

NO. 62380-0-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

DOYLE MUIR,

Plaintiff/Respondent,

v.

COUNCIL 2 WASHINGTON STATE COUNCIL
OF COUNTY & CITY EMPLOYEES and LOCAL
1849, AFSME, AFL-CIO,

Defendant/Petitioner

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN -4 PM 3:22

PETITIONER'S OPENING BRIEF

San Juan County Superior Court Case No. 07-2-05041-9

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 2

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 2

IV. STATEMENT OF THE CASE 2

 A. The Arbitrator’s Rulings 3

 1. The original Opinion and Order 3

 2. The Amended Opinion and Order 4

 B. The Collective Bargaining Agreement 6

 1. The “involuntary transfer” provision 6

 2. When Mr. Muir’s salary is reduced by the County at the end of the 12 month “redline” period he files a grievance 7

 C. Mr. Muir’s request that his union pursue his pay grievance to arbitration is denied after reviews by both the union’s general counsel and its President/Executive Director 8

 1. The request 8

 2. The review by Ms. Eide 8

 3. Mr. Dugovich’s review 11

V. ARGUMENT 13

 A. STANDARD OF REVIEW 13

B.	MR. MUIR WAS REQUIRED TO SHOW AND THE TRIAL COURT HAD TO FIND THAT THERE ARE MATERIAL FACTS IN DISPUTE WHETHER THE UNION'S CONDUCT WAS ARBITRARY, DISCRIMINATORY OR IN BAD FAITH	15
C.	THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO ACKNOWLEDGE COUNCIL 2'S BROAD DISCRETION IN DETERMINING WHETHER MR. MUIR'S CASE SHOULD BE ARBITRATED AND INSTEAD SCRUTINIZED THE QUALITY OF COUNCIL 2'S DECISION	17
	1. The union's decision not to arbitrate Mr. Muir's wage claim was not arbitrary because it was a rational exercise of its judgment	17
	2. The union did not discriminate against Mr. Muir	27
	3. The union exercised good faith in making its decision whether to arbitrate Mr. Muir's grievance	28
VI.	CONCLUSION	30

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Air Line Pilots v. O’Neill</i> 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991)	16, 17
<i>Allen v. Seattle Police Officers’ Guild</i> 100 Wn.2d 361, 670 P.2d 246 (1983)	16, 18
<i>City of Oak Harbor v. St. Paul Mercury Ins. Co.</i> 139 Wn. App. 68, 159 P.3d 433 (Div. 1, 2007)	13
<i>Cross v. United Auto Workers, Local 1762</i> 450 F.3d 844 (8 th Cir., 2006)	26
<i>Eichelberger v. NLRB</i> 765 F.2d 851 (9 th Cir., 1985)	23
<i>Evangelista v. Inlandboatmen’s Union of Pacific</i> 777 F.2d 1390 (9 th Cir., 1985)	20, 21
<i>Ford Motor Co. v. Huffman</i> 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953)	16, 17
<i>Greater Harbor 2000 v. City of Seattle</i> 132 Wn.2d 267, 937 P.2d 1082 (1997)	14
<i>Hertog v. City of Seattle</i> 38 Wn.2d 265, 979 P.2d 400 (1999)	14
<i>Humphrey v. Moore</i> 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964)	16
<i>Johnson v. Camp Auto, Inc.</i> 148 Wn. App. 181, 199 P.3d 491 (Div. 3, 2009)	14
<i>Johnson v. King County</i>	

148 Wn. App. 220, 198 P.3d 546 (Div. 1, 2009)	13
<i>Johnson v. U.S. Postal Service</i> 756 F.2d 1461 (9 th Cir., 1985)	16, 21
<i>Lindsey v. Municipality of Metropolitan Seattle</i> 49 Wn. App. 145, 741 P.2d 575 (Div. 1, 1987) ..	15, 18, 19, 21, 22, 23, 24, 26, 27, 29
<i>Lipscomb v. Farmers Insurance Co. of Washington</i> 142 Wn. App. 20, 174 P.3d 1182 (Div. 1, 2007)	14
<i>Miranda Fuel Co.</i> 140 NLRB 181 (1962) rev'd 326 F.2d 172 (2 nd Cir., 1963)	16
<i>Moore v. Bechtel Power Corp.</i> 840 F.2d 634 (9 th Cir., 1988)	16, 29
<i>Patterson v. Int. Broth. of Teamsters</i> 121 F.3d 1345 (9 th Cir., 1997)	16, 27, 29
<i>Peterson v. Kennedy</i> 771 F.2d 1244 (9 th Cir., 1988) cert. denied 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986) .	16, 19, 23
<i>Ross v. Bennett</i> 148 Wn. App. 40, 203 P.3d 383 (Div. 1, 2008)	15
<i>Sanders v. Youthcraft Coats & Suits, Inc.</i> 700 F.2d 1226 (8 th Cir., 1983)	26
<i>Schmidtke v. Tacoma School District</i> 69 Wn. App. 174, 848 P.2d 203 (Div. 2, 1993)	15, 19, 29
<i>Slevira v. Western Sugar Co.</i> 200 F.3d 1218 (9 th Cir., 2000)	22

<i>Spietz v. Kaiser Aluminum And Chemical Corp.</i> 672 F. Supp. 1368 (W.D. Wash. 1987)	26
<i>Steele v. Louisville & Nashville R.R.</i> 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944)	16
<i>Stevens v. Moore Business Forms</i> 18 F.3d 1443 (9 th Cir., 1994)	16, 23
<i>Tenorio v. NLRB</i> 680 F.2d 598 (9 th Cir., 1982)	20
<i>Vaca v. Sipes</i> 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967)	16, 29
<i>Womble v. Local Union 73. IBEW</i> 64 Wn. App. 698, 826 P.2d 224 (Div. 3, 1992)	18, 29
<i>Zobrist v. Culp</i> 18 Wn. App. 622, 570 P.2d 147 (1977)	14

OTHER AUTHORITY

CR 56(c)	14
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I. INTRODUCTION¹

In August 2003 Doyle Muir was fired by the Public Works Department at San Juan County for the unsatisfactory performance of his duties as a road maintenance supervisor. Council 2 pursued the grievance it had filed on behalf of Mr. Muir before an arbitrator who overturned San Juan County's decision to terminate him. Ordering San Juan County to reinstate Mr. Muir and pay him his lost past wages, the arbitrator ruled that instead Mr. Muir should have been disciplined for thirty days and demoted from supervisor to equipment operator because of his "unacceptable attitude towards his co-worker and management." A year later, when, in accordance with the arbitrator's rulings, San Juan County reduced Mr. Muir's hourly wage from that of a supervisor to an equipment operator, he filed another grievance. Council 2 refused to pursue this subsequent grievance to arbitration concluding after an investigation and review process that it lacked merit. Based on Council 2's refusal to pursue his wage grievance to arbitration Mr. Muir sued it for breach of its duty of fair representation.

After the trial court denied Council 2's motion for summary judgment it petitioned this court for discretionary review. Review was

¹ This opening brief is being filed three days after it was due. RAP 10.2(a). Counsel for petitioner miscalculated the date and is solely responsible for any sanctions. See RAP 10.2(i), 18.9.

granted on December 23, 2008.

II. ASSIGNMENT OF ERROR

The trial court erred when it denied summary judgment concluding that the union's bases for its refusal to arbitrate Mr. Muir's grievance may have been wrong.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. When considering a motion for summary judgment brought by a union accused of breaching its duty of fair representation is it the role of the trial court to scrutinize the quality of the union's decision? (Assignment of error.)

2. Are there any issues of material fact precluding summary judgment? (Assignment of error.)

IV. STATEMENT OF THE CASE

Mr. Muir has been and is an employee of San Juan County and a member of the petitioner union. CP 2, ¶ 1.4.² Council 2 and San Juan County are parties to a Collective Bargaining Agreement ("CBA"). *Id.*, ¶ 2.1. After Mr. Muir was terminated from his position as a road maintenance supervisor for the County in August 2003 he filed a grievance challenging his termination and the union submitted his

² Reference to the Clerk's Papers will be abbreviated as "CP ____." The references will delete the zeroes so that, for example, "000002" will be shown simply as "2." When the reference in the Clerk's Papers is to an excerpt of a deposition we will include in parentheses the name of the deponent and the specific pages and lines referenced.

grievance to arbitration. *Id.*, ¶ 2.3. For purposes of the arbitration, the union and county consolidated the termination grievance with two previous grievances Mr. Muir had filed protesting a letter of reprimand and a three day suspension. CP 68.

A. The Arbitrator's Rulings.

1. The original Opinion and Order.

After a five day hearing, arbitrator Eric Lindauer rendered an Opinion and Order dated May 10, 2004. CP 67-132. He concluded that the County "had just cause to take disciplinary action against Muir," CP 126, but no cause to terminate him. *Id.* He found that Mr. Muir demonstrated that he was not capable of serving in a supervisory position and ordered that he be reinstated as an employee of the County, following a 30 day suspension without pay, to the position of Equipment Operator on a road crew, a lower, nonsupervisory position. CP 128.

Explaining his rationale for reinstating Mr. Muir to the non-supervisory position, the arbitrator wrote:

The Arbitrator has previously concluded that the County had just cause to initiate disciplinary action against Muir based on his unacceptable attitude towards his co-workers and management. . . . In determining the appropriate remedy to be ordered in this case, the Arbitrator concludes that Muir should be reinstated as an employee of the County but not to his former position as Supervisor for the San Juan Island Road Crew. Instead, the Arbitrator shall order that Muir be reinstated to the position of equipment

operator on a road crew to be determined by the County.

CP 126-127.

The record before the Arbitrator, based on all three disciplinary actions, is replete with the efforts that County management has undertaken to deal with Muir's attitude and improve his effectiveness as a Supervisor. Although these efforts were commendable and undertaken in good faith, they were largely to no avail. During the time period covered by the three disciplinary actions, Muir demonstrated no willingness to acknowledge his deficiencies or to improve on his ability to work with his crew and management. . . . For whatever reasons, Muir demonstrated that at least during the time period covered by these disciplinary actions, he was not capable of serving in a supervisory position. Given the circumstances, neither Muir nor the County would benefit from a reinstatement of Muir to his former position of supervisor of the San Juan Island Road Crew.

CP 127-128.

. . . The Arbitrator concluded Muir's unacceptable attitude constituted just cause to take disciplinary action.

CP 129.

. . . Finally, the Arbitrator concluded the appropriate remedy was to reinstate Muir with the County as an Equipment Operator instead of a Supervisor, with back pay, seniority and benefits.

CP 130.

2. The Amended Opinion and Order.

After the Opinion and Order was issued and Mr. Muir returned to work as an equipment operator, the union and county could not reconcile

certain differences they had over the implementation and interpretation of the ruling. To resolve their differences they submitted four questions³ to the arbitrator. In response to those questions the arbitrator issued an Amended Opinion and Order on July 2, 2004, CP 134-144, in which he confirmed that it was his intention to demote Mr. Muir to the position of equipment operator and that the demotion constituted an “involuntary transfer.” CP 136-139. As he explained his answers to the questions posed to him:

First, the Arbitrator intended to reinstate Muir to the position of equipment operator. The Arbitrator recognized, as argued by the union, that this puts Muir at two levels lower than the position he held when the County terminated him.

CP 136.

. . . The Arbitrator has inherent authority to fashion an appropriate remedy, including a disciplinary demotion, particularly where, as here Muir was clearly unfit to be reinstated to his prior supervisory position. . . .

Furthermore, as the County points out, the parties' Agreement allows for involuntary transfers under Article III. Therefore, the Arbitrator has not exceeded his authority in implementing a remedy which essentially amounts to the disciplinary demotion.

CP 136-138.

1. It was the Arbitrator's intent to demote Doyle Muir from road maintenance supervisor to Equipment Operator.

³ Only the first two are germane to the issues on review.

2. Mr. Muir's back pay award shall be at the Supervisor's rate of pay for the September 5, 2003, to the date of his reinstatement as an Equipment Operator.

3. On the basis that Mr. Muir's reinstatement to the equipment operator position constituted an involuntary transfer, the 'redline' commencement date, pursuant to Article XIX, Section 3 of the Agreement, shall be effective from the date of Mr. Muir's reinstatement as an Equipment Operator.

CP 143.

B. The Collective Bargaining Agreement.

1. The "involuntary transfer" provision.

In the mid-1990s the union and county negotiated as part of the CBA the effect of an involuntary transfer. The provision, Article XIX.C., states:

An employee who is involuntarily transferred to a position in a lower classification shall be placed on the step on the new pay range equivalent to their rate of pay prior to transfer, if such step exists. If no such step exists, the employee shall be "red-lined" until the lower pay range catches up or until the expiration of twelve (12) months, whichever occurs first. This section shall not apply to reduction in force situations.

CP 52. The language has remained unchanged in the CBA. CP 171 (Eide Dep., 53:12-18)

There was no step on the pay range of an equipment operator equivalent to the pay Mr. Muir received when he was a supervisor. CP 153 (Muir Dep., 98:19-22; 99:1-8.) The union and the county agreed that

he would be “redlined” in accordance with the CBA and the arbitrator set the date “for commencing the one-year salary ‘redline’ provision” as May 10, 2004, the date that Mr. Muir was reinstated as an equipment operator. CP 139. For the first year that he worked as an equipment operator for the county, Mr. Muir continued to be paid at the supervisory wage rate. CP 147 (Muir Dep., 52:19-22).

2. When Mr. Muir's salary is reduced by the County at the end of the 12 month "redline" period he files a grievance.

On or about May 10, 2005, Mr. Muir’s salary was reduced in accordance with the arbitrator's ruling to the wage paid by the county to equipment operators. His new salary was two steps below his prior pay. CP 147 (Muir Dep., 53:2-3). He promptly filed a grievance against the county over his reduction in pay. CP 147 (Muir Dep., 50:14-17). To support his grievance and this lawsuit, Mr. Muir constructed an argument that he should not have suffered a pay reduction because, he contends, it is not clear when the "redline" period for salary freezes in cases of involuntary transfers ends, if indeed it ever does, and that the term “redlining” is ambiguous. CP 246-7. Mr. Muir’s pay grievance was denied at three successive steps of the collectively bargained grievance process.⁴

⁴ At first, the county refused to process Mr. Muir's grievance. CP 148-149 (Muir Dep., 57:23-59:12.) Based on the County's refusal to process the grievance, Council 2 filed an

C. Mr. Muir's request that his union pursue his pay grievance to arbitration is denied after reviews by both the union's general counsel and its President/Executive Director.

1. The request.

After the final administrative denial of his grievance, Mr. Muir asked the union to pursue the grievance to arbitration. CP 150 (Muir Dep., 75:14-24). A special meeting of the local executive board was called to review Mr. Muir's request. Mr. Muir was president of the local at the time. CP 150 (Muir Dep., 76:2-18). The executive board could not come to a conclusion about whether to support the request to go to arbitration and asked Vinnie O'Connor, the Council 2 staff representative, to take Mr. Muir's request to Audrey Eide, Council 2's general counsel, which he did. CP 150 (Muir Dep., 76:14-23); CP 167 (Eide Dep. 20:6-21:2).

2. The review by Ms. Eide.

In evaluating the merits of Mr. Muir's claim, Ms. Eide interviewed Mr. O'Connor and asked him to put together a file of relevant documents. She then reviewed the documents Mr. O'Connor subsequently provided, including the grievance, the denials of the grievance by the county, Arbitrator Lindauer's Opinion and Order and Amended Opinion and Order, and the relevant CBA provisions. She also discussed her thoughts

unfair labor practice charge (ULP) with the Public Employment Relations Commission. CP 224-5. The charge was dropped when the county agreed to process a new grievance filed by Mr. Muir. CP 149 (Muir Dep., 60:2-61:22.)

regarding Mr. Muir's grievance with David Kanigel, the union's staff attorney who represented it on behalf of Mr. Muir at the employment termination arbitration presided over by Eric Lindauer, CP 168-170 (Eide Dep., 22:4-19, 23:8-10, and 32:18-34:4); CP 212-216; CP 219-221.

Mr. Kanigel told Ms. Eide during their discussion that he agreed that the arbitrator's opinions and orders were sufficiently clear so as to make it highly unlikely that Mr. Muir's wage grievance would succeed at arbitration. CP 220.

Ms. Eide concluded that Mr. Muir's wage grievance was not well founded and would not likely succeed at arbitration. CP 214, 218. She based her conclusion on her

(a) understanding of the facts and issues underlying Mr. Muir's claims through discussions with Mr. O'Connor and a review of the documents he had provided to her;

(b) review of the language in the arbitrator's Opinion and Order, the Amended Opinion and Order and the CBA and her belief that the Arbitrator had issued a final and binding decision on the pay issue raised by Mr. Muir;

(c) understanding of the industry term "redlined," derived from years of practicing labor law and her judgment that Mr. Muir's interpretation of the term conflicted with its commonly accepted

meaning in the collective bargaining setting;

(d) understanding that Mr. Muir was placed in the closest pay range and step that existed for an equipment operator and her view that the County's reduction of his pay reflected a proper interpretation of the CBA;

(e) reliance on information from the County which indicated that the former employee whose situation Mr. Muir relied on for his "past practice" argument was "reclassified" when the landfill where he worked was closed; his reclassification did not relate to a disciplinary action, and he retired shortly after his 12 month redline term expired; and

(f) determination that even if the two situations (the reclassification and Mr. Muir's demotion) were similar, Mr. Muir's grievance would not likely prevail at arbitration on the basis of a "past practice" argument because of the legal standard required to prove a "past practice," CP 214-215.

Ms. Eide advised Mr. O'Connor and Chris Dugovich, the President and Executive Director of Council 2, that she did not recommend arbitration. Her memorandum dated August 22, 2006 stated in part:

The grievant was reinstated after an arbitration regarding his termination from a Foreman Position. He was reinstated to an Equipment Operator [Position] which was a lower pay range and step than his Foreman Position. Under Article XIX of the Contract he was redlined for twelve

months at his foreman's salary. His placement in the Equipment Operator Position was considered an involuntary transfer. He did not catch up in salary in twelve months – he was placed in the closest pay range and step of the Equipment Operator Position that existed compared to his previous Foreman Position.

The Employer did follow the language of the Arbitrator's decision and the contract in this case. One example of someone in a different situation (reclassification) which [sic] was treated differently does not establish a past practice of handling this situation otherwise. Based on an evaluation of the arbitrable merits of this case it appears more likely than not this case would not be successful at arbitration. Council 2 does not recommend arbitration. Please notify the grievant of this recommendation and their [sic] appeal rights.

CP 218 (underlining in original).

Mr. O'Connor notified Mr. Muir that the union had evaluated his request to arbitrate the grievance and that it was determined that it did "not have arbitral merit." CP 151 (Muir Dep. 80:8-18); CP 176. Mr. Muir then exercised his right to appeal Ms. Eide's recommendation to Mr. Dugovich who has been the president of Council 2 since 1989. CP 159-160 (Dugovich Dep., 5:25-6:1, 7:2-8); CP 151 (Muir Dep., 80:19-21); CP 178 (Muir Dep. Exh. 17).

3. Mr. Dugovich's review.

Mr. Dugovich heads a staff of forty employees in eight different offices serving approximately 220 locals and approximately 17,000 members located across the state. CP 161 (Dugovich Dep. 10:16-18), CP

163-164, (Dugovich Dep., 109:24-110:1). Mr. Muir offers no evidence that Mr. Dugovich followed something other than his usual procedure in deciding whether Council 2 should arbitrate his grievance. Mr. Dugovich met with Ms. Eide and discussed Mr. Muir's grievance with her. They discussed her interpretation of and she answered his specific questions about the arbitrator's decisions. CP 216. Mr. Dugovich decided Council 2 would not arbitrate Mr. Muir's wage grievance and notified him of his decision by letter dated October 16, 2006. CP 160 (Dugovich Dep., 9:15-23); CP 180. He based his decision largely on Ms. Eide's opinion. CP 162 (Dugovich Dep., 29:21-24). Mr. Dugovich wrote in his letter:

Your appeal of Council 2's recommendation not to arbitrate your wage rate grievance has been received. Your grievance has been reviewed.

Your wage rate has been determined by an Arbitrator's decision. That was as a result of an arbitrator reinstating you to a lower paid position in a decision on your termination grievance. The Arbitrator then clarified his decision at your request. An arbitrator's decision is final and binding. The Employer has followed the directives of the arbitrator and the language in your collective bargaining agreement in determining your wage rate.

Based on an evaluation of the arbitrable merits of your grievance it appears your grievance would not be successful at arbitration. Council 2 does hereby deny your appeal. Your grievance will not be arbitrated.

CP 180 (underlining in original).

There is no evidence that Mr. Dugovich did not believe what he wrote in the October 16, 2006 letter to Mr. Muir denying his appeal, CP 152 (Muir Dep., 83:13-84:18), nor that the union refused to arbitrate its grievance for any reason other than those described in Ms. Eide's August 22, 2006 memorandum. CP 155 (Muir Dep., 111:16-25; 112:1-4).

D. The Lawsuit and Motion for Summary Judgment.

On March 14, 2007, Mr. Muir filed this lawsuit in San Juan County Superior Court alleging that Council 2 breached its duty of fair representation for not pursuing his grievance to arbitration. CP 1-4. After the parties concluded substantial discovery Council 2 filed a motion for summary judgment, CP 6-28, which was argued before and decided by the Honorable Susan K. Cook, Skagit County Superior Court. Judge Cook denied the motion on August 25, 2008. CP 518-19 (The order is misdated as *July 25, 2008*).

V. ARGUMENT

A. STANDARD OF REVIEW.

Appellate courts review decisions on motions for summary judgment de novo. *Johnson v. King County*, 148 Wn. App. 220, 225, 198 P.3d 546 (Div. 1, 2009); *City of Oak Harbor v. St. Paul Mercury Ins. Co.*, 139 Wn. App. 68, 71, 159 P.3d 433 (Div. 1, 2007).

Rule 56(c) of the Civil Rules of Superior Court provides that summary judgment:

....shall be rendered forthwith when the pleadings, depositions, answer to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the defending party is entitled to a judgment as a matter of law.

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

The purpose of a CR 56 summary judgment is to “examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists. *Zobrist v. Culp*, 18 Wn. App. 622, 637, 570 P.2d 147 (1977). A material fact is one upon which the outcome of the litigation depends. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997); *Lipscomb v. Farmers Insurance Co. of Washington*, 142 Wn. App. 20, 27, 174 P.3d 1182 (Div. I, 2007). The facts and reasonable inferences from the facts are considered in a light most favorable to the non-moving party. *Hertog, supra; Lipscomb, supra*.

Unsupported arguments do not create a material issue of fact sufficient to withstand summary judgment. *Johnson v. Camp Auto, Inc.*, 148 Wn. App. 181, 185, 199 P.3d 491 (Div. 3, 2009). If the moving party

satisfies its burden to show that there is no genuine issue of material fact, the nonmoving party must present evidence that demonstrates that material facts are in dispute. *Ross v. Bennett*, 148 Wn. App. 40, 49, 203 P.3d 383 (Div. 1, 2008). Subjective intent as to the meaning of a contract provision is not admissible evidence. *Id.* at 48.

A breach of the duty of fair representation claim is frequently decided on summary judgment as the question presented to the court for resolution is whether the union's conduct was arbitrary, discriminatory or in bad faith as a matter of law. *Schmidtke v. Tacoma School Dist.*, 69 Wn. App. 174, 848 P.2d 203 (Div. 2, 1993); *Lindsey v. Municipality of Metropolitan Seattle*, 49 Wn. App. 145, 148, 741 P.2d 575 (Div.1, 1987); *rev. denied*, 109 Wn.2d 1016 (1987). ("The motion must be granted if reasonable persons cannot differ in concluding that the moving party is entitled to judgment.")

B. MR. MUIR WAS REQUIRED TO SHOW AND THE TRIAL COURT HAD TO FIND THAT THERE ARE MATERIAL FACTS IN DISPUTE WHETHER THE UNION'S CONDUCT WAS ARBITRARY, DISCRIMINATORY OR IN BAD FAITH.

The duty of fair representation is a judicial doctrine created by the courts in response to the power granted to unions as the exclusive representative of all employees in a bargaining unit and the occasional

abuses of that power. *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 365 (1983); 670 P.2d 246 (1983). It was first articulated by the U.S. Supreme Court in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944).

Initially, the National Labor Relations Board and the courts struggled with the nature of the test to be used to determine if a union's conduct breached the duty of fair representation. *See, e.g., Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); *Humphrey v. Moore*, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); *Miranda Fuel Co.*, 140 NLRB 181 (1962) *rev'd*, 326 F.2d 172 (2nd Cir., 1963). The Supreme Court clarified the standard in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), holding that a breach occurs when a union's conduct in its representation of a member is "arbitrary, discriminatory, or in bad faith." *Id.* at 177.

Since *Vaca*, a substantial number of U. S. Supreme Court and federal circuit court opinions have addressed the nature, quality and quantum of proof a plaintiff must provide to show that a union's conduct was in fact arbitrary, discriminatory or in bad faith.⁵ As will be shown

⁵ *E.g., Air Line Pilots v. O' Neill*, 499 U.S. 65, 111 S.Ct. 1127, 113 L.E.2d 51 (1991); *Stevens v. Moore Business Forms*, 18 F.3d 1443 (9th Cir., 1994); *Patterson v. Int. Broth. Of Teamsters*, 121 F.3d 1345 (9th Cir., 1997); *Johnson v. U.S. Postal Service.*, 756 F.2d 1461 (9th Cir., 1985); *Moore v. Bechtel Power Corp.*, 840 F.2d 634 (9th Cir., 1988); *Petersen v. Kennedy*, 771 F.2d 1244 (9th Cir., 1985), *cert. denied*, 475 U.S. 1122, 106

below, the courts, federal and state, have set a high bar for plaintiffs, one that Mr. Muir has not successfully vaulted.

C. **THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO ACKNOWLEDGE COUNCIL 2'S BROAD DISCRETION IN DETERMINING WHETHER MR. MUIR'S CASE SHOULD BE ARBITRATED AND INSTEAD SCRUTINIZED THE QUALITY OF COUNCIL 2'S DECISION.**

1. **The union's decision not to arbitrate Mr. Muir's wage claim was not arbitrary because it was a rational exercise of its judgment.**

In *Air Line Pilots Assn. v. O' Neill*, 499 U.S. 65, 111 S.Ct. 1127, 113 L.E.2d 51 (1991), a unanimous Supreme Court held that a union's conduct toward its member is "arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." *Id.* at 67, citing *Ford Motor Co., supra*. The Court, in reversing the Fifth Circuit, wrote that the lower court's holding "unduly constrains the wide range of reasonableness" within which a union may act without breaching its duty of fair representation. *Id.* at 79. The Court concluded that ALPA's decision-making process during contract negotiations was not "irrational simply because it turns out in retrospect to have been a bad settlement." *Id.*

S.Ct. 1642, 90 L.Ed.2d 187 (1986).

Washington courts refer to the extensive body of federal case law for guidance when presented with a claim for a breach of the duty of fair representation. *See Allen, supra* at 373-75; *Lindsey, supra*, at 148-49; *Womble v. Local Union 73, IBEW*, 64 Wn. App. 698,701-04, 826 P.2d 224 (Div. 3, 1992). *Lindsey* was the first Washington State case to specifically address what constitutes arbitrary, discriminatory, or bad faith conduct by a union when processing a union member's grievance against the employer. The plaintiff in *Lindsey* argued the union breached the duty of fair representation by failing to adequately investigate his grievance, by processing it arbitrarily and perfunctorily and that the union "showed bad faith in its dealings" with him. *Lindsey*, at 149. Mr. Muir's claims are quite similar.⁶

The court in *Lindsey* used a two step test to determine whether the refusal to arbitrate Mr. Lindsey's grievance was "arbitrary". The first inquiry was whether the union failed to perform some procedural or ministerial act that required **no** exercise of judgment. *Lindsey*, at 151-52. The court held that the union's decision not to pursue Mr. Lindsey's

⁶ Mr. Muir's claims can be summarized as follows: 1) the union characterized a former employee's "involuntary transfer" as a reclassification in an "apparent attempt to justify" its refusal to arbitrate plaintiff's grievance. Complaint ¶2.11; and 2) the union's refusal to arbitrate his grievance "was premised on a discriminatory, dishonest, arbitrary or perfunctory investigation and analysis"... because a) neither Ms. Eide nor Mr. Dugovich met with him; (b) the union did not interview the former employee or his coworkers; and (c) the union agreed with the County. *Id.*, ¶ 2.13; Muir Dep. 111: 2-10, 112:9-25.

grievance was not “a procedural or ministerial act, but rather required the exercise of judgment.” *Id.*, at 152. This holding is consistent with the Ninth Circuit’s standard that:

A union’s decision to arbitrate a grievance based on its merits or lack thereof is considered an exercise of the union’s judgment.

Peterson v. Kennedy, 771 F.2d at 1254. A decision on whether to take a grievance to arbitration based on its merits involves the exercise of judgment. Here, Council 2 considered the merits and exercised its judgment with respect to Mr. Muir’s grievance. *See* Statement of the Case, *supra* at 8-12.

Turning to the second step of the inquiry employed in *Lindsey*, the court must consider whether the union “can supply a rational basis for its decision.” *Lindsey, supra* at 152-53; see also, *Schmidkte, supra* at 181.

Ms. Eide’s memorandum to Mr. Dugovich and the latter’s letter to Mr. Muir notifying him of the decision not to arbitrate his wage grievance are ample evidence to establish that the union’s reasons for refusing to arbitrate Mr. Muir’s grievance were rational. Importantly, for summary judgment purposes, the contents and intent of these letters stand unchallenged.

In his deposition, Mr. Muir complained that the union’s decision not to pursue his grievance was arbitrary because its president and general

counsel did not meet with him and the union did not interview certain witnesses:

- Q. [By Mr. Rosen] What evidence do you have that the union acted in an arbitrary manner by refusing to submit your grievance to arbitration and represent you?
- A. Chris Dugovich and Audrey not once sat down and had a conversation with me, even for me to present my case to them on why I think it was winnable. They didn't do any interviews. They did no investigation whatsoever.
- Q. And what's your evidence that they didn't do any investigation whatsoever?
- A. They never called Jerry Brown. I talked to Jerry Brown after I received Chris's letter. No one informed him or talked to him one bit. No one talked to the employees that used to work with Jerry Brown.

CP 155 (Muir Dep. 112:11-24).

However, a union need not obtain explanations from every grievant or even every discharged employee in order to satisfy its duty of fair representation. *Evangelista v. Inlandboatmen's Union of Pacific*, 777 F.2d 1390, 1395 (9th Cir., 1985); *Tenorio v. NLRB*, 680 F.2d 598, 602-03 (9th Cir., 1982). "So long as [the union's] interpretation of the collective bargaining agreement was reasonable and was not made in reckless disregard of [the grievant's] rights, we will not second guess the [union's] decision not to arbitrate [the] grievance." *Evangelista, supra* at 1396 (citations omitted).

In the instant case, Ms. Eide, the union's general counsel, collected substantial information before determining that Mr. Muir's grievance should not be arbitrated. Mr. O'Connor had spoken with Mr. Muir about his grievance and told him that he did not think his grievance would succeed. CP 151 (Muir Dep., 80:8-18). Mr. Kanigel was familiar with the previous arbitration awards and the wage grievance and also expressed his opinion to Ms. Eide that "it was highly unlikely that the union would prevail if it arbitrated Mr. Muir's grievance." CP 220. The courts have regularly recognized that it is senseless to require further investigation when it will not result in the development of additional evidence which would change the union's decision. *Johnson v. U.S. Postal Service*, 756 F.2d at 1466; *Evangelista*, 777 F.2d at 1395-96.

The court in *Lindsey* rejected the plaintiff's claim that the union's investigation was insufficient, stating:

a union satisfies its duty of fair representation if it conducts at least a minimal investigation into the merits of the grievance.

Lindsey, supra at 150. Quoting the Ninth Circuit, the court described the standard that is employed when considering a claim that the union's review was arbitrary because it was insufficient:

A union's duty requires some minimal investigation of employee grievances, the thoroughness depending on the particular case; only an *egregious disregard* for union

members' rights constitutes a breach of the union's duty.

Id. (emphasis added) (citations omitted). The fact that the union did not interview Mr. Brown (the former employee who was reclassified) or his coworkers and neither the union president or general counsel sat down with Mr. Muir to discuss his claim does not meet the *Lindsey* standard of an "egregious disregard" of plaintiff's rights, especially when viewed as part of the totality of the circumstances, especially Arbitrator Lindauer's detailed explanation of his decision to order the return of Mr. Muir to work but in a lower, non-supervisory position. *See* Statement of the Case, *supra*, pp. 3-6.

Ninth Circuit law has not changed since *Lindsey* was decided. In *Slevira v. Western Sugar Co.*, 200 F.3d 1218 (9th Cir., 2000), the Ninth Circuit reaffirmed the two step process adopted in *Lindsey*.

In determining whether a union handled a grievance arbitrarily by failing to consider a presumably meritorious grievance, we consider whether the union: (1) has deliberated the alleged meritorious argument, and (2) can provide an explanation for its decision not to pursue the argument.

In addition, in accordance with the broad discretion traditionally owed to unions, we do not scrutinize the quality of the union's decision.

Id. at 1221.

Council 2's collection of information, its review of pertinent

documents and its analysis of the merits of Mr. Muir's wage grievance place the union well above the threshold of "some minimal investigation." Its actions compare favorably with investigations that the Ninth Circuit has found adequate. *See, e.g., Stevens*, 18 F.3d at 1446-48; (union president relied on knowledge of result of similar claim in the past); *Eichelberger v. NLRB*, 765 F.2d 851, 857 n. 10 (9th Cir.1985) (fact that union president read grievant's letter several times before reaching conclusion was sufficient).

Finally, a union's decision on how to handle a grievance is entitled to "substantial deference" by the court. *Lindsey*, 49 Wn. App. at 153; *Schmidtke*, 69 Wn. App. at 181. As far as can be determined, the Ninth Circuit's observation in 1985 in *Peterson v. Kennedy* that it has "never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance" is still true today. *See Peterson*, 771 F.2d at 1254. The same can be said for Washington courts.

In her oral ruling, the trial court stated "I cannot, for the life of me, understand why the union wouldn't want a clear determination of what this clause [the "redlining" language] means and what's supposed to happen

after twelve months." RP 29.⁷ However, as the *Lindsey* court made very clear,

The union might very well wish to challenge this language, but its choice not to do so does not violate the duty of fair representation when the grievance is not particularly well suited for being the union's test case. The union's decision as to when to challenge contract language is exactly the type of decision to which we should accord deference, because its very nature entails a weighing of the individual grievance issues against those of the rest of its members.

Lindsey at 153.

The trial court concluded that "It's certainly arguable that Mr. Muir's take on the clause is at least a reasonable one and that *the 'can't win the case'* is no longer, at least for summary judgment purposes, a rational basis for deciding not to take the case to arbitration." RP 29. However, the court is basing her decision on allegations that do not exist, let alone appear in the record.

There is absolutely no evidence that any union official with any decision making authority or decision influencing authority said that the grievance "can't" be won at arbitration. In Ms. Eide's memorandum recommending to Mr. Dugovich that the grievance should not be pursued to arbitration she stated "based on an evaluation of the arbitral merits of this case it appears *more likely than not this case would not be successful*

⁷ The references to the Verbatim Report of Proceedings will be abbreviated as "RP ___."

at arbitration.” CP 218 (emphasis added).

In her declaration supporting the motion for summary judgment, Ms. Eide stated:

My review of the understanding of the documents and the facts and my discussions with Mr. O'Connor [the union's business agent assigned to the San Juan County employees] led me to conclude that plaintiff's grievance was not well founded and *would be highly unlikely to succeed at arbitration.*

CP 214 (emphasis added). Similarly, David Kanigel, the Council 2 attorney who represented Mr. Muir at the successful arbitration overturning his termination stated:

I told her [Ms. Eide] that I believed that the arbitrator's ruling was clear, that he intended for Mr. Muir to be demoted, and that after the redlining period expired there was to be a reduction in his wage from the supervisory rate to the equipment operator rate. I told Ms. Eide that I thought that *it was highly unlikely that the union would prevail if it arbitrated Mr. Muir's grievance.*

CP 220 (emphasis added). Finally, Mr. Dugovich wrote to Mr. Muir that “*it appears that your grievance would not be successful at arbitration.*”

CP 180 (emphasis added).

There is no support in the record for the lower court's finding that the union said that Mr. Muir "can't win the case." However, even if there is support in the record for the court to have made such a finding, given the factual landscape, the opinions and orders of arbitrator Lindauer make

it clear that Mr. Muir was to be demoted. Demoting someone to a lower level at work while allowing him to enjoy their salary in the position he was deemed not suitable to hold simply makes no sense.

The union made a well reasoned decision not to pursue a grievance which it believed had little, if any, chance of success based on its analyses of the CBA, the arbitrator's rulings, the facts it had obtained, and the applicable law. A union owes a duty to all members of a bargaining unit to use its best judgment when spending the dues of its members, "therefore 'the union has the affirmative duty not to press grievances which the union believes, in good faith, do not warrant such action.'" *Cross v. United Auto Workers, Local 1762*, 450 F.3d 844, 847 (8th Cir. 2006), citing *Sanders v. Youthcraft Coats & Suits, Inc.*, 700 F. 2d 1226, 1229 (8th Cir. 1983). A union needs to balance the collective and individual interests of its members. *Lindsey*, 49 Wn. App. at 152; *See also, Spietz v. Kaiser Aluminum and Chemical Corp.*, 672 F. Supp. 1368, 1372 (W.D. Wash. 1987) ("non-action alone 'will not be considered to be arbitrary, irrelevant, invidious, or unfair so as to constitute a breach of the duty of fair representation violative of the Act. Something more is required.'")

Mr. Muir has no grounds upon which to base his contention that the union's reasoned decision was "irrational." The legal principles

developed by the courts lead to only one conclusion: Council 2's decision not to pursue plaintiff's grievance was not arbitrary as a matter of law.

2. The union did not discriminate against Mr. Muir.

Mr. Muir claims that the union acted in a discriminatory manner because it represented Jerry Brown to make sure he kept his wage after he was "involuntarily transferred:"

Q. [By Mr. Rosen] So, just so that I'm clear, the evidence you have that the union acted in a discriminatory manner towards you is the Jerry Brown situation.

A. Yeah. They treated me completely different.

CP 154 (Muir Dep., 108:13-16).

The focus in considering a claim of discriminatory conduct by the union is on the subjective motivation of the union officials. In order to prevail, Mr. Muir must show that the union officials were motivated by a desire to discriminate against him in particular; that they "singled" him out for discrimination. *Lindsey*, 49 Wn. App. at 153-54. The standard for a showing of discrimination is high. *Patterson*, 121 F.3d at 134. Here, Mr. Muir acknowledges that the union did not consider his and Mr. Brown's situations to be similar.

Q. [By Mr. Rosen] Okay. Do you have evidence that the union officials who made the decision not to take your most recent grievance over pay to arbitration thought that the Jerry Brown situation and your situation were the same?

- A. I don't think they thought they were the same at all. We both fell under the same category in the contract though.
- Q. I mean, you acknowledge that you were demoted as a result of a discipline, whereas Mr. Brown was not, correct?
- A. Yes.

CP 154 (Muir Dep. 109:11-22).

There is no evidence that the union singled out Mr. Muir. The union followed its usual procedures in evaluating Mr. Muir's grievance. There is no evidence of any personal or professional animosity toward Mr. Muir by the union nor is Mr. Muir aware of any reason for the union to refuse to arbitrate his grievance other than those described by Ms. Eide in her memorandum to Mr. Dugovich. CP 155 (Muir Dep., 111:16-25; 112:1-4). These admissions preponderate over any unsubstantiated assertion that the union was motivated by a discriminatory animus against Mr. Muir.

3. **The union exercised good faith in making its decision whether to arbitrate Mr. Muir's grievance.**

Mr. Muir's bad faith allegation can be boiled down to his frustration that the union didn't agree with him:

- Q. [By Mr. Rosen] What evidence do you have that the union was dishonest in refusing to represent you and submit your grievance to arbitration?
- A. Dishonest, okay. Actually some of the letters that they wrote. I mean, it really made no sense. They just wrote exactly what the County wrote.
- Q. Do you have any evidence that they did not believe

what they wrote?

A. No.

CP 155 (Muir Dep. 111: 2-10).⁸

A union has no obligation to agree with a union member when it believes that the member is in error. In *Moore v. Bechtel Power Corp.* the Ninth Circuit declared:

To agree with [the employer's] interpretation of the Agreement does not indicate bad faith. Nor does a disagreement between a union and an employee over a grievance, standing alone, constitute evidence of bad faith, even when the employee's grievance is meritorious.

840 F.2d 634, 637 (9th Cir., 1985), citing *Vaca v. Sipes*. In *Patterson*, 121 F.3d at 1351-52, the Ninth Circuit found that a statement purportedly made by a local union official, as recorded in the employer's notes of a meeting just prior to arbitration -- "you've got to win. He might leave the state. That's the only way I can get rid of him." -- was not evidence of bad faith. *Patterson v. International Brotherhood of Teamsters*, 121 F.3d 1345, 1349 (9th Cir., 1997). In *Schmidtke*, "a single sarcastic letter" was insufficient to show that the union acted in bad faith. 69 Wn. App. at 181. In *Lindsey*, telling plaintiff there was no appeal procedure and failing to advise him of certain accusations and inconsistencies in the testimony of

⁸In order to prevail on a claim for breach of the duty of fair representation, Mr. Muir must also prove that the County's reduction of his pay violated the CBA. *Womble* at 703. Neither claim may survive if the other fails. However, it is not necessary for the court to reach this issue in order to find summary judgment for the union.

union officers was not evidence of bad faith. 49 Wn. App. 153-54.

As a matter of law, no reasonable person could find that the union acted in bad faith when it decided not to arbitrate Mr. Muir's grievance.

VI. CONCLUSION

Mr. Muir claims that even though Arbitrator Lindauer ruled that he should be demoted from his supervisory position, he should be allowed to continue to receive supervisory pay. That the union determined, after a review of the circumstances by its president and general counsel, to reject Mr. Muir's arguments and not pursue his pay grievance to arbitration is neither arbitrary, discriminatory nor in bad faith. The union does not have to prove that it would have lost the grievance in order to prevail on summary judgment. Neither does it have to show that Mr. Muir's interpretation of the involuntary transfer provision is wrong. All it must do is show that its decision was rational. It has done so and is entitled to judgment as a matter of law. The trial court erred when she went beyond the clearly articulated test for determining whether the union breached its summary judgment and scrutinized the quality of the union's decisionmaking process.

It is respectfully requested that the court grant its petition for review, reverse the trial court's denial of summary judgment, and remand

this matter to the trial court with instructions to grant summary judgment
in favor of Council 2 dismissing Mr. Muir's lawsuit.

Submitted this 4th day of June, 2009.

THE ROSEN LAW FIRM

By:

A handwritten signature in black ink, appearing to read "Jon Howard Rosen", written over a horizontal line.

Jon Howard Rosen, WSBA #7543
Attorney for Defendant/Petitioner

NO. 62380-0-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

DOYLE MUIR,

Plaintiff/Respondent,

v.

COUNCIL 2 WASHINGTON STATE COUNCIL
OF COUNTY & CITY EMPLOYEES and LOCAL
1849, AFSME, AFL-CIO,

Defendant/Petitioner

DECLARATION OF SERVICE

San Juan County Superior Court Case No. 07-2-05041-9

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STATE OF WASHINGTON
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The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

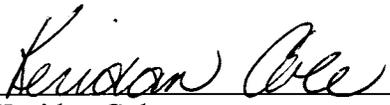
On this date I caused to be served in the manner noted below a copy of:

- PETITIONER'S OPENING BRIEF

Attorney for Plaintiff/Respondent (via facsimile and ABC Legal Messengers)
Richard J. Hughes
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Mount Vernon, WA 98273

The original and one copy were filed with the Court of Appeals, Division I.

DATED at Seattle, Washington this 4th day of June, 2009.


Keridan Cole