



## TABLE OF CONTENTS

|      |  |    |
|------|--|----|
| I.   | INTRODUCTION   | 1  |
| II.  | ASSIGNMENTS OF ERROR   | 2  |
|      | A.    Assigned Errors.   | 2  |
|      | B.    Issues Pertaining to Assigned Errors.  | 2  |
| III. | STATEMENT OF THE CASE  | 4  |
| IV.  | SUMMARY OF ARGUMENT  | 7  |
| V.   | ARGUMENT   | 10 |
|      | A.    The Trial Court erred by Granting Summary Judgment<br>against the Guild’s Request for Arbitration Because Jurisdiction<br>over any Collective Bargaining Agreement Interpretation Dispute<br>Rests with an Arbitrator. | 10 |
|      | 1.    When "Substantive Arbitrability" is challenged, the<br>Court's sole role is to determine if the dispute falls within<br>the face of the Collective Bargaining Agreement.   | 11 |
|      | 2.    These grievances fall within the face of the<br>Collective Bargaining Agreement.   | 15 |
|      | B.    Even if the Court did reach the Merits of the Interpretation<br>Dispute, it should have ruled for the Guild because the Grievances<br>are covered by a Binding Arbitration Clause.                                     | 19 |
|      | 1.    Retroactive Collective Bargaining Agreements<br>require arbitration of “hiatus” disputes unless the specific<br>Collective Bargaining Agreement otherwise indicates.   | 19 |

|     |  |    |
|-----|--|----|
| 2.  | The Collective Bargaining Agreements at issue here was fully retroactive and did not exclude these grievances from arbitration.  | 21 |
| C.  | The Trial Court erred by not ordering the Jim Rye Grievance to Arbitration.  | 22 |
| D.  | The County should be required to pay the Guild's Attorneys' Fees.  | 25 |
| 1.  | Parties to a Collective Bargaining Agreement enforcing their contractual binding arbitration clauses are entitled to attorney fees unless there is substantial justification for refusal to arbitrate. | 25 |
| 2.  | The Guild is entitled to its attorneys' fees because the County lacks substantial justification for their refusal to arbitrate.  | 27 |
| VI. | CONCLUSION   | 28 |

## TABLE OF AUTHORITIES

### **Cases**

|  |                |
|--|----------------|
| <i>AT&amp;T Technologies v. CWA</i> , 475 U.S. 643, 650, 106 S. Ct. 1415, 1419 (1986).....   | 12             |
| <i>Barclay v. City of Spokane</i> , 83 Wn.2d 698, 699, 521 P.2d 927 (1974).....  | 16, 22         |
| <i>Bond v. State</i> , 62 Wn.2d 487, 383 P.2d 288 (1963).....  | 10             |
| <i>Buffalo Police Benevolent Association v. City of Buffalo</i> , 114 Misc. 2d 1091, 453 N.Y.S. 2d 314 (1982).....   | 21             |
| <i>Burback v. Bucher</i> , 56 Wn.2d 875, 355 P.2d 981 (1960).....  | 10             |
| <i>Council of County &amp; City Employees v. Spokane County</i> , 32 Wash. App. 422, 424-25, 647 P.2d 1058 (Div. III 1982), <i>review denied</i> , 98 Wn.2d 1002 (1982).....             | 13             |
| <i>Local Union No. 77, International Brotherhood of Electrical Workers v. Public Utility District No. 1, Grays Harbor County</i> , 40 Wn. App. 61, 64, 696 P.2d 1264 (Div. II 1985)..... | 14             |
| <i>Mail-well Envelope v. Int'l. Assn. of Machinists, District 54</i> , 916 F. 3d 344 (6 <sup>th</sup> Cir. 1990).....  | 21             |
| <i>Maple Valley Firefighters v. King County Fire District 43</i> , 135 Wn.App. 749, 145 P.3d 1247 (2006), <i>review denied</i> , 161 Wn.2d 1011 (2007).....                              | 17, 18, 19, 21 |
| <i>Meat Cutters Local No. 494 v. Rosauer's Super Markets, Inc.</i> , 29 Wn. App. 150, 154, 627 P.2d 1330 (Div. III 1981).....  | 14, 18         |
| <i>Municipality of Metropolitan Seattle v. Amalgamated Transit Union, Div. No. 587</i> , 52 Wn. App. 1062 (Div. I 1988).....   | 25, 26         |

|   |        |
|---|--------|
| <i>Newspaper Guild of Greater Philadelphia v. Central States Publishing</i> ,<br>451 F.Supp. 1112 (F.D. Penn. 1978).....            | 21     |
| <i>Olympia Police Guild v. City of Olympia</i> , 60 Wn. App. 556, 805 P.2d 245<br>(Div. II 1991) .....                              | 12     |
| <i>Park Mansions, Inc.</i> , 105 L.A. 849 (Duff 1995).....  | 21     |
| <i>Peninsula Sch. Dist v. Pub. Sch. Employees of Peninsula</i> , 130 Wn.2d 401,<br>413-14, 924 P.2d 13 (1996)                       | 13     |
| <i>Rose v. Erickson</i> , 106 Wn.2d 420 (1986) .....  | 12     |
| <i>Snohomish County v. Anderson</i> , 124 Wn.2d 834, 843, 881 P.2d 240 (1994)<br>.....  | 10     |
| <i>Town of Rumapo v. Rumapo Police Benevolent Association</i> , 17 A.D. 3d<br>476, 793 N.Y.S. 2d 449 (2004).....                    | 21     |
| <i>United Steelworkers v. American Mfg. Co.</i> , 363 U.S. 564, 80 S. Ct. 1343,<br>4 L. Ed. 2d 1403 (1960).....                     | 11     |
| <i>United Steelworkers v. Enterprise Wheel &amp; Car Corp.</i> , 363 U.S. at 582-<br>83.....  | 11     |
| <i>United Steelworkers v. Warrior &amp; Gulf Navigation Co.</i> , 363 U.S. 574-83,<br>581, 4 L.Ed.2d 1409, 80 Sct. 1347 (1960)..... | 11, 13 |
| <i>Washington Hosp. Ctr. v. SEIU, Local 722</i> , 746 F.2d 1503 (D.C. Cir.<br>1984). .....  | 26     |
| <i>Western Stud Welding, Inc. v. Omar Indus., Inc.</i> , 43 Wn. App. 293, 296,<br>716 P.2d 959, 961 (Div. I, 1986). .....           | 25     |
| <i>Yakima County Deputy Sheriff's Guild v. Yakima County</i> , 133 Wn. App.<br>281, 285, 135 P.3d 558 (2006)                        | 11, 27 |

**Statutes**

RCW Chapter 41.56

|  |            |
|--|------------|
| RCW 41.56.950  | 15         |
| <b>Other Authorities</b>                                 |            |
| <i>Asotin County</i> , Decision 9549-A (PECB, 2007)..... | 20         |
| <i>Clark County</i> , Decision 3451 (PECB, 1990)         | 20         |
| WILLISTON ON CONTRACTS                                   | 20, 21, 27 |

## I. INTRODUCTION

Kitsap County and Kitsap County Deputy Sheriff's Guild are parties to Collective Bargaining Agreements (CBAs) which contain binding arbitration clauses. A lawsuit was filed by the Guild after the County refused to arbitrate a number of pending grievances presented under the CBA.

The grievances arose during periods of time in which the CBAs were lapsed. Eventually the parties signed successor CBAs which were made fully retroactive to cover the lapsed term. Upon execution of these CBAs, the Guild demanded arbitration on a number of unresolved interim grievances through the parties agreed-upon arbitration process. The County's continued refusal to arbitrate the pending grievances resulted in the lawsuit.

The lawsuit was heard in Pierce County Superior Court and resolved through cross motions for summary judgment presented to the Honorable Bryan Chushcoff. The trial court dismissed the Guild's actions and did not order the grievances to arbitration. Contending that the trial Court erred first, by issuing a binding judicial interpretation of a labor contract that was subject to binding arbitration by an arbitrator and, second, by adopting an interpretation at variance with a large and consistent body of labor law, the Guild filed this appeal.

## II. ASSIGNMENTS OF ERROR

### A. Assigned Errors.

1. The trial court erred in entering its order of October 12, 2007 granting Kitsap County's Motion for Summary Judgment and denying the Kitsap County Deputy Sheriffs Guild's Cross Motion for Summary Judgment.<sup>1</sup>

2. The trial court erred in entering its November 30, 2007 order denying the Guild's Motion for Reconsideration.<sup>2</sup>

### B. Issues Pertaining to Assigned Errors.

*Issue Number 1:* The parties' labor agreement required any unresolved grievance to be submitted to "final and binding arbitration" upon the demand of either party. Grievances arose during the time between expiration of the previous labor contract and the execution of the successor agreement. The agreement, once reached, guaranteed that it would be "in full force and effect" retroactive to the term of the prior agreement. Upon execution, the Guild demanded arbitration of the pending grievances. But the County refused, claiming that the labor agreement was not retroactive as to these grievances. Case precedent indicates that any and all disputes as to arbitrability should be decided by an arbitrator "unless it may be said with positive assurance the arbitration

---

<sup>1</sup> CP 163-65.

<sup>2</sup> CP 311-13.

clause is not susceptible of an interpretation that covers the asserted dispute.” Did the trial court err by not submitting the interpretation dispute to an arbitrator?

*Issue Number 2:* Over the Guild’s argument that the issue of arbitrability of the pending grievances was to be resolved by an arbitrator, the trial court proceeded to interpret the parties’ labor agreement. The contract was expressly agreed to be “in full force in effect” throughout its term including the retroactive period prior to its date of execution. Did the trial court err by interpreting the labor agreement so as to exclude the pending grievances from the retroactive provisions of the agreement?

*Issue Number 3:* Within days of executing the 2006-07 CBA, the Sheriff’s legal counsel threatened Deputy Jim Rye’s employment if he persisted in his election campaign against the incumbent Sheriff. The Guild grieved this threat. The County claimed on summary judgment that it was not arbitrable because it involved the behavior of a member of the Prosecutor’s Office even though the grievance was filed against the Sheriff and the County. Did the trial court err in refusing to allow an arbitrator to resolve this dispute?

*Issue Number 4:* Parties to a labor agreement are entitled to their attorneys’ fees for arbitration clause enforcement actions when the refusal

to arbitrate lacks “substantial justification.” Should the Guild be awarded its attorneys’ fees necessary to bring this arbitration clause enforcement action?

### III. STATEMENT OF THE CASE

The Kitsap County Deputy Sheriff’s Guild is a labor organization representing the commissioned Kitsap County Deputy Sheriff’s through the rank of Sergeant.<sup>3</sup> The parties collective bargaining relationship has been marked with frequent disputes, of which this lawsuit is but one, as well as frequent and extended periods during which the Collective Bargaining Agreements (CBAs) were lapsed.<sup>4</sup> For this reason, among others, the Guild always acted to ensure its labor agreements were fully retroactive to cover all interim disputes.<sup>5</sup>

This lawsuit concerns the “arbitrability” of grievances arising during the terms of *two separate* CBAs: The 2003-2005 CBA<sup>6</sup> and the 2006-07 CBA.<sup>7</sup> The parties had previously entered an agreement covering the years 2000 through 2002, expiring December 31, 2002.<sup>8</sup> The 2000-02 CBA required that discipline be for “just cause.”<sup>9</sup> This contract lapsed while the parties negotiated for a new agreement. During the pendency of

---

<sup>3</sup> CP 368.

<sup>4</sup> CP 337-38.

<sup>5</sup> *Id.*

<sup>6</sup> CP 366-414.

<sup>7</sup> CP 415-465.

<sup>8</sup> CP 183-205

<sup>9</sup> CP 191.

those negotiations, a number of grievances arose involving a claim that discipline had been issued without cause.<sup>10</sup>

These discipline grievances arose intermittently during the period of time that the parties had their lapsed labor agreement. Because the parties could not reach an agreement, they submitted their contract to a binding “interest arbitration” dispute as required by RCW 41.56.465. Neither these discipline grievances nor the retroactivity of the “just cause” requirement were the subject of that interest arbitration dispute.<sup>11</sup>

On May 12, 2005, the interest arbitrator issued his Decision on the disputed contract items<sup>12</sup> and on August 22, 2005, the parties executed the 2003-05 CBA encompassing the terms of his Decision.<sup>13</sup> As indicated, the CBA continued the just cause language contained in the prior CBA.<sup>14</sup> The grievance procedures were also unchanged.<sup>15</sup> The CBA expressly provided that the “Agreement shall be in full force and effect between the Guild and the Employer, Kitsap County, from January 1, 2003 through December 31, 2005.”<sup>16</sup> But the CBA then noted that certain specific contract clauses which had been revised as a result of the arbitrator’s order

---

<sup>10</sup> CP 6-7, 15, 34-139.

<sup>11</sup> See CP 207-288.

<sup>12</sup> CP 82.

<sup>13</sup> CP 388.

<sup>14</sup> Compare CP 191 and CP 374.

<sup>15</sup> Compare CP 187-90 and 371-73.

<sup>16</sup> CP 386.

were governed by the effective date “as provided in the interest arbitration award dated May 12, 2005.”<sup>17</sup>

The parties soon renewed negotiations on a successor agreement but were unable to reach an agreement before the 2003-05 CBA lapsed. Ultimately, on July 24, 2006, a 2006-07 successor CBA was executed.<sup>18</sup> Further grievances also arose during the early part of 2006 before the contract was executed.<sup>19</sup>

The County has persistently refused to arbitrate these “hiatus” grievances, contending that despite the retroactivity language in the CBAs these grievances were exempt from the arbitration clause. One of the grievances actually arose *after* the contract was executed. It concerned Deputy Jim Rye who was threatened with discharge for filing a candidacy in opposition to the incumbent Sheriff.

The Guild filed this lawsuit in Pierce County Superior Court. The parties brought cross motions for summary judgment. The Guild’s motion was denied and the County’s was granted. The Guild filed a motion for reconsideration which was also denied. This timely appeal followed.

---

<sup>17</sup> *Id.*

<sup>18</sup> CP 443.

<sup>19</sup>CP 8, 15.

#### IV. SUMMARY OF ARGUMENT

When a party seeking to enforce a CBA's binding arbitration clause files a breach of contract action in court, the *sole* role for the court is a narrow one: *To determine if the parties arbitration clause covers the dispute.* Once the court decides it does, the matter is to be referred to arbitration and the judicial role is at an end.

The underlying issue here involved whether pending grievances were encompassed within the parties binding arbitration clause. The CBA, according to its express terms, was "in full force and effect" at the time the grievances were filed. Although the CBAs were executed after a hiatus between the prior agreement and the successor agreement, the CBA terms explicitly made the contract retroactive *to the date of the expiration of the prior agreement.* The County claimed that because the grievances arose during this "hiatus" period, they were somehow — despite the "full force and effect" clause — not meant to be covered by the arbitration clause. But this claim involves a contract interpretation issue to be left to an arbitrator, not a court. The trial court erred when it looked beyond the face of the agreement and reached the merits of the dispute.

Washington courts follows federal law principles on what is known as "substantive arbitrability" disputes — those disagreements as to

whether a grievance is subject to a CBA's binding arbitration clause. That case law strongly favors orders to compel arbitration. In assessing "substantive arbitrability" a court does *not* consider the merits of the grievance. The sole judicial role in such disputes is merely to determine if *any* plausible argument could be made that the grievance *might* fall within the terms of the CBA. Once a determination is made that a grievance falls within the arguable scope of the arbitration clause, the judicial role is at an end.

The trial court error appears to stem not only from an expansion of its role but also from a mistaken understanding of the labor law applicable to this type of "hiatus" grievance. The trial court overlooked that there are distinct types of hiatus grievances and each have their own applicable arbitration requirements — those involving no effective successor agreement and those that do. The trial court mistakenly relied upon case law applicable to the first type of hiatus grievance. Under that case law, where a CBA has expired and no agreement is in place, a party cannot be held to the prior agreement. Yet under the case law it is also clear that once a successor agreement is reached, if it is retroactive in its terms, it encompasses all hiatus grievances absent some specific agreement by the parties to allow those grievances to expire.

Although the County tried to argue here that these hiatus grievances were intended to expire, it could point to no evidence to support its claim. Its argument flies directly in the face of the “full force and effect” language in the CBA. But even if the County could have proffered such evidence, it also flies in the face of the CBA language *any* such interpretation disagreement would ultimately be for an arbitrator to decide. Courts have repeatedly stated that there exists “a strong presumption of arbitrability” and that presumption could never be overcome on the record before this Court.

The trial court also erred when it overlooked that one of the grievances was not a “hiatus” grievance at all, in that it arose days *after* the CBA had been executed. This grievance concerns threats made by the Sheriff’s legal advisor against the incumbent Sheriff’s political opponent. The County’s arguments — that the Sheriff’s legal advisor was not the Sheriff’s agent at the time he conveyed the threats and that the County was not liable for his conduct — are precisely the type of fact questions that can only be determined by the agreed upon arbitration process.

Because the County breached its promise to arbitrate, it breached the CBA. The remedy for such a breach is to reimburse the Guild for its attorneys’ fees brought to enforce the binding arbitration clause. Only this

remedy places the Guild in a position it would have been but for the County's breach.

## V. ARGUMENT

### A. **The Trial Court erred by Granting Summary Judgment against the Guild's Request for Arbitration Because Jurisdiction over any Collective Bargaining Agreement Interpretation Dispute Rests with an Arbitrator.**

This issue comes before the Court de novo on an appeal after a trial court ruling on summary judgment. Summary judgment is proper only where the moving party is entitled to judgment *as a matter of law* and no genuine issue remains for trial.<sup>20</sup> Upon a motion for summary judgment, facts asserted by the nonmoving party and supported by affidavits or any other proper evidentiary material must be taken as true.<sup>21</sup> All reasonable inferences from the facts must be considered in the light most favorable to the nonmoving party.

In this instance there is no factual dispute that the CBAs came into existence. Nor is there any dispute that the CBAs contained a clause calling for final and binding arbitration. The issue presented is a legal dispute of what role a court has in enforcing the arbitration clause. As explained below, the error of the trial court was in not ordering the matter to be resolved in arbitration once it was determined that an arbitration clause in a valid CBA existed and that the grievances fell within the face of the valid CBA.

---

<sup>20</sup> *Snohomish County v. Anderson*, 124 Wn.2d 834, 843, 881 P.2d 240 (1994); *Burbach v. Bucher*, 56 Wn.2d 875, 355 P.2d 981 (1960) .

<sup>21</sup> *Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963).

**1. When "Substantive Arbitrability" is challenged, the Court's sole role is to determine if the dispute falls within the face of the Collective Bargaining Agreement.**

Washington courts have consistently elected to look to the body of federal law as persuasive authority in resolving "arbitrability" disputes such as this one. As the Court of Appeals recently reiterated again in *Yakima County Deputy Sheriff's Guild v. Yakima County*: "The arbitrability of labor disputes in Washington is controlled by federal law."<sup>22</sup> These federal law principles governing court intervention into labor arbitration disputes are set forth by the United States Supreme Court in several cases that have become known as the "Steelworkers Trilogy": *United Steelworkers v. American Mfg. Co.*,<sup>23</sup> *United Steelworkers v. Warrior & Gulf Navigation Co.*,<sup>24</sup> and *United Steelworkers v. Enterprise Wheel & Car Corp.*<sup>25</sup>

Since 1960, the "Trilogy" cases have defined the authority of the courts to determine the arbitrability of grievances under CBAs. The U.S. Supreme Court in *Warrior and Gulf Navigation Co.* stated:

The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he had not agreed so to submit. Yet, to be

---

<sup>22</sup> 133 Wn. App. 281, 285, 135 P.3d 558 (2006).

<sup>23</sup> 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960).

<sup>24</sup> 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).

<sup>25</sup> 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. *An order to arbitrate the 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. Doubts should be resolved in favor of coverage.*<sup>26</sup>

In 1986, in *AT&T Technologies v. CWA*, the U.S. Supreme Court reiterated the *Steelworkers Trilogy* holding, declaring that CBA disputes are non-arbitrable *only* when an exclusion from arbitration is specifically agreed upon by the parties.<sup>27</sup> The federal law has been well settled ever since.

Washington courts have long adopted and consistently followed the federal standard on arbitrability.<sup>28</sup> This standard requires a *strong presumption* that *all* collective bargaining disputes are arbitrable.<sup>29</sup> As this Court indicated in *Olympia Police Guild v. City of Olympia*: "There is a strong presumption that all disputes arising under a collective bargaining

---

<sup>26</sup> 363 U.S. at 582-83. (Emphasis supplied).

<sup>27</sup> 475 U.S. 643, 650, 106 S. Ct. 1415, 1419 (1986) ("[i]n the absence of any express provision excluding a particular grievance from arbitration ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail").

<sup>28</sup> Private sector labor cases are governed by the National Labor Relations Act and Section 301 of the Act confers jurisdiction over contract enforcement disputes to the federal courts. In Washington, public sector entities, such as the Guild and the County, are governed by the Public Employer Collective Bargaining Act (RCW Chapter 41.56). As a result, arbitrability disputes arising from Washington public sector contracts fall within the jurisdiction of state courts.

<sup>29</sup> See, e.g., *Olympia Police Guild v. City of Olympia*, 60 Wn. App. 556, 805 P.2d 245 (Div. II 1991) ("the arbitrability of labor disputes in Washington is controlled by federal law"); see, also, *Rose v. Erickson*, 106 Wn.2d 420 (1986) (arbitration is strongly favored as a matter of public policy).

agreement are subject to arbitration; that presumption holds unless negated expressly or by clear implication.”<sup>30</sup>

The State Supreme Court explained in *Peninsula School District v. Public School Employees of Peninsula*:

(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 express or by clear implication.<sup>31</sup>

The court also observed: “Thus, apart from matters that the parties specifically exclude, the questions on which they disagree must come within the scope of the grievance and arbitration provisions of the collective bargaining agreement.”<sup>32</sup>

In summary, certain basic principles govern arbitrability disputes:

- Courts have the initial jurisdiction only to determine if the dispute arguably falls within the CBA;

---

<sup>30</sup> 60 Wn. App. At 560. See, also, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 4 L.Ed.2d 1409, 80 Sect. 1347 (1960) (doubts involving arbitrability are resolved in favor of finding arbitrability).

<sup>31</sup> *Peninsula Sch. Dist v. Pub. Sch. Employees of Peninsula*, 130 Wn.2d 401, 413-14, 924 P.2d 13 (1996); quoting *Council of County & City Employees v. Spokane County*, 32 Wash. App. 422, 424-25, 647 P.2d 1058 (Div. III 1982), review denied, 98 Wn.2d 1002 (1982).

<sup>32</sup> 130 Wn.2d at 414, citing *Warrior & Gulf*, 363 U.S. at 578-83.

- There is a *strong presumption in favor* of arbitrability;
- Courts *do not* assess the merits of grievances;
- Matters are subject to arbitration unless there is *no possible CBA interpretation that covers the asserted dispute*;
- Doubts are to be resolved *in favor* of arbitration.

In short, under a substantive arbitrability determination, a court has the initial jurisdiction to determine *if the* grievance arguably falls within the face of the CBA *but that is the full extent of its involvement*. As the Court of Appeals explained in *Meat Cutters Local No. 494 v. Rosauer's Super Markets, Inc.*:

In an action to compel arbitration, the threshold question of arbitrability is for the court. The court has no concern with the merits of the controversy when construing the agreement. The sole inquiry is whether the parties bound themselves to arbitrate the particular dispute. *If the dispute can fairly be said to involve an interpretation of the agreement, the inquiry is at an end and the proper interpretation is for the arbitrator.*<sup>33</sup>

And this scope limitation applies *even if a court believes the grievance lacks merit*. As this Court indicated in *Local Union No. 77, International Brotherhood of Electrical Workers v. Public Utility District No. 1, Grays Harbor County*:

However, even frivolous claims are arbitrable, and a court has no business weighing the merits of a grievance or determining whether there is particular language in the labor agreement to support a claim. Such decisions are for

---

<sup>33</sup> 29 Wn. App. 150, 154, 627 P.2d 1330 (Div. III 1981). (Emphasis supplied.)

the arbitrator; a *court's* inquiry is at an end if the complaint on its face calls for an interpretation of the agreement.<sup>34</sup>

These principles are so well established in case law that they are beyond reasonable dispute.

**2. These grievances fall within the face of the Collective Bargaining Agreement.**

Kitsap County cannot meet its extremely high burden to show “with positive assurance” the CBA is not susceptible of *any* interpretation that covers the asserted dispute. Because of the “strong presumption” in favor of arbitrability, Kitsap County must show — but can not — that there has been either an express agreement or an agreement by clear implication not to arbitrate these particular grievances. The trial court erred when it concluded that the disputed grievances did not fall within the face of the CBAs.

The source of the trial court error appears to be its misapprehension of the law governing retroactive to the full term of the contract labor contracts. These CBAs were explicitly made retroactive and any dispute over the meaning and application of those retroactivity clauses should have been resolved by an arbitrator.

Retroactive agreements such as the ones at issue here are *expressly* allowed in the state collective bargaining law. As stated in RCW 41.56.950:

---

<sup>34</sup> 40 Wn. App. 61, 64, 696 P.2d 1264 (Div. II 1985)(emphasis in original).

Whenever a collective bargaining agreement between a public employer and a bargaining representative is concluded after the termination date of the previous collective bargaining agreement between the same parties, the effective date of such collective bargaining agreement may be the day after the termination date of the previous collective bargaining agreement *and all benefits included in the new collective bargaining agreement including wage increases may accrue beginning with such effective date as established by this section.*

(Emphasis supplied.) As indicated in this provision, the retroactive terms may permissibly cover “all benefits” included in the CBA. The State Supreme Court explained this provision in *Barclay v. City of Spokane*.<sup>35</sup> It held that contracts made retroactive as to be treated as “though the agreement was executed” on the first date of the retroactive term. The court also reiterated this result was to be in accordance with the plain terms of the agreement *without regard to either parties’ subjective intent.*

The Guild contends that the arbitration clause of the current agreement does not exempt this dispute. To counter that, the County simply asserts its subjective belief that the grievances were exempted in the retroactivity clause. The express language in the CBA itself, especially in light of *Barclay*, and the background facts concerning these grievances support only the Guild’s interpretation.

But strictly speaking this interpretation disagreement was *not* the issue for the trial court (or this Court) to decide. So strong is the

---

<sup>35</sup> 83 Wn.2d 698, 699, 521 P.2d 927 (1974).

presumption of arbitrability, that *even if* a court concluded that the Guild's interpretation lacked merit, *this matter nonetheless remained arbitrable before an arbitrator*. The sole judicial issue is whether the CBA is capable of *any* possible interpretation covering this dispute. Stated another way, these grievances are *only* exempt from arbitration only if *no* colorable claim can be made in support of the Guild's CBA interpretation. As long as the grievances fall *within the face* of the CBA, the ultimate resolution of the merits of those grievances rest with an arbitrator.

The trial court's error was a mistaken belief that *Maple Valley Firefighters v. King County Fire District 43*<sup>36</sup> governed this dispute. *Maple Valley* concerned a fire union that insisted on enforcing its labor arbitration clause during the "hiatus period" after the expiration of its agreement *yet before the adoption of the successor agreement*. Applying a well developed body of federal case law, the Court of Appeals concluded that no arbitration clause was in existence to enforce once the contract lapsed. The narrow *Maple Valley Firefighters* holding is succinctly stated at the outset of the decision:

A grievance arbitration clause does not survive the expiration of a collective bargaining agreement with regard to grievances arising after the expiration date of the agreement. Here, the grievance arose one year after the expiration of the collective bargaining agreement; thus the Union is not entitled to the grievance

---

<sup>36</sup> 135 Wn.App. 749, 145 P.3d 1247 (2006), *review denied*, 161 Wn.2d 1011 (2007).

arbitration procedures established under the *expired* collective bargaining agreement.<sup>37</sup>

The court only discussed the expired CBA. Never addressed in *Maple Valley Firefighters* — because it was never part of the facts — *is what happens once a successor agreement is executed*. As explained in greater detail below, a uniform body of cases hold that grievances arising during the hiatus become arbitrable upon execution of a retroactive CBA *unless the parties have expressly agreed otherwise*.

In this case the County claims that the parties intended to exempt these grievances from the terms of the CBA. *But that disagreement is precisely the type of interpretation issue that an arbitrator alone is to decide*.

Absent forceful and unambiguous evidence that the parties specifically agreed to exclude such grievances from the scope of the retroactive agreement, arguments about the interpretation are for an arbitrator. As the Court of Appeals explained in *Rosaurer's Super Market*: “If the dispute can fairly be said to involve an interpretation of the agreement, the inquiry is at an end and the proper interpretation is for the arbitrator.”<sup>38</sup> There is a presumption of arbitrability and doubts are to be resolved in favor of arbitration.

The County can point to no objective evidence indicating that the parties intended to remove these grievances from the retroactive reach of the CBA. But even if there was such evidence, disputes as to the meaning

---

<sup>37</sup> 135 Wn. App at 749. (Emphasis supplied.)

<sup>38</sup> 20 Wn. App. At 150.

and application of the evidence would solely be the responsibility of an arbitrator. The parties agreed that *all* disputes were to be resolved by arbitration. The parties' promise to resolve interpretation disputes with arbitration should be honored and enforced.

**B. Even if the Court did reach the Merits of the Interpretation Dispute, it should have ruled for the Guild because the Grievances are covered by a Binding Arbitration Clause.**

As indicated, the judicial role should end once it is determined that an arbitration clause arguably covers the dispute. But even once the trial court did delve in to interpret the meaning of the contract and decide the merits of the contract dispute, it still should have ruled in favor of the Guild. A uniform body of case indicates that retroactive CBAs fully encompass hiatus grievances of the type presented here.

**1. Retroactive Collective Bargaining Agreements require arbitration of "hiatus" disputes unless the specific Collective Bargaining Agreement otherwise indicates.**

The issue of the status of "hiatus grievances" is complex and frequently disputed when, as occurred in *Maple Valley Firefighters*, it arises during the period between the expiration of the CBA and the execution of the successor agreement. The *Maple Valley Firefighters* decision contains a detailed discussion of the controversies that come into play in *that type* of hiatus situation. In *Maple Valley Firefighters*, the Court of Appeals was relying upon past interpretations of the collective bargaining statute proffered by the Public Employment Relations Commission (PERC). Further detailed discussions of the complexities

surrounding these types of hiatus grievances are set out in PERC decisions including *Asotin County*<sup>39</sup> and *Clark County*.<sup>40</sup>

But *none* of these complexities are presented here. This case involves retroactive successor agreements. Where a successor contract is made retroactive, *absent a specific agreement by the parties otherwise*, the arbitration clause on the successor CBA is *fully applicable* to such hiatus grievances. The trial court erred by ruling otherwise.

The law applicable to hiatus grievances is well summarized in

WILLISTON ON CONTRACTS:

If a grievance concerning a dispute is submitted when no collective bargaining agreement is in force, neither party is obligated to arbitrate the grievance even though a collective bargaining agreement requiring arbitration of grievances subsequently becomes effective. This is because arbitration is solely a matter of contract. On the other hand, the parties may agree, even in an informal manner, to extend the arbitration provisions of the expired agreement, or that a subsequent bargaining agreement would be retroactively effective. Thus, if a new collective bargaining agreement is broad enough to reach back to cover preexisting disputes, a claim arising during the break between agreements is arbitrable.

Although it has been said that “the issue of whether a contract containing an arbitration clause exists, or is still in effect, is not within the purview of the arbitration clause for the reason that if there is no contract there is no provision for arbitration,” it has been more recently held that the question whether an agreement has expired, arguably relieving the reluctant party of a duty to arbitrate, is properly submitted to arbitration when a collective bargaining agreement provides that the interpretation to be

---

<sup>39</sup> Decision 9549-A (PECB, 2007).

<sup>40</sup> Decision 3451 (PECB 1990).

given any clause is for the arbitrator. The issue of the duration of a collective bargaining agreement is arbitrable where the contractual language in regard to the duration is vague and the arbitration clause is broad.

The Williston discussion accurately captures the law. As opposed to the *Maple Valley Firefighter* situation, involving hiatus grievances where no successor agreement has been executed, the litigation in the current situation where there *is* a retroactive successor grievance is infrequent and no published Washington case law exists addressing it. The Guild submits the scarcity of the case law is a direct result of the lack of controversy among labor law practitioners: It should be self-evident that contracts are effective by their express term.

As described in WILLISTON ON CONTRACTS, the extrajurisdictional case law that does exist uniformly holds that contracts made retroactive reach back to cover preexisting grievances.<sup>41</sup> The Guild has found *no* cases to support the County's claim that retroactive CBAs exclude hiatus grievances.

**2. The Collective Bargaining Agreements at issue here was fully retroactive and did not exclude these grievances from arbitration.**

---

<sup>41</sup> See e.g., *Buffalo Police Benevolent Association v. City of Buffalo*, 114 Misc. 2d 1091, 453 N.Y.S. 2d 314 (1982); *Town of Rumapo v. Rumapo Police Benevolent Association*, 17 A.D. 3d 476, 793 N.Y.S. 2d 449 (2004); *Mail-well Envelope v. Int'l. Assn. of Machinists, District 54*, 916 F. 3d 344 (6<sup>th</sup> Cir. 1990); *Newspaper Guild of Greater Philadelphia v. Central States Publishing*, 451 F.Supp. 1112 (F.D. Penn. 1978); *Park Mansions, Inc.*, 105 L.A. 849 (Duff 1995).

No material question of fact should exist as to the applicable term of these agreements. Both of the CBAs at issue were to cover a defined term which expressly included a retroactive period.<sup>42</sup> The CBAs are *also explicit* that during this term the contracts are to be “*in full force and effect.*”<sup>43</sup> Neither contract expressly excluded pending grievances from that “full force and effect.” These are the type of CBAs described by the Supreme Court *Barclay v City of Spokane*, to be treated as fully effective *as if they had always been in effect* clause.

In short, *even if* the court were to delve into the merits of the contract interpretation dispute, there would be no basis for finding these grievances excluded from the arbitration clause. There is nothing that the County can point to within the four corners of these CBAs that would indicate the parties intended to exclude the pending grievances. The trial court erred by not leaving the ultimate dispute resolution to an arbitrator.

**C. The Trial Court erred by not ordering the Jim Rye Grievance to Arbitration.**

As the trial court dealt with the application of the *Maple Valley Firefighters* case to the hiatus grievances, it overlooked that one of the grievances was not a hiatus grievance at all. That grievance involved Deputy Jim Rye arising from his candidacy for Sheriff. Because the grievance arose two days *after* the CBA was signed, no matter what application what made of *Maple Valley Firefighters*, this grievance was clearly arbitrable and the trial court erred in ruling otherwise.

---

<sup>42</sup> CP 337-38, 386, 443.

<sup>43</sup> Id. (Emphasis supplied.)

In 2006, Deputy Jim Rye had announced he was running for Sheriff. On July 26 of that year the legal advisor for the Sheriff, Deputy Prosecutor Martin Muench, was confronted Rye and told him that he had a choice: Either quit his race for Sheriff or he would be fired.<sup>44</sup> The Guild contends that Muench was acting as an agent of the Sheriff.<sup>45</sup> The Guild also contends Muench's threats violated several provisions of the CBA.<sup>46</sup>

The County's trial court summary judgment motion was presented by the same Martin Muench. In court, the County did not appear to deny the grievance arose while a valid CBA was in full effect. It hardly could have, given that the issue arose only two days after the 2006-07 CBA was executed.<sup>47</sup> Instead, Muench claimed in his summary judgment motion that his conduct could not be subject to a grievance because "the Prosecuting Attorney's Office is not a signatory to the CBA."<sup>48</sup>

The argument misses some key points. The CBA governs *both* the Sheriff's office in particular *and* the County as an entity.<sup>49</sup> The grievance was filed under the Grievance Steps outlined in the CBA, starting with Step 1 to the Undersheriff.<sup>50</sup> The premise of the grievance was that Muench, as the Sheriff's legal advisor, was acting as the agent of the Sheriff at time he conveyed the threats.<sup>51</sup> Indeed, it would be difficult to comprehend how the attorney for the Sheriff was *not* acting as the

---

<sup>44</sup> CP 339-40, 467-69.

<sup>45</sup> CP 340.

<sup>46</sup> CP 339.

<sup>47</sup> See CP 91 and 443.

<sup>48</sup> CP 29.

<sup>49</sup> See 368.

<sup>50</sup> CP 91 and 340.

<sup>51</sup> CP 340.

Sheriff's agent as a matter of law whenever involving himself in Sheriff's office matters. In his pleadings filed with the trial court, Muench seemed to confuse the grievance filed with the Sheriff's office with the complaint filed by the Guild against him with the Prosecutor's office.<sup>52</sup>

Beyond that, what the County really disputes is not arbitrability but to the ultimate merits of the grievance. *But those disputes are to be left to an arbitrator.* For example, while Muench claims that he was acting without the Sheriff's knowledge, Guild disputes the truthfulness of this representation.<sup>53</sup> Muench also claims that he merely sought to make Rye aware of a "potential" Hatch act violation stemming from a small number of overtime hours Rye had worked which were federally reimbursed and that he only volunteered his "comments to Mr. Rye in direct response to Rye's questions."<sup>54</sup> The Guild yet again disputes the truthfulness of Muench's excuses.

But these are fact issues to be resolved by the arbitrator. These fact disputes should not be decided by a trial court during a summary judgment motion on arbitrability. To the extent the trial court thought this grievance to be per se nonarbitrable on some type of disputed claim that the Sheriff's attorney was not his agent, it erred.<sup>55</sup>

---

<sup>52</sup> Compare 91-93 with 466-69.

<sup>53</sup> CP 340, 468-69.

<sup>54</sup> CP 28, 33.

<sup>55</sup> The oral argument before the trial court did not center on the Rye grievance and, although it was briefed to the court, it is possible the court simply overlooked this particular grievance.

It should also be noted in this context, that the Guild procedurally objected to a Declaration filed by Muench.<sup>56</sup> The Guild's motion to strike asserted that it was improper for Muench to interject his own disputed witness testimony into the record since he was also appearing as the attorney for the County in the same proceeding.<sup>57</sup> The trial court never ruled on the motion to strike although it does not appear that the trial court relied upon any of the asserted "facts" in the disputed declaration. To the extent the County's summary judgment motion depends upon the disputed Declaration, its motion should not be granted.

**D. The County should be required to pay the Guild's Attorneys' Fees.**

**1. Parties to a Collective Bargaining Agreement enforcing their contractual binding arbitration clauses are entitled to attorney fees unless there is substantial justification for refusal to arbitrate.**

Washington courts have only allowed the award of attorney's fees when authorized by private agreement, statute, or recognized ground of equity.<sup>58</sup> Division One's decision in *Municipality of Metropolitan Seattle v. Amalgamated Transit Union, Div. No. 587*,<sup>59</sup> is authority on the issue of when attorney fees are due in an arbitration enforcement action. To answer the question of when the award of fees is appropriate under grounds of equity in an arbitration enforcement case, the *Metro* Court

---

<sup>56</sup> See CP 31-33.

<sup>57</sup> CP 326-27.

<sup>58</sup> *Western Stud Welding, Inc. v. Omar Indus., Inc.*, 43 Wn. App. 293, 296, 716 P.2d 959, 961 (Div. I, 1986).

<sup>59</sup> 52 Wn. App. 1062 (Div. I 1988).

looked to the federal courts.<sup>60</sup> The court determined that federal courts have used two different standards:

The imposition of attorney's fees under the first standard is based upon federal labor policy favoring voluntary arbitration and is met when the court finds that a party's refusal to abide by an arbitration decision is "without justification." The second and stricter standard is met when a party's conduct is construed as being in bad faith, vexatious, wanton, or oppressive. *In addition, courts have awarded attorney's fees to a union when the employer, in bad faith or without justification, refused to proceed to arbitration.* (Emphasis added)<sup>61</sup>

In adopting the less stringent standard for Washington, Justice Webster, writing for the majority in *Metro*, continued: "It appears that a majority of the courts have adopted the 'without justification' standard.... I would join them and, next, consider whether Metro's refusal to proceed to arbitration was without justification."<sup>62</sup> The *Metro* Court then held that a challenge to arbitration is unjustified when the employer either ignores settled law or when the employer maintains a contrary position to such well established law.<sup>63</sup> In awarding attorney's fees to the union, the *Metro* court stated that the employer's arguments against arbitration, concerning who could bring a grievance under the contract, were without justification

---

<sup>60</sup> *Municipality of Metropolitan Seattle*, 52 Wn. App. at 1070.

<sup>61</sup> *Id.* at 1070-71, citing 80 A.L.R. Fed. 302, 308-09 (1986).

<sup>62</sup> *Id.* at 1071, citing 80 A.L.R. Fed. at 310-13.

<sup>63</sup> 52 Wn. App. at 1072, citing *Washington Hosp. Ctr. v. SEIU, Local 722*, 746 F.2d 1503 (D.C. Cir. 1984).

as they were merely “procedural arguments couched in the terms of substantive arbitrability.”<sup>64</sup>

**2. The Guild is entitled to its attorneys’ fees because the County lacks substantial justification for their refusal to arbitrate.**

The recent Court of Appeals *Yakima County* decision, involving the County’s trial court counsel while he was a Yakima County DPA, reiterated the long standing rule that CBA interpretation disputes are subject to arbitration. The County should have honored its contractual promise to arbitrate grievances. And in light of the recent *Yakima County decision*, which its counsel litigated, it could not have been unaware of the fundamental legal principles governing this action. It lacked substantial justification for its position and, as a result, should be directed to pay the Guild’s attorney fees.

The standard of lacking substantial justification is *not* as narrow as the Rule 11 standard for fees. The question is not whether the County’s position is frivolous. The question is whether a party to a CBA that has contractually committed to promptly arbitrate disputes should be allowed to evade its promise without good reason. *When a party improperly refuses to arbitrate they are in breach of contract and a breach of contract remedy is needed.*

The County’s summary judgment motion, with its out-of-context quotes<sup>65</sup> and disregard of long standing arbitrability case law, has never set

---

<sup>64</sup> 52 Wn. App. at 1073.

<sup>65</sup> In its summary judgment motion, the County quoted the WILLISTON ON CONTRACT discussion on hiatus contract but left out the sentences that immediately followed its

forth a good or substantial reason for evading arbitration. The fact that the trial court ruled in the County's favor cannot be invoked to establish a "substantial justification" for the County's argument. Either it has justification or it does not. The trial court's error cannot be invoked to immunize the County for its liability for its breach of the labor contract.

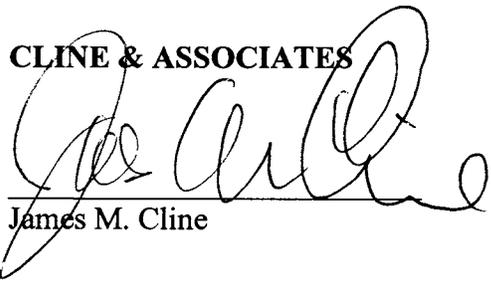
The Guild should be reimbursed its attorneys' fees for having to bring this lawsuit to get the County to honor its promise to arbitrate. This is not a windfall for the Guild but a minimal step toward restoring the parties in the position they would have been in were in not for the County's breach of contract.

## VI. CONCLUSION

For the foregoing reasons, the trial court should be reversed, and, upon remand, summary judgment should be granted in favor of the Guild with an order to arbitrate the unresolved grievances.

**RESPECTFULLY SUBMITTED** this 5th day of May, 2008, at Seattle, Washington.

**CLINE & ASSOCIATES**



James M. Cline

---

quoted language which showed that Williston supports precisely *the opposite* of the position argued by the County. Compare CP 24 and CP 327-28.

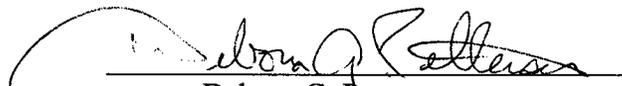
**CERTIFICATE OF SERVICE**

I, Debora G. Pettersen, Legal Assistant at Cline & Associates,  
declares, under penalty of perjury, under the laws of the State of  
Washington, that I served the Opening Brief of Appellant to which this  
Certificate of Service is attached in the following manner to the entities  
below listed:

|                                       |  |
|---------------------------------------|--|
| Clerk                                 | <input type="checkbox"/> Via Facsimile               |
| Court of Appeals, Division II         | <input type="checkbox"/> Via U.S. Mail               |
| 950 Broadway, Suite 300               | <input checked="" type="checkbox"/> Via Legal Mssngr |
| Tacoma, WA 98402                      | <input type="checkbox"/> Email                       |
| <br>                                  |  |
| Jacquelyn Aufderheide                 | <input type="checkbox"/> Via Facsimile               |
| Kitsap County Prosecuting Office      | <input checked="" type="checkbox"/> Via U.S. Mail    |
| M/A 35a                               | <input type="checkbox"/> Via Legal Mssngr            |
| 614 Division Street                   | <input checked="" type="checkbox"/> Email            |
| Port Orchard, WA 98366-4691           |  |
| <u>Jaufderh@MAIL1.CO.KITSAP.WA.US</u> |  |

I certify and acknowledge under the laws of the State of  
Washington that the foregoing is true.

DATED at Seattle, Washington, this 5th day of May, 2008.

  
\_\_\_\_\_  
Debora G. Pettersen

FILED  
COURT OF APPEALS  
DIVISION II  
08 MAY -5 PM 4: 23  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY