

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38711-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CLARK COUNTY FIREFIGHTERS LOCAL 3674

Plaintiff/Respondent

v.

CLARK COUNTY FIRE DISTRICT NO. 11

Defendant/Appellant

On appeal from Clark County Superior Court
Cause No. 08-2-03386-8
The Honorable Robert Harris

APPELLANT'S BRIEF

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ORIGINAL

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1. INTRODUCTION

This case is a dispute between the appellant Clark County Fire District No.11 (“Fire District”) and respondent Clark County Firefighters Local 3674 (“Local”) as to whether or not the grievance provisions of their 2006-2008 Collective Bargaining Agreement (“the CBA”) apply to the termination of a probationary employee, Shawn Parrish (“Parrish”), for his failure to pass mandatory testing components of the Fire District’s one year probation period. Parrish was an at-will employee of the Fire District who was not successful during his probationary period, and was not retained as a permanent employee.

The CBA does not include specific language regarding Fire District’s probationary employment program or the termination of probationary employees. The Local argues that this omission conclusively results in the termination “for cause” language of the CBA being applicable to Parrish. In order to dispute Parrish’s termination, the Local also argues that the grievance process of the CBA applies to his termination. Parrish filed his grievance alleging “wrongful termination/discrimination” as the basis of his claim.

The Fire District denies both these allegations. The whole purpose of probationary employment programs would be nullified if a “for cause” standard applied to probationary employees. The Fire District’s probationary program is a

rigorous and formalized process that includes regular observation, reporting, and mandatory skills testing for newly-employed firefighters. The program has been in place for many years, through several 3-year CBA contract cycles, but has never been included within the CBA or challenged by the Local. The Local does not dispute that probationary program was the pattern and practice of the parties, which was confirmed in a subsequent labor agreement declaring that probationary employees were not covered by the “for cause” language and had no recourse to any grievance process to contest a termination.

Even if this Court determines that the CBA applies to this dispute, the summary judgment should be reversed. As an alternative basis for reversal of the trial court’s decision, the Fire District relies upon a section of the CBA which specifically addresses complaints of discrimination. The CBA requires that the person alleging discrimination file a written demand for arbitration of the claims, and waive all other administrative or judicial remedies. Parrish has never made such an election. Instead, he has pursued both administrative and judicial remedies. Nevertheless, the trial court ordered arbitration of the dispute.

The trial court erred in granting summary judgment to the Local under the facts of the case, and the summary judgment order should be reversed and remanded.

2. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred by concluding that there was no genuine issue of material fact and in awarding summary judgment to the Local contrary to the evidence.

ISSUE 1.1 Did the trial court err when it failed find that the undisputed evidence of the Fire District created at the very least a question of material fact as to whether or not the scope of the CBA included the one year probationary training and evaluation program for new Fire District employees?

ISSUE 1.2 Did the trial court err when it failed to consider the undisputed extrinsic evidence that the scope of the CBA did not include the one year probationary training and evaluation period for new Fire District employees?

ASSIGNMENT OF ERROR NO. 2: The trial court erred by granting summary judgment to the Local and interpreting the CBA without consideration of the entire context of the CBA.

ISSUE 2.1 Did the trial court err by failing to examine the entire context of the CBA to interpret the meaning and scope of its provision?

ISSUE 2.2 Did the trial court err by improperly limiting its inquiry to the specific terms of the CBA in order to determine the intent of the parties?

ASSIGNMENT OF ERROR NO. 3: The trial court erred by granting summary judgment without consideration of the State's public policy.

ISSUE 3.1 Did the trial court's decision granting summary judgment violate an explicit, well established and dominant public policy of the State of Washington in favor of probationary periods for fire fighters?

ISSUE 3.2 Would the State's public policy favoring probationary employment be violated by requiring a "for cause" standard for termination including grievance arbitration?

ASSIGNMENT OF ERROR NO. 4: The trial court erred by granting summary judgment and compelling arbitration without compliance with an express condition of the CBA.

ISSUE 4.1 Did the trial court's order on summary judgment ignore an express condition precedent of the CBA that Parrish execute a written waiver of all administrative or judicial remedies in order to pursue arbitration?

ISSUE 4.2 Should the Fire District be compelled to engage in an arbitration process where Parrish has rejected the arbitration process and elected to pursue judicial and administrative remedies?

3. STATEMENT OF THE CASE

Since 1994 the Fire District and the Local have negotiated collective bargaining labor agreements in successive three year terms. CP 119 Past negotiations between the Fire District and the Local have always recognized that probationary employees are not subject to the same terms and conditions as those employees who have completed their probation. CP 120 It has been the regular past practice of the Fire District that probationary employees are subject to

termination without “just cause” and without recourse, including the grievance process or appeal. CP 120

The use of a one year probationary period is a standard practice for Fire Departments in Clark County. This is, and has been, the policy of the Fire District. CP 175 The rationale is that such a probationary or introductory period allows an evaluation of the employee’s skills and compatibility with the organization, department, and/or job position. CP 226 During this period, the employee also has the opportunity to demonstrate his/her ability to learn and satisfactorily perform the new job. CP 226

The Fire District’s probationary period is not a mere formality. CP 122 The probation period for firefighters is designed and intended to be a rigorous test, with ongoing evaluation of the probationer by experienced officers. CP 122 Formal written evaluations of probationers have been required since at least 2002. CP 122 The training curriculum was updated and expanded in 2004. CP 122

It is also a well-established general practice and custom in the fire service that a probationary firefighter is not entitled to grieve a termination for failing to complete the probationary period. In the City of Vancouver, the new employee may be discharged at any time for any lawful reason, or for no reason, with or without cause. CP 224 In Clark County Fire District 6 and Clark County Fire

District 12, the established policy is that if a probationary employee is not performing to expected standards, he or she may be terminated without the opportunity or right to file a grievance on that termination. CP 204; 216 The same is true in Snohomish County and Cowlitz County. CP 220; 212; 208.

In March 2006, the Local and the Fire District entered into a CBA for the period January 1, 2006 through December 31, 2008. CP 37 The CBA provides that “Grievances are defined as disputes involving the interpretation or application of this Agreement.” CP 50 The grievance resolution process contains multiple steps, culminating in arbitration. CP 51 However, the arbitrator has no power to alter, amend, or change the terms of the CBA. CP 51

The CBA also provides that “Except as expressly limited by the terms of the Agreement, the Fire District reserves the right to manage and operate the Fire District in all respects. This right specifically includes the right “...to make and enforce reasonable rules and regulations, and to undertake such other actions as it may deem necessary in the discharging of its obligation to the public.” CP 52

Article 16 of the CBA addresses the applicability of the grievance procedures to claims of illegal discrimination. Article 16 states that, “...prior to any arbitration, the employee shall have an election of remedies between arbitration and judicial or administrative remedies. If the employee elects

arbitration, he or she must provide a written waiver of all other remedies and the arbitral forum shall provide the final determination of the dispute.” CP 53

Parrish joined the Fire District in January 2006 as a temporary, part-time firefighter. In March 2006 he became a regular part-time firefighter, and in February, 2007, he was employed as a full-time firefighter. CP 122 Therefore, Parrish’s 1 year probationary period as a full time firefighter commenced in February 2007.

On or about January 10, 2008, the Fire District terminated the probationary employment of Parrish, who was a member of the Local at that time. CP 37; 164 Parrish’ status as a probationary employee is admitted. CP 173 The letter advising Parrish of the termination stated that the reason for the action was that he had not successfully completed the probationary period. CP 164 Parrish failed to meet probationary standards by not complying with the requirement to obtain the necessary monthly evaluations, and by failing his Phase 3 testing. CP 122

The probationary status of a new Fire District employee is confirmed in the “Firefighter Task Book” that was issued to Parrish when his employment began. The Fire District’s procedures and practices in dealing with probationary employee have been regularly followed with new hires without any objection from the Local. CP 63

The “Firefighter Task Book” states that it is a guide to the first year of employment. CP 68 A new employee must complete the Task Book, four separate phases of training, and regular testing and evaluation as a part of the probationary training. CP 69. The probationary employee is required to complete a daily shift evaluation report and a monthly probationary report. CP 69. The employee is considered a “trainee” during his first year of employment, and must successfully complete the Task Book and testing within that year. CP 70 It is undisputed that Parrish, on January 3, 2008, failed his Phase 3 probationary written and practical exams. CP 173

On February 7, 2008, Parrish submitted a request to “...grieve my wrongful termination from employment.” CP 62

On February 14, the Fire District responded that Parrish was a probationary employee of the District, whose termination of employment was not disciplinary in nature but was related to a failure to pass probation. CP 63 The Fire District relied upon its policies and past practices of the Fire District and the Local that clearly establish that all new employees are subject to a one year probationary status. CP 63 The probationary requirement is confirmed in the “Firefighter Task Book” that was issued to Parrish when his employment began. CP 63 The Fire District’s procedures and practices in dealing with probationary

employee have been regularly followed with new hires without any objection from the Local. CP 63

On February 19, Parrish submitted a letter to Fire Chief Mason regarding his “Request for Grievance – Wrongful termination / Discrimination.” CP 77 Parrish recites that “Section 15A of the contract allows for discipline or discharge ‘for just cause’. This applies to all employees.” CP 77 Fire Chief Mason responded to that letter on February 25, stating that it was the Fire District’s position that “...as a probationary employee, you (Parrish) do not have a right to grieve your termination.” CP 78 The Fire Chief re-stated that the District’s position was “...overwhelming(ly) supported by district policies and procedures, past practice, full knowledge and agreement of Local 3674 for all newly hired firefighters over the past several years, and case law...” CP 78

The following day, February 20, Parrish signed a Standard Tort Claim Form against the Fire District. CP 198; 199 The claim by Parrish alleged that he was wrongfully terminated for complaining about a discriminatory and hostile work environment. CP 199 The claim further alleged that he “...was treated differently than other new and probationary employees, based upon (his) ethnic background.” CP 199 Parrish had also filed discrimination charges against the

Fire District with the Equal Employment Opportunity Commission; Charge No. 551-2008-00895. CP 119

Subsequent to the Parrish termination, the Fire District merged with another fire district, and a new Interim Collective Bargaining Agreement was adopted with the Local in a Memorandum of Understanding between Clark County Fire District 11, Fire District 12, IAFF Local 4229 and IAFF Local 3674. This agreement was executed March 26, 2008 to be effective April 1, 2008. CP 70; 71 Article 17 of the Interim Agreement states that, "Employees in their first year of employment...shall be considered probationary. During the probationary year, employees may be terminated without cause and without recourse to the grievance and arbitration provisions of this agreement." CP 195; 130 This language was included in the agreement as a clarification of the past accepted practices of both Fire Districts, and the understanding of all the parties regarding those past practices. CP 121

The Local filed its complaint for declaratory judgment on May 30, 2008. CP 3 The complaint alleged a single cause of action for specific performance of the CBA, and asked the court to compel the Fire District to submit the Parrish grievance to arbitration. CP 5; 6

The Fire District answered the complaint, denying that the termination of Parrish's probationary employment was subject to the grievance process of the CBA. CP 30; 31 The answer also raised the affirmative defenses of estoppel, lack of mutual assent, and that Parrish had an adequate remedy at law. CP 33 The estoppel defense against the Local is based upon the long standing practice of the parties regarding a probationary period. CP 33 The lack of mutual assent defense alleged that dismissal of a probationary employee was not included in the terms of the CBA. CP 34 The adequate remedy at law defense goes to the need for Parrish to affirmatively elect to pursue arbitration and waive all other administrative or legal remedies, which he has not done. CP 33

The Local filed its motion for summary judgment, which was decided on December 5, 2008. CP 228 The trial court granted summary judgment, relying solely on the fact that there was no specific clause for probationary employees in the CBA. RP 8 The trial court stated that there were other "very meaningful" issues to be determined, but that those would have to be presented to the arbitrator in dealing with the labor contract. RP 8

The Fire District duly filed its appeal of the court's summary judgment order. CP 231.

4. ARGUMENT

ASSIGNMENT OF ERROR #1

ISSUE 1.1 Did the trial court err when it failed find that the undisputed evidence of the Fire District created at the very least a question of material fact as to whether or not the scope of the CBA included the one year probationary training and evaluation program for new Fire District employees?

ISSUE 1.2 Did the trial court err when it failed to consider the undisputed extrinsic evidence that the scope of the CBA did not include the one year probationary training and evaluation period for new Fire District employees?

In reviewing a grant of summary judgment, the appellate court reviews the matter “de novo” and engages in the same inquiry and analysis as a trial court.

Higgins v. Stafford, 123 Wn2d 160, 168, 866 P2d 31 (1994) A “de novo appeal” is without any deference to the prior decision or findings of the trial court.

Black’s Law Dictionary, 8th Ed. (2004)

A motion for summary judgment is governed by CR 56. A motion for summary judgment requires a determination of whether a genuine issue of any material fact exists. CR 56(c); Lundgren v. Kieren, 64 Wn.2d 677 (1964) A material fact in summary judgment law is one upon which the outcome of the litigation depends, in whole or in part, and where proof of an essential element of a claim is lacking, all other facts are rendered immaterial. Shields v. Morgan Financial, Inc., 130 Wn.App. 750, 125 P.3d 164 (2005)

A motion for summary judgment may be granted only if “after viewing all the pleadings, affidavits, depositions, admissions, and all reasonable inferences drawn therefrom in favor of the nonmoving party,” the court finds “(1) that there is no genuine issue as to any material fact, (2) that all reasonable persons could reach only one conclusion, and (3) that the moving party is entitled to judgment as a matter of law.” Higgins, at 169; Balice v. Underwood, 62 Wn.2d 195 (1963) The burden is on the moving party to demonstrate that there is no issue as to a material fact, and “the moving party is held to a strict standard.” Scott v. Pacific West Mt. Resort, 119 Wn.2d 484, 502, 503, 834 P.2d 6 (1992)

In 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. Bond v. State 62 Wn.2d 487, 383 P.2d 288 (1963)

Likewise summary judgment is not proper if reasonable minds could draw different conclusions from undisputed facts and inferences, or if all of the facts necessary to determine the issues are not present. Ward v. Coldwell Banker/San Juan Props. Inc., 74 Wn.App. 157, 161, 872, 872 P.2d 69 P.2d 69, review denied, 125 Wn.2d 1006 (1994)

This is particularly true in contract cases. The interpretation of a contract provision is a question of law only when the interpretation does not depend on the

use of extrinsic evidence, or when only one reasonable inference can be drawn from the extrinsic evidence. Go2Net, Inc. v. C I Host, Inc., 115 Wn.App. 73, 85, 60 P.3d 1245 (2003) Therefore, summary judgment as to a contract interpretation is proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning. Id.

In the contract interpretation context, “summary judgment is not proper if the parties’ written contract, viewed in the light of the parties other objective manifestations, has two or more reasonable but competing meanings.” Hall v. Custom Craft Fixtures, Inc., 87 Wn.App. 1, 9, 937 P.2d 1143 (1997).

The trial court should have considered the undisputed extrinsic evidence offered by the Fire District. The parole evidence rule only applies to a writing intended as a final expression of the terms of the agreement. Emrich v. Connell, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). When making this initial determination of whether parties intended the written document to be an integration of their agreement, which is a question of fact, “the trial court must hear all relevant, extrinsic evidence, oral or written.” Emrich, at 556. “If the court finds that the parties intended the writing to be a final expression of the terms it contains but not a complete expression of the terms agreed upon – i.e., partially integrated – then the terms not included in the writing may be proved by

extrinsic evidence only in so far as they are not inconsistent with the written terms.” Id.

For this case, the reasonable inferences arising from the evidence establish that since 1994 the Fire District and the Local have negotiated successive collective bargaining labor agreements which have always recognized that probationary employees are not subject to the same terms and conditions as those employees who have completed such probation. The regular past practice of the Fire District and the Local is that probationary employees are subject to termination without “just cause” and without recourse, including any grievance process or appeal. This practice is consistent with the policies of other neighboring Fire Departments, as well as being the general practice in the fire service industry. CP 204; 208; 212; 216; 220.

Further, Parrish’s status as a probationary employee is not contested. The letter from the Fire Chief advising Parrish of his termination stated that the reason for the action was that he had not successfully completed the probationary period. Parrish failed to meet the probationary standards by not complying with the requirement to obtain the necessary monthly evaluations, and by failing his Phase 3 testing.

The parties have ratified the past practice for probationary employees by their subsequent conduct. Following a merger of Fire Districts and Locals, the parties executed a new CBA which states that, "Employees in their first year of employment...shall be considered probationary. During the probationary year, employees may be terminated without cause and without recourse to the grievance and arbitration provisions of this agreement." This language was included in the agreement as an affirmation of the past accepted practices of both Fire Districts, and the understanding of all the parties regarding those past practices. The incorporation of the probationary period into the Agreement is indicative of the Fire District's and the Local's ongoing recognition of the importance of the probationary employment program. Although not previously identified within the CBA, there is not now, nor has there ever been, any indication that the Fire District and the Local intended for probationary employees to be entitled to identical treatment with regular employees.

All these facts are uncontroverted, regardless of whether or not the specific language of the CBA mentions probationary employees. Given the extensive conditions attached to probation by the District, the past history and subsequent conduct of the parties, it is apparent that the probationary process was expressly excluded from the CBA. This makes summary judgment for the Local, as

awarded by the trial court, impossible. Summary judgment for the Local must be denied.

ASSIGNMENT OF ERROR # 2:

ISSUE 2.1 Did the trial court err by failing to examine the entire context of the CBA to interpret the meaning and scope of its provision?

ISSUE 2.2 Did the trial court err by improperly limiting its inquiry to the specific terms of the CBA in order to determine the intent of the parties?

It is important to note that the CBA at issue in this case does not purport to be an integrated agreement. There is no recitation in the document that it is a final expression of all the parties' agreements. An integrated contract is one where the parties intend a written document to be a final expression of their agreement.

Whether the parties intended an integrated contract is generally a question of fact. Emrich v. Connell, 105 Wn.2d 551, 556, 716 P.2d 863 (1986) A court may consider evidence of negotiations and circumstances surrounding the formation of the contract, and if the agreement is not completely integrated, additional terms may be proved to the extent they are consistent with the written terms. Emrich, at 556.

Secondly, the language of the CBA itself limits its effect on Plaintiff's administration and operation of the Fire District. Article 15 of the CBA provides that "Except as expressly limited by the terms of this Agreement, the Fire District

reserves the right to manage and operate the Fire District in all respects.” This language is a specific limitation on the scope of the CBA, excluding any and all issues not “expressly limited” by its language. The rights reserved to the District include, and are not limited to, the right to hire, promote, discipline or discharge for just cause. It is clear from the evidence submitted by the Fire District that the one year probationary period for new Firefighters was a well established practice for the District, with specific job requirements, tests, and ongoing evaluations. CP 122. Nevertheless, the CBA is entirely silent on these job related aspects of employment. As such, the District is not “expressly limited” by the CBA in any respect in how it tests, evaluates, and discharges employees who do not meet the standards. This is in contrast to the detailed provisions for other aspects of Firefighter employment, such as shifts, holidays and vacations, sick leave, equipment provided, pay rates, overtime and seniority.

The subsequent conduct of the parties is also instructive. The language of the contractual provisions at issue is only one factor in the equation of the parties' intent, and the court also looks to the contract as a whole, its subject matter and objective, the circumstances of its making, subsequent acts and conduct of the parties, and the reasonableness of the parties' interpretations. The subsequent conduct of the parties to a contract is only one factor that may aid in elucidating

the parties' intent. Davis v. State, Dept. of Transp., 138 Wn.App. 811, 159 P.3d 427 (2007) Here, the CBA which is currently in effect with the IAFF local expressly excludes probationary employees from the grievance process and arbitration.

Under the “context rule” used to interpret a contract, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties. Go2Net, Inc. v. C I Host, Inc., 115 Wn.App. 73, 84, 60 P.3d 1245 (2003)

Any determination of meaning or ambiguity of a contract term should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. Id. A trial court may resort to parol evidence for the limited purpose of construing the otherwise clear and unambiguous language of a contract in order to determine the intent of the parties. Id. The mutual intent of parties to a contract

may be established directly or by inference, but any inference must be based exclusively on the parties' objective manifestations. Id.

The context of the CBA would include the bargaining history of the parties, the provisions of prior and subsequent agreements, the actual practice of the Fire District in consistently requiring successful completion of probation by its employees, the industry standard for probationary employees, as well as the express language in the document. The evidence is undisputed that the intent of both parties was that probationary employees were not considered to be covered by the grievance process and “for cause” termination language of the agreement.

Even arbitrators recognize that where an agreement provides that new employees are not to have seniority rights until completion of a probationary period, and is otherwise silent as to management rights with respect to them, probationary employees may be discharged for any reason not otherwise unlawful. In one case where the provisions of a collective bargaining agreement mentioned probationary employees, but were unclear as to whether the employees were included under a just cause clause, the arbitrator held that “the weight of arbitral authority supports the proposition that Management has broad, if almost unlimited, discretion where probationary employees are concerned” Elkouri & Elkouri: How Arbitration Works, 6th Edition, pg 934 (2003)

While it is generally true that any doubt should be resolved in favor of arbitration, “the courts must be equally careful to refrain from blindly throwing into arbitration every case involving an ‘arbitration of interpretation’ clause . . . ” Hanford Guards Local 21 v. General Electric Co., 57 Wn.2d 491, 494, 358 P.2d 307, 310 (1961) “A factor to be considered is the unique character of the collective-bargaining process, and contracts resulting therefrom, in which not every potential dispute is attempted to be provided for, and the product of which is designed to be a guide as well as a declaration of rights. Conditions and practices within the industry at the time of negotiation may have been relied upon and expected to continue without unmistakable reference being made to them in the contract.” Shulman: Reason, Contract, and Law in Labor Relations, 68 Harvard L.Rev. 999 (1955), cited in *Hanford Guards*, at 495, 496.

The declaration of Chief Mason clearly establishes that the issue of requiring “just cause” for termination of a probationary employee was simply not bargained for or included in the 2006 CBA. The Interim CBA Agreement which superseded the 2006 CBA between the District and the Local affirms the past practice of the parties and specifically excludes probationary employees from contesting termination thru the grievance/arbitration process.

Summary judgment was not appropriate because the court refused to consider the entire context of the agreement in determining the intent of the parties.

ASSIGNMENT OF ERROR #3

ISSUE 3.1 Did the trial court's decision granting summary judgment violate an explicit, well established and dominant public policy of the State of Washington in favor of probationary periods for fire fighters?

ISSUE 3.2 Would the State's public policy favoring probationary employment be violated by requiring a "for cause" standard for termination including grievance arbitration?

As with any contract, a court may not enforce a collective-bargaining agreement that is contrary to public policy. *See W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983); *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000). If the contract, as interpreted, violates some explicit, well-defined, and dominant public policy, the Court is not required to enforce it. *W.R. Grace & Co.*, 461 U.S. at 766 (citing *Hurd v. Hodge*, 334 U.S. 24, 35, 68 S.Ct. 847, 92 L.Ed. 1187 (1948) and *Muschany v. United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 89 L.Ed. 744 (1945)).

Persons initially appointed or employed by local governments in the State of Washington, both under civil service and otherwise are customarily

probationary employees for indicated periods. The purpose of a probationary period is to give the employer time to observe and evaluate the actual performance of the new employee on the job. Samuels v. City of Lake Stevens, 50 Wn.App. 475, 478, 749 P.2d 187, *review denied*, 110 Wn.2d 1031 (1988); Arbogast v. Town of Westport, 18 Wn.App. 4, 6, 567 P.2d 244 (1977), *review denied*, 89 Wn.2d 1017 (1978); Sandra M. Stevenson: Antieau on Local Government Law 2d, Vol. 5. Section 76.10 (2008)

It is well established that the satisfactory completion of an in-service training program may be required of one who has been appointed to a probationary term and failure to show sufficient job competence at the conclusion of a training course will warrant dismissal even though this requirement is in addition to the qualifications prescribed by the civil service commission, which the probationer has already successfully met. Discretion to terminate or demote or to make the appointment permanent is frequently rested in the appointing officer. It is well established that a probationary status civil service employee does not enjoy the job security afforded to regular status employees who may be removed only for just cause. Unlike a regular status civil service employee, a probationary status civil service employee does not possess a substantial personal or property right in continued employment. McQuillan Mun Corp sec 12.81 (3rd Ed). A

probationer is not generally entitled to a hearing as to the reasons for not making his or her appointment absolute at the expiration of the probationary period. Id.

The declarations of other Clark County Fire Departments emphasize that this general policy is followed within the District, as well as other jurisdictions across the State.

Indeed, a probationary period is mandated for municipal fire departments in Washington. The statute relating to fire service employment provides that, “To enable the appointing power to exercise a choice in the filling of positions, no appointment, employment or promotion in any position in the classified service shall be deemed complete until after the expiration of a period of three to six months' probationary service, as may be provided in the rules of the civil service commission during which the appointing power may terminate the employment of the person certified to him or her, or it, if during the performance test thus afforded, upon observation or consideration of the performance of duty, the appointing power deems him or her unfit or unsatisfactory for service in the department.” RCW 41.08.100. (Emphasis Added)

The Local incorrectly argues that the “just cause” requirement for termination under the CBA applies to all Fire District employees, including probationers like Parrish.

“Just cause” is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power, which is not for any arbitrary, capricious, or illegal reason and which is based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true. Baldwin v. Sisters of Providence, 112 Wn.2d 127, 139, 769 P.2d 298 (1989) This is very different standard than the good faith decision by an appointing authority to make a discretionary decision that an employee is unfit or unsatisfactory for service in the department. To eliminate the distinction between probationary employment and regular employment, by requiring “substantial evidence” to terminate a probationer for failing probation, results in the Fire District’s probationary program being a superficial exercise.

ASSIGNMENT OF ERROR #4

ISSUE 4.1 Did the trial court’s order on summary judgment ignore an express condition precedent of the CBA that Parrish execute a written waiver of all administrative or judicial remedies in order to pursue arbitration?

ISSUE 4.2 Should the Fire District be compelled to engage in an arbitration process where Parrish has rejected the arbitration process and elected to pursue judicial and administrative remedies?

Without prejudice to the Fire District’s arguments that the CBA does not apply to the Parrish termination, even if the Court were to find that the CBA applied, then the summary judgment should be reversed because the order ignores

an express condition precedent in the agreement. As a matter of contract law, “conditions precedent” are those facts and events which occur subsequent to making of a valid contract and which must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, or before usual judicial remedies are available. Ross v. Harding, 64 Wn. 2d 231, 391 P.2d 526 (1964)

Courts do not have the power, under the guise of interpretation, to rewrite contracts the parties have deliberately made for themselves; courts may not interfere with the freedom of contract or substitute their judgment for that of the parties to rewrite the contract or interfere with the internal affairs of corporate management. McCormick v. Dunn & Black, P.S., 140 Wn.App. 873, 167 P.3d 610 (2007)

Here, the CBA contains a specific provision regarding complaints of illegal discrimination. Article 16 of the CBA addresses discrimination issues and states that, “The grievance procedures of this Agreement shall apply to any dispute under this article, provided, however, that prior to any arbitration, the employee shall have an election of remedies between arbitration and judicial or administrative remedies. If the employee elects arbitration, he or she must provide a written waiver of all other remedies and the arbitral forum shall provide

the final determination of the dispute.” The language requiring Parrish to provide a written waiver of all other remedies, prior to any arbitration, creates a condition precedent that must be satisfied before there is any right to arbitrate his claims and before the trial court could order the Fire District to proceed with arbitration.

It is apparent that in a case where complaints of “discrimination” are the basis of a grievance, the default remedy is not the arbitration process. An affirmative election is required by the employee to engage arbitration as the “final determination” of the dispute. Such provisions for an election of remedies by an employee override the general presumptions in favor of arbitration. Minter v. Pierce Transit, 68 Wn.App. 528, 843 P.2d 1128 (1993)

The CBA terms provide that Parrish has an “election of remedies” between arbitration and other administrative or judicial recourse. The elements which must be present before party will be held bound by election of remedies are: (1) two or more remedies must exist at time of election, (2) the remedies must be repugnant and inconsistent with each other, and (3) the party to be bound must have chosen one of them. Lange v. Town of Woodway, 79 Wn.2d 45, 483 P.2d 116 (1971). The provisions of the CBA are specific that Parrish has the option to pursue his claims in appropriate administrative or judicial venues, or he must affirmatively elect arbitration in writing, waiving all the other administrative and

judicial remedies. Parrish has never provided the written waiver necessary to avail himself of arbitration. On the contrary, he has actively pursued his civil remedies by filing a notice of tort claim form and an EEOC complaint.

The grievance process arbitration existed as an option at the time Parrish decided to pursue his civil remedies, and the CBA makes it clear that it is an “either/or” decision as to which option to choose. The language provides that in order to pursue grievance arbitration, Parrish must first file a written “waiver of all other remedies and the arbitral forum shall provide the final determination of the dispute.” The requirement that Parrish waive “all” other remedies demonstrates that the remedies are mutually exclusive, inconsistent and repugnant. Parrish has obviously made his choice, since not only has he failed to execute the waiver of administrative and judicial remedies, he has actively pursued them. For all of these reasons, Parrish has elected not to pursue arbitration and the trial court was wrong to impose arbitration of his claim on the Fire District.

5. CONCLUSION

The trial court’s summary judgment order renders the Fire District’s entire “probationary” testing and evaluation process meaningless. The summary judgment was contrary to the law and public policy of this State regarding the use

of probationary employment status to evaluate public employees' suitability for their positions. Alternatively, even if the CBA applies, the order ignores the "election of remedies" requirement of the agreement and re-writes the terms of the contract. For all of these reasons, the court should reverse the decision of the trial court, vacate the order granting summary judgment, and remand the case to the superior court.

Respectfully submitted this 9 day of July, 2009.



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No. 38711-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CLARK COUNTY FIREFIGHTERS LOCAL 3674

Plaintiff/Respondent

v.

CLARK COUNTY FIRE DISTRICT NO. 11

Defendant/Appellant

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____
DEPUTY

On appeal from Clark County Superior Court
Cause No. 08-2-03386-8
The Honorable Robert Harris

DECLARATION OF SERVICE

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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I, Thomas G. Burke, attorney for Appellant, certify that on the below indicated date, I mailed a copy(ies) of the following documents:

- Appellant's Brief

To the following parties:

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Signed in Des Moines, Washington this 9th day of July, 2009.

BURKE LAW OFFICES, INC. PS



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