

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. AR-3-03 and AR-4-03

(PETITION FOR REVIEW OF ARBITRATION AWARD)

IN THE MATTER OF THE ARBITRATION OF A)
DISPUTE BETWEEN SERVICE EMPLOYEES)
INTERNATIONAL UNION, LOCAL 503,)
OREGON PUBLIC EMPLOYEES UNION,)

Petitioner,)

v.)

STATE OF OREGON, OFFICE OF SERVICES FOR)
CHILDREN AND FAMILIES,)

Respondent,)

Case No. AR-3-03;)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

IN THE MATTER OF THE ARBITRATION)
BETWEEN STATE OF OREGON, OFFICE OF)
SERVICES FOR CHILDREN AND FAMILIES,)

Petitioner,)

v.)

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

Respondent,)

Case No. AR-4-03.)

Before this Board on both parties' Petitions to Review Arbitration Award, Objections to the Petitions, and briefs received on December 22, 2003.

Joel L. Rosenblit, Attorney at Law, SEIU Local 503, AFL-CIO, CLC, P.O. Box 12159, Salem, Oregon 97309-0159, represented Petitioner/Respondent Service Employees International Union Local 503, Oregon Public Employees Union.

Donna Sandoval-Bennett, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97310, represented Petitioner/Respondent State of Oregon, Office of Services for Children and Families.

On August 14, 2003, Service Employees International Union, Local 503, Oregon Public Employees Union (Union) filed a petition under ORS 240.086(2) challenging the enforcement of an arbitration opinion and award that was issued on July 31, 2003.¹ On August 15, 2003, the State of Oregon (State), Office of Services for Children and Families (SCF) filed a petition challenging the enforcement of the same award.

The Arbitrator concluded there was no just cause for Grievant's dismissal. As a remedy, she ordered Grievant reinstated, but without back pay or benefits. She further order SCF to purge all its files of documents relating to the charges against Grievant, send those documents to the confidential files of the Oregon Department of Justice, and change its computer records related to those charges.

Neither party challenges the merits of the Arbitrator's opinion that the termination lacked just cause. Both parties challenge portions of the remedy the Arbitrator awarded. The Union asserts that the portion of the award denying Grievant back pay violates ORS 240.086(2)(f) because the Arbitrator awarded upon a matter not submitted to her. The State asserts that the portion of the award regarding purging files and changing computer records violates ORS 240.086(2)(d) because the remedy exceeded the powers conferred upon the Arbitrator by the parties' collective bargaining agreement; violates ORS 240.086(2)(f) because the Arbitrator awarded upon a matter not submitted to her; and violates ORS 240.086(2)(g) because it would require the State to violate the law.

¹The Arbitrator faxed the "Award" page to the parties on July 31; computer problems delayed printing and mailing the full 153-page opinion and award until August 8.

The parties submitted a complete fact stipulation on November 12 and closing briefs on December 22.

The issue before this Board is whether the arbitration award should be enforced, vacated, or modified under the standards of ORS 240.086(2)(d), (f), and (g). We conclude the award should be modified so that the State is not required to purge a document concerning Grievant from a registry the State is required by statute to keep. The award should be enforced in all other respects.

FINDINGS OF FACT²

1. The State is a public employer.
2. The Union is the exclusive bargaining representative of a group of employees employed by agencies of the State.
3. At all material times, the Union and the State were parties to a collective bargaining agreement. Article 21 of that agreement contains a grievance procedure that culminates in binding arbitration. Section 6(f) of that Article states, in relevant part:

“The Parties agree that the decision or award of the arbitrator shall be final and binding on each of the parties.
* * * 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. * * *”

4. Article 20, Section 1, of the agreement between the State and the Union states, in relevant part:

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

²The Findings of Fact are based upon the parties' fact stipulation.

5. Grievant worked for SCF as a social service specialist 1 (caseworker) and was a member of the bargaining unit represented by the Union. On October 13, 2000, SCF notified Grievant that she was dismissed from her employment effective at the close of business that day.

6. The purpose of Grievant's position, as stated in her position description, was to "provide casework services to SOSCF clients." Those services included assistance to parents and children in their own homes, and, when the children resided in substitute care, assistance to parents, children, and the care providers. In general, the purpose of those services was to "protect children and meet their needs to the extent specified by law and SOSCF policy."

7. Among Grievant's duties as a caseworker were determining eligibility for SCF services; initiating or providing protective services to children when needed or appropriate; and providing the courts with reports, recommendations concerning termination of wardship, and temporary custody, as required and needed.

8. Grievant is the biological mother of two children: "R," who was eight years old at the time of the event which served as the basis of Grievant's dismissal; and "T," who was six years old.³ Grievant was divorced and had custody of the children. Grievant was also the foster parent of two other children.

9. T has Attention Deficit Hyperactivity Disorder and a history of nosebleeds, among other medical issues.

10. On February 20, 1999, Grievant, her sons, and one of her foster children visited a Walgreen's store in Gresham. While at the store, R and T had a scuffle; there followed a series of events which culminated in T having a bloody nose and being ushered out of the store by Grievant after Grievant hit his bottom through his coat and sweatpants and "flicked" or hit his face with two fingers.⁴

11. A bystander in the Walgreen's store perceived Grievant's physical contact with T as child abuse, and made reports to that effect to both the Gresham

³We will refer to these minor children by an initial rather than by name.

⁴In her decision, the Arbitrator notes that patting T's bottom or touching him in certain areas, particularly the cheeks or mouth, is a behavioral treatment technique Grievant has been taught to help calm and redirect him. In one report, Grievant stated she was trying to pat his mouth and "assumed" she hit his nose instead.

Police and the SCF Child Abuse Hotline for Multnomah County. Because of Grievant's employment with SCF, the report to the Hotline was "flagged."

12. The Gresham Police investigated the incident that night, and notified the Hotline that they were releasing the children to Grievant's custody pending further investigation. They also notified the supervisor at the Hotline that they were not arresting or charging Grievant at the time; that there would be an investigation and possible charges; but that there was nothing at that time to support an allegation of abuse.

13. Because the report involved an allegation of abuse by an SCF employee, SCF assigned the investigation to Shirley Vollmuller, an SCF employee outside the county where Grievant was employed and the incident occurred. Ms. Vollmuller requested an interview with Grievant. On advice from her attorney, Grievant refused.

14. Ms. Vollmuller investigated Grievant as a parent suspected of child abuse, not as an SCF employee suspected of misconduct by her employer. Ms. Vollmuller conducted the only SCF investigation of abuse. The Human Resources section of SCF did not conduct a separate investigation of the incident in the Walgreen's store.

15. Ms. Vollmuller found no incidences of prior abuse by Grievant.

16. Ms. Vollmuller concluded there was some evidence of physical abuse (called a "Founded Disposition" under OAR 413-015-1000 et seq.) by Grievant toward her child based on the police investigation and T's statement that his mother struck him hard enough to cause his nose to bleed.

17. According to the parties' stipulation, the Founded Disposition precluded Grievant from continuing to work for SCF and from having foster children.

18. On June 22, 1999, the Grand Jury of Multnomah County charged Grievant with the crimes of Criminal Mistreatment I and Assault III (of T), Harassment (of a witness to the event), and Tampering With Witnesses (R and Kenneth Quackenbush—her former husband).

19. Grievant's trial on the criminal charges arising out of the Walgreen's incident occurred on August 24 through 26, 1999. During her testimony in the criminal

proceeding, Grievant stated for the first time that she was trying to “redirect” T’s behavior when she hit him on February 20, 1999, at Walgreen’s.

20. Grievant was acquitted of all criminal charges on August 26, 1999.

21. On November 15, Grievant appealed to Diana Roberts, Branch Manager of SCF’s Clackamas Branch, to change the disposition from “Founded” to “Unfounded” in light of the “not guilty” verdict in the criminal trial.

22. On November 23, 1999, Ms. Roberts responded she would not provide the requested remedy. She noted that the standard of proof in a criminal trial was “beyond a reasonable doubt,” whereas the standard of proof in an SCF assessment was “reasonable cause to believe” that a child had been harmed or threatened by abuse. She concluded the information in the file supported a finding of “reasonable cause to believe” that abuse had occurred.

23. Grievant was notified that she could ask the Administrator for the Western Region of the Department of Human Services (Department) to formally review Ms. Roberts’ decision.⁵ Grievant elected not to seek formal review because she did not think she could get a fair process and she would have to give up much of her right to privacy.

24. After participating in a predissmissal meeting on August 24, 2000, Grievant was dismissed from her SCF employment, effective October 13, 2000. The dismissal letter stated, in relevant part:

“During the CPS investigation you told Detectives McGowen and Mack the following: That you spanked

⁵OAR 413-010-0700 *et seq.* permit review of a Founded Disposition by a committee consisting of three child welfare employees, none of whom were involved in the assessment that resulted in the specific Founded Disposition under review. OAR 413-010-0705. The committee reviews the case and file along with information provided by the person requesting review. It does not re-interview the victim; interview or meet with the person requesting a review, or others associated with the requestor, or others mentioned in the assessment; or conduct a field assessment of the allegation of child abuse or neglect. OAR 413-010-0735(3)(b). The review committee can revise the disposition and make appropriate changes in the Department’s information system. OAR 413-010-0750. Such a review must be requested within 30 days after receipt of notice of the Founded Disposition. OAR 413-010-0721. According to the Union, the Department has indicated it will waive that deadline in this instance.

your son, [T], one, two or three times on the bottom and then told him to come on. When [T] continued to cry you turned around and slapped him with two fingers along the side of the face, and that you accidentally hit his nose. Witnesses told the detectives that they observed you punch [T] in the face. Your son [R], who was also present at the time of the alleged incident, told Ms. Vollmuller and the detectives that you hit his brother [T] in the face and caused his nose to bleed. Your son [T] also told Ms. Vollmuller and the detectives that you hit him in the nose causing it to bleed.

“Shirley Vollmuller concluded from the CPS and Law Enforcement investigations, that you hit your son hard enough to cause his nose to bleed. Your actions constitute founded abuse of your dependent child.

“* * * * *

“As a Social Service Specialist 1 employed by SCF, you are responsible for the protection of abused and neglected children and for the provision of services to them and their families to assure their safety. In your position you are expected to know the statutes applicable to abuse and neglect and are required by statute to report violations of those statutes. It is a reasonable expectation that you, as a social service worker with SCF, would comply with the statutes with which you work on a daily basis and which you apply to the families in your community. SCF cannot have a lower standard for its employees than it has for the members of the community within which those employees work. SCF would lose its credibility with families, partners and the community if it employed persons whom themselves engage in the conduct for which those families are held responsible by the agency.”

The dismissal letter did not mention Grievant’s refusal to be interviewed by Ms. Vollmuller.

25. On or about October 16, 2000, the Union grieved the dismissal on grounds that Grievant was terminated without just cause.

26. The Arbitrator conducted a hearing on June 26 through 27 and August 15, 2001. The parties stipulated to the issues as follows:

“Was there just cause for the dismissal of [Grievant]?”

“If not, what is the remedy?”

27. On July 31, 2003, the Arbitrator issued an award regarding the subject grievance. The parties did not receive the opinion and award in its entirety until August 8, 2003.

28. The Arbitrator held, as an initial matter, that the applicable standard of proof in the matter before her was “clear and convincing evidence.” Applying that standard, she found that Grievant’s conduct toward T did not constitute physical abuse. The Arbitrator made the following pertinent remarks:

“* * * Grievant’s hand hit [T’s] nose in such a way that that contact contributed to an injury which caused his nose to bleed. * * * That that means of contact (hitting [T’s] nose, as opposed to brushing his cheek or chin with the fingers) was non-accidental is not established on this record. While that blow caused the blood that already had started to flow to come out of [T’s] nose, the record (as noted above) does not establish that Grievant hit his nose hard or that she willfully, intentionally, deliberately or even negligently hit [T’s] nose hard enough to contribute to causing it to bleed. It also does not establish that Grievant hit [T] punitively, angrily or with any malicious intent.”

29. The Arbitrator concluded that SCF lacked just cause for Grievant’s dismissal because the dismissal failed three of the traditional tests of just cause. The Arbitrator summarized her “ultimate findings” as follows:

“As the Arbitrator has found that the investigation that SCF conducted before discipline was administered to Grievant was not fair and objective, that at the investigation, the ‘judge’ did not obtain substantial evidence or proof of the

misconduct charged, and that the degree of discipline administered by [SCF] was not reasonably related to the seriousness of Grievant's proven offense, the Arbitrator concludes that there was not just cause for the dismissal of Grievant. That dismissal, accordingly, violated the provision of Section 1, Article 20 of the Agreement stating that discipline (which includes dismissal) shall be imposed only for just cause. The grievance, therefore, will be sustained."

30. As part of the remedy, the Arbitrator ordered SCF to reinstate Grievant "to the Gresham Branch under her last supervisor, if that person is still serving in that position." She concluded that the reinstatement should be without back pay on the following grounds:

"* * * Grievant did, however, take an action that impeded, and perhaps was responsible for thwarting, the opportunity she had to be absolved during SCF's investigation (and, thereby avoid being discharged in the first place): she declined to talk with her employer's investigator, Ms. Vollmuller, about the Walgreen's incident.

"The record contains no direct information about why Grievant did that, other than it was on advice of counsel. It was part of a reasonable investigation for the employer's investigator, and the person who would in fact make the assessment for the employer of whether Grievant had engaged in the alleged abuse, to inter-view [*sic*] Grievant.

"Just as SCF, as Grievant's employer, was obligated to conduct an investigation (specifically, to thoroughly investigate the facts upon which a disciplinary action would be premised), Grievant had a duty to cooperate with an investigation (specifically, to diligently present all pertinent information which might affect the disciplinary decision). * * * It would be unreasonable, after all, to hold management to the duty of conducting a thorough investigation and, at

the same time, to tie its hands by allowing employees to refuse to participate.⁴⁵ * * *

“⁴⁵ A condition of requiring an employee to cooperate with an investigation is that the matter be of legitimate concern to the employer. * * * This matter was: given its mission, SCF had a legitimate concern in ascertaining whether its employee had engaged in child abuse.

“Most arbitrators who take this majority view make no distinction between misconduct that is purely ‘industrial’ in nature and offenses that could lead to criminal prosecution. * * * Child abuse is one such offense. At the time Ms. Vollmuller first could have interviewed Grievant, the law enforcement investigation of the Walgreen’s incident, which could lead to criminal charges being filed against Grievant, was continuing, and Grievant had not yet been indicted for any crime. The original grand jury regarding the allegations against Grievant was held on March 11, 1999, 15 days after Ms. Vollmuller was assigned the case and 27 or so days before she issued her Assessment report. Ms. Vollmuller was a CPS worker doing what she herself has labeled a joint assessment between law enforcement and SCF. Given these facts, the Arbitrator can speculate that Grievant declined to speak to Ms. Vollmuller about the Walgreen’s incident because criminal charges stemming from that incident either could be, or had been, filed against Grievant and because of Ms. Vollmuller’s actual and/or perceived involvement, as a CPS worker doing a joint assessment between law enforcement and SCF, in whatever criminal investigation was then still ongoing. There is nothing on the record, however, establishing that that was the case (not even an assertion that Grievant told Ms. Vollmuller that that was why she was declining to speak with her). There is no evidence or assertion on the record, moreover, that in declining to speak with Ms. Vollmuller about the incident, Grievant offered or otherwise made available alternative ways of communicating with Ms. Vollmuller that would have offered her protection

from the potential of incriminating herself (for purposes of criminal proceedings): speaking with Ms. Vollmuller with her attorney present or having her attorney speak with Ms. Vollmuller for her.

“Because the record does not establish why Grievant declined to speak with Ms. Vollmuller about the Walgreen’s incident, and because there is no indication on the record that Grievant offered any alternative way of communicating with Ms. Vollmuller that would have addressed concerns about Grievant incriminating herself for purposes of criminal proceedings, the Arbitrator cannot find that Grievant had a reason for declining to speak with Ms. Vollmuller that operated to put such a conversation beyond the scope of a reasonable investigation.

“By declining to speak with Ms. Vollmuller about the Walgreen’s incident, Grievant missed her only opportunity to tell her side of the story, and to answer the questions of, and otherwise give input directly to, the one SCF employee conducting SCF’s investigation of Grievant’s conduct, as Grievant’s employer, and the person responsible for SCF’s assessment of whether the abuse allegations against Grievant were founded. As a result of Grievant’s declining, Ms. Vollmuller, for purposes of the only investigation SCF was doing of the allegations against Grievant, did not interview Grievant or have a face-to-face contact with her, and Grievant was not directly questioned or heard during the investigation by the only SCF investigator involved and the person who would formulate the disposition, in the CPS/SCF assessment, of the allegations against Grievant. Instead, for her information from Grievant, Ms. Vollmuller relied upon Det. McGowan’s report of the detectives’ interview of Grievant and upon the original police report regarding the Walgreen’s incident. With only that input from Grievant, Ms. Vollmuller completed the CPS/SCF assessment with a disposition of founded for not only the allegation of physical abuse of [T] by Grievant but also for threat of harm of [T] and [R] by Grievant.

“Where there is insufficient proof of misconduct by an employee to justify the action taken by the employer, lack of cooperation can affect the remedy to which the no [sic] cooperating employee is entitled. * * * Specifically, in a case where the employee/grievant has not been found to have engaged in the misconduct charged, reinstatement with no back pay typically is awarded where the grievant has refused to cooperate with a reasonable investigation by management or has taken some other step that contributed to his or her own difficulties. * * *

“As the Arbitrator has found that that is what happened in this matter, and because the Arbitrator finds it will be a fair and appropriate remedy herein, the Arbitrator will award Grievant reinstatement with no back pay. * * * Likewise, the Arbitrator will not order SCF to make restitution to Grievant for benefits lost due to her discharge (i.e., the Arbitrator will not award the requested back benefits or restoration of rights, such as out-of-pocket medical and educational expenses Grievant would not have incurred had she been employed by SCF).” (Citations omitted.)

31. The Arbitrator found the record contained insufficient evidence to assess the appropriateness of some relief sought by the Union. However, she found it appropriate to order “certain actions regarding documents and computer files relating to Grievant’s discharge or the finding of abuse.” Specifically, she concluded an appropriate remedy included an order requiring SCF to:

“* * * [P]urge from its files, and send to the confidential files of the Department of Justice, all documents in its possession relating to Grievant’s discharge or the finding of abuse and any other documents relating to the Walgreen’s incident, to be released only if required by the Public Records law; and to change all its computer records to delete the finding of abuse or change that finding to unfounded.”

32. The Arbitrator's award ordered SCF to:

“(a) reinstate Grievant to the Gresham Branch, under her last supervisor, if that person is still serving in that position;

“(b) purge from its files, and send to the confidential files of the Oregon Department of Justice, all documents in its possession relating to Grievant's discharge or the finding of abuse and any other documents relating to the February 20, 1999 incident at Walgreen's Drug Store, to be released only if required by the Public Records Law; and

“(c) change all its computer records to delete the finding of abuse or change that finding to unfounded.”

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Arbitrator exceeded her authority and required an act that is contrary to law when she ordered SCF to either alter or purge documents from the State's central child abuse registry.
3. The remainder of the Arbitrator's award is lawful and will be enforced.

The Law Concerning Review Of Arbitration Awards

Both parties petition this Board to find certain aspects of the Arbitrator's remedy unenforceable. This Board will enforce an arbitration award involving agencies of the State of Oregon unless the petitioning party carries its burden of proving one of the exceptions listed in ORS 240.086(2).⁶ To resolve this dispute, we will first identify

⁶ORS 240.086(2), in relevant part, requires this Board to:

“Review and enforce arbitration awards involving employees in certified or recognized appropriate collective bargaining units. The awards shall be enforced

(continued...)

the legal standard for the review of remedies in arbitration awards. We will then apply that standard to this dispute.

Cases seeking review of arbitration awards come to this Board in one of two ways. One is through the Public Employee Collective Bargaining Act (PECBA);⁷ the other, as in this case, is through ORS 240.086(2). We apply the same standard of review in both types of cases. *Executive Department, State of Oregon v. Federation of Oregon Parole and Probation Officers*, Case No. AR-1-85, 9 PECBR 8497 (1986); and *State of Oregon, Department of Corrections v. AFSCME Council 75*, Case No. AR-1-92, 13 PECBR 846, 858 (1992).

Because 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,"

⁶(...continued)

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.

"(g) The award is in violation of law."

⁷Under ORS 243.672(1)(g), it is an unfair labor practice for a public employer to refuse to accept an arbitration award if the parties previously agreed to accept such awards as final. ORS 243.672(2)(d) creates a similar unfair labor practice for labor organizations that fail to accept an arbitration award.

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).

These principles of limited review apply equally to the remedy awarded by an arbitrator. This Board has frequently recognized that "an arbitrator has substantial discretion in formulating an award." *Department of Corrections*, 13 PECBR at 863 (citing *Woodburn Education Association and Bradford v. Woodburn School District No. 103C*, Case No. C-126-83, 7 PECBR 6509 (1984); and *N. Clackamas Educ. Assn. v. N. Clackamas Sch. Dist. No. 12*, Case No. C-275-79, 5 PECBR 4107 (1980), *aff'd* 54 Or App 211, 634 P2d 1348 (1981)). See also *Department of Motor Vehicles, supra*, 17 PECBR at 825 ("an arbitrator has substantial discretion in devising a remedy"). It is immaterial whether this Board would agree with the arbitrator's conclusion regarding the appropriate remedy. This Board has enforced awards upon a finding that the remedy was "tailored to the violation and grounded in the contract." *Department of Corrections, supra*, 13 PECBR at 863.

An arbitrator's remedial authority is not, however, unlimited. "It is simply not enough that the remedy be somehow related to the issue submitted to arbitration * * *." *Oregon State Police v. Oregon State Police Officers' Association*, Case No. AR-1-93, at 14 (1993). "We require more explicit language to authorize an arbitrator to exceed well-established customary limitations on arbitral remedies * * *." *Id.* at 17. Further, we will refuse to enforce an award that requires the commission of an unlawful act. *Astoria Education Association v. Astoria School District 1*, Case No. UP-42-96, 16 PECBR 813, 821, 823 (1996), *AWOP* 149 Or App 212, 942 P2d 302, 303 (1997).

With these principles in mind, we turn to the dispute before us.

Enforcement of The Remedy Ordered by the Arbitrator

Neither party challenged the Arbitrator's conclusion that SCF violated the collective bargaining agreement when it dismissed Grievant without just cause. We will order that portion of the award to be enforced without further comment.

Both parties challenge the remedy the Arbitrator awarded. We begin with the observation that the Arbitrator had the general authority to award an appropriate

remedy. The parties expressly asked the Arbitrator to decide both the merits of the dismissal as well as the appropriate remedy if the dismissal was without just cause. Our only concern is whether the Arbitrator's exercise of that grant of authority was inappropriate in any of the ways asserted by the parties.

UNION'S PETITION

The Denial of Back Pay and Benefits

The Arbitrator ordered SCF to reinstate Grievant, but she did not award back pay. As quoted at length in Finding of Fact 30, the Arbitrator explained her view that Grievant's refusal to submit to SCF's request for an interview was a lack of cooperation that contributed to her own difficulties. The Arbitrator concluded that reinstatement without back pay was the fair and appropriate remedy under the circumstances.

The Union challenges the portion of the remedy that denies Grievant back pay.⁸ It argues that the denial of back pay violates the requirements of ORS 240.086(2)(f) because the Arbitrator based the denial on a matter not submitted to her. In essence, the Union asserts that the Arbitrator punished Grievant by withholding back pay based on a finding of misconduct for which Grievant was not disciplined, *i.e.*, her refusal to submit to an interview during Vollmuller's investigation. In support of its objection, the Union notes that SCF did not include that act of non-cooperation in its charges against Grievant. The Union thus argues that the Arbitrator's award was based on a matter not submitted to her—*i.e.*, misconduct in not participating in the investigation.

The Union correctly observes that when an arbitrator concludes an employee engaged in misconduct, but the misconduct did not warrant discharge, the arbitrator will often reduce a discharge to an unpaid suspension by denying back pay. That, however, is not the *only* grounds on which arbitrators reduce or deny back pay and, based on the Arbitrator's explanation, that is not what occurred here.

The Arbitrator based her award on the contract. The contract gave the Arbitrator broad authority to fashion a remedy. Her remedy was based on the record in

⁸Although the text of the Arbitrator's discussion of the appropriate remedy states that the reinstatement will be without back pay or back benefits, the formal "Award" portion, quoted above, does not mention that limitation on the remedy. No dispute exists that the award does, indeed, exclude back pay and back benefits, and we will analyze the award accordingly.

the proceedings, and she explained her reasoning at length. An arbitrator “is empowered to grant any relief reasonably fitting and necessary to remedy a contract violation * * *.” *Woodburn School District, supra*, 7 PECBR at 6527. Whether we agree with the Arbitrator’s reasoning and choice of remedies is immaterial.

Given our limited review of arbitrators’ awards, the Union has not shown that the Arbitrator ruled on a matter not before her in denying back pay. We will therefore dismiss the Union’s petition.

STATE’S PETITION

The Order to Purge Files and Change Computer Records

The Arbitrator found that Grievant did not engage in child abuse as alleged by SCF. She therefore concluded that SCF violated the collective bargaining agreement by terminating Grievant without just cause. As part of the remedy for the violation, the Arbitrator ordered SCF to purge its files of all documents relating to the discharge or finding of abuse. As one aspect of the purge, the Arbitrator specifically ordered SCF to “change all its computer records to delete the finding of abuse or change the finding to unfounded.”

SCF asserts that the portion of the Arbitrator’s award which requires SCF to change and purge its computer records is partially unenforceable under ORS 240.086(2)(d) (arbitrator exceeded her powers), (2)(f) (arbitrator awarded on matters not submitted), (2)(g) (arbitration award violates the law). For the reasons discussed below, we conclude the Arbitrator exceeded her powers and required an act contrary to law to the extent her award orders SCF to change or delete information contained in a registry of child-abuse reports required by statute. The award is otherwise lawful and will be enforced.

Some brief background is necessary to understand this dispute. The legislature enacted an extensive statutory scheme to further the public policy of preventing child abuse and safeguarding abused children. ORS Chapter 419B. As part of this scheme, the legislature established duties to report child abuse, ORS 419B.010, and obligated the Department or a law enforcement agency to investigate all such reports, ORS 419B.020. It also enacted ORS 410B.030 which requires the Department (of which SCF is a part) to establish and maintain a central registry of certain child abuse investigations: “The local offices of the department shall report to the state registry in writing when an investigation has shown reasonable cause to believe that a

child's condition was the result of abuse even if the cause remains unknown." ORS 419B.030(1).

Charges of child abuse are considered "founded" for purposes of the registry when an investigation concludes there is reasonable cause to believe that abuse has occurred. OAR 413-010-0705(4)(a). A disposition is considered "unfounded" only when "no evidence of child abuse was identified or disclosed." OAR 413-010-0705(4)(b). As the Court of Appeals aptly observed, the agency's determination that a complaint was "founded" does not mean the complaint was true, or even that child abuse probably occurred; it means only that there is evidence that creates a reasonable suspicion. *Berger v. SOSCF*, 195 Or App 587, 98 P3d 1127 (2004). SCF challenges the Arbitrator's award to the extent it requires the agency to either remove the "founded" disposition from the State registry, or else change the disposition to "unfounded."

The issue arises because SCF commenced parallel proceedings against Grievant involving the same child abuse complaint and resultant investigation report. SCF wore two hats. In one proceeding, SCF acted as Grievant's employer. SCF terminated Grievant's employment, and that termination was the appropriate focus of the grievance arbitration.

The second proceeding arose because the Department (which includes SCF), in addition to being Grievant's employer, is the body designated by law to conduct investigations and maintain a registry of child abuse complaints made against any member of the public, including its own employees. SCF's inclusion of Grievant in the registry was a matter of statute. It did not arise out of or otherwise involve her employment. In this regard, SCF treated Grievant just as it would any other member of the public. We do not believe that Grievant's employment with SCF gave her remedies greater than those available to members of the public. For purposes of inclusion in the registry, a person's employer is irrelevant. SCF's inclusion of the information in the registry did not arise out of, and is not otherwise related to, Grievant's employment.⁹

⁹The situation here is analogous to a police officer charged with criminal misconduct. The police department wears two hats. As a law enforcement agency, it would conduct a criminal investigation just as it would if the same allegations were made against any other member of the public. As the officer's employer, the department could also separately take employment action against the officer based on the same allegations and the same police reports. If a grievance arbitrator heard the employment matter and concluded the alleged misconduct did not occur, the arbitrator could not order the police department to change the criminal investigation reports or to purge them entirely from the records. Similarly, an arbitrator who hears an employment
(continued...)

An arbitrator “is empowered to grant any relief reasonably fitting and necessary to remedy a *contract violation* * * *.” *Woodburn School District, supra*, 7 PECBR at 6527 (emphasis added). Here, SCF’s inclusion of Grievant in the registry was neither a contract violation itself nor an injury sustained as a result of a contract violation. SCF did not purport to terminate Grievant because of her inclusion in the registry; the Union did not argue, and the Arbitrator did not conclude, that SCF violated the contract by including Grievant in the registry. Similarly, there is no assertion that inclusion in the registry was a type of injury or damage that Grievant suffered as a result of SCF’s contract violation. Because the order to purge the registry is not grounded in the contract, it is a remedy beyond the Arbitrator’s authority. We will modify the award by deleting the requirement to change or remove documents in the registry.

We reach our conclusion for another reason. The Arbitrator’s award is contrary to law insofar as it attempts to impose a standard that is higher than the one prescribed by statute for placing material in the registry. The statute places information in the registry when there is “reasonable cause to believe” child abuse has occurred. ORS 419B.030(1). As the Court of Appeals recently observed, the statute only requires “evidence that creates a reasonable suspicion of child abuse; it does not decide whether the child abuse in fact occurred or even probably occurred.” *SOSCF, supra*, 195 Or App at 590.

The Arbitrator applied a higher standard. She determined that the parties’ contract required proof by “clear and convincing” evidence. “Clear and convincing” evidence means the truth of the facts asserted is “highly probable.” *Cook v. Michael*, 214 Or 513, 527, 330 P2d 1926 (1958). The Arbitrator concluded that SCF failed to produce clear and convincing evidence of the abuse charges against Grievant, and as part of the remedy, ordered SCF to either change the information in the registry to exonerate Grievant, or else purge the information concerning Grievant from the registry. In other words, the Arbitrator required SCF to prove that the abuse allegations were highly probable before they could be placed in the registry; according to the Court of Appeals, the statute does *not* require proof that the allegations are probably true in order to include them in the registry. A collective bargaining agreement cannot impair the statutory mandates for processing child abuse complaints. The Arbitrator’s award is contrary to law insofar as it holds SCF to a higher standard than permitted by statute for including information in the registry.

⁹(...continued)

dispute cannot (absent some specific contractual authority which does not exist here) order SCF to change or purge its report of a child abuse investigation conducted pursuant to statute.

REMEDY

Having concluded that the Arbitrator's award cannot be enforced as written, we must next consider the appropriate remedy. The statute permits us to vacate or modify the award. ORS 240.088(1).¹⁰ This award can be readily modified to correct the concerns. We will delete that portion of the award that requires SCF to either modify or purge the contents of the registry.

It is clear, however, that the Arbitrator intended to prevent SCF from using the information in the registry against the Grievant. The method the Arbitrator chose to accomplish this purpose—changing the contents of the registry—was improper and overbroad. Although the statute may govern the contents of the registry, it does not guarantee SCF the right to use the registry information against Grievant in the employment context. To accomplish the obvious intent of the Arbitrator to the extent permitted by law, we will further modify the award to prohibit SCF from using the contents of the registry in any manner that impacts or is otherwise related to Grievant's current or future employment.

One further point bears comment. The parties stipulated that a finding of abuse by the Department precluded Grievant from continuing to work for the Department. The parties did not identify a legal source (*e.g.*, a statute, administrative rule, work rule, etc.) for this statement, and they made no mention of this issue in their briefs. To the contrary, SCF made a point of stating that it does not challenge the Arbitrator's order to reinstate Grievant to her former position. Our modification of the award in regards to the registry has no impact on the reinstatement order. The Arbitrator's award as modified—including the order of reinstatement—does not conflict with the statute. Even if there is an agency rule that purports to prohibit Grievant's employment, such a rule would not be enforceable in light of the collective bargaining agreement. ORS 240.321(3) (agency rules touching on subjects covered by a collective bargaining agreement do not apply to employees in a bargaining unit covered by the agreement). We will order SCF to comply with the award of reinstatement.

ORDER

1. The Union's petition in AR-3-03 is dismissed.

¹⁰The statute also says that this Board may remand the matter to the Arbitrator with proper instructions. Neither party has requested a remand, and we do not believe that a remand would further the interests of justice under these circumstances.

2. SCF's petition in AR-4-04 is granted. The arbitration award is modified to delete the requirement that SCF either purge the information about Grievant contained in the child abuse registry or else modify the registry's contents. SCF may not use the information contained in the registry, or the fact that Grievant is mentioned in the registry, in any manner that impacts or is otherwise related to Grievant's current or future employment.

3. SCF will immediately implement the arbitration award, as modified. If it has not already done so, SCF will reinstate Grievant with back pay and benefits from the date of the award until paid, along with interest at the legal rate.

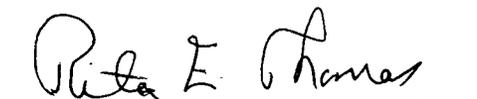
DATED this 18th day of February 2005.



Paul B. Gamson, Chair



James W. Kasameyer, Board Member



Rita E. Thomas, Board Member

This Order may be appealed pursuant to ORS 183.482.