

WASHINGTON COURT CASES

2007..... 2

WASHINGTON COURT OF APPEALS EXPLAINS RULES OF CONTRACT INTERPRETATION..... 2

2006..... 4

WASHINGTON COURT DENIES MOTION TO COMPEL ARBITRATION OF REDUCTION IN HEALTH INSURANCE BENEFITS: GRIEVANCE AROSE AFTER CONTRACT EXPIRED 4

YAKIMA COUNTY MUST ARBITRATE TERMINATION OF DEPUTY BECAUSE SHE WAS NOT “FIT FOR DUTY” 4

2005..... 5

OFFENSIVE E-MAILS HELP CREATE HOSTILE WORK ENVIRONMENT 5

2007

WASHINGTON COURT OF APPEALS EXPLAINS RULES OF CONTRACT INTERPRETATION

The Washington Court of Appeals (Division Two) recently stated that the following principles must be followed when interpreting a collective bargaining agreement:

- 1) The intent of the parties controls
- 2) Intent is ascertained by reading the contract as a whole
- 3) A court will not read ambiguity into a contract
- 4) Words and provisions in a contract are given their ordinary meaning (if their meaning is uncertain or if they are capable of more than one meaning, they are considered ambiguous—but words and provisions are not rendered ambiguous simply because a party suggests an opposing meaning)

The parties' intent is determined by

- 1) The language of the contract provision at issue
- 2) The language of the contract as a whole
- 3) The contract's subject matter and objective
- 4) The circumstances of the contract's making (bargaining history)
- 5) The subsequent acts and conduct of the parties (past practice)
- 6) The reasonableness of the parties' interpretations

Applying these principles, the Court ruled that employees of the Washington State Ferry system should have been paid for watch changes (15 unpaid minutes per shift in which off-going employees passed on information to their relief) under the unambiguous terms of their collective bargaining agreement. However, the Court also ruled that because the employees failed to file a grievance seeking compensation, their claim under Washington law was barred. *Davis v. Department of Transportation*, 138 Wn.App. 811 (2007).

Editorial Comment: Pretty basic statement of contract interpretation rules long recognized by Washington courts, but the Court of Appeals put them all together very nicely. Under Washington law, CBA's are interpreted under the same principles as other contracts.

WASHINGTON ARBITRATION AWARD VACATED: REINSTATEMENT OF DEPUTY VIOLATES PUBLIC POLICY

Kitsap County Deputy Brian LaFrance was fired for “misrepresentation” and “lack of candor” and no less than 22 additional policy violations (including failure to document cases, failure to follow orders to turn in materials, mishandling evidence, and so forth). The Guild grieved his termination.

Arbitrator David Gaba applied Carroll Daugherty's seven tests of just cause. The Arbitrator found that the County met the first six tests by clear and convincing evidence, but concluded that the penalty of termination was too harsh. He reduced the termination to three "Final Written Warnings" for untruthfulness, incompetent performance, and failure to follow rules and directives.

When the County refused to implement the arbitrator's award, the Kitsap County Deputy Sheriff's Guild sued for enforcement. The Superior Court denied the County's motion to review and vacate Arbitrator Gaba's award reinstating Deputy LaFrance.

On appeal, the Washington Court of Appeals vacated the arbitration award. The Court of Appeals recognized that Washington law "strongly favors finality of arbitration awards." However, the courts cannot enforce a collective bargaining agreement that is contrary to public policy. An arbitration award interpreting a CBA will not be enforced if it is contrary to public policy.

The Court of Appeals concluded that reinstatement of a deputy who was found to be untruthful violated several public policies including RCW 36.28.010 (requiring sheriffs deputies to make arrests, execute court and judicial orders, etc.) The Court declared the deputy's "proven record of dishonesty prevents him from useful service as a law enforcement officer. To require his reinstatement to a position of great public trust in which he cannot possibly serve violates public policy."

Kitsap County Deputy Sheriff's Guild et al. v. Kitsap County et al. (Court of Appeals Division II 2007) (unpublished opinion).

Editorial Comment: This decision will heighten the interest of Washington law enforcement agencies in raising Brady issues that arise in internal affairs investigations.

George Merker, the Guild's attorney, states that the Court of Appeals is considering a motion for reconsideration. If the decision stands, an appeal to the Washington Supreme Court is likely. The opinion was issued as an unpublished opinion which, under Washington Rules of Appellate Procedure, cannot be cited in future cases. However, interested parties have filed motions to have the opinion published. Published or unpublished, this decision shows that the Brady argument will continue to be a substantial issue in Washington labor relations.

2006

**WASHINGTON COURT DENIES MOTION TO COMPEL ARBITRATION OF
REDUCTION IN HEALTH INSURANCE BENEFITS: GRIEVANCE AROSE AFTER
CONTRACT EXPIRED**

A Washington Court of Appeals recently affirmed the Superior Court's denial of a fire fighters' union's motion to compel arbitration of a grievance challenging a reduction in insurance benefits. The union's collective bargaining agreement expired at the end of 2003. In late 2004 one of the health insurance plans available under the CBA was discontinued. The fire district refused to arbitrate a grievance challenging this reduction in benefits. The fire fighters union filed suit to compel arbitration. The Superior Court granted the district's motion to dismiss the lawsuit and the Court of Appeals upheld the dismissal.

Generally under RCW 41.56 terms of a CBA concerning mandatory subjects of bargaining must be maintained after the expiration of the CBA during the pendency of interest arbitration proceedings. The Court cited PERC decisions concluding that although a grievance procedure is a mandatory subject of bargaining under Washington law, it is "a different type of mandatory subject than are wages, hours and working conditions." Binding arbitration under a grievance procedure expires when the CBA expires: only grievances that arose while the contract was in effect may be arbitrated under the grievance procedure. Since the grievance at issue in this dispute arose nearly one year after the CBA expired when the health insurance plan was discontinued, the Court refused to order the district to submit the dispute to arbitration. *Maple Valley Professional Fire Fighters v. King County Fire Protection District No. 43*, 135 Wn. App. 749 (2006).

Editorial Comment: Clearly, if the reduction in insurance benefits had occurred prior to the expiration of the CBA at the end of 2003, the Court would have ordered the district to submit the dispute to arbitration. In this case, the fire fighters' union would have had a potential remedy by filing an unfair labor practices charge under RCW 41.56 with the PERC.

**YAKIMA COUNTY MUST ARBITRATE TERMINATION OF DEPUTY
BECAUSE SHE WAS NOT "FIT FOR DUTY"**

The Washington Court of Appeals, Division Three, recently held that where a Yakima County Deputy Sheriff was discharged because she was "not fit for duty" the County must nevertheless submit a grievance concerning her discharge to arbitration pursuant to the provisions of its Collective Bargaining Agreement. The deputy was discharged while a disciplinary investigation was pending against her. She was required to undergo a fitness for duty examination by a psychologist. Although the psychologist initially was undecided about her fitness for duty, after reviewing an internal file, and ongoing

investigation reports supplied by the Sheriff, the psychologist concluded that the deputy was not fit for duty. The Sheriff then terminated the deputy's employment. When the Yakima County Law Enforcement Officer's Guild grieved the deputy's termination, the Sheriff took the position that the grievance was not subject to arbitration and refused to proceed. The Guild sued the County in Benton County Superior Court to compel arbitration.

The Court of Appeals concluded that since the arbitrability of labor disputes under Washington law is controlled by the "Steelworkers Trilogy" doubts regarding the arbitrability of a dispute must be resolved in favor of arbitration. Although the contract included language stating that suspensions, demotions and discharge "shall be reviewed by the Yakima County Civil Service Commission" the Court found that Arbitration was required.

Editorial Comment: This decision demonstrates that under Washington law, a public employer cannot circumvent the just cause requirements of a contract by arguing that a public employee has been dismissed, not for discipline, but because the employee is not fit for duty.

2005

OFFENSIVE E-MAILS HELP CREATE HOSTILE WORK ENVIRONMENT

The Washington Court of Appeals reinstated a hostile work environment claim filed by a female employee of Eastern Washington University. Ms. Campbell worked as a secretary in the Military Science Department of EWU. Her supervisors made remarks such as "women should stay home and make babies" and "women are useless." When Campbell complained about work study students taking materials from her desk, she was informed that her "desk will be raped on a daily basis." The supervisor added that women should not work, men are the leaders of the family, and women should obey them.

Ms. Campbell also received several offensive e-mails. One was titled "Don't Bother Me Button." A video attachment showed a log swinging violently from one side of the screen directly into a woman and "forcibly removing her." Another titled "Men and Women Switchboard" implied that women were impossible to figure out.

The Superior Court dismissed all claims brought by Campbell. On appeal, the Court of Appeals reinstated her hostile work environment claim. The Court declared that to establish this claim Campbell would have to prove that (1) the harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected conditions of employment and (4) was attributable to the employer. The Court found that based on the emails and other evidence of discrimination, she might be able to prove her claim at trial. *Campbell v. State*, 129 Wn. App. 10 (2005).

Editorial Comment: E-mails, like diamonds, are forever. They make great evidence. Under Washington law they are public records. Under most employer's policies, they can be monitored by the employer and used to support discipline. They certainly can be obtained in discovery in a civil lawsuit. The lessons to be learned from this case are clear.