410 (9th Cir., 1996), was whether the defendant was properly considered the alter ego of the predecessor employer, and whether it had been provided with sufficient notice of the arbitration proceeding. See *Id.*, at 412. That case in no way held that a pre-arbitration order was required in order to “force” the employer to arbitrate the contractual dispute at issue. Therein, what was again at issue was whether the arbitrator or the court was the proper body to decide the question of arbitrability, and, secondarily, whether the employer was bound by the terms of a collective bargaining agreement entered into by an alleged “alter ego” corporation. Consistent with *Livingston*, the *Carpenters* court held that the court was the proper body to make that determination, and thus remanded the case to the trial court to do so. *Id.* 96 F.3d at 416.

Finally, in *Ralph Andrews Productions v. Writers Guild of America*, 938 F.2d 128 (9th Cir., 1991), again relied upon by the District, the issue before the court was again, as between a court and an arbitrator, who should rule as to the arbitrability of a dispute. Significantly, that case originated on petition by the employer seeking to vacate an arbitration award previously entered against it

in a collective bargaining agreement arbitration proceeding, thus belying any argument from the District that the case involved the issue of whether a pre-arbitration order compelling arbitration was required. See *Id.* at p. 129. In the end, the court merely held that the question of arbitrability is reserved for judicial determination, absent explicit language to the contrary in the collective bargaining agreement. *Id.* at 130.

In sum, questions concerning the validity of collective bargaining agreements' arbitration awards can make their way to the court through a variety of procedural mechanisms. Although not required to do so, a union can file suit prior to proceeding to arbitration, seeking an order compelling the employer to participate in the arbitration, as was done in *Livingston*, 376 U.S. 543 *supra*. Alternatively, an employer can file a pre-arbitration action contesting arbitrability and seeking a declaration that it is under no obligation to arbitrate the dispute, as was done in *Mount Adams School District v. Cook*, 150 Wn.2d 716, 81 P.3d 111 (2003), *supra*.

Following an arbitration award, the employer can file suit seeking to vacate that award, as was done in *Ralph Andrews Productions v. Writers Guild of America*, 938 F.2d 128 (9th Cir., 1991), *supra*. Finally, a union can file an action seeking to confirm

and enforce an arbitration award previously entered, as was done in the instant case, and as was done in *Int'l Firefighters v. City of Pasco*, 53 Wn.App. 547, 549, 768 P.2d 524 (Div. III, 1989).

Whatever the procedural route, the result is consistently the same. Absent specific language in the collective bargaining agreement excluding a particular dispute from arbitration, all disputes arising under the contract are presumed arbitrable, and a party to an arbitration agreement cannot escape its obligation to arbitrate disputes arising under the contract by merely refusing to participate in an arbitration proceeding.

I. THE WASHINGTON UNIFORM ARBITRATION ACT SIMILARLY PROVIDES FOR ARBITRATION HEARINGS TO TAKE PLACE PENDING JUDICIAL RESOLUTION OF SUBSTANTIVE ARBITRABILITY, AND ALLOWS FOR EX PARTE ARBITRATION PROCEEDINGS.

Although not directly applicable to arbitration proceedings involving employers and their employees,¹⁹ Chapter 7.04A RCW, the “Uniform Arbitration Act”, expresses the same strong policy favoring binding arbitration proceedings as do the authorities cited above. That Chapter makes explicit that a pre-arbitration judicial

¹⁹ (See RCW 7.04A.030(4): “This chapter does not apply to any arbitration agreement between employers and employees or between employers and associations of employees.”)

determination of substantive arbitrability is not necessary for the arbitration to proceed and to result in an enforceable arbitration award. Specifically, RCW 7.04A.060(4) provides as follows:

If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

Similarly, with respect to whether a party can effectively avoid arbitration by refusing to participate, RCW 7.04A.150(3) provides in relevant part that:

The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear.

Finally, RCW 7.04A.220 provides, with respect to the confirmation of arbitration awards:

After a party to the arbitration proceeding receives notice of an award, the party may file a motion with the court for an order confirming the award, at which time the court shall issue such an order unless the award is modified or corrected under RCW 7.04A.200 or RCW 7.04A.240 or is vacated under RCW 7.04A.230.

Thus, by requiring the trial court to confirm the arbitration award absent action by the losing party to modify or vacate it, § 220

makes clear that the award is presumed valid, and that the burden is squarely upon the party challenging the validity of it.

J. WVEA SHOULD BE AWARDED ITS REASONABLE ATTORNEYS' FEES AND EXPENSES PURSUANT TO RAP 18.1

Plaintiff/Appellant hereby requests reasonable attorney's fees and expenses pursuant to Rules of Appellate Procedure 18.1. Reasonable attorney's fees and expenses allowable at trial are also recoverable on appeal. See *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406, 411 (2001). Under the American rule, a litigant ordinarily may not collect attorney's fees unless authorized by statute or contract. See *Int'l Union of Petroleum and Indus. Workers v. W. Indus. Maint., Inc.*, 707 F.2d 425 (9th Cir. 1983). However, a court can award attorney's fees when a party has "acted in bad faith, vexatiously, wantonly or for oppressive reasons." *Id.* at 428 (quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975); *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976). Here, attorney's fees should be awarded on equitable grounds because, as a matter of law, the District acted in bad faith by refusing to participate in arbitration and by further refusing to abide by the subsequent arbitration award as required

by law and as agreed to in the parties' collective bargaining agreement.

1) Federal Law Is Persuasive Authority Regarding Washington Public Employment Disputes.

Disputes interpreting collective bargaining agreements between private employers and unions are governed by federal labor law. *Swinford v. Russ Dunmire Oldsmobile, Inc.*, 82 Wn.App. 401, 918 P.2d 186 (1996). In contrast, Chapters 41.56 and 41.59 RCW govern the relationship between Washington school districts and their public employees represented by unions. While federal law is not binding on public employee labor disputes, Washington courts rely on federal decisions because of similarities between the National Labor Relations Act and provisions of RCW 41.56 and RCW 41.59. *See Public Employees Relations Com'n v. City of Vancouver*, 107 Wn.App. 694, 33 P.3d 74 (2001). Moreover, the Washington Public Employment Relations Commission, which has authority to promulgate rules and regulations necessary to administer Chapter 41.59 RCW, is required to consider the rules, precedents, and practices of the National Labor Relations Board, provided they are consistent with the chapter. RCW 41.59.110. In sum, Washington courts look to federal labor law decisions as

persuasive authority to the extent that the reasoning supporting such decisions comports with Washington labor law.

The Washington Supreme Court has relied on federal labor decisions to hold that, even though RCW 41.56.160 does not explicitly grant the power to award attorney's fees, an administrative agency enforcing state labor laws can award attorney's fees in order to best effectuate the policies behind collective bargaining. *State ex rel. Washington Fed'n of State Employees v. Board of Trustees*, 93 Wn.2d 60, 605 P.2d 1252 (1980). The Court went on to hold that attorneys' fees could be awarded when "a defense to the unfair labor practice charge can be characterized as frivolous or meritless." *Id.* at 69; *accord Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 730 P.2d 653 (1986); *Pasco Housing Authority v. State, Public Employment Relations Com'n*, 98 Wn.App. 809, 991 P.2d 1177 (2000). Just as Washington courts have looked to federal labor decisions and have recognized that refusing to comply with a party's collective bargaining obligations can justify an award of attorney's fees, so too should Washington courts recognize that refusing to abide by an arbitration decision without justification can support an award of reasonable attorney's fees.

2) Unjustifiably Refusing To Abide By An Arbitration Decision Equates With Bad Faith And Wantonness As A Matter Of Law.

In the context of labor disputes, the Ninth Circuit has upheld awards of attorney's fees based on facts similar to those here because, as a matter of law, "an unjustified refusal to abide by an arbitrator's award may equate with an act taken in bad faith, vexatiously or for oppressive reasons." See *Int'l Union of Petroleum and Indus. Workers v. W. Indus. Maint., Inc.*, 707 F.2d 425 (9th Cir. 1983). As the Court explained, "bad faith may be demonstrated by showing that a defendant's obstinacy in granting a plaintiff his clear legal rights necessitated resort to legal action with all the expense and delay entailed in litigation." *Id.* at 428 (quoting *Huecker v. Milburn*, 538 F.2d 1241, 1245 n. 9 (6th Cir. 1976). Awarding attorney's fees under such circumstances serves the dual purpose of deterring frivolous dilatory tactics and compensating a plaintiff for the added expense of vindicating clearly established rights in court. *Id.* Such a dual purpose is "particularly apt in the context of labor arbitration" because "[e]ngaging in frivolous dilatory tactics not only denies the individual prompt redress, it threatens the goal of industrial peace." *Id.* Accordingly, "the deterrence aspect of an award of attorneys' fees is particularly served where a

party, without justification, refuses to abide by an arbitrator's award." *Id.*

As discussed above, the school district has taken the legally untenable and completely unreasonable position that, first, it itself may unilaterally determine the substantive arbitrability of disputes arising under its collective bargaining agreements, and thus may also unilaterally determine when it will and will not suffer itself to participate in arbitration proceedings it has agreed to in those agreements, and second, that it does not have to abide by any arbitration award with which it disagrees. Such a position defies common sense and over a century of settled Washington law, as well as long settled and unanimous federal labor law decisions.

"The very purpose of arbitration is to avoid courts and the formalities, the delay, the expense and the vexation of ordinary litigation." *Grays Harbor County v. Williamson*, 96 Wn.2d 147, 153, 634 P.2d 296, 299 (1981). Indeed, grievance arbitration by itself "can be expensive [and] unions are not always able to bring grievance proceedings even in meritorious cases." *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 50, 42 P.3d 1265, 1275 (2002). As a practical matter, given the disparity of resources between an employer and its unions, requiring court

action to compel every arbitration or enforce any resulting award would essentially eviscerate unions' ability to enforce CBA's and would allow employers to blatantly ignore their contractual obligations. See e.g. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 580.²⁰

Here, the grievant's redress has been significantly delayed. In addition, the union incurred not only its own costs and attorney's fees in successfully pursuing the grievance at arbitration but was also forced advance the district's portion of the arbitrator's fees, and now has had to incur substantially greater expense in court simply because of the district's bad faith and dilatory tactics.

²⁰ "A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. *Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.* . . .

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement." Id.

3) The School District's Conduct Herein Justifies An Award Of Reasonable Attorneys' Fees.

"[T]he policy concerns raised by frivolous or bad faith refusals to arbitrate...are the same as those raised by frivolous or bad faith refusals to comply with an arbitration award. Accordingly, the award of fees is appropriate when a party frivolously or in bad faith refuses to submit to arbitration...." *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). In other words, attorneys' fees should be available when an employer unjustifiably refuses to abide by the agreed upon grievance process, whether on a motion to compel attendance at arbitration or on a motion to enforce an arbitration award.

The school district cannot maintain that it was justified in ignoring the award because it considered the award to be invalid. In Washington, "there is a strong presumption in favor of arbitrability; all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication." *Peninsula Sch. Dist.*, 130 Wn.2d at 413-14, 924 P.2d 13 (quoting *Council of County & City Employees v. Spokane County*, 32 Wn. App. 422, 424-25, 647 P.2d

1058 (Div. III, 1982)). Given this strong presumption, the district's arguments are completely without merit and unjustified.

Plaintiff/Appellants have found no Washington cases directly addressing whether, in equity, attorney's fees are available for compelling arbitration or enforcing an arbitration award. However, Washington courts "have often looked to federal case law for guidance in analyzing labor disputes." *Clark County Public Utility District No. 1 v. Int'l Bhd. of Elec. Workers, Local 125*, 150 Wn.2d 237, 76 P.3d 248 (2003). Both federal and Washington state public policy favor arbitration. See *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 51, 42 P.3d 1265, 1275 (2002); see also *Int'l Union of Petroleum and Indus. Workers v. W. Indus. Maint., Inc.*, 707 F.2d 425 (9th Cir. 1983). Moreover, Washington law agrees with federal law that there is a strong presumption in favor of arbitration. Accordingly, the Ninth Circuit's view that awarding attorney's fees for the dual purpose of deterring frivolous dilatory tactics and compensating a plaintiff for the added expense of vindicating clearly established rights in court is equally persuasive under Washington law. This court should follow the guidance of the Ninth Circuit and hold that, as a matter of law, the school district's refusal to abide by an arbitration decision without

justification can and does support an award of reasonable attorney's fees.

The school district's position that it itself could unilaterally determine and dictate to the union when it would suffer itself to participate in an arbitration process required by the parties' collective bargaining agreement, was patently without justification, was advanced in bad faith, and should be recognized for what it was – a naked attempt by an employer to break the union by using its perceived superior position and resources to impose its will upon its employees, in direct contravention of its statutory and contractual obligation to engage in good faith labor relations. Such conduct should not be countenanced, and the WVEA should be awarded its reasonable attorneys' fees incurred in this matter.

IV. CONCLUSION

The Court should reverse the decision of the Superior Court that dismissed Appellant WVEA's Motion for Summary Judgment; order the Respondent School District to immediately and fully comply with the arbitrator's decision in all respects, including payment of the arbitrator's fees advance on behalf of the District; award Appellant WVEA its costs and reasonable attorneys' fees

expended on this appeal; and order entry of a judgment to that effect.

Respectfully submitted this 23 day of July,

2007.

A handwritten signature in black ink, appearing to read "Michael J. Gawley", written over a horizontal line.

Michael J. Gawley, WSBA# 22110
Attorney for Plaintiff
Wishkah Valley Education Association

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the Brief of Appellant in the above captioned matter, upon the person named below, or his/her authorized agent, by personal service, of ABC/Legal Messenger Service:

Chad Horner
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Kent, WA 98032

DATED in Federal Way, Washington, this 23rd day of July, 2007.



JENIFER PETERSEN