

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-057-13

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL)
UNION LOCAL 503, OREGON PUBLIC)
EMPLOYEES UNION,)

Complainant,)

v.)

STATE OF OREGON, DEPARTMENT OF)
JUSTICE,)

Respondent.)

RULING ON RECONSIDERATION

Respondent seeks reconsideration of this Board’s December 12, 2014, order, which held that: (1) Complainant’s complaint should not be deferred until the outcome of a pending grievance arbitration; and (2) Respondent violated ORS 243.672(1)(b) and (e) by directly dealing with an employee regarding a pending grievance. *See* 26 PECBR 276 (2014). Specifically, Respondent asserts that we erred with respect to both holdings, and that we erred by ordering Respondent to post a notice of these violations as part of the remedy. For the reasons set forth below, we grant reconsideration and adhere to our prior order, as supplemented herein.

Pre-Arbitration and Post-Arbitration Deferral

In our prior order, we explained the distinction between how this Board has historically analyzed two types of arbitration-related “deferrals”: (1) pre-arbitration deferral (or abeyance); and (2) post-arbitration deferral. Respondent’s motion for reconsideration characterizes that distinction as “arbitrary” and one that fails to adhere to the Board’s preference for “avoiding multiple litigation and the possibility of inconsistent results.” According to Respondent, the “timing” of the deferral (pre- or post-arbitration) is insignificant. Respondent further avers that this distinction elevates the Public Employee Collective Bargaining Act (PECBA) over the terms of a parties’ collective bargaining agreement. Consequently, Respondent asks us to reconsider our precedent of distinguishing between pre- and post-arbitration deferral requests.

We decline Respondent’s invitation to overrule our precedential distinction in how we approach requests for pre- and post-arbitration deferral. As set forth in our prior order, this Board’s distinction between pre- and post-arbitration deferrals is longstanding. Moreover, it is a distinction that has long been made by the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA), after which the PECBA was modeled. As a matter of logic, post-arbitration deferral, which looks to the terms of an arbitration award that has already been issued, cannot be applied to pre-arbitration deferral because an arbitration award does not yet exist. Thus, the deferral standards must necessarily be different. Consequently, far from being “arbitrary,” the distinction between pre- and post-arbitration deferral is fundamental.

We further disagree with Respondent’s assertion that distinguishing between pre- and post-arbitration deferrals erodes our preference for avoiding multiple litigation and the possibility of inconsistent results. According to Respondent, our approach in pre-arbitration deferrals encourages multiple litigation over the same issues and runs the risk of our decision conflicting with a future arbitration decision. In Respondent’s own words, “the practical result [of the Board’s approach] is multiple litigation (ULP hearing first and then arbitration), with the possibility of inconsistent results ([this Board] concludes [that] the conduct violates [the] PECBA where the Arbitrator concludes [that] the conduct was negotiated and authorized by the [collective bargaining agreement (CBA)].”

Respondent’s argument rests on a flawed premise—namely, that the issues in the case to be decided by this Board and an arbitrator are the same. As set forth in our prior order, if a pending grievance and a pending unfair labor practice complaint have the same facts and congruent decisional standards, we *will* defer the processing of the complaint until the arbitration is complete. In this case, however, we have not concluded that congruent decisional standards will be applied by this Board and an arbitrator. That is so, as we previously explained, because the contract provision at issue is not analogous to the alleged statutory violation. Stated simply, it is possible that Respondent’s actions did not violate the particular contract provision, but did violate the PECBA. Unless the matter includes both the same facts and congruent decisional standards, we will not order a pre-arbitration deferral.

This brings us to Respondent’s next argument, which is that our decision to not hold the complaint in abeyance places the PECBA above the terms of the parties’ CBA. To begin, Respondent’s argument rests on a failed understanding of our order. Because we have concluded that the contract provision and the statutory provision at issue are distinct, there is no necessary conflict between our order and any potential arbitration award, even one that agrees with Respondent’s argument that its conduct was not proscribed by the CBA. In other words, our pre-arbitration deferral requirements (that a pending grievance involve the same facts and apply congruent decisional standards) are meant to avoid multiple litigation on the same issue and the possibility of inconsistent results.

Moreover, if a conflict did exist—*i.e.*, if the parties had negotiated terms that are in violation of the PECBA, then the PECBA *would* control. Indeed, under both our pre- and post-arbitration deferral, any invalid provision in a collective bargaining agreement would not be upheld by this Board, even if the matter went to arbitration and an award was issued upholding the invalid provision. *See* ORS 240.086(2)(g) (award in violation of law not enforceable).

Waiver

Respondent further states that the “clear and unmistakable” waiver test does not apply to the facts of the case. Rather, according to Respondent, we should apply the three-part test for interpreting contracts, because if the Board is not going to defer to pending arbitration, we “must then ascertain what process the parties agreed to in bargaining.”

In its answer, Respondent raised affirmative defenses of “waiver through action” and “waiver through bargaining.” By raising these affirmative defenses, Respondent is asserting that the labor representative has “waived” its statutory right to collectively bargain with the employer and represent its bargaining unit members in dealing with the employer. To prevail on this waiver defense, Respondent is required to show that such a waiver is “clear and unmistakable.” *See Ass’n of Oregon Corr. Employees v. State*, 353 Or 170, 179, 295 P3d 38 (2013); *see also Laborers’ International Union of North America, Local 483, v. City Of Portland, Bureau Of Human Resources*, Case No. UP-027-12, 25 PECBR 810, 825, *recons*, 25 PECBR 892, 895 (2013). The contract language cited by Respondent does not clearly and unmistakably establish that Complainant waived its right to represent the grievant.

Remedy

Finally, Respondent asks us to reconsider issuing a Notice of Posting, particularly because Complainant did not object to this portion of the recommended order. Respondent is correct that this Board generally will not revisit an issue unless a party has filed a timely objection. With respect to the remedy matter, however, we are inclined to exercise our discretion to ensure that the unfair labor practice is appropriately remedied. When we determine that an unfair labor practice has occurred, we are required to “take such affirmative action, * * * as necessary to effectuate the [statutory] purposes.” ORS 243.676(2)(c). We have broad authority to determine the appropriate remedy in any given case. *Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12, *recons*, 25 PECBR 845, 846 (2013). As stated in our Order, the Respondent’s actions of bypassing the exclusive representative and dealing directly with the employee has an inherent significant impact on the representative’s functioning. We affirm that requiring a Notice of Posting was, and is, necessary to effectuate the purposes of the PECBA.

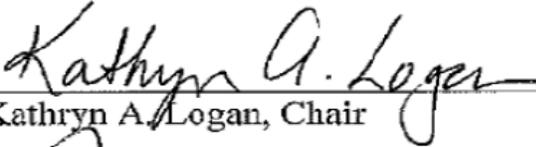
The remaining matters need no further discussion. Although we will grant Respondent’s request for reconsideration, we will adhere to our prior order, supplementing it with our discussion above.

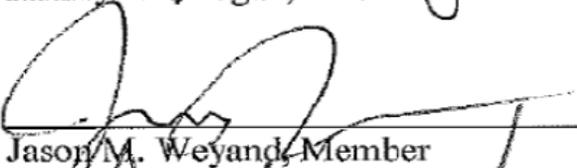
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ORDER

1. Respondent's motion for reconsideration is granted.
2. We adhere to our prior order, as supplemented herein.
3. If the Respondent has not already posted the Notice of the violation attached to our original order, it must do so within seven days of the date of this order.

Dated this 4 day of February, 2015.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.