

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DR-003-08

(DECLARATORY RULING)

IN THE MATTER OF THE PETITION )  
FOR DECLARATORY RULING FILED BY ) DECLARATORY RULING  
THE STATE OF OREGON, DEPARTMENT )  
OF ADMINISTRATIVE SERVICES )

This Board heard oral argument on September 29, 2008, following the submission of a fact stipulation by the parties.

Kathryn A. Logan, Sr. Assistant Attorney General, Department of Justice, 1162 Court Street NE, Salem, Oregon 97301-4096, represented Petitioner.

Joel L. Rosenblit, Attorney at Law, Service Employees International Union Local 503, OPEU (SEIU), P.O. Box 12159, Salem, Oregon 97309-0159, represented Intervener.

---

Petitioner, State of Oregon, Department of Administrative Services (State), filed this petition for declaratory ruling on August 8, 2008. The State asks that we determine whether Article 22 of the 2007-2009 collective bargaining agreement between the State and Service Employees International Union, Local 503, OPEU (SEIU) is a legal contract clause. SEIU intervenes in this matter and agrees to be bound by this Board's determination.

STATEMENT OF FACTS BEING ADJUDICATED<sup>1</sup>

I. SEIU and the State are parties to a collective bargaining agreement effective through June 30, 2009.

---

<sup>1</sup>These findings of fact are based on the parties' fact stipulation and included exhibits.

2. In Article 21--Grievance and Arbitration Procedure, the parties define what constitutes a grievance and establish the steps and time frames for grievance processing. A grievance that is not resolved in the earlier steps may proceed to arbitration, with certain exceptions:

“All grievances shall be processed in accordance with this Article and it shall be the sole and exclusive method of resolving grievances, except for the following Articles:

- “• Article 2--Recognition
- “• Article 5--Complete Agreement/Past Practices
- “• Article 56--Sick Leave (FMLA/OFLA)
- “• Article 22--No Discrimination
- “• Article 81--Reclassification Upward, Reclassification Downward, and Reallocation.”

3. Article 22--No Discrimination provides that a grievance alleging unlawful discrimination may be filed with an Agency Head or designee. If not resolved, the unlawful discrimination grievance may be submitted by either the union or grievant to the Bureau of Labor and Industries (BOLI) or the Equal Employment Opportunity Commission (EEOC). Allegations of unlawful discrimination do not proceed to arbitration.

4. Consistent with Article 22, the parties have not arbitrated discrimination claims.

5. The parties have outstanding grievances which allege violations of only Article 22. Other outstanding grievances allege violations of Article 22 and other contract articles.

#### STATUTES BEING APPLIED TO THE FACTS

ORS 243.672(1)(g); Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); and ORS 659A.030(1)(f).

#### QUESTION PRESENTED BY PETITIONER

Does Article 22, which does not provide arbitration for grievances alleging unlawful discrimination, constitute unlawful retaliation under state and federal law?

### ANSWER REQUESTED BY PETITIONER

Article 22 is a legal and enforceable contract provision.

### ANSWER REQUESTED BY INTERVENER

Article 22 violates state and federal anti-discrimination statutes. Therefore, the parties must renegotiate the provisions of Article 22.

### CONCLUSION AND REASONING

The State asks us to clarify the legality of Article 22 of the parties' contract in light of our recent decision in *Portland State University Chapter of the American Association of University Professors v. Portland State University*, Case No UP-36-05, 22 PECBR 302 (2008) *appeal pending*.

In *PSU*, the parties' collective bargaining agreement contained a grievance procedure which culminated in final and binding arbitration for all grievances. The contract also contained a "Resort to Other Procedures" (ROP) clause. The ROP clause provided that if an employee pursued a discrimination complaint through an outside agency, the employee relinquished the right to pursue a grievance under the contract. The union alleged that the ROP clause was unlawful and that the employer violated ORS 243.672(1)(g)<sup>2</sup> when it refused to process the grievance because the grievant sought resolution of the dispute in another forum.

We determined that the ROP language violated state and federal anti-discrimination laws because it penalized employees who chose to resolve their discrimination claims through BOLI or EEOC. We also concluded that an employer unlawfully retaliates against an employee if the employer refuses to process a grievance filed under a collective bargaining agreement *solely* because the employee tried to resolve the dispute through BOLI or the EEOC. In other words, the language was unlawful because it required an employee to relinquish a guaranteed contractual right in order to

---

<sup>2</sup>ORS 243.672(1)(g) makes it an unfair labor practice for an employer to "[v]iolate the provisions of any written contract with respect to employment relations including an agreement to arbitrate \* \* \*."

pursue a statutory claim.<sup>3</sup> We held that the employer violated ORS 243.672(1)(g) by refusing to process the union's grievance alleging unlawful discrimination.

Here, the situation differs markedly from that presented in *PSU*. The parties' collective bargaining agreement contains a grievance procedure for discrimination claims, but specifically excludes discrimination and other listed claims from arbitration. Employees may pursue discrimination claims simultaneously through BOLI and/or the EEOC and through the contract grievance procedure. Unlike *PSU*, employees are not penalized because they pursue a claim through BOLI or EEOC.

Final and binding arbitration is not a guaranteed right unless the parties agree to arbitration in their collective bargaining agreement. *J.C. Luoto and Long Creek Education Association v. Long Creek School Dist. No. 17*, 9 PECBR 9314, *aff'd*, 89 Or App 34, 747 P2d 370 (1987), *rev den*, 305 Or 576, 753 P2d 1382 (1988). Here, the parties agreed that grievances alleging unlawful discrimination are not arbitrable. Unlike *PSU*, a grievance alleging unlawful discrimination is not excluded because the grievant chooses to assert statutory rights. Employees may still pursue a grievance under the limited procedure provided for allegations of unlawful discrimination without waiving the employees' statutory rights guaranteed under state and federal law.

SEIU asserts that by refusing to arbitrate grievances alleging unlawful discrimination, the State treats these type of grievances differently from those alleging other contract violations. According to SEIU, this disparate treatment unfairly penalizes grievants who claim that the State has unlawfully discriminated against them. We disagree. Article 21 of the parties' collective bargaining agreement specifies that violations of a number of contract articles cannot be grieved. Thus, the State has not unfairly singled out grievants alleging unlawful discrimination for harsher treatment. It affords the same rights to all grievants who alleged unlawful discrimination and does not penalize them for asserting statutory or contractual rights.

Article 22 neither penalizes nor discriminates against employees who allege that the State unlawfully discriminated against them. We conclude that it is a legal and enforceable contract provision.

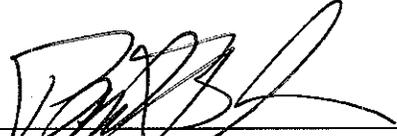
---

<sup>3</sup>In *PSU*, we acknowledged the division in the courts surrounding the issue of whether it is unlawful for an employer to deny an employee access to the employer's grievance procedure solely because an employee filed an EEOC complaint. We found the court's reasoning in *EEOC v Board of Governors of State Colleges and Universities*, 957 F2d 424 (7<sup>th</sup> Cir.), *cert den*, 506 US 906 (1992) to be persuasive.

RULING

Article 22 of the parties' collective bargaining agreement is a legal and enforceable provision.

DATED this 3<sup>rd</sup> day of December 2008.

  
\_\_\_\_\_  
Paul B. Gamson, Chair

  
\_\_\_\_\_  
Vickie Cowan, Board Member

  
\_\_\_\_\_  
Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.