

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

(PETITION FOR REVIEW OF ARBITRATION AWARD)

Case No. AR-1-06

IN THE MATTER OF THE ARBITRATION)
BETWEEN THE STATE OF OREGON,)
DEPARTMENT OF TRANSPORTATION,)

Respondent,)

v.)

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

Petitioner.)
_____)

RULINGS,
FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

On June 29, 2006, Service Employees International Union Local 503, Oregon Public Employees Union (Union, Local 503) filed this petition for review of an arbitrator's award pursuant to ORS 240.086(2)(g). According to Local 503, an arbitration award issued by Arbitrator Gary Axon on June 19, 2006 is "in violation of law" and must be set aside as unenforceable. On July 20, 2006, the State of Oregon, Department of Transportation (ODOT, Employer) filed its answers and objections to the petition.

The parties thereafter agreed to submit this matter directly to the Board on stipulated facts, together with the pleadings and the parties' briefs. The record closed on October 16, 2006 on submission of ODOT's motion to strike certain material from the brief filed by Local 503.

Joel L Rosenblit, Attorney for SEIU Local 503, Oregon, Public Employees Union, 1730 Commercial St. S.E., P. O. Box 12159, Salem, Oregon 97319-0159, represented Petitioner.

Sally A. Carter, Assistant Attorney General, 1162 Court Street NE, Salem, Oregon 97301-4096, represented Respondent.

The only issue before the Board is whether Arbitrator Axon's award is "in violation of law" as provided in ORS 240.086(2), and is therefore unenforceable.

RULINGS

ODOT has asked this Board to strike any reference to an employer's exhibit from the brief submitted by Local 503. In referring to this exhibit, Local 503 sought to contest certain of the arbitrator's factual findings. This Board does not allow the parties to relitigate the arbitrator's findings of fact in proceedings under ORS 240.086(2). *In the Matter of the Arbitration of a Dispute between the State of Oregon, Department of Consumer and Business Services v. SEIU Local 503, OPEU*, Case No. AR-1-05, 21 PECBR 307, 319 (2006). We will disregard Local 503's reference to the exhibit which ODOT finds objectionable.

FINDINGS OF FACT¹

1. ODOT is a public employer. Local 503 is the exclusive representative of a bargaining unit which includes employees who work for ODOT. David Sutkowski (Sutkowski) is a member of the Local 503 bargaining unit.

2. In a letter dated March 3, 2005, Sutkowski received a one-step, one-month pay reduction from the Employer. The discipline was based on two grounds: first, the use of profanity by Sutkowski on December 30, 2004; and second, Sutkowski's providing false and/or misleading information about the profanity in a subsequent investigatory meeting.

3. The Union filed a grievance dated March 29, 2005, contending that the discipline violated Article 10, Article 20, and Article 21 of the collective bargaining agreement between the Union and the Employer.

4. The Employer and the Union were unable to resolve the grievance and the Union requested that the grievance proceed to arbitration. For efficiency, other non-disciplinary grievances arising out of the same course of events were combined for arbitration with Sutkowski's March 29, 2005 grievance.

¹These findings are taken from the parties' "Stipulation of Procedural Facts," which was filed with the Board on October 11, 2006, and from the text of the arbitration award itself.

5. The grievances were heard by Arbitrator Cary L. Axon in Astoria, Oregon on March 23, and 24, 2006.

6. Arbitrator Axon issued his Opinion and Award on June 19, 2006, which, *inter alia*, denied and dismissed Sutkowski's March 29, 2005 grievance. The arbitrator framed the issue before him as:

"Did the Employer have just cause to issue David Sutkowski a one-step, one month pay reduction? If not, what is the appropriate remedy?" (Opinion at 2.)

Axon ruled that ODOT did have just cause to issue Sutkowski the pay reduction. He reasoned as follows:

"I find Grievant Sutkowski did utter the word [obscenity] at the conclusion of a volatile telephone conversation with manager Spaeth. The comment was made in the break room at the Humbug shop. Other employees were present in the break room who could readily overhear Grievant Sutkowski's words.

"It is unnecessary for your Arbitrator to further review in detail the testimony and argument in the discussion section of the Award. I credit the testimony of manager Spaeth and office manger Sloane that they heard Grievant utter the profanity at the conclusion of the telephone conversation. In order to accept the Union's claim Grievant did not call Sutkowski a [obscenity], I would have to find Spaeth and Sloane fabricated their testimony. I hold there is no basis in the record to conclude Spaeth and Sloane manufactured the testimony on what they heard Sutkowski say.

"Moreover, former Union representative Hall testified Sutkowski admitted to him that he called Spaeth a [obscenity]. While Hall's testimony standing alone probably would not sustain the charge, I hold his testimony corroborates that of Spaeth and Sloane. Hall's testimony lends credence to the testimony of Spaeth and Sloane that further undercuts Grievant's excuse that he did not recall using the expletive in reference to Spaeth.

“Turning to Grievant’s testimony that he did not recall using the term at issue, I find his testimony is not credible. Grievant Sutkowski is an experienced employee and shop steward who understands that if you call your supervisor a profane name in the presence of other employees, consequences are likely to follow. I concur with the Employer’s position that Grievant Sutkowski’s testimony that he did not recall directing the word [obscenity] at Spaeth was a misguided attempt to avoid responsibility for his conduct.

“* * * * *

“* * * None of the Union witnesses testified unequivocally that Grievant did not call Spaeth a [obscenity]. Thus, I must conclude the Union’s evidence was insufficient to contradict the testimony of Spaeth and Sloane that they heard Grievant direct the profanity at manager Spaeth.

“ODOT also charged Sutkowski with providing ‘false and/or misleading information about directing profanity at your manager, thereby violating the directive to be honest and forthcoming that was set forth in the beginning of the investigatory meeting.’ [Exhibit citation omitted.] Your Arbitrator previously concluded Grievant Sutkowski’s explanation that he could not recall calling manager Spaeth a [obscenity] to be implausible. Therefore, I am compelled to hold the false and/or misleading information charge is sustained.

“The Union next argued that Grievant could not be disciplined for using the profanity when he was acting in a steward capacity. I disagree. The setting and circumstances where Grievant Sutkowski expressed the expletive are undercut by the fact Sutkowski was not in a private office where he was engaged in a grievance meeting with Spaeth. In addition, the profanity was not expressed in discussions at the bargaining table. Grievant uttered the word in the break room area at the Humbug work site. Other employees were present at the time Grievant called his manager a [obscenity]. Grievant’s use of the profanity was not ‘shoptalk.’ Sutkowski

directed the word at this manager in the form of an insult. It is one thing to engage in shoptalk with a coworker, and a different level of conduct when the profanity is a verbal attack aimed at a supervisor. Simply put, verbally abusing a supervisor while in the work place in the presence of coworkers is not protected activity.

“The grievance of David Sutkowski is denied and dismissed in its entirety” (Opinion and Award at 28-30)

7. On June 29, 2006, the Union filed a Petition for Review and Exceptions to Arbitrator’s Award with the Employment Relations Board.

8. On July 20, 2006, the Employer filed Respondent’s Answers and Objections to Petitioner’s Petition for Review and Exceptions to Arbitrator’s award.

CONCLUSIONS OF LAW

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

2. Arbitrator Axon’s award is not “in violation of law” and is therefore enforceable under ORS 240.086(2)(g).

Standards for Decision

ORS 240.086(2) authorizes this Board to:

“[r]eview and enforce arbitration awards involving employees in certified or recognized appropriate collective bargaining units [of State employees]. The awards shall be enforced unless the party against whom the award is made files written exceptions thereto for any of the following causes:

“* * * * *

“(g) The award is in violation of law.”

This Board applies the same standard of review to arbitration awards under ORS 240.086(2) that we apply in reviewing arbitration awards under ORS 243.672(1)(g) and (2)(d). *Executive Department, State of Oregon v. Federation of Oregon Parole*

and Probation officers, Case No. AR-1-85, 9 PECBR 8497(1986); and *In the Matter of the Arbitration Between State of Oregon, Department of Corrections v. AFSCME Council 75, Local 2623*, Case No. AR-1-92, 13 PECBR 846, 858 (1992).

Our review under either statute is very limited. As the Board stated in *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 Nos. AR-3/4-03, 20 PECBR 829, 842-43 (2005),

“[b]ecause of the strong public policy favoring arbitration, our review of an arbitrator’s award is limited in scope. ‘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, 563, 679 P2d 868, *rev den*, 297 Or 458 (1984). In furtherance of these interests, ‘this Board will not engage in a “right/wrong” analysis’ of an arbitrator’s award, *Department of Corrections*, 13 PECBR at 858, and it will not conduct ‘an inquest into the arbitrator’s analysis,’ *Oregon Department of Transportation v. OPEU*, Case No. AR-1-98, 17 PECBR 814, 825 (1998). Factual errors or misinterpretation of the contract, no matter how clear, will not suffice to overturn an arbitrator’s award. ‘As is often stated in arbitration enforcement cases, it is the arbitrator’s interpretation of the contract terms which the parties bargained for and it is that interpretation to which the parties are now bound.’ *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986).”

Finally, the Court of Appeals has described, in specific terms, the scope of review applicable to arbitration awards under ORS 240.086(2)(g):

“* * * The [statutory] 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.” *Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 562, 679 P2d 868 (1984) (emphasis in original).

Discussion

We apply our limited scope of review to these facts. ODOT gave Sutkowski a one-step, one-month pay reduction for using profanity in the workplace and for providing false and/or misleading information about the profanity in a later investigatory meeting; or as SEIU would have it, “David Sutkowski received a pay reduction for saying the word [obscenity] and for saying that he did not recall saying it.” (Petition at 2.) Arbitrator Axon upheld the discipline. He found that Sutkowski used the forbidden word in the break room area at the Humbug work site, and concluded that verbally abusing a supervisor while in the work place in the presence of coworkers is not protected activity. Axon also did not believe Sutkowski’s statements that he could not recall making the offending remark.

Local 503 gives three reasons why this Board should overturn Axon’s opinion and award. The Union argues that the arbitrator got the facts wrong—or at least omitted facts which he should have included. Local 503 also argues that the arbitrator got the law wrong when he concluded that Sutkowski was not engaged in protected activity when he uttered the offending word. Finally, Local 503 argues—as it must—that Arbitrator Axon’s award is “in violation of law.” The award violates the law, according to Local 503, because it permits ODOT to discipline Sutkowski based on his union activity which is protected under ORS 243.672(1)(a).

All of these arguments ignore the standard of review which the Board must use in proceedings under ORS 240.086(2)(g). We do not engage in a “right/wrong analysis” of arbitration awards. We do not determine whether the arbitrator got the facts, or the law, wrong.² Finally, we do not examine the arbitrator’s reasoning when we decide whether his award is in violation of law. Instead, we look to the result. We ask whether the award orders ODOT to commit an unlawful act or refrain from an act that is required by law. *Amalgamated Transit Union Division 757 v. Tri-County Metropolitan*

²As the Supreme Court explained in *Brewer v. Allstate Insurance Co.*, 248 Or 558, 561-562, 436 P2d 547 (1968):

“The arbitrator acts within the bounds of his authority not only when he decides a question of law correctly according to judicial standards, but also when he applies the law in a manner which a court would regard as erroneous. As we said in *Mahaffy v Gray*, 242 Or 522, 525, 410 P2d 822 (1966), ‘Neither a mistake of fact or law vitiates an award.’”

Thus, for purposes of reviewing this arbitration award, we must accept the arbitrator’s factual determination that Sutkowski directed an obscenity at his manager, as well as the arbitrator’s legal conclusion that Sutkowski was not engaged in protected union activity at the time

Transportation District of Oregon, Case No. UP-64-03, 21 PECBR 443, 469 (2006), *appeal pending*. Arbitrator Axon found that Sutkowski directed an obscenity at his manager, and he concluded that the conduct was not protected union activity. As a consequence, the arbitrator dismissed the grievance because he found that ODOT had just cause to discipline Sutkowski. Local 503 points to no law, and we know of none, that prohibits an employer from disciplining an employee who verbally abused a manager, when the employee was not engaged in protected union activity.

For the foregoing reasons, we dismiss Local 503's Petition for Review and Exceptions to Arbitrator's Award.

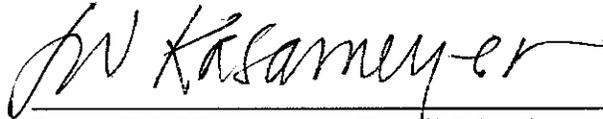
ORDER

The Petition for Review and Exceptions to Arbitrator's Award is dismissed.

DATED this 23rd day of May 2007.



Paul B. Gamson, Chair



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.