

NO. 290689

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

SEP 30 2010

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DIVISION III
STATE OF WASHINGTON
By: _____

CHELAN COUNTY

Appellant

v.

CHELAN COUNTY DEPUTY SHERIFF'S ASSOCIATION and
DALE ENGLAND

Respondents

RESPONDENTS' REPLY BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from counter lawsuits filed by Chelan County and the Chelan County Deputy Sheriff's Association involving a grievance filed under the parties Collective Bargaining Agreement (CBA). The grievance concerns Sheriff Mike Harum's discharge of the Association's then President, Deputy Dale England. The parties attempted to resolve the grievance through mediation. The parties arrived at a tentative settlement agreement but were unable to reach an executed final agreement. The Association now asserts that the grievance must be decided through final and binding labor arbitration, as defined in the CBA, but the County resists that arbitration.

The parties reached a tentative agreement that was placed into handwritten notes. These notes provide only *an outline* of the elements of an agreement. The notes were initialed by the parties as a tentative agreement but it was explicitly understood that the legal language would be fully developed by the attorneys and would be subject to ratification and approval.

Before the agreement could be executed, Sheriff Harum made reports to the local media, which the Association believed were false and actionable under the terms of the tentative agreement. In light of the Sheriff's conduct, which the Association and England believed violated

the tentative agreement, they were no longer willing to settle on the previous discussed terms. Further discussions between the parties did not generate any executable agreement. The Association insisted on returning the matter to the Arbitrator for resolution, but the County sued instead.

Any dispute over the interpretation and application of the parties' labor agreement *must* be decided under the parties' final and binding arbitration procedure. The County's claim, that the rights under the grievance have been settled and extinguished by the tentative agreement, is a CBA interpretation and application issue. So too is the Association's claim that the grievance remains unresolved. The County's request to have a court intervene in the parties' labor dispute is contrary to the arbitral jurisdiction established by the parties' CBA.

Under case law precedent, including that of this Court, this arbitral jurisdiction extends to cases even where a grievance may only be "arguably" covered by the CBA. There is a strong presumption of arbitrability and all doubts about arbitral jurisdiction are to be resolved in favor of the arbitrator's jurisdiction.

Even if jurisdiction of the parties' labor dispute is properly in a court of law, the County's lawsuit lack merit. Only a handwritten tentative agreement was reached. The parties did not manifest any intent that the handwritten note would itself constitute a complete agreement. In

fact, the parties' statements and conduct *all indicated to the contrary*. As was explicitly indicated, this tentative draft was subject to further drafting and ratification.

The handwritten draft agreement lacked all the essential terms of an executable agreement. Among the omissions was the absence of a clause covering the Age Discrimination in Employment Act (ADEA) requirements. Those statutory requirements mandate that any ADEA settlement must include waiver terms that are identified with particularity and be followed by a mandatory waiting period. *The County's own later written document corroborates the existence of these requirements*. Furthermore, the County's draft of the final agreement had omitted key terms at variance with the tentative agreement, further reflecting the Association's claim that the handwritten notes did not establish a complete meeting of the minds.

As a result, the County's action here is demonstrated to be baseless based upon its own actions. Judge Burchard properly dismissed the County's lawsuit and it should not be reinstated through this appeal.

II. COUNTERSTATEMENT OF THE CASE

In November 2008, County Sheriff Mike Harum discharged Dale England. England and the Association grieved the discharge and contended that it was in violation of the "just cause" requirements of the

parties' Collective Bargaining Agreement.¹ The parties were unable to resolve the grievance, and it was submitted to the parties' final and binding arbitration process.

The CBA requires that all discipline be for "just cause."² The CBA also requires that violations of the labor contract are subject to a grievance procedure resulting in final and binding arbitration.³

Dale England's discharge resulted from a prank telephone call to a friend in which he misdialed another telephone number by mistake.⁴ Once provided an opportunity, England explained this error, yet was continued on administrative leave.⁵ Ultimately, the Sheriff concluded that the prank telephone call involved a bona fide threat made by Dale to a friend, and that England had lied about.⁶ The Sheriff fired England for allegedly making "threats" and lying about it.⁷ The Association believed England's telephone call was an obvious joke and not a real threat, and because any reasonable person would have so concluded, it believed that the Sheriff's decision to discharge England was made in retaliation for previous charges England made concerning the Sheriff's management.⁸

¹ CP 63-83.

² CP 63.

³ CP 57, CP 72-73.

⁴ *Id.*

⁵ CP 57, CP 98.

⁶ *Id.*

⁷ CP 57, CP 134-135.

⁸ CP 57.

The grievance was scheduled for presentation to Arbitrator Mike Beck in November 2009.⁹ On November 5, before the scheduled arbitration date, the parties agreed to enter voluntary mediation with Mediator Fred Rosenberry in an attempt to resolve the grievance.¹⁰ The mediation session produced an understanding regarding the terms of a tentative settlement.¹¹

The understanding was handwritten into a one page outline of bullet points that identified the key aspects to be placed in a formal agreement.¹² It was expressly understood that the parties' attorneys would draft the outline into a formal legal agreement, which would then be subject to approval and execution of the parties.¹³

The Association had grieved the discharge of Dale England for many reasons, but key among them was that it believed Dale England had been falsely accused of misconduct without due process or supporting evidence.¹⁴ The Association believed that Dale was wrongly being called a liar by the Sheriff.¹⁵ Dale was a highly regarded deputy who had been Deputy of the Year more than once.¹⁶ The Association was essentially

⁹ CP 57-58.

¹⁰ *Id.*

¹¹ *Id.*

¹² CP 57-58, CP 89-90.

¹³ CP 57-58.

¹⁴ CP 58.

¹⁵ *Id.*

¹⁶ CP 58.

seeking a name clearing of its former President, who it believed was being defamed as part of a retaliatory vendetta.¹⁷

The parties' tentative agreement stipulated that the charges against Dale England would be deemed not sustained, that he would be reinstated, and he would retire by the end of May 2010.¹⁸ The Association would not have entered the tentative agreement without these key stipulations.¹⁹

The County soon produced a five page draft settlement.²⁰ But before the Association could even review the County's settlement draft, Harum spoke with media outlets and claimed that he was refusing to re-employ Dale England because of his poor behavior.²¹ Harum told the KOZI Radio Station in a broadcast interview that he had "a responsibility and obligation to the citizens of Chelan County to not employ deputies or employees that exhibit this type of behavior."²² He further reported that the settlement "disallows" Dale from being an employee of the Sheriff's office "or Chelan County in general."²³

¹⁷ CP 58.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ CP 92-96.

²¹ CP 110-111.

²² CP 137.

²³ *Id.*

Under the mediation draft, England was to be reinstated immediately where he would stay in paid status until May 31, 2010, at which point he would retire.²⁴ *Nothing* in the mediation document restricted England's ability to transfer or seek other County employment; however, the County, consistent with Harum's media statement, inserted that never-discussed item as a term in its draft of the final settlement.²⁵

Given that the Sheriff had conceded in the tentative agreement that England had *not* engaged in the behavior which the Sheriff had alleged as the basis for the discharge, both Dale England and the Association were upset by Harum's statement.²⁶ The Association deemed Harum's conduct to be inconsistent with the not-yet-signed final agreement.²⁷ The Association and England elected to refuse to execute the proposed draft agreement based on Harum's statement.²⁸

But when the Association fully reviewed the draft final agreement, it was provided an even additional reason for rejecting the document: *The County's proposed typewritten draft was at odds with the parties' handwritten tentative settlement.*²⁹ Among the most significant changes in the typewritten draft was that the County had omitted a key element.

²⁴ CP 89.

²⁵ CP 95.

²⁶ CP 58-59.

²⁷ CP 59.

²⁸ *Id.*

²⁹ CP 59.

Specifically, it failed to include the key clause that the charges against England were *not sustained*.³⁰ It did provide that the notice of termination was to be “rescinded” — which corresponded to Point 1 of the handwritten mediation draft — *but failed to incorporate* the additional Point 2 which indicated that the charges were “not sustained.”³¹

The County’s *own draft* also recognized the revocable nature of the agreement.³² The parties’ tentative settlement indicated that Dale England would waive any civil claims against the County.³³ In drafting the final agreement, the County had inserted language into the document never expressly discussed by the parties, which detailed the extent of the waivers.³⁴ *That language, which adopted the waiting rescission requirements of the Age Discrimination in Employment Act, indicated that any agreement was not final, even upon execution, but was subject to cancellation after a statutory 21 day waiting period.*³⁵

After Harum’s actions, the parties were never able to arrive at a document they could all willingly sign.³⁶ As a result, the Association sought to submit the grievance back, as originally agreed, to Arbitrator

³⁰ CP 59, CP 89, CP 92-96.

³¹ CP 89, CP 92-96.

³² CP 59-60.

³³ CP 59-60, CP 92-96.

³⁴ *Id.*

³⁵ *Id.*

³⁶ CP 60.

Beck.³⁷ But the County refused to arbitrate the grievance and continues to do so.³⁸

Rather than submitting the dispute to Beck, the County filed a lawsuit in Chelan County Superior Court seeking enforcement of the typed settlement document it had drafted after mediation.³⁹ The Association filed a Counterclaim asking for the dispute to be submitted to arbitration.⁴⁰ The matter was set before this Visiting Superior Court Judge Burchard on Cross-Motions for Summary Judgment.⁴¹ At the hearing, the County asserted that it was not the typed agreement but the handwritten agreement that was enforceable.⁴² Judge Burchard rejected that claim, found that no enforceable contract had been formed and ordered that the matter was to be submitted to arbitration.⁴³

III. ARGUMENT

A. The Superior Court Properly Granted the Association Summary Judgment because even Assuming all Disputed Facts in the County's Favor, no Binding Settlement of the Grievance was ever Finalized and a Grievance Dispute Continues that must be Resolved.

This matter is to be reviewed de novo as a review of a summary judgment order. Summary judgment is appropriate if "the pleadings,

³⁷ *Id.*

³⁸ *Id.*

³⁹ CP 1-25.

⁴⁰ CP 26-32.

⁴¹ CP 279.

⁴² CP 159.

⁴³ CP 280-282.

affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."⁴⁴ While the parties here may disagree as to some of the facts surrounding this case and the significance to be attached to those facts, the *material* facts are not in serious dispute and summary judgment is appropriate. After construing the facts of each Cross Motion in favor of the non-moving party, this Court should conclude that the Association's Motion was properly granted and the County's was properly denied.

The County's refusal to return this dispute to Arbitrator Beck for final resolution and its subsequent lawsuit appears premised on the factually unsupported claim that the November 5 tentative settlement was a complete and binding legal contract. This conclusion is contradicted both by the known facts and *the County's own conduct*.

The handwritten settlement document was, at most, a skeleton outline of the points of agreement. It was subject to being drafted into a proper, complete and enforceable legal contract. The Sheriff even admitted in his deposition that he had told KOZI Radio that the extent to which there was an agreement "has not been completely worked out."⁴⁵

⁴⁴ *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn. App. 281, 135 P.3d 558 (2006); CR 56(c).

⁴⁵ CP 111, CP 137.

He also admitted that it was also subject to ratification and execution.⁴⁶

This tentative settlement is not the first and will not be the last *draft* agreement that fell apart before it could be executed. The drafting issues involved in this very case demonstrate the normal vagaries of moving from a conceptual agreement to a legally executable document.

There is no dispute that the parties left mediation understanding that the draft tentative settlement was to be subject to further drafting work by the parties' lawyers.⁴⁷ In this case, the County's subsequent draft inserted some points never discussed and *omitted* at least one point key to the tentative agreement — that the charges against England were not sustained. That key omission was precisely the element that the Association was to claim had been violated by the Sheriff's statements to KOZI Radio.

Anyone experienced in the drafting process understands that even when the parties are operating in good faith, agreements can breakdown in the process. Translating the general intentions of the parties into a specific and complete draft can sometimes result in a breakdown. In this case, the drafting resulted in key term being omitted, which coincidentally — or not — was the term the Association believes that the Sheriff had violated. *The fact that the Sheriff still believes his conduct was appropriate only*

⁴⁶ CP 111-112.

⁴⁷ CP 112, CP 57-58.

confirms the Association's argument that there was not a complete meeting of the minds.

The County's draft also *includes* another clause that also undermines its claim that any agreement reached on the day of mediation was final. In mediation, the County had sought a waiver of all civil claims, which the Association and England had been willing to do as part of the conceptual agreement. But in order to make such a waiver legally effective in a binding agreement, the County inserted the mandatory waiver and rescission language of the ADEA into the final settlement document. *That language, as drafted by the County's own attorney, acknowledges that England had a 21 day waiting period after the final execution to still withdraw from the agreement.*

Under the drafting requirements of the ADEA, the County *had to* extend to England an opportunity to withdraw his continued consent. Therefore, even assuming the facts in the light most favorable to the County, England was permitted to withdraw his consent *even before* the Sheriff violated his promise to exonerate England on the charges.

The handwritten notes indicate intent that Dale England would waive "all civil claims." Both parties acknowledge that this encompassed civil employment law claims. Because Dale England is over the age of

40,⁴⁸ this would extend to any potential claims under the Age Discrimination in Employment Act (ADEA). Despite failing to specify ADEA claims in particular in the handwritten outline, all parties agree that they anticipated that England would waive his ADEA claims as part of an ultimate settlement.

And this is where the County's argument completely falls apart. The County's draft agreement (appropriately) identified *with particularity* the requirements of an ADEA waiver. But in so doing, it demonstrated how the handwritten notes did not constitute a complete agreement. *The express terms of the ADEA require several elements in any waiver agreement which the handwritten notes lacked.*

As described in 29 U.S.C § 626, any effective waiver of ADEA rights *must* be described in detail the rights waived, a 21-day waiting period prior to execution *must* be offered, then, during at least a seven-day period after execution, the agreement *must* be completely revocable *even after it is signed*. The detailed requirements of 29 U.S.C. § 626 state (with the pertinent provisions in bold text):

- 1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

⁴⁸ CP 276.

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) *the waiver specifically refers to rights or claims arising under this chapter;*

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) *the individual is advised in writing to consult with an attorney prior to executing the agreement;*

(F) (i) *the individual is given a period of at least 21 days within which to consider the agreement, or*

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) *the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;*

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

The County's legal counsel understood and acknowledged the essential nature of these provisions when he added these ADEA elements into the agreement draft. As such, the County's *own conduct* confirms how the handwritten notes fall woefully short of constituting any binding final agreement.

Furthermore, *even if* the handwritten notes had contained all the required ADEA terms, the draft *still would not have been binding*. As the ADEA requires, and *as the County's own later draft confirms*, Dale England would have been entitled a 21-day waiting period during which he could obtain his own legal counsel and avoid the agreement, followed by yet another waiting period of seven days *even after* signing the agreement. There is no material dispute that the handwritten notes lacked this required level of detail and, as matter of law, it cannot constitute a complete and binding agreement upon these parties.

B. The County’s Authority is Inapplicable Because the Parties Manifested an Intent that the Handwritten Outline was not the Final Binding Agreement.

The County cites *Morris v. Maks*⁴⁹ for the proposition that the handwritten notes at issue here constitute a final and binding agreement. The evidence indicates otherwise, and *Morris* is inapplicable here.

The parties manifested a specific intent that the handwritten notes did *not* constitute a binding agreement. First, the notes themselves indicated that it was not a final agreement in that it was *subject to ratification and adoption by the County Commissioners*. The County representatives *only* committed to “recommending” adoption.

Further, the undisputed evidence is that *all parties* anticipated a complete document would be drafted for later execution. Contrary to *Morris*, the handwritten notes here were not anticipated to be the actual or final agreement. Instead, this case is similar to *Evans & Son v. City of Yakima*.⁵⁰ In *Evans*, the parties intended that the complete terms would be delineated in a subsequent draft. Like *Evans*, all the parties to this mediation were clear that the handwritten notes were to be transformed later into a final agreement.

This case is also like *Evans* in another respect – further legal claim releases were anticipated and expected by the parties. And in this case,

⁴⁹ 69 Wn. App. 865, 85 P.2d 1357 (1993).

⁵⁰ 136 Wn. App. 471, 149 P.3d 691 (2006).

such releases were an essential term of the agreement but were *not included* in the handwritten notes.

As the County concedes, even the authority it cites in *Morris v. Maks* requires that the preliminary agreement contain *all* the essential terms. Because not all the essential terms were delineated in the disputed document, no binding contract was entered here. The County's *own conduct* confirms that essential elements were lacking.

C. Any Dispute Over the Nature of the Settlement can only be Decided Through the Parties Final and Binding Arbitration Agreement, not in a Court of Law.

Notwithstanding the foregoing arguments, this Court need not, and in fact should not, decide the dispute between the parties. The parties have already agreed that any disagreement between them is to be resolved in final and binding arbitration. Whether the grievance was fully and finally settled is a disagreement arising from the parties' CBA grievance process that must be decided under the terms of the agreed upon arbitration process.

1. Any Dispute Arguably falling under the Terms of the Parties' Collective Bargaining Agreement must be Submitted to an Arbitrator for Resolution.

The principles governing court intervention into Washington public sector 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.*;⁵² *United Steelworkers v. Warrior & Gulf Navigation Co.*;⁵³ and *United Steelworkers v. Enterprise Wheel & Car Corp.*⁵⁴ The “Trilogy” cases have defined the authority of the courts to determine the arbitrability of grievances under CBAs. The 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 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.⁵⁵

Since the 1960 “Steelworkers Trilogy,” the U.S. Supreme Court has reiterated the holding of *Warrior & Gulf Navigation*, declaring that CBA

⁵² 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960).

⁵³ 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).

⁵⁴ 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)..

⁵⁵ 363 U.S. at 582-83.

disputes are non-arbitrable *only* when an exclusion from arbitration is specifically agreed upon by the parties.⁵⁶

Washington courts have adopted the federal standard on arbitrability.⁵⁷ This standard requires a *strong presumption* that *all* collective bargaining disputes are arbitrable.⁵⁸ As the Court of Appeals, Division II indicated in *Olympia Police Guild v. City of Olympia*: "There is a strong presumption that all disputes arising under a collective bargaining agreement are subject to arbitration; that presumption holds unless negated expressly or by clear implication."⁵⁹

As the State Supreme Court explained in *Peninsula School District*, Washington courts have fully adopted the principles set forth in the "Steelworkers Trilogy":

(1) Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the

⁵⁶ *AT&T Technologies v. CWA*, 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").

⁵⁷ *See, e.g., Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn. App. 281, 135 P.3d 558 (2006). 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.

⁵⁸ *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, 721 P.2d 969 (1986) (arbitration is strongly favored as a matter of public policy).

⁵⁹ *See, also, United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960) (doubts involving arbitrability are resolved in favor of finding arbitrability).

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.⁶⁰

As the State Supreme Court further 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.”⁶¹

Arbitrability is *only* determined by whether or not the dispute *arguably* falls within the scope of the CBA. State (and the parallel federal case law) also acknowledges certain basic principles:

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

⁶⁰ *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 Wn. App. 422, 424-25, 647 P.2d 1058 (Div. III 1982), review denied, 98 Wn.2d 1002 (1982).

⁶¹ *Peninsula Sch. Dist v. Pub. Sch. Employees of Peninsula*, citing *Warrior & Gulf*, 363 U.S. at 578-83.

- Doubts are to be resolved *in favor* of arbitration; and
- Courts only have the initial jurisdiction to determine if the dispute arguably falls within the CBA.

Under a substantive arbitrability determination, the 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 this 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.⁶²

As this Court explained in *Yakima County Law Enforcement Officers Guild v. Yakima County*,⁶³ it does not matter that one party may arguably offer a more “legally correct” interpretation than the other party. *Disputes over competing and arguable interpretations require submission to arbitration*. This scope limitation applies *even if a court believes the grievance lacks merit*. And as the Court of Appeals

⁶² 29 Wn. App. 150, 154, 627 P.2d 1330 (Div. III 1981).

⁶³ 133 Wn. App. 281, 286-87, 135 P.3d 558 (2006).

Division II explained 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 the arbitrator; a *court's* inquiry is at an end if the complaint on its face calls for an interpretation of the agreement.⁶⁴

2. This Disagreement Constitutes an Arbitrable Dispute under the Parties' Collective Bargaining Agreement.

The Sheriff believes he properly discharged Dale England, and England and the Association disagrees. There can be no question that this disagreement is arbitrable under the parties' CBA. Even the County would not seemingly dispute this much.

Before the arbitration was held, the parties attempted mediation. The County claims that the mediation resolved the grievance, and the Association contends that it did not. This issue of whether the grievance is or is not extinguished falls within the terms of the parties' CBA.

Section 9.1 of the CBA provides that “[a] grievance is defined as a dispute involving the interpretation, application or alleged violation of any provision of this Agreement.”⁶⁵ The County cannot deny that disputes over grievances are to be resolved through final and binding

⁶⁴ 40 Wn. App. 61, 64, 696 P.2d 1264 (Div. III 1985) (emphasis in original).

⁶⁵ CP 71.

arbitration. Whether or not the grievance has been procedurally extinguished and resolved is solely a question for the arbitrator.

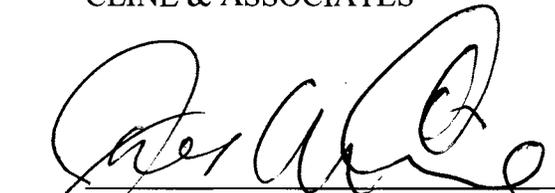
The Association contends that its rights and those of Dale England are insufficiently remedied. The County claims that the handwritten settlement draft, even though its own counsel subsequently added to the document, constitutes some type of final extinguishment and remedy of all the grievance claims. The Association disagrees. Whether any viable rights and remedies arising from the CBA remain alive is necessarily a question for the Arbitrator. Without even delving into the merits of the parties competing arguments, this Court can and should resolve this disagreement by referring it to arbitration.

IV. CONCLUSION

For the foregoing reasons, the County's appeal should be dismissed.

RESPECTFULLY SUBMITTED this 28th day of September, 2010, at Seattle, Washington.

CLINE & ASSOCIATES



James M. Cline, WSBA #16244
Attorneys for Respondent

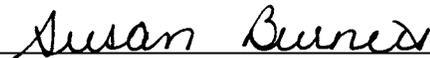
DECLARATION OF SERVICE

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

Via U.S. Mail:
Stanley A. Bastian, Esquire
Jeffers, Danielson, Sonn & Aylward, P.S.
P.O. Box 1688
Wenatchee, WA 98807

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

DATED at Seattle, Washington, this 28th day of September, 2010.



Susan Burnett