

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. AR-001-14

(PETITION FOR REVIEW OF ARBITRATION AWARD)

In the Matter of an Arbitration Between the	)	
	)	
STATE OF OREGON, OREGON HEALTH	)	
AUTHORITY,	)	
	)	
Petitioner,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION, LOCAL 503, OPEU,	)	
	)	
Respondent.	)	
_____	)	

Lisa M. Umscheid, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Petitioner.

Marc A. Stefan, Supervising Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Respondent.

On February 13, 2015, Administrative Law Judge (ALJ) B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service of that order to file written objections. *See* OAR 115-010-0090. Neither party filed objections.

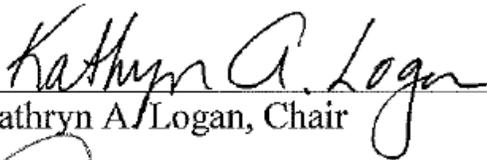
When neither party objects to a recommended order, we generally adopt the recommended order as our final order and consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. The final order is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential

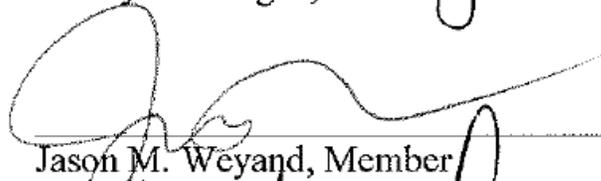
limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

ORDER

1. The Board adopts the recommended order as the final order in this matter.
2. The petition is denied.

DATED this 5 day of March, 2015.

  
Kathryn A. Logan, Chair

  
Jason M. Weyand, Member

  
Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

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STATE OF OREGON, OREGON HEALTH	)	
AUTHORITY,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION, LOCAL 503, OPEU,	)	
	)	
Respondent.	)	
	)	

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A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on December 5, 2014, in Salem, Oregon. The record closed on December 24, 2014, following receipt of the parties' post-hearing briefs.

Lisa M. Umscheid, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Petitioner.

Marc A. Stefan, Supervising Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Respondent.

On September 16, 2014, the State of Oregon, Oregon Health Authority (OHA), filed this Petition alleging that an arbitration award reinstating the Grievant is unenforceable under ORS 240.086(2)(d) and ORS 243.706(1) because reinstatement would violate public policy as established by ORS 419B.010. On September 30, 2015, the Service Employees International Union, Local 503, OPEU (SEIU or Union), filed an opposition to the petition, asserting that the

award ordering the Grievant's reinstatement does not violate any clearly defined public policy and must be enforced.

The issue is: Is the August 29, 2014 arbitration award enforceable under ORS 240.086(2)(d) and ORS 243.706(1)?

We conclude that the arbitration award is enforceable under ORS 240.086(2)(d) and ORS 243.706(1), and we deny OHA's petition.

### RULINGS

The rulings of the Administrative Law Judge were reviewed and are correct.

### FINDINGS OF FACT

1. OHA is a public employer as defined by ORS 243.650(20). The Union is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit which includes Grievant, a Transporting Mental Health Aide at Oregon State Hospital.

2. OHA and the Union were parties to a collective bargaining agreement in effect from August 2011 until June 30, 2013. The agreement included provisions stating that: (1) the principles of progressive discipline shall be used when appropriate; (2) grievances are defined as acts, omissions, applications, or interpretations alleged to be violations of the terms or conditions of the collective bargaining agreement; (3) all grievances shall be processed in accordance with these provisions and it shall be the sole and exclusive method of resolving grievances; (4) the final step in the grievance process is arbitration, and the decision or award of the arbitrator shall be final and binding on each of the parties. (Exh. P-1 at 17-18.)

3. OHA has a crisis response protocol for occasions when a patient acts in a destructive or violent manner. Grievant had received training in this protocol, which involved calling additional staff, creating a plan, and acting on the plan.

4. On December 27, 2012, Grievant grabbed a patient, who had been acting in a destructive and violent manner, around the waist and fell with the patient to the floor. On April 9, 2013, DHS terminated Grievant's employment for using physical force against a patient that was unnecessary and inconsistent with patient treatment.

5. The Union grieved Grievant's termination, and the matter proceeded to arbitration before Arbitrator Timothy D.W. Williams. The parties agreed that the issues before the arbitrator were:

"1. Did the Employer have just cause to terminate the Grievant?

"2. If not, what is the appropriate remedy?" (Exh. P-2 at 7.)

6. On August 29, 2014, Arbitrator Williams issued his award. The Arbitrator concluded that OHA met its burden of establishing, by clear and convincing evidence, that the Grievant's conduct constituted physical abuse as defined by the pertinent employer rules and governing legal authority.<sup>1</sup> The Arbitrator held that OHA had failed to establish that Grievant's actions, viewed in light of all of the circumstances, were sufficient to justify his termination.

7. In reviewing the punishment, the Arbitrator quoted OHA's brief, which stated that "[t]his is an unfortunate case in which a well-regarded, well-intentioned, and well-liked employee with no disciplinary record made a tragic decision to physically restrain a patient at Oregon State Hospital." (Exh. P-2 at 32.)

8. Arbitrator Williams compared Oregon Administrative Rules governing patient care, cited by OHA, with the contractual just cause standard. The arbitrator noted that they both required that discipline of employees be commensurate with the seriousness of the conduct and with aggravating or mitigating factors.<sup>2</sup>

9. In summarizing his decision, the Arbitrator stated:

"[T]he Grievant, a good employee, went prematurely hands-on with a patient that was engaged in a behavioral incident including the destruction of OHA property and making loud threats against staff. Because the hands-on action was not authorized, the Grievant's actions are correctly classified as physical abuse. Clearly, however, the Grievant's actions were not malicious or intended to harm the patient. Given all of the facts of this case, the progressive discipline requirement of the [collective bargaining agreement] CBA must be applied and the Grievant given the opportunity to correct his deficiency. Thus the decision to discharge the Grievant violated Article 20, Section 1 -- progressive discipline should have been used. The grievance is sustained." (Exh. P-2 at 35.)

10. Arbitrator Williams concluded,

"The Arbitrator was tasked with the responsibility to determine whether OHA had just cause to terminate the Grievant's employment. The Grievant's employment was terminated based on an allegation that he had physically abused a patient. The Arbitrator found that the Employer had clear and convincing evidence to establish the truth of that charge. However, the Arbitrator noted that the CBA required the use of progressive discipline unless the Employer could establish a compelling case to move for immediate discharge. The Arbitrator determined that the Employer's case for immediate

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<sup>1</sup>As used in this employment setting, the term "physical abuse" is not the same as its meaning to laypersons. As used by OHA, the term does not require an intent to do harm, and OHA does not contend that Grievant had an intent to do harm. At one point OHA characterizes Grievant's conduct as a violation of treatment protocols.

<sup>2</sup>OHA argues that Arbitrator Williams erred in concluding that aggravating or mitigating factors are relevant to evaluating Grievant's termination.

discharge was extremely weak and almost nonexistent. As a result, the Arbitrator sustained the grievance in that he found the proven charges sufficient to warrant a suspension but not discharge. As a remedy, the Arbitrator is directing the Employer to reinstate the employment of the Grievant and make him whole for lost wages and benefits.” (Exh. P-2 at 36-37.)

The Arbitrator entered the award as described, and this petition followed.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

#### Standards for Decision

Under Article 21 of the collective bargaining agreement, OHA and the Union agreed to resolve disputes arising under that contract by submitting the matter to arbitration, and that the decision or award issued by the arbitrator would be final and binding on them both. Despite this agreement, OHA argues that this Board must determine that the arbitration award ordering Grievant’s reinstatement is unenforceable.

Public policy strongly favors the use of binding arbitration to resolve labor disputes. *See generally, Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08, 23 PECBR 671, 685-86 (2010). The Court of Appeals has held that this Board’s consideration of arbitration awards under ORS 240.086(2) and ORS 243.672 is only a “sparing review, in the interest of promoting the efficiency and finality of arbitration as a decision-making process for those who contract to use it.” *Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 563, 679 P2d 868, *rev den*, 297 Or 458 (1984). We do not treat an arbitration award challenged under ORS 240.706(1) any differently. *In the Matter of an Arbitration Between the State of Oregon, Department of Human Services, v. Service Employees International Union, Local 503, OPEU*, Case No. AR-001-13, 25 PECBR 836 (2013). Further, we do not review the arbitrator’s decision to determine whether it is right or wrong, and we must enforce the decision even if we believe it was erroneous. *Portland Association of Teachers v. Portland School District 1J*, Case No. UP-64-99, 18 PECBR 816, 836-37 (2000), *ruling on motion to stay*, 19 PECBR 25 (2001), *AWOP*, 178 Or App 634, 39 P3d 292, 293, *rev den*, 334 Or 121, 47 P3d 484 (2002).

OHA and the Union agreed to use binding arbitration as the sole means of resolving contractual grievances, and therefore agreed to accept the arbitrator’s interpretation of their contract. When an arbitrator’s award is based an interpretation of the contract language, the parties are bound by that decision unless a statutory exception applies. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986).

OHA filed its petition under ORS 240.086(2)(d), which grants this Board authority to review arbitration awards issued in disputes between a state agency and the exclusive

representative of the agency's employees.<sup>3</sup> This statute requires that we enforce an arbitration award unless it meets certain listed exceptions. OHA argues that the award is unenforceable under ORS 240.086(2)(d), which precludes enforcement where "[t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."<sup>4</sup> Specifically, OHA argues that the award violates public policy and is unenforceable under ORS 243.706(1), which states that:

"A public employer may enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in binding arbitration or any other dispute resolution process agreed to by the parties. As a condition of enforceability, any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work."

When a party alleges that an arbitration award that reinstates an employee violates public policy, we apply a three-part analysis. First, we determine whether the arbitrator found that the grievant engaged in the misconduct for which discipline was imposed. If so, we then determine if the arbitrator reinstated or otherwise relieved the grievant of responsibility for the misconduct. If both of these tests are met, we then determine if the award violates a clearly defined public policy expressed in statutes or judicial decisions. *Portland Police Association v. City of Portland*, Case No. UP-023-12, 25 PECBR 94, 111 (2012), *appeal pending*; see also *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UP-55-97, 17 PECBR 845, 860 (1998), *rev'd and rem'd*, 169 Or App 445, 9 P3d 742 (2000), *rev den*, 332 Or 137, 27 P3d 1043, 1044 (2001), *order on remand*, 19 PECBR 321 (2001).

The statutory public policy exception is a narrow one. The Oregon Supreme Court has stated that this Board may not overturn an arbitrator's award because we believe that an employee's *conduct* violated public policy. Rather, "[t]he proper inquiry \* \* \* is whether the *award itself* complies with the specified kind of public policy requirements." *Washington Cty. Police Assn. v. Washington Cty.*, 335 Or 198, 205, 63 P3d 1167 (2003) (emphasis in original). Therefore, the question here is whether an award ordering reinstatement of an employee whose actions

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<sup>3</sup>This Board also reviews arbitration awards in the context of unfair labor practice complaints alleging violations of ORS 243.672(1)(g) and 243.672(2)(d) (refusal to accept the terms of an arbitration award when the parties have agreed to accept the awards as final and binding). We apply the same "sparing review" standard to arbitration awards under ORS 240.086(2) that we apply in reviewing arbitration awards under subsections (1)(g) and (2)(d). See *Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App at 563; *In the Matter of the Arbitration Between the State of Oregon, Department of Transportation v. State Employees International Union Local 503, Oregon Public Employees Union*, Case No. AR-1-06, 21 PECBR 838, 842 (2007).

<sup>4</sup>DHS does not assert a "typical" ORS 240.086(2)(d) claim that the arbitrator lacked the authority to decide the grievance as presented or that a final and definite award was not made on the matter. Rather, the sole contention advanced by DHS is that the arbitration award is contrary to public policy and, therefore, is unenforceable under ORS 243.706(1) and ORS 240.086(2)(d).

constituted physical abuse of a patient “fail[s] to comply with some public policy requirements that are clearly defined in the statute or judicial decision.” *Id.* More specifically, the decision before us is not whether there is a statute or judicial decision that clearly defines a public policy requiring an individual to refrain from actions constituting physical abuse of a patient. The decision before us is whether a statute or judicial decision contains a clearly defined public policy against *reinstating* an employee whose actions constituted physical abuse. *See Washington Cty. Police Assn. v. Washington Cty.*, 187 Or App 686, 691-92, 69 P3d 767 (2003). The Oregon Supreme Court has also held that a “clearly defined” statute or judicial decision “must outline, characterize, or delimit a public policy in such away as to leave no serious doubt or question respecting the content or import of that policy.” *Washington Cty.*, 335 Or at 205-06.

2. The August 29, 2014 arbitration award is enforceable under ORS 240.086(2)(d) and ORS 243.706(1).

OHA fails to identify any public policy against reinstating Grievant.

The arbitrator found that Grievant’s conduct constituted physical abuse, the misconduct alleged. The arbitrator also concluded that OHA did not have just cause to terminate the grievant, holding that a one week unpaid suspension was the appropriate level of discipline, followed by reinstatement. Therefore, the first two standards are satisfied.

We turn to whether clearly a defined public policy against reinstating an employee whose actions constituted physical abuse renders the award unenforceable.

OHA claims that the award violates the public policy embodied in various statutes and rules against physical abuse of patients. It is correct that the various statutes and rules establish a clearly defined public policy against physical abuse of patients. In fact, Arbitrator Williams concluded that Grievant’s conduct violated this clearly defined public policy.

However, OHA cites no statutes “about employment or reinstatement” as described by *Washington County. Washington Cty.* 335 Or at 206. OHA has provided no credible answer to the precise question at issue here, which is *not* whether public policy dictates that Grievant should have refrained from physical intervention with the patient. The precise question at issue here is whether some statute or judicial opinion outlines, characterizes, or delimits a public policy against *reinstating* a public or private official (such as Grievant) who has not complied with standards of conduct defining and governing physical abuse of patients.<sup>5</sup> *Washington Cty.*, 187 Or App at 691-92; *see also Salem-Keizer Assn. v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 25 (2003) (“whether the underlying conduct violates public policy is not the

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<sup>5</sup>OHA argues that some of these statutes and rules are about employment and reinstatement because some of these mandates can only be effectuated by employees. Whether or not it is correct that only employees can effectuate some of these rules, the rules do not, in fact, address whether an employee must be terminated for their violation. As Arbitrator Williams noted in his Opinion and Award, examples of such provisions exist in other jurisdictions. Illinois law provides that a mental health care worker who engages in certain statutorily defined abuse has their name placed on a registry, and no one on the registry may be employed in any capacity in any licensed entity providing mental health services. 20 ILCS 1705/7.3. OHA points to no such statute or rule in Oregon.

relevant inquiry”). Further, if there is such a statute or judicial decision, does the statute or decision “articulate that policy in such a way as to leave no serious doubt or question respecting the content or import of that policy.” 187 Or App at 692 (interior quotation marks omitted).

OHA has not identified any statute or judicial decision that clearly prohibits the reinstatement of a public or private official who failed to comply with standards of conduct defining and governing physical abuse of patients. Therefore, OHA has presented no meritorious arguments, and the arbitration award is enforceable.

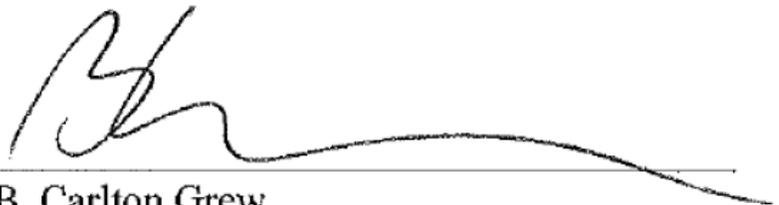
Our decision here is consistent with prior decisions of the Oregon Court of Appeals and this agency. In its order on remand from the Supreme Court in *Washington Cty.*, the Court of Appeals held that an arbitration award reinstating a public safety officer who used marijuana off-duty was enforceable because there was no clear statute or judicial decision barring arbitral *reinstatement* of a public safety officer who had engaged in such conduct. Therefore, the employer’s refusal to implement that award constituted an unfair labor practice. 187 Or App at 690-91. In *Salem-Keizer Sch. Dist. 24J*, the Court of Appeals held that an arbitration award reinstating an instructional assistant who admitted to, but had not been convicted of, second-degree theft was enforceable because no statute or judicial decision clearly prohibited reinstatement. 186 Or App at 26. Finally, in *State of Oregon, Department of Human Services*, 25 PECBR 836, this Board concluded that the Department of Human Services had failed to establish the existence of a public policy against the reinstatement of an employee who had failed to report suspected child abuse in violation of ORS 419B.010.

The standards of limited review set out in the statutes and judicial decisions above require that this Board order that the petition be denied.

PROPOSED ORDER

The petition is denied.

SIGNED AND ISSUED 13 February 2015.



**B. Carlton Grew**  
**Administrative Law Judge**

NOTE: The Employment Relations Board’s rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The “date of filing objections” means the date objections are received by this Board; “the date of service” of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-035-0050; 115-045-0040; and 115-070-0055.)