



On April 13, 2005, the State of Oregon, Department of Consumer and Business Services, Oregon Occupational Safety and Health Division (OR-OSHA or employer), timely filed this petition challenging the enforcement of an arbitration opinion and award that was issued on March 31, 2005. Service Employees International Union Local 503, OPEU (SEIU) timely filed its answer and objections to that petition on April 27, 2005.

The parties submitted fact stipulations on July 28, August 8, and August 10, 2005; Respondent filed its closing brief on July 29.

The issue is whether the arbitration opinion and award of March 31, 2005 is enforceable under ORS 240.086(2)(g).

### RULINGS

After filing its petition, the Department moved the Employment Relations Board (ERB) for a stay of the reimbursement remedy ordered by the arbitrator, pending the outcome of this case. The ALJ correctly denied the Department's request for a stay.

Petitioner seeks what amounts to a temporary injunction against enforcement of the arbitration award. ERB does not have the statutory authority to grant Petitioner's request. Compare ORS 183.482(3), which gives ERB discretion to stay its order pending resolution of an appeal to the Court of Appeals. We therefore deny Petitioner's request.

The remaining rulings of the ALJ have been reviewed and are correct.

### FINDINGS OF FACT<sup>1</sup>

1. SEIU, a labor organization, is the exclusive representative of a bargaining unit of personnel employed by OR-OSHA, a public employer.

2. SEIU and OR-OSHA were parties to a collective bargaining agreement (CBA) effective July 1, 2003 through June 30, 2005, which included the following terms:

"ARTICLE 20 - DISCIPLINE AND DISCHARGE

"Section 1.

"The principles of progressive discipline shall be used when appropriate. Discipline shall include, but not be limited to:

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<sup>1</sup>The Findings of Fact are based upon the parties' fact stipulation and the arbitrator's decision and award, the sole exhibit.

written reprimands; denial of an annual performance pay increase; reduction in pay;\* demotion; suspension without pay\*; and dismissal. Discipline shall be imposed only for just cause.

“\* For FLSA-exempt employees, except for penalties imposed for infractions of safety rules of major significance, no reduction in pay and only suspensions without pay in one (1) or more full work week increments unless or until FLSA restrictions on economic sanctions for exempt employees are eliminated by statute or a court decision the State determines dispositive. Safety rules of major significance include only those relating to the prevention of serious danger to the Agency, or other employee.

“ARTICLE 21 - GRIEVANCE AND ARBITRATION PROCEDURE

“\* \* \*

“Section 6. Arbitration Selection and Authority.

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“(f) The Parties agree that the decision or award of the arbitrator shall be final and binding on each of the Parties. The arbitrator shall issue his/her decision or award within thirty (30) calendar days of the closing of the hearing record. The arbitrator shall have no authority to rule contrary to, to amend, add to, subtract from, change or eliminate any of the terms of this Agreement. The arbitration will be handled in accordance with the rules of the American Arbitration Association.”

3. Michael Rogers was hired by OR-OSHA on October 3, 1980, as a safety representative 1 in its Pendleton, Oregon office. In 1984, Rogers transferred to the Eugene field office, where he remained. Rogers was promoted several times. At all times material, he was a member of a bargaining unit represented by Respondent. At the time of the grievance, he was classified as an occupational safety specialist 3 (OSS 3).

4. Rogers' primary duties were to conduct onsite inspections of businesses, and recommend steps the businesses could take to improve workplace safety and employee security. Rogers spent approximately 60 percent of his time in the field. The remaining time was spent writing reports on a computer in his office cubicle. Rogers received good performance evaluations, and was routinely used as a resource by his coworkers.

5. On June 6, 2002, Craig Sorseth was appointed as the field consultation supervisor for the OR-OSHA Eugene Field Office.

6. On September 11, 2003, OR-OSHA notified Rogers that it was imposing a two-step, four-month salary reduction as discipline for Rogers' alleged misconduct in violating employer's policy against violence in the workplace. On October 9, 2003, SEIU Local 503 filed a grievance contending the employer did not have just cause for the pay reduction in violation of Article 20 of the collective bargaining agreement between the union and the State of Oregon. The parties were unable to resolve the dispute, and the union requested arbitration.

7. The grievance was heard by arbitrator Katrina I. Boedecker in Eugene, Oregon, on January 27 and 28, 2005.

8. The arbitrator rendered her decision on March 31, 2005. She ruled that Rogers did not violate the employer's policy against violence in the workplace by his intentional acts but that Rogers did violate the violence in the workplace policy by his threatening behavior.<sup>2</sup> Her discussion of the facts of the case included the following:

“\* \* \* [O]n August 20, 2003, Rogers gave Sorseth an evaluation prepared by Higgins-Lee, the licensed psychologist he had been seeing through the Employee Assistance Program. She had written it on June 16, 2003. Higgins-Lee diagnosed Rogers as suffering from Post Traumatic Stress Disorder (PTSD). She found that Rogers' PTSD manifested itself with an 'exaggerated startle response.'”

“When Rogers gave Sorseth the psychologist's evaluation, he told Sorseth that he had recently struck three employees in the office. Rogers assured Sorseth that he had control of the startle reflex when he worked in the field.”

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<sup>2</sup>The question of whether the arbitrator properly determined that Rogers violated the policy against violence in the workplace by his threatening behavior is not at issue in this case.

“Rogers asked that he be allowed to work from home for part of his work time as he had done in 1997 through 2001, and as his psychologist had recommended.<sup>3</sup> Sorseth denied his request. Rogers asked to reconfigure his office cubicle so that he would not have his back to the entrance. The record does not show what management’s immediate response was, but six months later, Rogers’ cubicle was rebuilt to allow him to face the entry. In the interim, Rogers put a mirror on his computer as an early warning of people approaching. At some time, Rogers opened file drawers to block the entrance to his cubicle, so that coworkers would have to make noise to alert him. The employer was concerned that this created a safety issue, so it told Rogers to keep the drawers closed.

#### “Sorseth’s Investigation

“Sorseth immediately informed his supervisor about the three incidents in which Rogers claimed he had struck a coworker. Rogers was placed on administrative leave effective Thursday, August 26, 2003, while Sorseth began his investigation.

“Wally Weintritt, a coworker of Rogers, had come around a corner and brushed Rogers’ shoulder, when Rogers was outside his cubicle talking to other employees. Weintritt startled Rogers. Rogers responded by giving Weintritt a ‘hardy push’ below the rib cage. Weintritt viewed this as an isolated incident. Rogers apologized. After the push, Weintritt remembered to approach Rogers in a more announced manner.

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<sup>3</sup> OR-OSHA has adopted a ‘telework’ policy that allows employees to work from home. Sue Schwediman, assigned to the Eugene office is allowed to work from home. About half of Comacho-Ching’s Portland office of 11 employees are allowed to work from home to reduce pollution and congestion caused by commuting.

“Debbie O’Connor is the receptionist for the OR-OSHA Eugene office. One time she came up behind Rogers while he was talking with others in the hallway. She touched his shoulder. He immediately swung his arm back and struck her in the chest. The

strike was hard enough to make her catch her breath. They both apologized to each other; because she had forgotten to approach him in the way she had been warned to previously. O'Connor had a stepfather with the same startle response. She did not consider the incident with Rogers violent because she viewed it as an involuntary action. Chris Short, a manager at this time, was one of the employees with whom Rogers was talking. After the investigation, Short received a written reprimand for not reporting the incident as one of violence in the workplace.

"Linda Olson was hired into the OR-OSHA Eugene office as Sorseth's assistant while Rogers was out on his first administrative leave. She had been working there approximately one month when Rogers returned from leave. On or about November 25, 2002, she went to his cubicle for information on one of his reports. He was wearing headphones. She tapped him on the shoulder. Rogers turned suddenly and told her not to touch him. During or about March, 2003, Rogers was standing outside of Bryant's cubicle speaking with him. Olson came up behind Rogers heading for Bryant's cubicle. Rogers swung out and struck her. She had the wind knocked out of her. Rogers apologized and walked her back to her desk, explaining more about his condition.

"A few days later, Olson met with Rogers and shop steward Bryant. She told the men that 'the past was the past', but she was putting Rogers on notice that if he struck her again, she would file an assault report with the police. She characterized the strike as violence in the workplace. Shortly thereafter, she overheard part of a conversation in which Rogers was talking about bringing a shotgun into work. She did not hear the entire conversation wherein Rogers spoke about bringing the handle in to show his coworkers the artwork on it. From being struck and the overheard partial conversation, Olson believed Rogers to be an intimidating person. Olson told the employer that she wanted it to fulfill its obligation to provide a safe working environment.

"Based on Sorseth's investigation, the employer concluded that Rogers had violated his return to work agreement. The employer weighed Rogers' behavior against his over 20 years of service to the agency and determined that a two-step, four month salary

reduction was appropriate discipline. Rogers received notification of the disciplinary action on September 11, 2003.

“In October, 2003, Higgins-Lee supplied the employer a ‘verification of request for ADA reasonable accommodation by health care provider.’ Higgins-Lee recommended that Rogers be allowed to work from home.

“Expert testimony

“The union called Leslie E. Goldmann, Ph.D. to testify about Post Traumatic Stress Disorder. Goldmann stated that a high startle reflex is a classic symptom of PTSD. Goldmann examined Rogers’ medical records and spoke with Rogers. He concluded that Rogers did suffer from PTSD.<sup>4</sup>

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<sup>4</sup> At the hearing, the employer stipulated that Rogers did have PTSD.

“Psychiatrist Dr. Victor B. Richenstein testified that he was treating Rogers for his PTSD. He confirmed that the startle reflex is a manifestation of Rogers’ condition.

“Psychologist Dr. Higgins-Lee testified. She confirmed that she had diagnosed Rogers’ condition as PTSD, also, when she had begun seeing Rogers in 2003 because of the stressors in his life. She noted that Rogers learned he had PTSD when he began seeing her through the employee assistance program. This was the first time that Rogers came to have an understanding of the medical nature of his startle reflex.

“Both Richenstein and Goldmann testified that stress increases the symptoms of PTSD. Sorseth confirmed that the office was a more stressful place for Rogers than the field, considering the problems he was having with [coworker] Rowland.”

9. The Arbitrator concluded that Rogers had not engaged in misconduct through violent behavior. She reasoned as follows:

“As the department’s policy for preventing violence in the workplace states: ‘ORS 654.010, OSHA’s ‘general duty’ clause,

requires all employers to provide a safe and healthful workplace.’ The policy goes on to state, ‘Threats, threatening behavior, or acts of violence against employees, visitors, guests, or other individuals by anyone at any place where DCBS conducts business will not be tolerated.’

“Rogers’ startle reflex was never malicious. He never lashed out in anger. Richenstein, Rogers’ current therapist, testified uncontrovertedly, that the startle response of a PTSD sufferer is not a voluntary act. The reaction is not premeditatedly violent because it is a reflex and not intentional. The exaggerated startle response is not conscience [*sic*]; rather it is an instinctive protective action. Richenstein concluded that Rogers was not a violent person and that his startle response was a medical issue.

“The startle reflex is a defensive action. It is not an offensive, threatening act. Higgins-Lee characterized the startle response as more akin to an accident than violence. Salvador Llerenas, the Assistant Human Resources Manager for DCBS confirmed that the violence in the workplace policy does not cover accidents. He also testified that an employee’s intent does matter in deciding discipline. The union’s expert witnesses established that a person who suffers from PTSD and manifests a startle reflex, is actually taking action to protect him or herself. The PTSD sufferer perceives he or she is being threatened and needs to act to avoid the threat.<sup>5</sup>

“I find that Rogers’ physical contacts with O’Connor, Weintritt and Olsen were not acts of violence. They were unintentional. The physical contacts were the result of Rogers’ startle reflex which is a manifestation of his post traumatic stress disorder.<sup>6</sup>

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<sup>5</sup> The employer argued that Olson’s view of the striking being violent should not be discounted by Weintritt’s, O’Connor’s and Short’s perception that it was accidental. It would be ironic, but in keeping with the employer’s theory here, for Rogers to claim that people who came up to him unannounced and startled him, were actually threatening him, in violation of the employer’s policy.

“I do agree with the employer, however, that it has a duty to maintain a safe work environment. I will discuss this in the remedy section of this award.”

10. The arbitrator also concluded that OR-OSHA officials believed, during their investigation, that Rogers could control his startle reflex, and that they had misinterpreted the Higgins-Lee evaluation. The arbitrator stated:

“At some point, the employer’s position changed from Rogers’ being able to control the startle reflex to employer acknowledging that Rogers suffered from PTSD. However, there is no indication that the employer revisited the discipline that it had meted out after it had this change of theory.

“The record does not show that the employer made any attempt to investigate and verify Rogers’ version of the cause of the striking incidents. The employer only learned of the striking of his coworkers by Rogers own self-confession. The coworkers did not report it. Rogers made the confession when he asked for the Higgins-Lee evaluation to be placed in his personnel file. The report, and Rogers’ remarks about it, triggered the investigation. By failing to look into Rogers’ version of the events, the employer failed to fully and fairly investigate the incidents.”

11. In evaluating the appropriate level of discipline, the arbitrator stated:

“The employer’s imposition of a two range, four month pay reduction was based on consideration of the degree of Rogers’ misconduct and consideration of his 20+ years of service with the agency. The employer saw two parts to Rogers’ misconduct: threatening behavior and actual violent acts of striking coworkers. Since I find that Rogers’ PTSD caused his acts to be unintentional and more akin to accidents, the events must be removed from the evaluation of misconduct. With the incidents of the physical contacts removed from consideration, the employer did not have just cause based on Rogers’ other misconduct to issue a two step, four month pay reduction.

“I do agree with the employer that Rogers used threatening behavior against certain of the employees in the office. Thus, the

employer may issue Rogers a written reprimand warning him not to demonstrate threatening or physically intimidating behavior in the office in the future.”

12. In the course of her discussion regarding remedies, the arbitrator addressed the issue of the employer’s obligation to provide a safe work environment, as she had promised in a footnote to her misconduct analysis. The arbitrator referred to the employer’s “telework” policy as follows:

“The employer is strongly urged to allow Rogers to work from home as he had during 1997 through 2001. Other employees of the agency are allowed to telework. Expert witnesses testified that teleworking would be a very good solution. Teleworking would be a good balance for the employer to acknowledge Rogers’ long term service to the agency and to overcome the employer’s concern that other employees should not be subjected to potentially harmful, even if unintentional, behavior.”

13. The “Award” section of the arbitrator’s decision and award stated, in its entirety:

“AWARD

“Any facts or arguments presented at the hearing or in briefs not cited within this decision I found non-persuasive or immaterial. Based on the sworn testimony of the witnesses, the documents admitted into evidence, and the record as a whole, it is awarded:

“The grievance is sustained in part and denied in part.

“The employer did not have just cause to issue the grievant a two step, four month, pay reduction, since the grievant did not violate the employer’s policy against violence in the workplace by his unintentional physical acts.

“The employer does have just cause to issue the grievant a written reprimand since the grievant did violate the employer’s policy against violence in the workplace by his threatening behavior.”

“ISSUED in Chehalis, Washington, this 31<sup>st</sup> day of March, 2005.

“Katrina I. Boedecker  
Arbitrator”

14. On April 13, 2005, the State filed this petition challenging enforcement of the award, asserting that the award did not meet the requirements of ORS 240.086(2)(g).

### CONCLUSIONS OF LAW

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

2. The arbitration award issued by Arbitrator Katrina I. Boedecker on March 31, 2005 is enforceable.

### **Legal Standards**

ORS 240.086(2)(g) provides that an award is unenforceable where it “is in violation of law.” The Court of Appeals has described the scope of review generally applicable to arbitration awards under ORS 240.086(2) as follows:

“\* \* \* The [ORS 240.086(2)(g)] phrase ‘[t]he *award* is in violation of law’ (emphasis supplied), read literally, refers to the legality of the end-product of the arbitration and not to the legal reasoning underlying the arbitrator’s decision or to intermediate rulings in the arbitration proceeding. Moreover, that literal understanding of what is reviewable under ORS 240.086(2)(g), in conjunction with the matters ERB may review pursuant to ORS 240.086(2)(a)-(f), makes the *overall* scope of review and the matters reviewable under that statute commensurate with the very limited judicial or administrative review that other arbitration statutes and interpretive case authority permit. \* \* \*

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“\* \* \* The guiding principle \* \* \* is that arbitration awards should be subject only to sparing review, in the interest of promoting the efficiency and finality of arbitration as a decision-making process for parties who contract to use it. \* \* \*” *Fed. Of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 562-

63, 679 P2d 868, *rev den* 297 Or 458 (1984) (Emphasis in original).<sup>3</sup>

This Board “will not engage in a ‘right/wrong’ analysis” of an arbitrator’s opinion and award. *In the Matter of the Arbitration of a Dispute Between Service Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Office of Services for Children and Families*, Case No. AR-3-03 and AR-4-03, 20 PECBR 829 (2005)

In addition, arbitration awards must comply with ORS 243.706(1). That statute provides in part:

“\* \* \* 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. In addition, with respect to claims that a grievant should be reinstated or otherwise relieved of responsibility for misconduct based upon the public employer’s alleged previous differential treatment of employees for the same or similar conduct, the arbitration award must conform to the following principles:

“(a) Some misconduct is so egregious that no employee can reasonably rely on past treatment for similar offenses as a justification or defense to discharge or other discipline.

“(b) Public managers have a right to change disciplinary policies at any time, notwithstanding prior practices, if such managers give reasonable advance notice to affected employees and the change does not otherwise violate a collective bargaining agreement.”

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<sup>3</sup>See also *Deschutes County Sheriff’s Association v. Deschutes County and Deschutes County Sheriff’s Office*, 169 Or App 445, 453, 9 P3d 742 (2000), *rev den* 332 Or 137, 27 P3d 1043, 1044 (2001), holding that, under ORS 243.706(1), “it is the *award* that must comply with public policy” (Emphasis in original). In *State of Oregon, Department of Transportation, Department of Motor Vehicles v. OPEU*, Case No. AR-1-98, 17 PECBR 814, 825 (1998), this Board noted that “[t]he State is seeking an inquest into the arbitrator’s analysis. It is not our role to conduct such a probe.”

OR-OSHA argues that the arbitrator's award violates the law because "[t]he arbitrator's award requires Petitioner to allow Rogers to strike individuals while engaged in the course and scope of his work duties." OR-OSHA argues that the award violates its duty under ORS 654.010<sup>4</sup> and the common law to provide a safe working environment; could subject Petitioner to criminal charges for assault in the fourth degree under ORS 163 160;<sup>5</sup> and is inconsistent with Oregon's disability laws.

The employer's argument depends upon the factual premise that Rogers' startle reflex is *voluntary*. This view was rejected by the arbitrator.<sup>6</sup> We do not determine the accuracy of the arbitrator's findings of fact.

The arbitrator specifically found that Rogers' startle reflex was *involuntary*. Therefore, Roger's actions, when that reflex was elicited, is not misconduct within the meaning of ORS 243.706(1).

Nor do we engage in "right/wrong" review of the arbitrator's award. We note, however, that nothing in ORS 654.010 requires an employer to *discipline an employee* for involuntary conduct, even if that conduct affects other employees. This is especially so where

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<sup>4</sup>ORS 654 010 provides the following:

"\* \* \* Every employer shall furnish employment and a place of employment which are safe and healthful for employees therein, and shall furnish and use such devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees."

<sup>5</sup>ORS 163 160 provides in part as follows:

"\* \* \* (1) A person commits the crime of assault in the fourth degree if the person:

"(a) Intentionally, knowingly or recklessly causes physical injury to another; or

"(b) With criminal negligence causes physical injury to another by means of a deadly weapon

"(2) Assault in the fourth degree is a Class A misdemeanor."

<sup>6</sup>OR-OSHA does not directly challenge the underlying factual findings of the arbitrator, and no basis for such a challenge appears in the record. This Board is bound by those findings. *See Deschutes County*, 169 Or App at 455.

there are other means available to remove the risk created by that conduct.<sup>7</sup> For the same reasons, ORS 163.160 does not apply to this situation.<sup>8</sup>

Finally, OR-OSHA argues that the arbitrator's discussion of teleworking, in which she "strongly urged" OR-OSHA to allow Rogers to work from home, was an imposition of a "reasonable accommodation" under Oregon disability law, and, therefore, exceeded arbitral authority. The employer offers no credible reason why this hortatory language in the remedy section of the decision and award offends the contract, the Public Employee Collective Bargaining Act, or any other law, and we find none.

We will dismiss the petition.

ORDER

The petition is dismissed. OR-OSHA shall comply with the award, and shall reimburse Rogers in accordance with the arbitration award, together with interest at 9 percent per annum from the date of the award until paid.

DATED this 7<sup>th</sup> day of April 2006.

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Donna Sandoval Bennett, Chair



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Paul B. Gamson, Board Member



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James W. Kasameyer, Board Member

\*Chair Bennett is recused in this matter.

This Order may be appealed pursuant to ORS 183.482.

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<sup>7</sup>As the arbitrator noted, Rogers had teleworked in the past, and was in the field 60 percent of the time.

<sup>8</sup>OR-OSHA imposed a two-step, four-month, pay reduction on Rogers, a sanction which appears inconsistent with its arguments that Rogers was guilty of committing criminal violence in the workplace.