IN ARBITRATION BEFORE
ARBITRATOR ANTHONY D. VIVENZIO

TEAMSTERS LOCAL UNION NO. 117, Union, v. DEPARTMENT OF CORRECTIONS, STATE OF WASHINGTON, Employer. (Grievance No. 149-10, Bargaining Unit: Employer Implemented Furloughs)	FMCS Case No. 100818-04604-8

UNION'S OPPOSITION TO RESPONDENT'S MOTION FOR CLARIFICATION OF ARBITRATOR'S OPINION AND AWARD

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INTRODUCTION

Teamsters Local Union No. 117 ("Local 117," "Teamsters," or "Union"), by and through its attorneys, Robert H. Lavitt and Spencer Nathan Thal, hereby replies to the Washington State Department of Corrections' ("State," or Employer") Motion to Clarify Arbitrator Anthony D. Vivenzio's Opinion and Award ("Award") of May 5, 2011.

The State's Motion to Clarify ("Motion") essentially requests that the Arbitrator abandon the clear, self-executing terms of his Award, and instead embrace an alternative remedy that the State prefers. The Motion advances an entirely new theory based on facts and arguments that were never presented during the parties' Arbitration. In the face of an Award that the State finds unfavorable, it now pleads for reconsideration. Such reconsideration of the merits of the Award is well beyond the Arbitrator's authority. The State's Motion is therefore an improper attempt to avoid liability for the hundreds of Local 117-represented employees who lost wages and benefits when the State's Department of Corrections ("DOC") unilaterally imposed layoffs in violation of the State's collective bargaining agreement ("CBA") with Local 117.

While the Arbitrator's Award is clear and self-executing, the Union requests that the Arbitrator further clarify the Award by reaffirming its definite terms. The Arbitrator properly maintains jurisdiction to clarify remedial questions in this case and these clarifications are not barred by the doctrine of *functus officio.* The Arbitrator may clarify his Award by affirming that he intended the Respondent to pay damages, including but not limited to lost wages and interest to *all* Local 117 represented employees who DOC laid off in violation of the State's CBA with Local 117. He may further clarify the Award by specifying the economic losses, in addition to lost wages and interest, that he intended the remedy to include.

FACTUAL BACKGROUND

The State and Local 117 are parties to a CBA that governs working conditions of 5,800 DOC employees. *Award,* 2-3. In 2010, the State Legislature implemented a number of cost-saving measures designed to reduce funding used for state employee compensation. *Id.* at 4. On June 2, 2010, the Director of Office of Financial Management notified the Teamsters' Secretary-Treasurer that DOC would implement a layoff system that would affect all DOC employees not exempted by Engrossed Substitute Senate Bill ("6503"). *Id.*

In response to these proposed layoffs, Local 117 filed a bargaining unit-wide grievance on June 22, 2010, before the first round of temporary layoffs was scheduled to occur. The grievance alleged that DOC's plan violated the parties' CBA by reducing the hours of all employees in the affected classifications without regard to seniority. *Id.* at 9. Specifically the Union alleged violations of several CBA Articles, including Articles 16 (hours of work), 26 (leave without pay), and 35 (layoff and recall). *Id.* at 13. The Union calculated that DOC's layoffs would result in a 3.84% pay cut for approximately 800 union-represented employees. *Id.*

An arbitration hearing was held before this Arbitrator in Tacoma, Washington on February 11, 2011. *Id.* at 3. At the parties request, the Arbitrator formulated the issues for arbitration as: "[d]id the employer violate the Collective Bargaining Agreement between the Parties when it directed certain bargaining unit employees not to report for work on certain specified unpaid days in 2010 and 2011, and if so, what is the remedy?" *Id.* at 5.

During the hearing, both Parties had the full opportunity to present evidence, examine and cross-examine witnesses, and make oral arguments. *Id.* The evidentiary record was closed on February 11, 2011, and the parties filed post-hearing briefs which were timely received by the

Arbitrator. *Id.* at 13. Therefore, the full record of the arbitration proceeding was closed and the matter submitted for final and binding decision on March 29, 2011.

The State did not raise any issue or present any evidence regarding harm suffered by Local 117-represented employees, nor did it present evidence related to a claim that its disregard of seniority in implementing the layoffs constituted a harmless error at any point during the proceedings. *DOC Post-Hearing Brief ("DOC Brief"),* 2-11.

Local 117 provided evidence to support its argument that Respondent's actions resulted in substantial economic harm for bargaining unit members, including a 3.84% pay cut for affected employees and specific evidence regarding the impact of these cuts on bargaining unit employees. *Award,* 13; *Union Post-Hearing Brief ("Union Brief"),* 7-8.

Critically, the parties did not dispute that DOC's layoffs affected approximately 800 Teamster represented employees, or that at the time of the hearing, DOC had already implemented six (6) of the ten (10) layoff days. *DOC Brief* at 3; *Union Brief* at 1, 6; *Award* at 4.

On May 5, 2011, Arbitrator Vivenzio issued his Award sustaining the Union's grievance based on his finding that the Respondent violated Articles 34.2, 35.4, and 35.5 of the parties' CBA when it implemented temporary layoffs under Article 35.4 without regard to seniority. *Id.* at 25-26. The Arbitrator concluded that DOC's action affected whole classifications of employees represented by the Union by denying these employees compensated work time. *Id.* Based on these findings and conclusions, the Arbitrator fashioned a remedy, specifically directing the Employer to make employees affected by its action whole for any economic losses resulting from the Employer's action, including, but not limited to, lost wages and interest there upon. *Id.* at 26. Instead of complying with this Award, on June 30, 2011, Respondent moved for reconsideration.

ARGUMENT

A. The Arbitrator Appropriately Retains Jurisdiction To Clarify His Award, But That Does Not Afford The Employer An Opportunity To Introduce A New Theory To Avoid Liability.

As a general rule, arbitrators may retain limited jurisdiction to resolve remedial questions after an award has issued to ensure that awards are properly carried out. See, e.g., *Young's Commercial Transfer,* 101 LA 993 (McCurdy, 1993) (arbitrator who retained jurisdiction to resolve disputes arising from the calculation of back pay subsequently interpreted the contract to require payment of pension contributions as part of backpay).

In this case, the Arbitrator has appropriately retained jurisdiction to resolve disputes regarding the remedy directed in his Award. *Award* at 26. Local 117 agrees that the Arbitrator should further clarify his Award to ensure the Employer's compliance with the full scope and intent of the remedy directed. Consideration of new evidence and arguments alleged in DOC's Motion, however, is beyond the scope of the Arbitrator's authority to clarify his Award.

1. The Doctrine Of *Functus Officio* Does Not Bar The Arbitrator From Specifying The Definite Terms Of His Award.

Under the common law doctrine of *functus officio,* an arbitrator may not redetermine an arbitration award. *McClatchey Newspapers v. Central Valley Typographical Union No. 46,* 686 F.2d 731, 733-34 (9th Cir.), *cert. denied,* 459 U.S. 1071 (1982). This is because re-examination of a final decision in light of external evidence might affect a new conclusion. *Id.* "It is a fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration because of the potential evil of outside communication and

unilateral influence which might affect a new conclusion." *Id.* (quoting *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967)).

While the doctrine of *functus officio* normally precludes an arbitrator from revisiting a well-executed and complete award, a party's request that an arbitrator further specify the definite terms of an award is a well-established exception to this doctrine. *Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Local 631 v. Silver State Disposal Service, Inc.* 109 F.3d 1409, 1411. (9th Cir. 1997). "It has been recognized in common law arbitration that an arbitrator can correct a mistake which is apparent on the face of his award, complete an arbitration if the award is not complete, and clarify an ambiguity in an award." *Id.* at n. 1 (citing *McClatchy,* 686 F.2d at 734).

The clarification-completeness exception to the doctrine of *functus officio* "applies when an arbitration award fails to resolve an issue or "specify the remedy in definite terms." *Silver State Disposal Service, Inc.*, 109 F.3d at 1411 (citing *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 279 (1st Cir.1983)). The clarification-ambiguity exception to the doctrine, in contrast, applies when an award seems complete but leaves doubt as to whether the award has been fully executed." *Id.* (citing, *La Vale Plaza,* 378F.2d at 573).

In this case, the Arbitrator's award is complete and fully executed because the Arbitrator fully resolved the issues presented for arbitration on the basis of the evidence presented in the arbitration proceedings. The Award is also clear and self-executing, because it directs DOC to make whole a specified group of employees by compensating them for a determinable amount of damages. However, because the State's motion reflects the Employer's desire to avoid liability for the economic harm it caused hundreds of Local 117-represented employees, the Union requests that the Arbitrator clarify his Award under the clarification-completeness exception to

the doctrine of *functus officio*. He may properly do this by reaffirming the definite terms of his Award.

2. The Arbitrator May Not Revise His Award In Light Of DOC's New Allegations Because The Arbitrator Is Limited To Clarifying The Award Based On The Issues Presented For Arbitration.

Arbitrators have broad authority to fashion appropriate remedies on a submitted issue but they have no authority to decide issues not submitted by the parties. *Hughes Aircraft Co. v. Electronic & Space Technicians Local 1553,* 822 F.2d 823, 125 LRRM 3243 (9th Cir. 1987) (citing *Wren v. Sletten Construction Co.,* 654 F.2d 529, 533 (9th Cir. 1981)). Although an arbitrator may retain jurisdiction to decide disputes arising in the administration of an award, that jurisdiction does not extend to deciding the merits of grievances not submitted to him for arbitration. *Hughes Aircraft Co.* 822 F.2d 823 (citing *Hanford Atomic Metal Trades Council, AFL-CIO v. General Electric Co.,* 353 F.2d 302, 307-08 (9th Cir. 1966)).

Clarification of an arbitrator's award is not proper where a party seeks reconsideration of the merits of an arbitrator's award, and clarification is not an opportunity to re-litigate damages. See, e.g. *Hanford Atomic Metal Trades Council,* 353 F.2d 302, (arbitrator's clarification was proper because it did not allow a party to re-litigate a damage action or modify an award, but simply provided additional clarification and interpretation of previously issued award). In this case, clarification of the terms of the existing award in light of the issues submitted to the arbitrator and the evidence presented in the arbitration proceedings is permissible. But the State may not re-litigate the merits of the Award, or the damages it provides as a remedy, by introducing new post-Award evidence.

3. The State May Not Use Clarification As An Opportunity To Re-litigate The Damages Award On The Basis Of New Evidence Not Submitted For Arbitration.

The State's Motion essentially requests that the Arbitrator abandon the clear, self-executing terms of his Award, and instead embrace an alternative remedy that DOC prefers. It does this by alleging a completely new theory of liability that is beyond the scope the arbitration, *see, Hanford Atomic Metal Trades, supra.* Although the State presented no evidence and raised no issue on the question of harm during the arbitration proceedings, it now seeks reconsideration of the merits of the Arbitrator's damages Award in light of new evidence that it developed in response to the Award. See *Motion.* This type of reconsideration is improper and beyond the scope of the issues presented for arbitration.

The Declaration of DOC Human Resources Manager Marcos Rodriguez, which accompanies the Motion, was prepared on June 28, 2011, nearly three months after the record of the arbitration proceeding was closed and the matter submitted for decision. *Award* at 13. The declaration summarizes a study that DOC conducted in response to Arbitrator Vivenzio's Award. *Motion* at 6. Mr. Rodriguez explains that after determining that DOC owed a total of $931,482, plus interest to Local 117-represented employees who were laid off in violation of the CBA, DOC asked him to determine what the layoffs would have looked like if DOC had conducted them based on seniority. *Motion* at 12.

Based on Mr. Rodriguez's comparative study, the State now argues that it is not liable for the damages that the Arbitrator directed it to pay. The Motion seeks reconsideration of the Award, asking the Arbitrator to treat the Department as if it had not violated the parties' CBA. It asks the Arbitrator to hypothesize as to what would have occurred if the State had not violated the contract by laying off employees out of seniority order. This is not appropriate because there

is no evidence in the record to support such an assumption or conclusion. It is simply not possible or appropriate for the Arbitrator to assume that, in an environment where the statutorily mandated furloughs were not available, the Employer would have laid off employees in seniority order. The Arbitrator cannot assume or validate an action that was not taken or litigated. The State then asks the Arbitrator to develop an imaginary, post-Award hypothesis that no Local 117-represented employees suffered economic losses. This hypothesis directly contradicts the Arbitrator's findings that DOC harmed Local 117-represented employees when it failed to provide them compensated work in violation of the CBA. If DOC wanted to advance its theory of harmless error, it should have (*and could have*) done so during the arbitration proceedings, allowing the issue to be fully examined and properly arbitrated.

B. The Arbitrator's Award Is Clear And Directs The Employer To Make Whole All Local 117 Employees Who Were Laid Off In Violation Of The CBA.

An Award that orders a remedy that is determinable within the scope of the issues and evidence properly presented for arbitration is considered fully executed and not ambiguous. *Silver State Disposal Service, Inc. supra* at 1411. The Award is unambiguous and fully executed because it directs the Employer to make whole employees laid off in violation of the parties' CBA, it specifies which employees are to be made whole, and it states that the make whole remedy includes lost wages and interest thereupon.

The plain language of the Award demonstrates that the Arbitrator intended the Employer to make whole *all* Local 117-represented employees who were laid off through the payment of lost wages and interest. Specifically, the Award directed the Employer to "make employees affected by its action whole for any economic losses resulting from the Employer's action, including, but not limited to, lost wages and interest thereupon." *Award* at 26. This statement is

not ambiguous in its scope or intent. It contains no exception for employees that would have or could have or might have been laid off under a hypothetical proposed system of layoff that was not implemented or litigated in this arbitration process.

The "action" to which the Award refers was the Employer's denial of "compensated work time" to "whole classifications" of Local 117-represented employees without regard to seniority. *Id.* at 25-26. The Arbitrator found that this action violated the parties' CBA and "affected" whole classifications of Local 117-represented employees. *Id.* The Award "directed" the Respondent to make these employees whole for "economic losses resulting from the Employer's action, including, but not limited to lost wages and interest thereupon." As demonstrated by the post-Award declaration, the Department is capable of determining who was laid off in violation of the CBA, and it is also able to calculate lost wages. Because the specific amount of damages owed to specific Local 117-represented employees is easily determined, the Award is fully executed and not ambiguous.

While it is true that arbitrators sometimes order parties to develop and propose their own remedial schemes, these types of awards are generally issued when an arbitrator lacks sufficient information to fully execute an award. See, e.g. *Lakawanna Leather,* 113 LA 603 (Pelofsky, 1999) (arbitrator, who lacked sufficient evidence to determine whether company violated a CBA, ordered the company to assess whether laid off employees were qualified to do the same work as the employees retained by the company, and compensate those found to be qualified).

Here the Arbitrator requested no additional information and did not authorize the Employer to fashion or propose its own remedy. Unlike the Award in *Lakawanna,* the Arbitrator's Award did not request that DOC conduct a study to determine which employees were affected by DOC's action. It did not authorize the Department to propose its own damages

remedy based on how it *would have* implemented the layoffs if it had initially considered the seniority provisions of the parties' CBA. This Arbitrator's Award, in short, did not leave the Employer a choice as to who would be compensated for what damages. Because the Award orders a remedy that is determinable within the scope of the issues and evidence properly presented for arbitration, the Arbitrator's award is fully executed and not ambiguous.

C. The Arbitrator Properly Awarded Interest Because It Is An Appropriate Component Of A Make Whole Remedy And The State Waived Its Immunity By Entering Into A CBA With Local 117 And Submitting To The Arbitrator's Authority To Fashion A Remedy.

As a matter of simple justice, workers who have been improperly denied wages are routinely granted interest on back pay, which is considered a necessary element in "make-whole" Awards. In this case, the Arbitrator appropriately granted interest on lost wages as a remedy for the economic harm suffered by DOC's denial of compensated work to hundreds of Local 117-represented employees. DOC may not avoid its obligation to pay by invoking sovereign immunity.

1. Interest Is A Necessary Element Of A Make Whole Remedy Absent Explicit Agreement To Limit The Arbitrator's Authority To Grant Interest On Lost Wages.

In the labor-management context, Arbitrators are granted broad authority to fashion remedies for contract violations. "In empowering the arbitrator to resolve their dispute, parties are generally considered to have given authority to grant adequate monetary relief for contract violations where the arbitrator finds that the grievance has merit, even though the contract does not specifically authorize this remedy." Elkouri & Elkouri, *How Arbitration Works,* (6th Ed. 2003), 1200. Parties may limit an arbitrator's authority to fashion remedies, either within the

dispute resolution provisions of a CBA, or within the context of a particular dispute resolution proceeding. See, e.g. *McHenry Cmty. High Sch. Dist. 156 Bd. Of Educ.,* 85 LA 976 (Craver, 1985) (the Arbitrator was limited by the parties to making a decision without providing a remedy and the remedy was stipulated by the parties.)

However, in cases where the parties authorize the arbitrator to determine an appropriate remedy in the event that a CBA violation is found, the Arbitrator's discretion in fashioning an appropriate remedy is recognized, even where a CBA is silent on the question of remedy. See, e.g. *Amana Refrigeration,* 86 LA 827 (Kulkis, 1986); *Robertshaw Controls Co.,* 85 LA 538 (Williams, 1985); *Gilmore Envelope Corp.,* 110 LA 1036, 1041 (Ross, 1998) ("[a]rbitrators have universally held that even though a contract is silent as to remedy, the arbitrator has the authority to fashion a remedy, including a monetary award, in order to make whole the party damaged by the violation.")

Courts recognize that the authority to grant an award of interest is "within the traditional inherent powers of an arbitrator to award in order to make an employee whose rights have been violated reasonably whole." *Falstaff Brewing Corp. v. Teamsters Local 153*, 479 F.Supp.850, 862, 103 LRRM 2008 (D.N.J. 1978). This is so even where a collective bargaining agreement is silent on the question of interest as a remedy. *Id.* Moreover, interest is often considered an important provision in "make whole remedies," see, e.g. *Atlantic Southeast Airlines,* 101 LA 515, 525-26 (Nolan, 1993) ("because of the time value of money, the awarding of interest was necessary to make a grievant whole."). See also, *Wackenhut Corporation,* 124 L.A. 1345 (Kravit 2008)(citing *Atlantic Southeast Airlines,* 101 LA 515 (1993)) (Interest "...is a matter of simple justice: getting a sum a year late does not make the recipient whole. Interest is the normal way to compensate the injured party for delayed payment... [it] is a necessary element of make-whole

relief.") Awards of interest have also been granted to prevent a party from unjust enrichment. See, *Sterling Colo. Beef Co.,* 86 LA 866 (Smith, 1986) (interest award to make grievant whole and prevent employer from being unjustly enriched).

In Washington, it is appropriate for arbitrators to include interest for lost wages and back pay in make whole remedies involving public employers. See, e.g. *City of Asotin,* Decision 1978 (PECB 1984); *Seattle Housing Authority*, 117 LA 1611, (Monat, 2002) (arbitrator ordered "[b]ack pay shall be with interest at the rate currently in use by the National Labor Relations Board.")

2. Prejudgment Interest Is Appropriate In This Case Because The Employer Improperly Denied Local 117-Represented Employees Compensated Work And The Damages Awarded Are Ascertainable.

The State's Motion misstates the controlling law governing prejudgment interest on Arbitrator's Awards. See *Motion* at 3. An Arbitrator has the discretion to award prejudgment interest in a grievance arbitration, because grievance arbitrations adjudicate existing rights of employees. See, *Yakama County v. Yakima County Law Enforcement Officers Guild*, 157 Wash.App. 304, 346, 237 P.3d 316 (2010). The application of prejudgment interest to any arbitration award is an issue for the arbitrator to determine on the merits, and thus is beyond the scope of judicial review. *Id.* at 338. Moreover, interest applies when the damages are liquidated *or* can be ascertained from an objective standard. *Bostain v. Food Express, Inc.,* 159 Wn.2d 700, 723, 153 P.3d 846 (2007). (Prejudgment interest applied because the court had been presented "objective evidence of the overtime due and the basis for their calculations.").

Prejudgment interest is applied "not only when one party has improperly used the funds, but also when one party is improperly deprived of those funds." *Forbes v. American Building Maintenance, Inc.,* 170 Wn.2d 157, 168, 240 P.3d 790, (2010). "Prejudgment interest is favored

in the law based on the premise that a person who retains money that should be paid to another should be charged interest on it." *Universal/Land Constr. Co. v. Spokane,* 49 Wn. App. 634, 641, 745 P.2d 53 (1987) (Citing *Prier v. Refrigeration Eng'g Co.,* 74 Wn.2d 25, 34, 442 P.2d 621 (1968)).

This rule applies with equal force even where one of the contracting parties is a state agency. *Pierce County v. State*, 144 Wn. App. 783, 857, 185 P.3d 594 (2008). In *Pierce County*, the Department of Health and Human Services violated its contractual duties and was ordered to pay interest as part of the remedy. The Court required the payment of interest and reasoned that the agency should not be allowed to benefit from its breach of contract: "[t]he Department wrongfully retained money that it should have paid to the County; the Department should pay the County interest" on that money. *Id.*

In this case, there is no question that the State improperly retained money to the detriment of Local 117-represented employees. The Arbitrator determined that the State violated the terms of its CBA with Local 117 by unilaterally imposing layoffs without regard to seniority. That action deprived compensated work time to hundreds of Local 117-represented DOC employees, causing substantial economic harm. Local 117 provided evidence of the type of economic harm suffered by its employees, explaining the reduction in work hours was enough to push many employees over the line into financial instability. *Union Brief,* 8.[1] Under Washington Law, DOC is required to compensate Local 117 represented employees for interest on lost wages improperly denied.

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[1] Local 117 cited several types of economic harm experienced by DOC employees, including, but not limited to the fact that many single-parents were required to pay the costs of day care even when forced to take leave without pay, some clerical personnel had to apply for food stamps as the result of the layoffs, and other Local 117 employees were unable to pay child support, or repair their cars. *Union Brief* at 8.

3. The Appropriate Rate Of Interest Should Be The Rate Applied By The Public Employment Relations Commission On Back Pay Remedies, Which Is The Statutory Rate Of Interest On Civil Judgments.

Because the amount of damages ordered by the Arbitrator in this case is determinable, interest should be calculated at the state rate for interest on civil judgments, which is the rate applied by the Washington Public Employment Relations Commission (PERC). See, e.g. *City of Mabton*, Decision 10323 (PECB 2009) ("Money amounts due shall be subject to interest at the rate which would accrue on a civil judgment of Washington state courts, from the date of the violation to the date of payment."); *Morton School District*, Decisions 5838 and 5839 (PECB 1997) (School District ordered to pay grievant back pay with interest, interest was to be computed in accordance with WAC 391-45-410.)

The rate used by Washington's public labor relations agency is applicable here because DOC is a state agency and the PERC is the state equivalent of the NLRB for the private sector; in private sector arbitration, the NLRB's interest rate is most often utilized. See, *Wackenhut Corporation,* 124 L.A. 1345 (Kravit 2008); *Atlantic Southeast Airlines,* 101 LA 515 (1993).

PERC requires that money amounts due "shall be subject to the interest at the rate which would accrue on a civil judgment in the Washington state courts, from the date of the violation to the date of the payment." WAC 391-45-410(3). According to the Revised Code of Washington (RCW), interest on civil judgments owed under the Award should be calculated at the maximum rate permitted under the law that governs interest on judgments. RCW 4.56.110(4), 19.52.020. Under the statute, interest should thus be paid at the rate of 12% per annum. RCW 19.52.020 (1).

4. The Arbitrator Appropriately Awarded Interest In This Case Because The State Waived Its Sovereign Immunity.

The State's allegation that the Arbitrator exceeded his remedial authority by requiring the Employer to pay interest on lost wages fails. The State waived its right to sovereign immunity when it entered its CBA with Local 117 and when it agreed to allow the Arbitrator to determine an appropriate remedy in the event that he found a CBA violation in the present arbitration.

State consent to liability for interest can be implied, and is not limited to the express statutory or contractual consent. *Architectural Woods, Inc., v. State*, 92 Wash.2d 521, 526, 598 P.2d 1372 (1979); *see also Pierce County, supra*, at 854-58. Under the rule in *Architectural Woods,* when a State agency enters into an authorized contract with a private party, the State, absent a contractual provision to the contrary waives its sovereign immunity in regard to the transaction and impliedly consents to the same responsibilities and liabilities as the private party, including liability for interest. *Id.*

In *Architectural Woods* the Court determined that the State waived its immunity by result of two separate acts: (1) the legislative adoption of the statute authorizing the State to enter into the contract; and (2) the State's entrance into the contract. 92 Wn.2d at 526-27. In this case, the State waived its immunity in the first place, by passing legislation authorizing state agencies to enter CBAs with public employee unions, and requiring that those agreements employ final, binding arbitration as the means through which disputes arising from the CBAs will be resolved. (See, RCW 41.80, et. seq.). The State also waived its sovereign immunity by the act of entering into its CBA with Local 117, agreeing to the final, binding arbitration clause for grievance disputes, and failing to set any limitations on the Arbitrator's authority to fashion an appropriate remedy in this case.

In *Pierce* County, as here, the Department violated its contractual duties, the court stated: "[t]he Department created this problem by acting in a manner that exceeded its statutory

authority. It would not be allowed to benefit from this act by hiding behind the cloak of sovereign immunity." *Pierce County,* 144 Wn. App. at 857.

The State's reliance on *Union Elevator & Warehouse Company, Inc.,* 171 Wn.2d 54, 248 P.3d 83 (2011) to distinguish the Court's ruling in *Architectural Woods* is inapposite. The State cites no authority for its claims that bargaining over terms of employment with a labor union is different than contracting with other private entities for the purposes of sovereign immunity. The Employer's argument ignores the fact that the State signed a CBA with Local 117, and the terms of that CBA constitute the State's implied waiver.

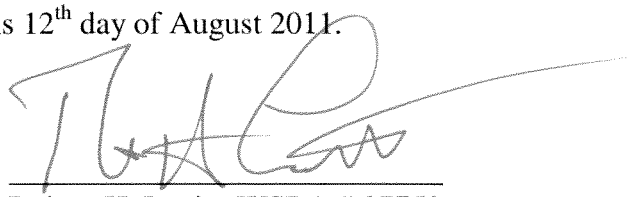
The appropriate question in this case is whether the State's act of entering a collective bargaining agreement with Local 117, on its own, or combined with the State's act of giving the arbitrator the authority to fashion a remedy without specific limitation constitutes a waiver. See, e.g. *Olympic Pipe Line Co. v. Thoeny*, 124 Wash.App. 381, 398, 101 P.3d 430 (2004) (noting that "the State enjoys a sovereign immunity from payment of interest, unless it places itself in a position of liability by contract or statute"). Because an arbitrator's authority to grant an interest award on lost wages is well established and accepted in the labor management context, an interest award is not barred by the doctrine of sovereign immunity. By entering a collective bargaining agreement with Local 117, and agreeing to the Arbitrator's discretion to fashion a remedy, DOC waived its sovereign immunity from interest liability.

CONCLUSION

The Employer's Motion to Clarify reflects an effort to avoid its financial responsibility for the damages it caused when it violated the parties' CBA. Local 117 respectfully requests that the Arbitrator clarify his Award in this case. The Arbitrator may clarify his Award by affirming

that he intended the Employer to pay damages, including but not limited to lost wages and interest to *all* Local 117 represented employees who DOC laid off in violation of the State's CBA with Local 117. He may further clarify the Award by specifying the economic losses, in addition to lost wages and interest, that he intended the remedy to include.

RESPECTFULLY SUBMITTED this 12th day of August 2011.



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