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Case No. 89344-6

SUPREME COURT
OF THE STATE OF WASHINGTON

KITSAP COUNTY,

Appellant

v.

KITSAP COUNTY DEPUTY SHERIFFS' GUILD,

Respondent.

~~CORRECTED~~ ~~REPLY BRIEF~~ OF RESPONDENT'S BRIEF

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 ORIGINAL

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I. INTRODUCTION

The Kitsap County Deputy Sheriff's Guild filed a lawsuit against Kitsap County and prevailed on its summary judgment motion before Pierce County Superior Court Judge James Orlando. The County now appeals that ruling and the Guild replies in this brief.

The County wants to impose "retroactive" increases in the health insurance premiums paid by the Deputy Sheriffs that are represented in collective bargaining by the Guild. The Guild contends that decreasing compensation and benefits — after the work has already been performed — is an unconstitutional "taking" of a "vested" property right. The Guild also contends that deducting charges for insurance from wages, when the employees did not explicitly agree to the deduction, violates the State wage withholding law.

The County asserts it has a right to make these changes as a result of an "interest arbitration" decision issued under the State collective bargaining law. The Guild contends that this portion of the decision is void, in direct conflict with the statutory requirement that any arbitrator decision must conform to the law. In other words, an arbitrator cannot extend authority to the County to do something that it could not lawfully do itself.

Judge Orlando sustained the Guild's claims that the arbitration award was defective because its terms violated the Constitution and the wage withholding law. He also agreed that this element of the Award was "arbitrary and capricious" in that it was in direct conflict with a term of the

existing Collective Bargaining Agreement (CBA) that required an “open enrollment period” in which the Deputies could mitigate the effect of the retroactive increase. The Guild seeks affirmance of Judge Orlando’s ruling in these respects. The Guild also presents its own cross-appeal in which it asserts that because this is a wage recovery action, it is entitled to its reasonable attorneys’ fees both below and for this appeal.

II. ERRORS ASSIGNED AND ISSUES PRESENTED

A. Errors Assigned on Respondent’s Cross- Appeal

The Guild assigns the following errors to the Superior Court in its Cross-Appeal:

Assigned Error Number 1: The Superior Court erred by denying the Guild’s request for attorneys’ fees.

B. Issues Presented

The Guild identifies the following as issues for the Court, Issues 1 through 3 relating to the County’s appeal and Issue 4 relating to the Guild’s Cross-Appeal:

Issue 1: Kitsap Deputy Sheriff’s continued to work after the Guild’s CBA expired at the end of 2009. The CBA was submitted to binding arbitration. The Arbitrator issued an arbitration award in March 2013 granting a County proposal to “retroactively” increase the employee’s contribution to the health insurance premiums. The County now seeks to deduct from the Deputies wages monies to pay for this retroactive increase, even though the Deputies had already performed services to the County. Did the Superior Court properly rule that under substantive due process requirements, that a County government may not force its employees to pay more for health insurance “retroactively” by imposing premium increases on those employees after they have already performed the work that earned the insurance benefits?

Issue 2: Under the terms of the arbitration award which the County now seeks to impose, deductions would be taken from the Deputies’ wages without their specific written consent. The purpose of the deduction is to pay for the “retroactive” increases in health insurance premiums. The State

wage law (RCW 49.52.050) specifies that employer deductions from wages must be preceded with employee written consent. Did the Superior Court properly rule that the County attempt to deduct from Deputies' wages to pay for the retroactive premium increases violates the State wage withholding law when the Deputies did not consent to the deduction?

Issue 3: The CBA extends to Deputies an open enrollment period during which Deputies have a right to add or drop coverage and opt out of previously consented wage deductions to pay for increased insurance premiums or coverage that are no longer wanted. But the arbitration award by contrast, calls for the imposition of these retroactive premium increases through unconsented wage deductions and without any opportunity for an open enrollment period or the exercise of contractual opt out rights. Did the Superior Court properly rule that the conflicting requirements of the award and the CBA made the award "arbitrary and capricious"?

Issue 4: The Guild was successful on its motion in Superior Court urging a declaration that the County's attempted taking and deduction of wages violated the State wage withholding law. That law allows attorneys' fees for successful wage statute claims. Should the Guild be awarded reasonable attorneys' fees for any successful wage claim both below and for this appeal?

III. CONTERSTATEMENT OF THE CASE

Background. The Kitsap County Deputy Sheriff's Guild is a labor organization representing all commissioned law enforcement deputies in Kitsap County through the rank of Sergeant.¹ The Guild contract with the County expired at the end of 2009, and the Deputies have been working without a contract since.² Unsuccessful in achieving a negotiated settlement, the parties entered into mediation with the Public Employment Relations Commission (PERC).³ That mediation did not produce a settlement either. Eventually, PERC certified the parties for a final and binding arbitration provision called for under the PERC collective

¹CP 326 ¶ 1

² Id.

³ Id.

bargaining statute, or "interest arbitration."⁴

Both the Guild and the County agreed that the term of the labor contract should cover only three years, 2010 through 2012.⁵ For a variety of reasons, including the lengthy negotiation and mediation process, arbitration on the contract was pushed into 2012.⁶ The County sought (and the Guild did not object) to delay the Deputy Sheriffs Guild arbitration until later in 2012 because it wanted to arbitrate its separate contract with the corrections officers in the first part of 2012 ahead of the Deputies contract.⁷

Health Insurance Issue. One of the significant issues in the arbitration was the County's proposal for a change in health insurance.⁸ The County's proposal had two components. First, the County wanted to change the terms of the existing health insurance plan with diminished benefits that offered lower premiums (albeit with increased "out-of-pocket" charges to the deputies). Second, the County wanted to increase the deputies' percentage share of the health care premiums.⁹ The County also proposed that its proposal be implemented on a "retroactive" basis, asking that the arbitrator change benefits and premiums after the fact, charging the deputies

⁴ Id.

⁵ CP 326, 337 ¶ 2,

⁶ Id.

⁷ Id.

⁸ CP 326, 327 ¶ 3

⁹ Id. Under the 2009 contract, and in the years since, the County paid 100% of the deputies' health insurance premium and 90% of the premium for the dependents of the deputies, with the deputies picking up the remaining 10% of the premium. Id. In the arbitration hearing, the County made a proposal that the deputies would pick up 3% of the premium for their own employee coverage and it also proposed that the dependent premium share would increase from 10% to 15%. Id.

more for insurance that they had already earned and consumed.¹⁰

The Guild argued for the continuance of current CBA language.¹¹ Besides addressing the statutory “comparability” arguments, the Guild made a legal argument addressing the legality of the County’s proposal.¹² The Guild argued that The County's "retroactive" insurance proposal was both unconstitutional and unlawful.¹³ The Guild explained that increases could only be prospective and only imposed after an "open enrollment" period in which employees would be allowed to exercise their right to opt out of insurance coverage that they did not want to pay.¹⁴

Arbitration Award. The arbitration hearing was heard before Arbitrator Howell Lankford.¹⁵ Lankford retroactively increase the amount of health insurance premiums the deputies were to pay *in 2012*, even though it was late *February of 2013* before he issued his decision.¹⁶ Under his decision, effective July 2012 deputies would begin paying 3% of their insurance premium (previously fully paid) and the deputies’ share of the dependent premium would increase from 10 to 15%.¹⁷

Under this award, the labor contract only actually expired December 31, 2012.¹⁸ As the Guild understands the County's proposal (and the arbitrator's award), employees would have monies removed from their

¹⁰ CP 327, 328 ¶ 4,

¹¹ CP 328 ¶ 5

¹² Id.

¹³ Id. Exhibits A and B, CP 234-253.

¹⁴ id.

¹⁵ CP 328 ¶ 6

¹⁶ CP 328.

¹⁷ Id.

¹⁸ CP 329 ¶ 7, and Exhibit C, CP 254-287

paycheck to pay for these "retroactive" increases in the premiums.¹⁹ The deputies would not be able to exercise any right to "opt out" the insurance coverage or otherwise avoid the mandated contributions for that coverage.²⁰

Problems in the Award. The Guild contends that the failure to extend the opt out right not only violates the State wage deduction law, but it also violates the existing terms of the labor contract.²¹ In the past when health insurance plans have changed, the Guild's members have been always provided an opportunity to exercise an opt-out to drop dependents if they no longer wished to pay for them.²² This right is contained in the preceding 2008-09 Guild CBA²³ and continued would continue but without apparent recognition by Lankford of this conflict.²⁴

That CBA language provides employees the right to "opt out" during the open enrollment period.²⁵ By past practice, this coverage change open enrollment language has been interpreted to provide employees not only the right to *add* dependents, but, of course, also to *drop* dependents.²⁶

¹⁹CP 329 ¶ 7

²⁰ Id.

²¹CP 329 ¶ 8

²² Id.

²³ Id. See Exhibit D, CP 231-300.

²⁴ Id.

²⁵ CP 329-30 First, employees who can demonstrate alternative coverage are allowed to "waive" coverage under the County's plan. Id. Although this not an option that employees have generally exercised in the past, the Guild believes that if employees are to begin paying part of their premium, some of the deputies would want to exercise that option if faced with premium increases. Id. Second, the CBA specifically mentions that there will be an annual enrollment period, normally occurring every November. Id. The CBA open enrollment clause also specifically mandates that during that time the County "shall allow employees to change insurance plans" and add dependents. Id

²⁶CP 330. The open enrollment forms the County uses specifically recognize the right of the deputies to drop dependents that they no longer wish to pay for. CP 301-10, 330. Employees have consistently been accorded the right to drop dependents during the open enrollment period. CP 330. The Guild and the County have consistently agreed to reopen the labor contract whenever a change in the insurance benefit arrangement occurred.²⁶ CP

Under the arbitrator's decision, the deputies' share of the full family monthly premium would increase by \$77.94.²⁷ The trial court record shows that some Deputies would look for alternative ways to cover their family members to avoid this additional expense, if provided an opportunity.²⁸

During the course of the arbitration hearing, the Guild attorneys pointed out that an open enrollment period was required.²⁹ The County's own witnesses admitted that open enrollment periods were always involved whenever there was a change in insurance.³⁰ In fact, the County's expert witness admitted that he had *never heard* of a public employer changing insurance coverage and *not* extending an open enrollment period.³¹

Action in Superior Court. The County insisted on enforcing the disputed terms of the arbitration award and the Guild brought a declaratory and injunctive action in Pierce County Superior Court. The Guild presented a summary judgment motion to Judge James Orlando. Judge Orlando granted the Guild's motion, holding that the retroactive imposition of premium increases constituted an unlawful taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution, that the attempted unconsented deduction from wages violated the State wage

330-31. This always provided employees the ability to re-enroll and change their selection and enrollment for insurance. *Id.* For example, in 2005 the parties agreed to change the insurance in the middle of the year and a new open enrollment period was extended before the change was implemented. CP 313-16. This has repeatedly occurred at least as far back as 1999 whenever there was a midyear change in insurance coverage.²⁶ CP 317-320, 331.

²⁷CP 330 ¶ 11 and Exhibit I, CP 303-304

²⁸ *Id.*

²⁹ CP 331 ¶ 13,

³⁰ *Id.* and Exhibit M and N CP 313-325.

³¹ *Id.*

withholding law and that the Award was “arbitrary and capricious” by imposing terms that conflicted with existing CBA open enrollment opt out rights. He did deny the Guild’s requested order for attorneys’ fees. After an unsuccessful motion for reconsideration, the County filed this appeal and the Guild cross-appeal on its fee request.

IV ARGUMENT

A. The County’s Statement of the Standard of Review Misapprehends that this Court has De Novo Review over All Errors of Law.

The County somewhat misstates or misapprehends the applicable standard of review. It is true, as the County’s brief notes, that the Court reviews the issue “de novo”³² applying the “arbitrary and capricious” standard, but the County mischaracterizes how that “arbitrary and capricious” standard *actually applies* in this context where the issues are all ones of pure law.

The County argues that this Court should be “very deferential” to the arbitrator’s “conclusions of law.”³³ But the arbitrary and capricious standard in the context of a judicial review of an interest arbitration decision does *not* mean that this Court defers to or any in way accepts the errors of law committed by the arbitrator. Judicial review of an administrative panel’s actions inherently includes an assessment of whether the exercise of authority included illegality.³⁴ Any attempt by an interest arbitrator to

³² This a review of a Superior Court CR 56 Summary Judgment Motion in which this Court extends no deference to the Superior Court but the ultimate judicial review involved here is that of the Arbitrator’s Award.

³³ *Id.* at 9.

³⁴ *Federal Way School District v. Vinson*, 172 Wn.2d 769, 261 P.3d 145 (2011); *Wheeler v. East Valley School District*, 59 Wn. App. 326, 328, 796 P.3d 1298 (1990); *Williams v.*

impose unlawful or unconstitutional terms in a CBA would, by definition, be arbitrary and capricious.

The County inaptly applies the *contractual grievance arbitration* review decisions. This litigation arises under the *statutory review process applicable to interest arbitrations*. Interest arbitration is a creature of statute, the rights and responsibilities of which are defined in the Public Employees Collective Bargaining Act (PECBA), RCW Chapter 41.56, specifically within RCW 41.56.430-492. The legislature has conferred upon an arbitration panel the ability to resolve CBA negotiation disputes by imposing the terms of the CBA after a proper evidentiary hearing. In extending such power, the legislature did *not* confer carte blanche authority. Instead, it specified the grounds, conditions and limitations of its awards process and provided a specific method of judicial review.

RCW 41.56.465 specifies the “factors to be considered” by the panel in issuing its award. In the very first restriction imposed on the panel by the legislature (41.56.465(a)) is that the panels were *explicitly* instructed to be cognizant of “the constitutional and statutory authority of the employer.” In other words, the arbitration panel *cannot* create a contract that confers authority to a public employer to treat its employees in any manner that it could not legally do on its own authority.

Seattle School District, 97 Wn.2d 215, 221, 643 P.2d 426 (1982); *IFPTE, Local 17 v. State Personnel Board*, 47 Wn.App. 465, 472-73, 736 P.2d 280(1987); *Pierce County Sheriff v. Civil Service Commission*, 98.2d 690, 693-94, 658 P.2d 648 (1983); *Leonard v. Civil Service Commission*, 25 Wn.App. 699, 701-02, 611 P.2d 1290 (1980); *Wilson v. Nord*, 23 Wn. App. 366, 597 P.2d 914 (1979); *Casebere v. Clark County Civil Service*, 21 Wn.App 73, 77-78, 584 P.2d 416 (1978).

The legislature indicated in RCW 41.56.450 that decisions should be “final and binding” *but* that policy of finality did *not* mean that inappropriate or unlawful decisions are insulated from judicial review. The scope of judicial review delineated in RCW 41.56.450 indicates that arbitration panel’s “determination shall be final and binding upon both parties, subject to review by the superior court upon the application of either party solely upon the question of whether the decision of the panel was arbitrary or capricious.”

The Guild concedes that interest arbitration awards have rarely been challenged because this standard has successfully promoted the acceptance of the finality of the panel’s ruling. Among published appellate decisions challenging the merits of awards, we have only two, one contesting the arbitrator’s decision to apply a particular CPI inflation standard³⁵ and another questioning arbitrator conduct.³⁶ In both cases, the challenges to the awards were rejected. Neither of these cases, though, involved an error of law issue. This case seems to be a case of first impression concerning an interest arbitrator’s legal error.

The County errantly argues here that this Court is *compelled* to accept the arbitrator’s legal errors. But such a standard would *directly conflict* with RCW 41.56.465 which mandates that awards be issued cognizant of all the employer’s legal and constitutional obligations.

³⁵ *City of Moses Lake, v. IAFF, Local 1052*, 68 Wn. App. 742, 847 P.2d 16, *review denied*, 121 Wn.2d 1026, 854 P.2d 1085 (1993).

³⁶ *IAFF Local 1296 v. City of Kennewick*, 86 Wn.2d 156, 542 P.2d 1252 (1975).

The County misrelies upon *contractual* grievance arbitration cases that have nothing to do with the *statutory* interest arbitration process involved here. Although both the grievance arbitration review cases and the interest arbitration statute review provisions declare the general review standard to be “arbitrary and capricious” the *application* of these standards means *very different* things based upon the differing sources of contractual versus statutory arbitral authority.

Traditionally, and certainly in the cases cited by the County, parties to a CBA include an express clause that arbitrations deciding grievances *interpreting* contracts be conferred “final and binding” authority. Courts have concluded *in this common law context* that final and binding means that the arbitrator is the judge of both fact and law. Such an arrangement is a specific creation of contract law in which parties have knowingly waived their appeal rights in exchange for a prompt and final determination.

The issue here, by contrast, concerns judicial review of an *interest arbitration* panel *writing* the terms of the CBA. The Guild concedes that, in most contexts, the panel is extended fairly wide berth to arrive at a conclusion of what the precise wages, benefits and terms of those CBA should be. But the panel cannot adopt terms that violate other state law or the Constitution. The arbitrator simply does not get to be his or her own “judge” as to whether he or she has correctly interpreted the law. Rather it is for this Court to say what the law is.

Even under the insulated review applicable to *grievance* arbitration cases, the arbitrator's authority is not unlimited. An arbitration award issued in conflict with public policy is void.³⁷ If an Arbitrator creates an Award that mandates a violation of the United States Constitution, that would surely seem to be an award in conflict with high level public policy.

Furthermore, even if the arbitrator's legal errors were insulated from judgment that would change the result. In this case, *the arbitrator never made an express ruling of law on this issue.* Although the Guild presented its legal arguments in tremendous detail, objecting to the proposal³⁸ Arbitrator Lankford, apart from asserting that he had "no doubt" of his "authority," *simply ignored all the legal objections* and addressed it *solely* as a matter of economics, equity and compromise³⁹. Such dismissive consideration of serious constitutional and legal claims does rise to the level of constituting an actual *legal* ruling (although such disregard might be considered arbitrary and capricious action.)

On those occasions interest arbitrators in which make legal errors, those simply cannot be allowed to stand. When the State Supreme Court affirmed in *City of Spokane v. Spokane Police Guild*⁴⁰ that the interest arbitration statute was itself a constitutional delegation of authority, it did so in *express recognition* that the law contained "procedural safeguards"

³⁷ *International Union of Operating Engineers v. Port of Seattle*, 176 Wn.2d 712, 295 P.3d 736 (2013); *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428; 219 P.3d 675 (2009)

³⁸ CP 238

³⁹ CP 281

⁴⁰ 87 Wn.2d 457, 553 P.2d 1316 (1976)

designed to prevent “arbitrary action and any abuse of discretionary power.”⁴¹

The County’s proffered standard of review would render the legislatively adopted “procedural safeguards” meaningless and, frankly, the constitutionality of the PECBA interest arbitration provisions suspect. Under the County’s standard of review, a panel could adopt all forms of unlawful work rules such as those, for example, permitting discrimination against individuals of a statutorily protect class or retaliation against whistleblowing employees. Such an alleged limitation of this Court’s ability to meaningfully review arbitrator conduct stands in direct contradiction to the defined review mandate of the law.

B. The Guild has Standing to Assert its Members’ Rights Concerning Compensation.

Labor organizations have standing to assert their members legal rights, even though they might also be individual rights in nature, concerning their wages and other compensation.⁴² The issues here, a though intertwined with the *Guild’s* collective bargaining rights, also involve the *members’ rights* to compensation and due process associated with that. Therefore, the Guild has standing to assert these rights.

C. The County’s Appeal is Built upon a Misapprehension of the “Tripartite” Nature of the Collective Bargaining Relationship.

⁴¹ Id at 463 (citing *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972)).

⁴² *IAFF Local 1789 v. Spokane Airport*, 146 Wn. 2d 207, 45 P.3d 186 (2002); *Teamster Local 117 v. Dep’t of Corrections*, 145 Wn.App. 507, 187 P.3d 754 (2008).

Before proceeding to the constitutional and statutory claims, the Guild engages in a brief review of the broader collective bargaining law principles. This brief diversion is especially necessary here because the County argues from an apparent premise which misapprehends the real nature (and limitations) of collective bargaining. The County's premise is generally unstated except that the County does repeatedly conflate the individual "deputies" with the Deputies' *Guild*.⁴³ The distinction between the employees and the union that represents the employees is an important one. Although, as indicated immediately above, a union has legal standing in certain contexts to present legal claims on behalf of its individual members, the relative interests and rights of union and their members do not always converge and can at times conflict.

The Guild has a set of rights and responsibilities *separate and distinct* from its individual members. While the Guild has legal standing to assert the employment rights of its individual members in litigation concerning its working conditions, neither the Guild nor any of the parties to a collective-bargaining action is permitted to waive statutory rights that uniquely belong to the individual employees. A brief overview of basic collective bargaining law concepts will help explain the legal framework through presented issues can be assessed.

In any collective bargaining relationship exist three distinct parties — the employer, the union, and the employees. Within that tripartite

⁴³ See County Brief at 1, 34, 35.

relationship, the union has authority to reach agreements with the employer binding the employees (even over their individual objections). In recognition of this broad conferral of authority, a union bears a reciprocal responsibility to fulfill its "duty of fair representation" to those employees.

Courts have wrestled with the extent of union authority, probably due to the unique (and at times nuanced and perplexing) nature of this tripartite relationship. The Federal Eighth Circuit Court of Appeals recently discussed the role of individual employees in the grievance process and sought to explain the nature of the tripartite relationship by quoting Harvard labor law professor (and former Solicitor General) Archibald Cox. The Guild sets out this lengthy quote here because it aptly and articulately describes the essence of this tripartite relationship:

We decline to more broadly define the relationship between employees and unions outside the facts of this case. However, we do note that it is possible that this relationship might not be amenable to principal-agent analysis at all. As commentator and former Solicitor General Archibald Cox noted:

In my judgment it is a mistake to attempt to force agreements between labor unions and employers into more familiar legal pigeonholes such as usage, third party beneficiary contracts, or contracts negotiated by the union as agent for the employees as principals. The law has always had trouble with tripartite relationships; and in the labor field there are additional complications. The parties affected by a collective bargaining agreement are employer, union, and many individual employees. The identity of the individual employees may change from day to day; Joe Smith quits but Annie Jones is hired. Often several employees have conflicting interests, as where the claim is that some are being permitted to deprive others of work by doing jobs outside of their own classification. The second party--the labor union

or collective bargaining representative--is in a very real sense only the third party--the individual employees--acting as an organized group through its agents and through constitutional processes. The group interests, however, may conflict with the claims of individuals because several classes of individuals have divergent interests, because the demands of group organization and coherence clash with individual self-interest, or even because the union officialdom is not immediately responsive to the wishes of a numerical majority of the members. Since experience offers no factual parallel to these arrangements, no other legal conception is quite analogous.⁴⁴

Archibald Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 604 (1956).

The limitations on union authority (and the authority of the parties in a collective-bargaining relationship) especially come into play when the Constitution or statutes confer specific employment rights on employees. Generally these constitutional and statutory employment rights may not be waived by the union or in a collective bargaining agreement.

Courts have repeatedly recognized the nonwaivable rights of the statutory guarantees. The State Supreme Court best expressed this principle in its 1999 decision in *Lundborg v. Keystone Shipping Company*.⁴⁵ *Lundborg* concerned litigation on behalf of seamen seeking "maintenance" (food and lodging expenses) as required under statute but at a rate at variance with the terms of the CBA. In concluding that the CBA could not trump the statutory rights, the court set forth a lengthy yet insightful

⁴⁴ *Sheet Metal Workers Local Number 2 v. Silgan Containers Manufacturing Corporation*, 690 F.3d 963, 969, n. 2 (2012).

⁴⁵ 138 Wash. 2d 658, 981 P.2d 854 (1999).

description of the relationship between collective-bargaining and employment statutes:

Likewise, even in the absence of a statutory prohibition against agreements or contracts that waive statutory rights, the United States Supreme Court has long held invalid contracts in violation of the minimum wage and overtime requirements set by the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 1- 9(b):

"Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."

Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 603, 64 S. Ct. 698, 88 L. Ed. 949, 152 A.L.R. 1014 (1944). The Court later said:

This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate. *Moreover, we have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement.*

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740-41, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981) (emphasis added) (citations and footnote omitted). *Accord Reich v. Interstate Brands Corp.*, 57 F.3d 574, 578 (7th Cir. 1995) ("There is no collective-bargaining exemption from the FLSA."), *cert. denied*, 516 U.S. 1042, 116 S. Ct. 699, 133 L. Ed. 2d 656 (1996); *Galvin v. National Biscuit Co.*, 82 F. Supp. 535, 537 (S.D.N.Y. 1949) (Rifkind, J.) ("Neither contract nor custom can open an avenue of escape from the obligations imposed by the Fair Labor Standards Act.").

Washington state laws governing the rights of workers also invalidate contracts that would waive such statutory rights.

Our industrial insurance act contains the following provision:

No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

RCW 51.04.060. Numerous other states have similar statutes or court rules to the same effect. Our Minimum Wage Act (MWA), chapter 49.46 RCW, specifically permits collective bargaining agreements to establish wages, but only so long as those wages are in excess of the applicable minimum under the MWA. *RCW 49.46.110.*

In summary, there is an extensive landscape of federal and state law dealing with the rights of workers holding that collective bargaining agreements do not supersede and cannot abrogate rights the law accords to workers. A CBA is not impervious to these numerous expressions of public policy, both statutory and court made, that accord greater solicitude to the legal rights of workers.⁴⁶

The Guild does not believe that the County can seriously dispute the nonwaivable nature of the employment law rights at issue here. Yet the County seems to conflate the rights and roles of *the Guild* with those of *the individual employees*. This overlooks a point of essential import to this litigation — that individual employees once having extended their personal labor, acquire certain vested property rights *separate and distinct* from those defined by the CBA - *and* these separate rights become nonwaivable in the collective-bargaining process. In short, *the various applicable employment laws create a “floor” below which the CBA may not fall.*

While the Guild, as the collective-bargaining agent, has broad authority to negotiate the terms and conditions of employment for the

⁴⁶ 138 Wash. 2d at 669-70.

employees, there exists, essentially, a *separate* employment arrangement between the employee and the employer that creates an effective “floor” for the later enacted CBA. Put another way, a basic “deal” is in place on any given day that is just between the employer and an individual employee. Under this “deal,” once the employees exert themselves on behalf of the employer on a given day in exchange for an established rate of compensation that compensation becomes a fully earned and vested benefit. *The parties to the CBA have no authority to adopt compensation terms below that which has already been earned.*

So, the County is correct that labor contracts may be negotiated in a retroactive manner *but* those CBAs may not retroactively *reduce* compensation *already earned*. The County is incorrect when it repeatedly argues that the Guild asserts a legal bar to any benefit reductions in the CBA; the Guild concedes the possibility of *prospective* reductions in forms of compensation.

The constitutional and statutory issues discussed below must be viewed within this framework. This framework recognizes that, despite the existence of an overarching “collective” bargaining relationship, a distinct and individual “deal” exists in which each of the Deputies provided daily services to the County and corresponding daily compensation has already been “earned” with each fulfilled day of service. As discussed below, this individually “earned” compensation is, by definition, simultaneously “vested.”

The parties can *enhance* this deal. But they cannot remove compensation from individual employees once *the compensation has been earned in direct exchange for services provided*.

D. Kitsap County Seeks to Impose a Unconstitutional Retroactive Reduction in Vested Employee Benefits.

1. Compensation, Including Benefits, is Vested Once the Work Associated with the Compensation is Performed, and it Violates the Constitutional Right to Substantive Due Process Rights to Take Vested Compensation Away After the Work has Already Been Performed.

The “constitutional” authority invoked in this case is the Fifth Amendment to the United States Constitution, which states “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The Fifth Amendment applies to the County via the due process clause of the Fourteenth Amendment.⁴⁷

A government taking of an employee’s vested right — without just compensation — infringes on these Fifth Amendment and Fourteenth Amendment rights to substantive due process. Apparently rare is the case in which an employer actually tries to reduce retroactively an employee wages. But when it does occur it has been found to be a clear violation of substantive due process. In *Foley v. Carter*, a federal court held that wages may not be retroactively reduced.⁴⁸ In *Foley*, on an unusual sequence of

⁴⁷ *Kelo v. City of New London*, 545 U.S. 469, 472 fn. 1 (2005).

⁴⁸ 526 F. Supp. 977, 985, (1981).

events, the federal government had retroactively reduced pay for a several day period. The court explained:

The right to a salary for work performed at the rate admittedly effective during the period when the work was performed is a right or property interest, a legitimate entitlement which qualifies for protection against governmental interference under the *Due Process Clause of the Fifth Amendment*. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 577-78, 92 S. Ct. 2701, 2709-2710, 33 L. Ed. 2d 548 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 261-63, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1980). American courts have traditionally refused to countenance retroactive legislation when it would have such an effect upon the rights of private parties. [Citations omitted.] The District Court in AFGE noted that the federal defendant in that case could cite no authority for the retroactive decrease of wage rates for services already performed, 474 F. Supp. at 359; the President in this case does not even make the argument that Public Law 96-86 should be applied retroactively. The Supreme Court in *Larionoff* viewed with displeasure the possibility that Congress might have intended to deprive a serviceman of pay for services already performed and yet owing, 431 U.S. at 879, 97 S. Ct. at 2159, and as long ago as 1850 the Supreme Court in *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 416, 13 L. Ed. 472, noted that

"(t)he promised compensation for services actually performed and accepted ... may undoubtedly be claimed both upon principles of compact and of equity..." This Court declines to accord the rights of federal employees today any less respect.

Washington courts have extended these same property rights principles to other forms of compensation, including retirement benefits, leave and health insurance. Although no Washington appellate court has addressed the precise issue raised here concerning retroactive health insurance premiums, the principles that apply from all other Washington

“vested” benefit cases would seemingly preclude the retroactive reduction in health insurance benefits that the County seeks to implement here.

The seminal and perhaps most widely cited “vesting” case in Washington is *Bakenhus v. City of Seattle*.⁴⁹ *Bakenhus* involved a change in the City retirement system applied to employees after the commencement of their employment. The Supreme Court ruled the change an impermissible infringement on a vested property rights. Since then, courts have applied *Bakenhus* numerous times to void retirement system modifications. But the vested rights concept in *Bakenhus* has also been extended to other forms of public employee compensation.

The Washington State Supreme Court has recognized a vested right to health insurance benefits, at least in the context of pensions. In *Navlet v. Port of Seattle*, numerous retired and current employees of the Port of Seattle claimed that they were entitled to lifetime retirement welfare benefits under a terminated CBA.⁵⁰ The Supreme Court held that retirement health benefits, once conferred by a collective bargaining agreement (CBA), create a vested right for the lives of eligible retirees who satisfied the requirements, unless there existed express language in the CBA specifically limiting the right to such benefits.⁵¹ Although differences again exist between that case and the current one, the general vested rights principle applied in *Navlet* directly applies here:

⁴⁹ 48 Wn.2d 695, 296 P.2d 536 (1956).

⁵⁰ 164 Wn.2d 818, 824-827, (Wash. 2008).

⁵¹ *Id.* at 850-851.

Generally, a “vested right” cannot be taken away once created. In the employment context, an employee who renders service in exchange for compensation has a vested right to receive such compensation. Upon vesting, such a right becomes a proprietary interest, even though created by contract.⁵²

The Guild is *not contending* here that Kitsap County can *never* change its insurance benefits or the charges associated with those benefits. The Guild is simply arguing that any such changes may *only be prospective*. Each month of work earns compensation which is earned and fully vested by the employee in exchange for services provided. The County might, subject to its other collective bargaining and legal obligations, change insurance terms moving forward, but they cannot retroactively strip employees in part or whole from compensation or benefits that already vested during the period in which the labor was provided.

Navlet and other cases⁵³ also makes clear that union negotiations *cannot* modify this constitutional mandate. A union and employer might negotiate a changes in the compensation terms, but those terms *cannot* be applied to any form of compensation *already vested*. Under RCW 41.56.470, the terms of the CBA remain in place although the contract has expired:

During the pendency of the proceedings before the arbitration panel, existing wages, hours, and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his or her rights or position under chapter 131, Laws of 1973.

⁵² Id. at fn. 5 (quoting *Leonard v. City of Seattle*, 81 Wn.2d 479, 487, 503 P.2d 741 (1972))

⁵³ See, e.g. *Abels v. Snohomish v. PUD No. 1*, 69 Wn.2d 542, 849 P.2d 1258 (1993) *Cruzan v. Naches School District*, 54 Wn.App. 388, 775 P.2d 960 (1989).

The County attempts to distinguish *Navlet*, arguing that *Navlet* was simply a case involving retirement benefits. But the vested benefit doctrine applies to *all types* of benefits. The fact that the CBA terms roll forward during the pendency of the dispute creates the minimum “floor” in the “deal” between the working employee and the employer, and, once services are performed, this effectively creates the vested benefit. Although terms of a CBA are subject to modification, any reductions in benefits, once labor has been supplied for those benefits, can only be prospective in nature.

In *Cruzan v. Naches School District*,⁵⁴ the court rejected the application of a CBA that was purported by the employer to strip away sick leave cashout benefits that were specified in the previous CBA and already earned:

By analogy, *Johnson v. Aberdeen*, 14 Wn. App. 545, 547, 544 P.2d 93 (1975) provides support for our decision. There, the court construed an ordinance which provided for sick leave buyout upon retirement. The court held the ordinance created a right to deferred compensation in the employee who met the specified conditions. Therefore, repeal of the ordinance did not affect any right earned by an employee prior to the repeal. *Johnson*, at 547 (citing *Bakenhus v. Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956)). Likewise, the mere elimination of the sick leave buyout policy from the 1983-85 contract did not forfeit buyout rights the teachers had accrued as of August 31, 1983.⁵⁵

In short, the authority of the parties to a CBA is circumscribed by the mandates of the Constitution. The County’s detailed argument on the

⁵⁴ 54 Wn.App. 388, 775 P.2d 960 (1989).

⁵⁵ Id at 966. (The decision does not clearly indicate but presumably August 31 was the date of the execution of the successor agreement.)

provisions within PECBA permitting retroactivity⁵⁶ seems to miss the entire point of the Guild's lawsuit and the ruling by Judge Orlando sustaining it. True, PECBA allows that a CBA *may* contain certain retroactive terms. But PECBA cannot alter the mandates of the United States Constitution or other applicable employment mandates, such as the wage withholding law.

The County's reliance on *Christie v. Port of Olympia*⁵⁷ (and the resultant legislative solution to address *Christie*) is misplaced. *Christie* involved a question of whether a retroactive wage *increase* negotiated into a labor contract constituted an unconstitutional gift of funds. The Supreme Court ruled it did, citing a lack of authorization for such a CBA and the legislature responded by expressly authorizing such increases.

The County asserts that RCW 41.56.950 (sometimes known as the Christie amendment) allows full retroactivity of *all* terms (no matter how drafted) and, therefore, the law allows retroactive *reductions*. The terms of RCW 41.56.950 are not quite as portrayed by the County. It permits backdated agreements and provides that "all benefits...including wage increases may accrue" to that retroactive date." The County compensation proposal here does not represent a "wage increase" and it is hard for the Guild to see the mandated *deductions* for premiums as a "benefit" that "accrues" to its members.

⁵⁶ County Brief at 13-17

⁵⁷ 27 Wn.2d 534, 179 P.2d 294 (1947)

Regardless, by allowing retroactive increases the legislature did not (nor could) remove the *constitutional* restriction on retroactive *reductions* in already vested compensation. The County cleverly attempts to compare the two as if they were identical invoking the rhetorical device of parallel construction: “The issue when was the constitutionality of a retroactive pay *increase*, now it is the constitutionality of a retroactive employee premium *increase*.”⁵⁸ But no amount of glib rhetoric can disguise the *actual* dissimilarities: The real issue presented is that the County wants to *reduce* compensation after it has been earned, and no mere act of the Legislature can permit that.

2. It is Undisputed that the County Seeks to Take Away Benefits from the Deputies Retroactively after the Work that Earned Those Benefits had Already Been Performed.

As indicated, the Guild’s argument is *not* that a prospective change in benefits would be unconstitutional. The Guild’s argument is that benefits cannot be stripped of employees *once the benefits have been vested*. The deputies provide service in exchange for benefits. Any diminution in those benefits after they have been earned (and immediately consumed) is an unlawful “taking” of vested property in violation of the due process clause.

The County simply misapprehends the entire nature of the vested benefit doctrine and its rationale. It attempts to distinguish *Foley*, *Navlet* *Bakenhus* by narrowly focusing on the facts of those cases, missing the broader concept of vesting. The County claims that the compensation fully

⁵⁸ County Brief at 16. (Emphasis supplied.)

earned should simply be treated as “provisional”⁵⁹ and it further dismissively characterizes the deputies insurance. The insured, it baldly asserts, is an “inducement” to continue work.⁶⁰ The Guild, with all due respect, submits that here the County is simply presenting futile contentions, not grounding its defense in either law or logic, and doing so mainly because the law cannot sustain its position.

The County cites the .5% wage increase awarded in July 2012 as designed to offset the increased in premiums which would take effect that same date. The County repeatedly asserts that the .5% wage increase granted by the arbitrator “more than offset the increased premium share.”⁶¹ While the arbitrator errantly designed the wage increase for that intended purpose, it is mathematically incontrovertible that the .5% does *not* offset the loss incurred. Under the order, the deputies’ share of the full family monthly premium would increase by \$77.94 which is about twice as much as the half percent increase in wages added.⁶² Furthermore, there is no support in the vested benefit decisions that support the claim that a benefit, *once fully vested*, can be removed by offering some unrelated offsets. Clearly, each deputy is impacted differently depending on their numbers of enrolled dependents but health insurance is an earned benefit, vested upon service.

⁵⁹ County Brief at 29.

⁶⁰ County Brief at 27.

⁶¹ County Brief at 2. See also County Brief at 36 and 38.

⁶² CP 330 ¶ 11, and Exhibit I, CP 303-304

E. The Trial Court Properly Found that Kitsap County Sought to Unlawfully Withhold Wages Without Consent of the Deputies.

1. State Law Bars the Unconsented Deductions for Wages Except for Narrow Purposes.

The RCW governing wage deductions dovetails with the substantive due process requirements. RCW 49.52.050 prohibits an employer from receiving any "rebate of any part of wages" owed to an employee or otherwise deprived an employee of earned wages. RCW 49.52.060 creates a narrow exception to that non-diversion rule; it permits a withholding of wages for certain statutory tax purposes or where the employee has "expressly authorized in writing" the deduction:

The provisions of *RCW 49.52.050* shall not make it unlawful for an employer to withhold or divert any portion of an employee's wages when required or empowered so to do by state or federal law or when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee nor shall the provisions of *RCW 49.52.050* make it unlawful for an employer to withhold deductions for medical, surgical, or hospital care or service, pursuant to any rule or regulation: PROVIDED, That the employer derives no financial benefit from such deduction and the same is openly, clearly and in due course recorded in the employer's books.

The proviso in the section concerning health care costs presumably relates a previously common practice of the employer provided health clinic. But those charges had to be developed pursuant to a defined rule *and* the employer was barred from receiving *any* financial benefit for the deduction.

2. The Unconsented Wage Withholding Kitsap County Seeks Violate the State Wage Deduction Law.

The County attempt to deduct the amount associated with these premium increases from employee wages is unlawful under RCW

49.51.050-060. Such deductions are without the employee's consent, written or otherwise. They are retroactive in nature and the employees are provided *no opportunity* to opt out of the charges. The benefits have already been earned and consumed by the deputies and their families, and they receive no new benefit for being post-charged for such insurance. The collection of these funds on a retroactive basis is *solely* for the benefit of the County.

The County baldly asserts that the monies it seeks to divert from paychecks do not constitute a "rebate."⁶³ But the County never defines what *it* considers to be a "rebate." The statute itself does not expressly define the term "rebate" except by implication; it defines what types of deductions may or may not be taken by an employer. The Guild finds it interesting that the County's brief only quotes *a part* the RCW 49.52.060, *omitting the key elements of the law*. The County's brief asserts that the statute "expressly provides" withholding may occur to pay for medical care" yet *omits* the limiting condition in RCW 49.52.060 "that the employer derives *no financial benefit* from such deduction and the same is openly, clearly and in due course recorded in the employer's books."

The recorded in "due course" requirement would seem to pose an additional hurdle for the County. The premium charges it seeks to impose were *not* recorded "in the employer's books" on July 1, 2013.

⁶³ County Brief at 32.

The County seeks to bypass these seemingly insurmountable legal hurdles by characterizing the wages at issue as an “overpayment” asserting a right to unilaterally “recoup.”⁶⁴ With all due respect, this County argument contains errors both in law and logic. The logic error is that it simply *assumes away* all the presented legal objections. The legal error is that the “overpayment recoupment” argument conflicts with the express terms of the statute. The statute requires *specific, written consent* of the employee. An employer’s unilateral characterization of its disputed claims as an “overpayment” is inconsistent with the letter and intent of the law.

F. The Trial Court Properly Found that The Arbitration Award Is Defective Because It Unconstitutional, and Unlawful and is Arbitrary And Because It Includes Contradictory Language That Cannot Be Properly Implemented.

1. The Award is Defective because it Contains Unconstitutional and Unlawful Provisions.

a. The Collective Bargaining Interest Arbitration Law Provides Controlled Discretion to an Arbitrator But Prohibits the Inclusion of Unlawful Provisions.

PECBA provides that, for certain types of emergency service workers for whom disruption of work is not a practical option, labor disputes are to be resolved by means of arbitration. As discussed above in the “standard of review” section, the statute provides the arbitrator a degree of discretion but not unlimited privileges. The decision must be decided in accord with specific statutory factors.⁶⁵ RCW 41.56.465(1)(a) *specifically*

⁶⁴ County Brief at 32-33

⁶⁵ (1) In making its determination, the panel shall be mindful of the legislative purpose enumerated in RCW 41.56.430 and, as additional standards or guidelines to aid it in reaching a decision, the panel shall consider:

(a) The constitutional and statutory authority of the employer;

requires that the arbitrator consider the “constitutional and statutory authority of the employer.”

Therefore, an arbitrator has *no authority* to issue an award containing unlawful terms. PECBA explicitly limits arbitral prerogative in adopting CBA provisions not to exceed beyond the constitutional and statutory authority conferred on the involved public entity. While made express by the legislature, even in the absence of such an express limitation, this principle seems rather commonsensical; *an arbitrator cannot make it legal for a public employer to do something that would be illegal if they did it without the authority of the arbitrator.*

b. The Award Contains an Unconstitutional and Unlawful Retroactive Compensation Reductions for Work Already Performed.

As indicated in detail previously, the County’s retroactive premium increases violate the substantive due process and wage rights of the deputies. The County *cannot* lawfully implement retroactive increases in premiums when the benefits have already been earned. An arbitration award indicating that County *could do* such a thing is simply invalid. Arbitrator

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- (b) Stipulations of the parties;
 - (c) The average consumer prices for goods and services, commonly known as the cost of living;
 - (d) Changes in any of the circumstances under (a) through (c) of this subsection during the pendency of the proceedings; and
 - (e) Such other factors, not confined to the factors under (a) through (d) of this subsection, that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment. For those employees listed in RCW 41.56.030(7)(a) who are employed by the governing body of a city or town with a population of less than fifteen thousand, or a county with a population of less than seventy thousand, consideration must also be given to regional differences in the cost of living.

Lankford *cannot* confer on the County the ability to impose retroactively a benefit reduction as it would be contrary to the “constitutional and statutory authority of” Kitsap County.

G. The Trial Court Properly Found that the Award is Defective Because it Includes Contradictory Language that Cannot be Properly Implemented.

1. The Collective Bargaining Statute Prohibits Arbitrary and Capricious Awards.

As described in greater detail above in the “standard of review” discussion, an interest arbitration award is subject to court review.⁶⁶ The award is normally “finally and binding” but not if it is deemed “arbitrary and capricious.” An action is “arbitrary and capricious” if it involves “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances”⁶⁷

2. An Award which is Inherently Contradictory and Cannot be Properly Implemented is, by Definition, “Arbitrary and Capricious.”

An award issued in disregard of established law is by definition arbitrary and capricious. So too is a contradictory award. An award that directs the parties to take contradictory actions or contains insurmountable conflicts that cannot be harmonized is inherently an “unreasoning action,” that is, an action contrary to fundamental reason.

Judge Orlando properly found that the award at issue here to be arbitrary and capricious. Frankly, the Arbitrator goofed. He erred not

⁶⁶ RCW 41.56.450.

⁶⁷ *Federal Way School District v. Vinson*, 172, 756, 769, 261 P.2d 145 (2011).

simply on his interpretation of the law, addressed above, but also in his failure to consider or comprehend the existing open enrollment mandate in the CBA. An open enrollment period is mandatory each year. By past practice, the parties have interpreted that provision to extend to all events in which a change in benefits has occurred.⁶⁸ Revised insurance plans were not imposed upon employees *without any opportunity* for them to consent to a deduction. The deputies were extended the opportunity to opt out of paying for an undesired premium charge, which they could do by dropping the coverage for some or all dependents.

Labor contracts are not to be interpreted like commercial contracts. There is a long-standing interpretation standard for interpreting CBAs that acknowledges that the additional practices of the parties (how the parties actually administer the agreement in the functioning reality of the workplace) guide the meaning of such agreements.⁶⁹ As the court recently explained in *Yakima County, v Yakima County Law Enforcement Officers Guild*: “[P]ast practices are an implied part of a bargaining agreement.”⁷⁰

Here the CBA allows employees an election period to opt out of coverage for themselves under certain circumstances. It also provides that annually they may add dependents. By action and interpretation of the parties, this has also been implied to mean that they may drop dependents.⁷¹

⁶⁸ CP 414

⁶⁹ *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn.App. 304, 327, 237 P.3d 316 (2010)

⁷⁰ *Id.*

⁷¹ CP 414

Whenever a contract has been modified and placed in effect after the annual November open enrollment period, a special enrollment period has been established.⁷²

Obviously that cannot occur here since as the action proposed by the County is completely retroactive, yet previous changes have *only* been prospective. The enrollment period at issues from the Award on the surface only covers the last half of 2012, since the labor agreement expires December 2012, although in reality once in place the County proposes to continue to lock employees out of their opt out rights until whenever the next available November enrollment period arises.

The arbitrator completely failed to contemplate the mandate for the open enrollment period permitting a change in coverage. He *never* addressed or *even acknowledged* this mandate in his written decision. But that mandate still exists in the awarded contract with or without his awareness of it. (The other terms of the 2008-09 CBA carry forward unless changed by agreement of the Award.⁷³) By leaving in the CBA two *mutually exclusive* terms he issued an award that by definition is “arbitrary and capricious” and cannot stand:

- Issuing an award with a recognition of or in defiance of an insurmountable conflict is an “unreasonable action.”
- Issuing an award without any analysis, attempt to harmonize, or even apparent knowledge of conflicting CBA mandates is an action taken “without regard to or consideration of the facts and circumstances” that exist.

⁷² Id.

⁷³ RCW 41.56.470

- Issuing an award that directly contradicts an established mandate in the CBA is both an “unreasonable action” and one that fails to consider existing “facts and circumstances” because the ongoing contract terms form their own independent legal mandate that cannot be evaded.

The County attempts to evade these difficulties by asserting that, because the arbitrator provided a wage offset, the CBA mandated open enrollment right can be ignored. Even apart from the fact that the .5% offset was inadequate in terms of incontrovertible math (the “offset” only equaled about half of the dollar value of the imposed premium increase in most cases), this argument ignores the *plain terms* of the CBA and its purpose. *Even if* the offset had been greater than the amount at issue, individual deputies would *still* retain a contractual right to opt out of insurance coverage they no longer desire. The CBA provided an express right to deputies to no longer pay for unwanted insurance; the arbitrator simply ignored this CBA mandate.

The County argues that the Guild members lost this CBA right because they should simply “guessed wrong” about how the arbitration would proceed.⁷⁴ But there is no “guessing” at issue with the express terms of the CBA. The Guild respectfully submits in return that the County here again presents futile assertions and that it is, instead, the County that “guessed wrong” about a whole range of issues. The County’s alternative request for a remand to create, somehow, a new, after-the-fact retroactive open enrollment period makes no legal or practical sense. The point is that

⁷⁴ County Brief at 35.

this County idea is practical impossibility; even the County's own witnesses conceded that consumed benefits cannot be altered after the fact.⁷⁵

H. Because the County's Appeal Cannot be Sustained by Legal Authority, the County Brief is Replete with Vague but Obvious Allusions to Equity but, Properly Weighed, the Balance of the Equities Actually Undermines the County Appeal.

The various allusions scattered throughout the County's brief to perceived unfairness or potentially negative policy impacts, submits with all due respect, is simply a diversionary tactic intended to distract attention from the relative lack of legal merit in the County's appeal. These comments are sprinkled throughout the County's Brief, and the Guild believes that the best way to address the interspersed comments is simply to identify them all in a single section and directly address them. Once squarely identified and addressed, it should become quite clear the County's implicit and explicit pleas for some type of equity do not justify its appeal.

1. The County's Predicted Impacts On The Collective Bargaining Process Entirely Misses The Mark Because The Prevailing Approach Is To Disallow Retroactive Decreases In Compensation And It Is This Arbitration Award Which Represents an Anomaly.

The County argues that affirmance of the trial court ruling will "forever" change and ultimate "eviscerate" collective bargaining. It would not be hyperbole to this claim "hyperbole." In fact, *none* of these predicted tribulations would occur because, in fact, the "status quo" condition of collective bargaining is represented by a *lack* of retroactivity in

⁷⁵ CP 331

compensation reductions. *It is this challenged Award, not the Guild argument, which is the outlier.*

All the nearly 200 interest arbitration decisions in the history of PECBA are published on the PERC website. *Only the Lankford decision at issue here orders a retroactive increase in premiums.*⁷⁶

Such a result should not be surprising. While the County argues that a lack of case law undermines the Guild's argument, in fact, the *lack* of case law suggests the opposite. It is, as Judge Orlando noted, "common sense" that compensation cannot be *reduced* after it is *earned*. The lack of case law reflects the lack of practical desire even otherwise aggressive employers might have to attempt to take money away from employees after they've earned it. What Kitsap County seeks is not remotely normal.

2. The County's Attempt To Portray It As Some Type Of Victim Entirely Misses The Mark Because It Was The County's Efforts To Evade The Constitution That Created This Situation, Not Any Fundamental Flaw In The Collective Bargaining Law Or Process.

The County invokes fairness, as it defines it, arguing that "[i]f the County had known that a shift in premiums could only be prospective, the County would have changed its proposals and entire bargaining strategy as well as its approach to the interest arbitration hearing." Apparently the County is alluding to the fact that it willingly pushed the arbitration hearing late into the third year of the proposed CBA after stipulating that its term would only be three years.

⁷⁶ See Published decisions at <http://www.perc.wa.gov/intarbawards.asp>.

The Guild fails to comprehend how the County's ignorance or disregard (even in the face of the Guild's specific illegality objections) entitles it to some kind of sympathy for its self-created plight. The three year term was not mandated by the statute (PECBA permits durations up to six years).⁷⁷ The record suggests that the parties moved slowly toward arbitration by *mutual* consent. While the record herein does not provide all the details as to why there was such slow movement, one could reasonably imagine that in the recent period, at the tail end of a significant recession, both parties to a collective bargaining relationship might have many reasons to push off a final verdict on their contract while economic and fiscal conditions evolved. The County has no valid complaint: If there was a "slow dance" to the hearing, the County was a willing "dance partner."

Despite its consent to this "dance" the County implies some type of irregularity of the structure of the collective bargaining process and argues that this will incentivize further "delays."⁷⁸ This is a similar point more extensively made by Amici and the Guild will address this point, both for reason of space and context, in its Reply to Amici. It suffices to say that there is no structural issue here that cannot be addressed by enforcing the statute, or, if necessary, addressing it in legislation. In fact, this is something that the Legislature has already covered in RCW Chapter 47.64, which governs the collective bargaining of ferry workers. This law imposes strict

⁷⁷ RCW 41.56.070.

⁷⁸ County Brief at 39.

timetables on the presentation and completion of ferry system interest arbitration.⁷⁹

3. The County Invocation of A Threat To “Public Finances” Or “Comparability” Are Misplaced Because these arguments Lack A Logic Nexus To The Constitutional Issues Presented.

The County cites the threat to public finances supposed engendered by this decision.⁸⁰ The County also justifies imposition of the unconsented retroactive taking, arguing it is a result of an arbitral compromise that was justified by the statutory “comparability” standard.⁸¹ Apart from the fact that a statute cannot trump the Constitution, there is something unwittingly contradictory in these County claims: If the arbitration process wisely weighs and balances all relevant statutory factors, why would it not fairly calibrate interests associated with sound public finance?

4. The County Argument that the Award should be upheld as part of some kind of closed door “compromise” is misplaced because it ignores the illegality of the Award.

The County presents an argument with some superficial appeal depicting a supposed “deal” allegedly reached by the arbitration panel.⁸² As with the County’s other superficially appealing “equity” arguments, the County’s appeal to fairness deflates upon closer scrutiny. Judge Orlando also seemed to question the nature of the maneuvering by the arbitrator, a concern somewhat misportrayed in the County’s brief. The County

⁷⁹ RCW 47.64.170.

⁸⁰ County Brief at 39.

⁸¹ County Brief at 36.

⁸² County Brief at 7 and 11-12.

criticizes Orlando's comments critiquing the compromise⁸³ without recognizing that he was also questioning the *process* that went into it.

The County misapprehends the role of the arbitration panel and the rights and responsibilities of the members of those panels relative to their constituents. In its opening summary judgment brief in Superior Court, the Guild did not expose the internal machinations of the arbitration panel's proceedings because it analogized those to the deliberations of a jury. The Guild also had no particular interest in exposing the apparent misconduct of the arbitrator in creating what might seem to be a personal attack when this matter could be disposed of solely on the legal claims.

But once the County raised this issue below in its Reply and then yet again here the Guild says in this brief that if we are going to ask how the "sausage" was made, then let's throw open the doors of the "sausage factory" and do a thorough inspection of the factory premises. Such a "sausage factory" inspection reveals a somewhat unsavory process, even extending to inappropriate coercion to protect the arbitrator from embarrassment from exposure of his flawed decision.

A review of the process by which the arbitration decision was published reveals *not* what the County claims exists — some kind of binding "deal" — but instead a coerced virtual bribe extended to the Guild partisan arbitrator not to publish a dissenting arbitration decision, a dissent which would have made public extensive flaws in the arbitrator's analysis.

⁸³ County Brief at 12.

Once the nature of that coercion is understood it does nothing to support the County's position and, if anything, only further shows how the decision is "arbitrary and capricious" at its core.

Context is important, and the County does not provide the correct context in its passing "deal" references. The "arbitration panel" in this case consisted of neutral Arbitrator Howell Lankford, County appointed partisan Nancy Buonanno Grennan and Guild appointed partisan arbitrator Jay Kent.⁸⁴ Under the interest arbitration statute, the partisans may advocate for their constituents' position. They may also agree to sign onto the neutral arbitrator's award *or* file a dissent but whatever they decide has no legal impact. Under RCW 41.56.450, the neutral arbitrator is required to "consult" the partisan arbitrators but has the independent authority (and obligation) to release an award, with or without their concurrence.

On occasion, and as began to develop here, partisan arbitrators who feel strongly adverse to the arbitrator's decision may publish a dissenting opinion. All arbitration awards, including dissenting opinions, are published on the PERC website thereby enabling all labor-management advocates to inspect and evaluate the work product of arbitrators.⁸⁵

Earlier in 2012 the same arbitrator had presided over a hearing between the County corrections Guild and the County.⁸⁶ In that award, he granted the corrections officers a 3.2% wage increase and backloaded it in

⁸⁴ CP 412 ¶ 4.

⁸⁵ See awards at <http://www.perc.wa.gov/intarbawards.asp>

⁸⁶ CP 412 ¶ 5.

the final year of the three-year agreement and also improved the corrections officers' health insurance plan.⁸⁷ When the deputies arbitrated in the fall of 2012 they made some arguments relative to the corrections arbitration.⁸⁸

The Deputies Guild presented as relevant background that during the previous corrections arbitration that separate corrections officers Guild had claimed that the County had a stronger financial position than they were representing to the arbitrator.⁸⁹ In the corrections arbitration the arbitrator had questioned some of the County's budget numbers but ultimately concluded the County had a limited ability to pay.⁹⁰ In the later deputy sheriffs arbitration in the fall of 2012, the Deputies Guild then asserted that it was apparent that the *previous representations* made by the County in the corrections officers' arbitration were now documented as being *inaccurate* and the County, in fact, had a strong ability to pay as additional funds had now been exposed.⁹¹

Despite the Guild's exposure of these additional funds, perplexingly, the arbitrator still wrote up a draft award asserting that the County, while better off than previously, was financially constrained.⁹² The Guild partisan believed this simply to be untrue. But Lankford used this error to temper the deputy Guild's award and even provided them less of a wage increase than the corrections officers had received.⁹³ As the award was being drafted he

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ CP 412, 413 ¶ 6.

⁹⁰ Id.

⁹¹ Id.

⁹² CP 413 ¶ 7.

⁹³ Id.

initially wrote that the deputies should receive a 2.0% wage increase in January of 2012, less actually than ordered for the Corrections Officers.⁹⁴

Partisan arbitrator Jay Kent, perceiving a much stronger financial situation for the County than described by Lankford's draft award, strongly disagreed with the arbitrator's financial conclusions and wage award and wrote all this up into a draft dissenting opinion.⁹⁵ The draft dissent revealed in *comprehensive detail* that the evidence in the record before the panel concerning the County's budget was *simply irreconcilable with the arbitrator's description of their financial resources*.⁹⁶ Kent's bluntly worded draft dissent also criticized the arbitrator's retroactive insurance award and extensively question its legality.⁹⁷

Apparently Arbitrator Lankford did not want this dissent published. He offered to Kent that *if he would not file his dissenting opinion* he would extend the deputy sheriffs an additional .5% in July of 2012.⁹⁸ In the course of the panel's discussions on this issue, Kent learned that the arbitrator had communicated *ex parte* with the County's partisan arbitrator. In that *ex parte* e-mail the arbitrator explained to the County arbitrator that he thought it would be "useful" to avoid a Guild dissent.⁹⁹

Lankford's "offer" placed Jay Kent in an untenable position. The deputies were already receiving less than the 3.2% awarded the corrections

⁹⁴ Id.

⁹⁵ CP 413 ¶ 8.

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ CP 413 ¶ 9.

⁹⁹ CP 413 ¶ 10.

officers whether they were extended the 2.0% or the 2.0% with the additional later .5%. Although Kent wanted to file a dissenting opinion and expose the flawed award, he did not want to cost the deputy sheriffs a half a percent in wages that they could otherwise receive.¹⁰⁰ He faced a dilemma.

But Kent also concluded, correctly, that not filing the dissent did not compromise the ability of the Guild or individual employees to challenge an unlawful award.¹⁰¹ While Kent was the President of the Deputies Guild, he was not individually authorized to reach any "agreement" on the terms of the CBA.¹⁰² Some discrete sections of the CBA had been negotiated between the County and the Guild successfully, but that was done through a separate bargaining committee chaired by Deputy Andy Aman.¹⁰³ Kent concluded, again correctly, that the award would be issued with or without his concurrence and that the only effect any refusal to drop the dissenting opinion would be to cost his members a half a percentage point in wages.¹⁰⁴

The County argument that this form some type of binding "deal" is simply incorrect. The role of the partisan arbitrator is not to "negotiate" and Kent specifically had no negotiation authority on the Guild's behalf. And even if Kent had such authority it would not have formed a binding contract whatsoever — because the arbitrator had the independent authority and

¹⁰⁰ CP 413, 414 ¶ 11.

¹⁰¹ CP 414 ¶ 12.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id.

responsibility to issue an award with or without Kent's concurrence, there was no valid consideration offered for the additional 1/2% "offered". Furthermore, the nature of any "deal" did not involve the Guild or the employees abandoning their ability to challenge the legality of the award, *even if* that was what Lankford and the County erroneously presumed would happen. Lankford and the County might have *hoped* for that benign result, but the Guild partisan had no authority whatsoever to bind either the Guild or the individual employees to an illegal contract, nor did he ever intend to do so.

So that context provides a much different portrayal of what has occurred inside the "sausage factory" than provided by the County. What the County sees as a "deal" the Guild simply sees as a coerced bribe not to file what would amount to an embarrassing dissenting opinion. Such a decision would have publicly criticized and exposed the flawed drafting of an arbitrator whose work is publicly available for inspection and consideration among other Washington labor and management advocates. To put it another way, it wouldn't have made him look good to others considering whom to select as an arbitrator in the future.

The Guild inversely views the extension of the half percent to Kent to be a form of improper duress in which he was essentially conveying "if you don't accept this your members will have their wage award reduced by 1/2%." The Guild understands that the arbitrator did not want to be so embarrassed by the dissenting opinion but this fear does not justify his

methods.

The County cannot escape judicial review of this decision by pointing to the partisan arbitrator's failure to file a dissenting opinion. If the award is unlawful, *it is unlawful without regard to whatever position any of the partisan arbitrators took on the award.* The Guild partisan cannot bind the entirety of the Guild to an unlawful agreement and the Guild partisan certainly cannot bind individual employees to an unlawful agreement in which their individual employment rights are violated.

5. The County invocation of its supposed "Power of Decision" is Misplaced because it actually points to policy considerations supporting the opposite result.

The County raises an issue concerning its "power of decision" in the collective bargaining process. The County's insertion of the issue actually invokes a policy consideration that *undermines* the County's position. While this issue arises in the context of interest arbitration, where an employer's "power" of implementation is statutorily restricted, the implications for public employee collective bargaining, especially as to those many groups lacking the protection of binding arbitration are profound. Under the County's theory, for groups not covered by the protection of arbitration, it could assert a right to label compensation occurring during contractual hiatus periods as "provisional" and then, years later, when impasse is reached and its statutory right to implement¹⁰⁵ is exercised, it could threaten to "recoup" what it then labels as a "provisional"

¹⁰⁵ See RCW 41.56.123.

wage and “overpayment.” PECBA confers *no* to right to strike in the face of such an aggressive action.¹⁰⁶

I. The County’s Proposed Remedy to Allow the Arbitrator to Rewrite the Award Should not be Granted.

The County argues that Judge Orlando erred by striking the unconstitutional provisions and should have returned the CBA to Arbitrator Lankford for readjudication. The County is wrong for two principle reasons: first, the existent CBA language creates a built-in and mandatory solution for fixing such provision, and second, there is no statutory basis to return the contract to readjudication by the arbitrator that created the error in the first place.

1. The Trial Court Properly Severed The Unlawful Provision As Mandated By The Agreed-Upon Severability Clause.

The County proposed “remand” remedy flies in the face of CBA language. The CBA “severability” clause expressly mandates what happens in the face of an unlawful provision. Neither of the parties inserted the entirety of the CBA into the summary judgement record. Assuming this court was able to take judicial notice of the public posted CBA¹⁰⁷ this is the applicable language regarding severability:

In the event that any portion of this Agreement is held invalid to any party, person or circumstances, *the remainder of the Agreement or its application to any other party, person or circumstances shall not be affected.* If any portion is held

¹⁰⁶ RCW 41.56.120

¹⁰⁷<http://www.kitsapgov.com/hr/PersonnelManualBargUnits/CollectiveBargainingAgreements.htm>

invalid, Guild and Employer shall meet forthwith and proceed to negotiate a replacement provision.¹⁰⁸

The County assertion that the remainder of the CBA has to be re-arbitrated in such circumstances cannot be sustained under the parties own agreed language. The severance of this clause cannot be held to affect the rest of the CBA. If this proves to become a “material question of fact” this matter could be remanded on that issue alone.

2. The County’s Argument For Its Proposed Remedy Ignores The Terms Of The Interest Arbitration Statute And Inaptly Relies Upon Irrelevant Grievance Arbitration Cases.

As it did in its “standard of review” argument, the County cites to innumerable *grievance* arbitration cases to support its requested remedy for this statutory *interest* arbitration matter.¹⁰⁹ Without any statutory support, it asserts the original arbitrator who created the error has a second chance to “reformulate” the award.

The grievance arbitration decisions cited by the County in which remand was ordered all involved a decision deemed “ambiguous” and therefore “incomplete.” Here the arbitrator’s award was not ambiguous, it was patently unconstitutional. Under these circumstances, as Judge Orlando properly ruled, severance fixes the problem completely. And even if there was some statutory basis for resubmittal to arbitration, there is nothing in the statute that supports the County’s claim that the Guild is somehow bound to submit the contract back to the same arbitrator that

¹⁰⁸ Cite to CBA, Section M

¹⁰⁹ County Brief at 37-38.

created the mess to begin with. If there were to be a remand with a direction of resubmission, the parties should be ordered to comply with the PECBA arbitrator selection procedures.

J. The Trial Court Erred by not Granting the Deputies Guild Attorney Fees for its Successful Wage Recovery Action.

The Guild seeks to vindicate the wage and due process rights of its members. If the Guild is successful in this litigation, the Guild is entitled to its reasonable fees to bring this action. Civil rights claimants under are entitled to fees for prevailing in actions and so too are successful parties to a wage recovery action. Unions are entitled to such fees for successful wage recoveries for their members.¹¹⁰

RCW actions broadly define “wages” for successful wage recovery purposes. Courts have consistently extended the definition of “wages” for such purposes to extend to benefits and not simply ordinary wages.¹¹¹ The prevention of unlawful deductions from the wages in order to divert the money to the County would constitute a successful wage recovery action. The trial court did not address under what rationale the Guild would not be entitled to its fee recovery. Functionally the deputies are left in an identical financial position whether they are allowed to “keep” the wages as a result of this successful injunction action or whether the wages were “recouped” in a lawsuit brought after the fact. The anticipatory procedural posture of this case should not affect the Guild’s fee entitlement.

¹¹⁰ *Everett Firefighters, Local 46. v. City of Everett*, 146 Wn.2d 29, 42 P.2d 1265 (2002).

¹¹¹ *McGinnity v. AutoNation*, 149 Wn.App. 277, 202 P.3d 1099 (2009); *Naches Valley Sch. Dist. v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989)

K. This Court Should Grant the Deputies Guild Attorney Fees for this Appeal of its Successful Wage Recovery Action.

RAP 18.1(b) mandates that parties seeking attorneys' fees for their work on the appeal must direct the Court's attention to that request in a separately identified section. For the reasons identified above, and assuming its success in this matter, the Guild is entitled to reasonable attorneys' fees, inclusive of those expended on this appeal.

VI. CONCLUSION

The Guild does *not* argue that no reductions in benefits can ever occur. It simply argues that such changes must be lawful and that the County may not impose upon employees charges that they never volunteered to incur. The County cannot strip compensation from Deputies after they have performed work and earned it through that work.

The County seeks to extract these retroactively imposed charges from the wages owed the deputies solely in furtherance its own interest and without the consent of the deputies. The trial court properly held that such an imposed taking is unconstitutional and unlawful. The trial court should be affirmed, and the appeal should be denied. Otherwise, the Guild's request for reasonable attorneys' fees should be awarded.

DATED this st 21 day of February, 2014, at Seattle, WA

CLINE & ASSOCIATES

By: James M. Cline, WSBA # 11947, for
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CERTIFICATE OF SERVICE

I certify that on February 21, 2014, I caused to be filed via email and U.S. Mail the original of the foregoing REPLY BRIEF OF RESPONDENT, and this *CERTIFICATE OF FILING & SERVICE* in the above-captioned matter. I further certify that on this same date, I caused to be served via Electronic Mail and U.S. Mail true and accurate copies of the same above-referenced documents on the party below:

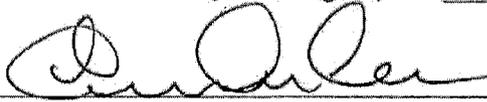
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I certify and acknowledge under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 21 day of February 2014.



Anneke Lee, Paralegal

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Sent: Friday, February 21, 2014 2:20 PM
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Subject: Kitsap County v. Kitsap County Deputy Sheriff's Guild/ 89344-6
Attachments: 2-21-14 corrected Reply Brief.pdf; 2-21-14 declaration of AL in support of motion to accept.pdf; 2-21-14 motion to accept corrected brief.pdf

Kitsap County v. Kitsap County Deputy Sheriff's Guild / 89344-6

Attached please find Respondent's Motion for Acceptance of corrected Respondent Reply Brief; Declaration of Anneke Lee in Support of Motion for Acceptance of corrected Reply Brief; and Corrected Reply Brief of Respondent

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