



Hospital and the American Federation of State, County and Municipal Employees, Local 3295 (AFSCME). On September 16, 2008, the Hospital amended its petition to assert that the arbitration award violates ORS 240.086(2)(d) and (f). AFSCME filed a timely answer.

The issue in this case is:

Did the September 2, 2008 arbitration award violate ORS 240.086(2)(d) and (f)?

### RULINGS

1. Evidence

At hearing, the Hospital sought to introduce exhibits P-1 through P-11 and P-13 through P-17 regarding the bargaining history of the collective bargaining agreement. In his recommended order, the ALJ correctly declined to admit this evidence. In proceedings to enforce a grievance arbitration award, the only evidence admitted is the parties' contract, the arbitration award, and evidence relevant to any claimed public policy exception. *Portland Association of Teachers and Jim Hanna v. Portland School District IJ*, Case No. UP-64-99, 18 PECBR 816 (2000).

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

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

#### Parties

1. The Hospital and AFSCME were parties to a collective bargaining agreement effective July 1, 2005 through June 30, 2007.<sup>2</sup>

#### Arbitration

2. The parties' 2005-2007 collective bargaining agreement contains an arbitration clause which states in part:

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<sup>1</sup>These facts are taken from the hearing as well as the parties' "Partial Stipulation of Facts."

<sup>2</sup>The parties entered a subsequent agreement that expired in 2009, but that agreement is not relevant here. The parties stipulated that the terms of the 2005-2007 agreement apply to the time that the grievant was on the administrative leave that is the basis for this dispute.

“Any grievance, having progressed through the Steps as outlined herein and remaining unresolved, may be submitted by the Union to arbitration.

“\* \* \* \* \*

“The parties agree that the decision or award of the arbitrator shall be final and binding on each of the parties and that they will abide thereby. The arbitrator shall have no authority to add to, subtract from, or change any of the terms of this Agreement.”

3. Effective February 1, 2007, the Hospital placed a bargaining unit employee accused of misconduct on paid administrative leave. She remained on administrative leave until October 9, 2007, when the Hospital returned her to work with a written reprimand. While on administrative leave, the employee did not have the opportunity to earn her customary shift differential and overtime pay.

4. Between October 31 and November 6, 2007, AFSCME filed a grievance over the lost wages. The grievance stated, in part:

“[The grievant] was placed on paid administrative leave on 02/01/07 and was not allowed to return until 10/09/07. As a result of [the grievant] not being able to work she was denied shift differential for working the off shift and any overtime opportunities that she would have taken advantage of. Articles violated are 20 [“Differentials”], 13 [“Overtime”], 16 [“Salary”] and any other applicable Articles.

“Adjustment required: Pay [the grievant] for all shift differentials she would have receive [*sic*] had she been allowed to work along with the hours of overtime she would have during this period and otherwise make her whole in all respects.”

5. In November 2007, the Hospital denied the grievance at the first step.

6. Between November 27 and 30 AFSCME sent the Hospital a letter. The letter stated, in part:

“While we are aware of the dates that [the grievant] was on leave with pay, it is clear that she suffered financial harm as a result of the hospitals’ decision to place her on administrative leave with pay in the form of differential and overtime pay. The Union asserts this is discipline above and beyond the written warning that she received. The Union finds this discipline unduly harsh and unnecessary given the facts of the case. We

continue to insist she be made whole for all shift differentials and any overtime opportunities she would have taken advantage of.”

7. On June 30, 2008, the parties participated in an arbitration hearing regarding the dispute. The arbitrator summarized the contentions of the parties as follows:

“The Union contends that the grievance was timely because it was filed within 30 days after [the grievant] returned to work on October 9 and because the Union normally waits until investigations are closed before ‘acting to ensure an employee has been properly paid.’ It also asserts that the Employer violated Article 13, Section 4, of the agreement because she was denied the contractually provided overtime that she otherwise would have earned if she had remained on her third shift, and that she therefore ‘was harshly disciplined with a large reduction of pay in violation of Article 55 because there ‘was no just cause for such a reduction in pay.’ [missing quote mark in original] The Union also maintains that [the grievant] is entitled to the prior shift differential she received under Article 20; that she also is entitled to holiday pay for the 4 holidays she stayed at home pursuant to Article 38; and that the Employer has violated its duty of good faith and fair dealing. The Union requests as a remedy that [the grievant] be made whole by paying her the lost overtime, shift differential and holiday pay.

“The Employer claims that the grievance is eight months late and untimely and is therefore not arbitrable because [the grievant] received monthly paychecks and thus knew as far back as February 2007 that she was not receiving shift differential pay; because her situation does not constitute a ‘continuing violation’ of the agreement which warrants a waiver of the agreement’s time limits; and because the Employer never waived its right to raise this timeliness issue at the Step 4 response since the Department of Administrative Services is the party to the agreement. The Employer also asserts that the grievance is without merit because the ‘agreement supports management’s treatment of the Grievant’; because ‘Policy and statute require investigation of allegations of inappropriate patient contact’; and because ‘standard practice’ was followed here. It also argues that the Union never raised these pay issues in contract negotiations even though the Union knew about them and that it thus would be wrong to grant a contract right or benefit that was not negotiated, and that any contrary practices involving different bargaining units ‘are irrelevant to the

established practice and application of the OSH nurses' bargaining agreement.”

8. On September 2, 2008, the arbitrator signed and issued his opinion and award. The award stated:

“1. The grievance is arbitrable.

“2. The Employer violated Article 55, Section 1, of the agreement when it assigned grievant \* \* \* to duty station at home without paying her the overtime and shift differential she previously earned.

“3. In order to make grievant \* \* \* whole, the Employer shall pay her the overtime and shift differential she otherwise would have earned between January 31 to October 8, 2007, in the manner described above.

“4. In order to resolve any questions which may arise over the interpretation or application of the remedy, I shall retain my remedial jurisdiction for at least 60 days and I shall automatically extend it if necessary.”

9. The arbitrator's opinion and award addressed three issues which are the basis for the Hospital's challenge here: that the grievance was timely, that the grievant's lost wage opportunities could be considered a form of discipline, and that the grievant was entitled to relief extending more than 30 days prior to the date of filing of the grievance.

#### Timeliness

10. In holding that the grievance was timely, the arbitrator stated:

“The first issue that must be decided here is whether the grievance was timely filed and hence arbitrable under Article 54 of the agreement, entitled ‘Grievance and Arbitration’, which states in pertinent part:

“Section 1 The grievance/arbitration procedure provides the means by which disputes or problems between the parties which arise concerning the application, meaning or interpretation of this Agreement are to be resolved.

“An alleged violation of the Agreement must be taken up at STEP 1 of the procedure within thirty (30) days from the time the

employee had knowledge, or in the normal course of events should have had knowledge, of the occurrence which created the problem. (Emphasis added [by arbitrator]). Disciplinary actions must be grieved within the thirty (30) day period, except for suspension and discharge which must be grieved within ten (10) days as described in Article 56 (Discipline and Discharge).

“Employee grievances which do not allege a violation of the Agreement, including written reprimands, may be heard only through STEP 3 of the Grievance Procedure.

“Here, the grievance was not formally received by the Employer until November 6 which was well past 30 days after [the grievant] was placed on duty station at home on January 31. She therefore should have filed a grievance at that time regardless of the ongoing investigation involving her contacts with a patient.

“Nevertheless, the agreement is completely silent over what is to be done with untimely grievances, as there is nothing in the agreement stating that untimely grievances must be automatically dismissed and not heard.

“Furthermore, and contrary to the Employer's claim that the situation here is ‘a discreet event,’ [sic] I find that the grievance raises an alleged continuing contract violation because the issues raised here can arise again whenever the Employer in the future assigns someone else to duty station at home. Indeed, Gregory testified that she over the years has been involved with about 27 situations of where employees have been assigned to duty station at home, thereby showing just how frequently such situations arise. It thus makes sense to address these issues now because that will save the parties the time and resources that they otherwise will have to expend in the future in order to resolve these ongoing policy issues which are not limited to [the grievant]'s situation.

“As a result, and because it is recognized that alleged continuing violations can excuse the tardy filing of a grievance, I find that the grievance is arbitrable.”

### Discipline

11. Regarding the Hospital's argument that the grievant's lost wages were not related to discipline, the arbitrator stated,

“The Employer states that ‘the re-assignment and consequent lost [sic] of shift differential or overtime is not defined as discipline in Article 55 – Discipline and Discharge’, and that [the grievant] did not meet the requirements for shift differential or overtime under Articles 13 and 20 of the agreement and thus ‘was not eligible under the terms of the contract’ for such payments.

“Article 13, entitled ‘Overtime’, states in Section 2 ‘Overtime for employees working a regular work week is time worked in excess of eight (8) hours per day, or forty (40) hours per week . . .’, and Article 20, entitled ‘Differentials’ states in Section 1, B, ‘Employees shall be eligible for the night shift differential when at least one-half (1/2) of the scheduled hours of their work shift fall between the hours of 12:00 midnight and 6:00 AM.’

“Since [the grievant] was not actually ‘working’ any overtime or ‘working’ on the night shift when she was assigned to duty station at home, it is understandable why the Employer makes this claim. That is why, standing alone, no payments are required under this language.

“But this language, along with Articles 8, 12, and 57, does not stand alone. It must be considered alongside the contractual just cause standard in Article 55, Section 1, because the Union charges that [the grievant] ‘was harshly disciplined with a large reduction in pay, in violation of Article 55, Discipline and Discharge’.

“As for that:

“It is generally held that computation of back pay for an employee who has been improperly discharged may be computed to include lost overtime opportunities.

“See Hill and Sinicropi, Remedies In Arbitration, (2nd Ed., BNA Books, 1991), at 198.

“Furthermore,

“‘arbitrators adhere to the principle that on finding a contract violation, arbitrators have inherent power under a contract to award monetary damages to place the parties in a position they would have been in had

there been no violation. Make whole awards may include recovery of lost overtime, premium, or other special pay. . .', including shift premiums. (Footnote citations omitted [by arbitrator]).

"See Elkouri and Elkouri, How Arbitration Works, (ABA-BNA Books, 6th Ed., 2003), at 1202.

"Back pay in such situations therefore is awarded even though the affected employees do not actually 'work' overtime or actually 'work' on a shift which pays a shift differential because a violation of the just cause standard normally carries with it the need to make the affected employees whole in order to place the employee in the position he/she would have been in but for the employer's action.

"As a result, Articles 13 and 20 must be construed in the same manner here, i.e. that they give way to the just cause standard which provides that employees must receive the same overtime opportunities and shift differential pay they previously enjoyed if the Employer in a disciplinary matter lacks just cause to deprive employees of those benefits."  
(Footnotes omitted.)

#### Awarding relief beyond 30 days

12. During the arbitration, the Hospital contended that the grievant was not entitled to any relief. It did not argue that any relief awarded could not cover more than a thirty day period. The arbitrator ordered that the grievant be made whole for lost overtime and shift differential wages from January 31 through October 8, 2007.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The September 2, 2008 arbitration award does not violate ORS 240.086(2)(d) and (f).

#### Standards for Decision: ORS 240.086

ORS 240.086(2), in relevant part, requires this Board to:

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

“\* \* \* \* \*

(d) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

“\* \* \* \* \*

“(f) The arbitrators awarded upon a matter not submitted to them, unless it was a matter not affecting the merits of the decision upon the matters submitted.”<sup>3</sup>

We apply the same standard of review to arbitration awards challenged under ORS 240.086(2) as we do under the Public Employee Collective Bargaining Agreement (PECBA). *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), citing *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).

We recently summarized our standards for reviewing grievance arbitration awards as follows:

“We review grievance arbitration awards under the deferential standard first set forth in *Willamina Education Association 30J and Lucanio v. Willamina School District No. 30-44-63J*, Case No. C-253-79, 5 PECBR 4086, 4099-4100 (1980). We will enforce an arbitration award unless it is ‘clearly shown’ that either:

‘(1) The parties did not, in a written contract, agree to accept such an award as final and binding upon them (for example, an arbitrator finds no violation of the agreement, but upholds a grievance as

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<sup>3</sup>ORS 240.086 provides other grounds for refusing to enforce an arbitration award which do not apply here.

constituting an unfair labor practice; an arbitrator exceeds a limitation on his authority expressly provided in the collective bargaining agreement); or,

‘(2) Enforcement of the award would be contrary to public policy (for example, the award requires the commission of an unlawful act; the arbitration proceedings were not fair and regular and, thus, did not conform to normal due process requirements).’

“Subsequent cases have reinforced these standards for enforcement of an arbitration award. “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.’ *Federation of the Oregon Adult Parole and Probation Officers, et al, v. State of Oregon, Corrections Division*, 67 Or App 59, 563, 679 P2d 868, *rev den*, 297 Or 458, 683 P2d 1371 (1984).

“Our review of the arbitrator's interpretation of a collective bargaining agreement is extremely limited. ‘So long as the arbitrator's decision and award is based upon his [or her] interpretation of the contract language, the arbitrator is within his [or her] contractual authority and the parties are bound by the decision. 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).

“Accordingly, we do not review an arbitrator's interpretation of a collective bargaining agreement to determine if it is right or wrong. *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). We refuse to substitute our judgment for that of an arbitrator, and will not correct a decision just because it is erroneous. *Portland Association of Teachers and Jim Hanna v. Portland School District 1J*, Case No. UP-64-99, 18 PECBR 816, 836-37 (2000), *AWOP*, 178 Or App 634, 39 P3d 292, 293 (2002).” *Clackamas County Employees Association v. Clackamas County*, Case No. UP-4-08, 22 PECBR 404, 410-11 (2008), *AWOP* 228 Or App 368, 208 P3d 1057(2009), *rev den* 347 Or 258, 218 P3d 540 (2009) (footnote omitted).

With these standards in mind, we turn to the facts of this case.

## Timeliness

The arbitrator concluded that an employee grievance filed months after the violation first occurred was arbitrable despite contract language which required that grievances be filed within 30 days. He reasoned that because the contract was silent on the consequences of filing untimely grievances, and because the alleged violation was a continuing one, the grievance was excused from strict compliance with the contractual time limits.

The Hospital argues that in finding the grievance timely, the arbitrator exceeded his authority and that his decision constituted a “perverse misconstruction” of the collective bargaining agreement. In support of its contention, the Hospital cites *Racine County v. Int’l Ass’n of Machinists & Aero. Workers, Dist. 10, AFL-CIO*, 310 Wis. 2d 508, 519, 751 N.W.2d 312, 317, 184 LRRM 2676 (2008).<sup>4</sup> The “perverse misconstruction” standard discussed in *Racine County* was never defined or applied by the court, however. Instead, the court vacated the arbitrator’s award on the grounds that it violated statutory law. We will not apply this standard to the arbitrator’s award here.

In *American Federation of State, County and Municipal Employees, Local 2067 v. City of Salem*, Case No. C-96-82, 6 PECBR 5532, 5541 (1982), *AWOP 64 Or App 855*, 669 P2d 843 (1983), *rev den 296 Or 350* (1984), we reviewed an arbitrator’s timeliness determination involving grievance language more restrictive than the language here. There, by contract, untimely grievances were deemed abandoned. Despite the fact that the grievance was not filed in conformance with the contractual time limits, the arbitrator found that the grievance “substantially complied” with the contract and was therefore timely. We declined to apply a right/wrong analysis to the arbitration award. We reasoned that in agreeing to grievance arbitration, the parties consented to a speedy, nontechnical, equity-oriented, and flexible approach to grievance resolution. If the parties desire to restrict the traditionally broad powers of the arbitrator, “they must express the extent and nature of the limitation in unmistakable terms.” 6 PECBR at 5539. The Court of Appeals affirmed our decision.

In *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746 (1986), we also upheld an arbitrator’s decision which found a grievance arbitrable despite the fact that the grievance did not strictly comply with contractual time limits. We reasoned that the parties agreed that the

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<sup>4</sup>The Hospital also cites *Local 236 Laborers Int’l Union of N. Am. v. City of Madison (In re Dispute Between Local 236)*, 255 Wis. 2d 832, 646 N.W. 2d 854 (2002), in support of its contention that the arbitrator’s decision was a “perverse misconstruction” of the collective bargaining agreement and should not be enforced. This case was an unpublished opinion of the Wisconsin Court of Appeals, however. As such, it has no precedential value.

arbitrator would interpret and apply the time limitations in the collective bargaining agreement grievance procedure. If we subjected the arbitration award to a right/wrong review, we would deny the parties the benefit of the bargain they made.

Here, the arbitrator determined that the alleged violation was continuing and thus not subject to the strict contractual time limits. His decision reflected his interpretation of the contract and his judgment on the requirements of that language. We will not determine if his analysis was correct. We will enforce his determination that the grievance was timely.

### Discipline

The Hospital placed the grievant on administrative leave for eight months while it investigated grievant's alleged misconduct. Because she was on administrative leave, the grievant lost wages in the form of shift differential and overtime pay. The arbitrator ordered the Hospital to make the grievant whole for this loss. Citing provisions of the collective bargaining agreement and the "common law of labor relations," the Hospital argues that the arbitrator wrongly interpreted the just cause provision, contrary to the "common law of labor relations," when he held that not paying shift differential or overtime was discipline without just cause. As the Hospital notes, this Board has previously referred to the "common law of labor relations." In *Oregon Education Association v. Willamette Education Service District*, Case No. UP-8-07, 22 PECBR 585, 608 (2008), this Board stated,

"In such circumstances, we give 'full consideration to the principles established over the years—mostly by arbitrators—that compose what is often called the 'common law of labor relations.'" *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8849 (1986)."

The *Willamette ESD* did not involve review of an arbitrator's decision. Instead, this Board was required to interpret the language of a collective bargaining agreement to address a claim that an employer violated subsection (1)(e) by failing to comply with the *status quo* of an expired collective bargaining agreement. Here, by contrast, the parties agreed by contract that the arbitrator would interpret the meaning of the contract. Whether or not the arbitration award was derived from a right or wrong interpretation of the "common law of labor relations" is precisely the type of analysis that this Board does not do. The parties agreed to submit those questions to an arbitrator, not this Board. We will dismiss this claim.

### Relief for lost wages exceeding 30 days

The Hospital argues that because grievances under the collective bargaining agreement must be filed within 30 days, remedies cannot extend beyond 30 days. We

apply the same deferential standards to challenges of remedies ordered by arbitrators as we do to their awards. *Clackamas County*, 22 PECBR at 411. To the extent that the Hospital's argument is simply a restatement of its position regarding timeliness, we have addressed it above. In addition, while the Hospital argued at arbitration that the grievance was untimely, it did not argue that relief, if awarded, should be limited to 30 days. This argument could have been raised in arbitration, and we will not consider it when raised the first time in a challenge to the award. We will dismiss this claim.

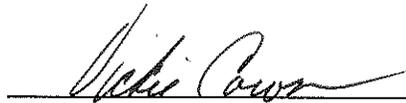
ORDER

The Petition is dismissed.

DATED this 14<sup>th</sup> day of April, 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.