

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DR-003-11

(DECLARATORY RULING)

IN THE MATTER OF THE PETITION )  
FOR A DECLARATORY RULING )  
JOINTLY FILED BY CITY OF WEST ) DECLARATORY  
LINN AND CLACKAMAS COUNTY ) RULING  
PEACE OFFICERS ASSOCIATION. )  
\_\_\_\_\_ )

On May 23, 2011, this Board heard oral argument on the parties' joint petition for a declaratory ruling.

Barbara Diamond, Attorney at Law, Diamond Law, Portland, Oregon, represented the Clackamas County Peace Officers Association.

Todd Lyon, Attorney at Law, Williams Zografos & Peck, Lake Oswego, Oregon, represented the City of West Linn.

On March 14, 2011, the City of West Linn (City) and the Clackamas County Peace Officers Association (Union) jointly filed this petition for a declaratory ruling. The parties ask that we determine whether the Jane Doe<sup>1</sup> grievance is arbitrable under section 12(D) of the parties' 2009-2012 collective bargaining agreement.

STATEMENT OF FACTS BEING ADJUDICATED<sup>2</sup>

1. The City, a public employer, and the Union, a labor organization, are parties to a collective bargaining agreement effective July 1, 2009 through June 30, 2012. The agreement includes the following provisions:

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<sup>1</sup>Jane Doe is a pseudonym.

<sup>2</sup>The Statement of Facts is based on the parties' joint statement of facts and included exhibits.

“Article 9, Discipline and Discharge

“A. Discipline shall include: oral reprimands, written reprimands, demotion, suspension without pay and dismissal. Disciplinary action may be imposed upon a non-probationary employee only for just cause.

“ \* \* \* \* \*

“Article 10, Grievance and Arbitration Procedure

“A. Grievance. A grievance, for the purpose of this Agreement, is defined as a dispute regarding the meaning of or interpretation of a particular clause of this Agreement, or regarding an alleged violation of this Agreement.

[The remainder of Article 10 sets forth a grievance procedure that culminates in final and binding arbitration.]

“ \* \* \* \* \*

“Article 12, Non Discrimination

“ \* \* \* \* \*

“B. Non-Discrimination. The provisions of this Agreement shall be applied equally to all members in the bargaining unit without discrimination as to age, martial status, sex, disability, race, color, creed, religion, national origin, union affiliation, political affiliation or other protected status or protected activity in accordance with applicable law.

“ \* \* \* \* \*

“D. Alleged Violations. In the event an employee elects to file a statutory claim of employment discrimination, including harassment prohibited by the employment discrimination laws, he/she is precluded from pursuing a claim of discrimination under the grievance and arbitration procedures set forth in Article 10. If the statutory claim is filed after a grievance is filed, the grievance shall proceed no further and shall not be subject to arbitration.”

2. Bargaining unit member Doe was a regular non-sworn employee who worked for the West Linn Police Department. On or about December 1, 2009, Doe reported to the City Human Resources Department that she had been subject to

unwanted sexual advances and had been denied training as a result of refusing these advances. The City conducted an extensive and immediate investigation concerning Doe's report. After the investigation, the City dismissed Doe's sexual harassment complaint.

3. After dismissing Doe's complaint, the City conducted an investigation into whether Doe was untruthful in statements she made during the sexual harassment investigation. Untruthfulness in an official investigation is a potential discharge offense in many law enforcement jurisdictions. The City notified Doe that the charge of untruthfulness, if proven, would result in discipline up to and including discharge.

4. After a due process hearing, City Police Department Chief Terry Timeus discharged Doe for untruthfulness by letter dated April 19, 2010.

5. In a letter to the City Manager dated April 30, 2010, Union attorney Barbara Diamond filed a grievance concerning Doe's discharge. The letter stated in pertinent part:

"A Statement of the Grievance and Relevant Facts

"[Doe] was terminated from her position with the City of West Linn on or about April 19, 2010. The ground for termination was alleged untruthfulness in a report of sexual harassment.

"As you know, the City has the burden of proving untruthfulness by clear and convincing evidence. We are not convinced that this level of proof exists. Rather, it appears that the City has failed to conduct a fair and unbiased investigation and is taking statements out of context or otherwise misconstruing the record. As a result, the grievance must allege that the City lacked both procedural and substantive just cause in terminating the employee. In addition, there was a violation of Ms. [Doe's] right to just cause.

"The Provisions of the Agreement Allegedly Violated

"Article 12, Non-discrimination and retaliation for filing a harassment complaint.

"Article 9 A, Just cause

"Article 9 E, Investigatory Interviews

"The Remedy Sought

"Reinstatement with full back pay and benefits, plus interest."

6. After the parties exhausted the grievance procedure, on or about October 5, 2010, they selected an arbitrator to hear Doe's grievance. The grievance is scheduled for hearing before the arbitrator on July 12-15, 2011.

7. On or about December 30, 2010, Doe filed a complaint in federal court alleging statutory claims for sexual harassment and discrimination.

8. By letter dated January 18, 2011, counsel for the City notified the Union that the City believed that the arbitrator's jurisdiction over the grievance was abrogated by Doe's filing of her federal court claims.

9. By an e-mail dated January 21, 2011, the Union's attorney responded to the City's letter. The e-mail stated:

"In reviewing the grievance, I see that we did include a claim under Article 12, Non-discrimination. In light of the City's position, the Union respectfully withdraws the Article 12 portion of the grievance and will arbitrate only the just cause portion. In light of this development, please advise as to the City's position."

10. Because the parties could not agree upon the lawfulness and substantive arbitrability of the grievance, the parties have jointly petitioned for a declaratory ruling from this Board. The parties acknowledge that under Article 35 of the collective bargaining agreement,<sup>3</sup> should Section 12(D) be declared "unlawful, invalid or unenforceable" in this proceeding, the ruling shall apply only to Section 12(D) and the remainder of the contract will be in full force and effect.

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<sup>3</sup>Article 35 of the parties' 2009-2012 contract states:

"Should any Article, section or portion thereof of this Agreement be held unlawful, invalid or unenforceable by any court of competent jurisdiction or by the Employment Relations Board of the State of Oregon, such decision of said court or board shall apply only to the specific Article, section or portion thereof, directly specified in said decision. Upon the issuance of such decision, the parties agree to negotiate immediately a substitute, if any, for the invalid Article, section or portion thereof."

### QUESTIONS PRESENTED BY PETITIONERS

1. Is the Doe grievance arbitrable under Article 12(D) of the parties' 2009-2012 collective bargaining agreement?
2. If the grievance is not arbitrable under Article 12(D), is the language of Article 12(D) lawful and enforceable?
3. If the language of Article 12(D) is unlawful and unenforceable, what is the effect, if any, on the pending Doe grievance?

### ANSWER REQUESTED BY THE CITY

1. Article 12(D) is lawful and precludes the entire grievance from proceeding to arbitration.
2. If Article 12(D) is not lawful, the parties must renegotiate a lawful Article 12(D) and subject the grievance to the newly negotiated provisions.
3. If the grievance is arbitrable under Article 12(D), the Union may not present and argue facts or allegations of discrimination, including but not limited to, retaliation or harassment at the grievance arbitration.

### ANSWER REQUESTED BY THE ASSOCIATION

1. Article 12(D) does not apply to the Doe grievance and the grievance is arbitrable under the terms of the collective bargaining agreement. Questions as to what evidence is admissible in arbitration are for the arbitrator to decide.
2. If the grievance is not arbitrable under Article 12(D), Article 12(D) is unlawful and unenforceable because it penalizes a grievant for filing a discrimination claim.
3. If Article 12(D) is unlawful, the savings clause of the parties' agreement requires them to reopen that portion of the agreement.

### CONCLUSION AND REASONING

The parties ask us to determine whether the Doe grievance is arbitrable under the terms of their 2009-2012 collective bargaining agreement. If we conclude it is not, they ask that we decide whether Article 12(D) is lawful and enforceable.

Under the Public Employee Collective Bargaining Act (PECBA), arbitration is strongly favored as a method of resolving disputes involving alleged violations of a collective bargaining agreement. *Lane Unified Bargaining v. South Lane Sch. Dist.*, 334 Or 157, 47 P3d 4 (2002). We will order parties to arbitrate a grievance unless we can say with “positive assurance” that the arbitration clause is not susceptible to an interpretation that covers the dispute in question. Any doubts should be resolved in favor of coverage. *Corvallis Sch. Dist. v. Corvallis Education Assn.*, 35 Or App 531, 534, 581 P2d 972 (1978) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 US 547, 582-83 (1960)).

We explain the positive assurance test as follows:

“The emphasis in applying the positive assurance test is whether the arbitration clause is or is not susceptible to an interpretation that covers the dispute. \* \* \* Where a contract contains what the court in *AT&T Technologies [v. Communications Workers of America]*, 475 US 643 (1986) calls a ‘broad’ arbitration clause, application of the positive assurance test leads the mind to search for an express provision excluding the particular grievance from arbitration. If such an express exclusion is not found, and barring other ‘most forceful evidence of a purpose to exclude the claim,’ arbitration will be ordered.” *Luoto v. Long Creek School Dist. No. 17*, Case No. UP-16-86, 9 PECBR 9314, 9329, *aff’d* 89 Or App 34, 747 P2d 370 (1987), *rev den* 305 Or 576, 753 P2d 1382(1988). (Emphasis in original; footnotes omitted.)

In deciding whether a grievance is arbitrable, our involvement is limited. We apply the positive assurance test to determine the extent of the parties’ agreement to arbitrate and decide if the parties intended to arbitrate the alleged violation of the contract language at issue. “We do not decide what the parties intended the language to mean.” *Id.* at 933.

If there is any ambiguity in the relevant contract language, we will find the grievance arbitrable. In *Portland Fire Fighters’ Association, Local 43 v. City of Portland*, 181 Or App 85, 45 P3d 162 (2002) (en banc), *rev den* 334 Or 491, 52 P3d 1056 (2002), the grievance procedure at issue required arbitration of “any grievance.” The court concluded that under this broad language, a grievance brought on behalf of retired employees was arbitrable:

“[T]he ambiguity as to the arbitration provision’s coverage demonstrates an absence of positive assurance that the dispute in question is *not* arbitrable, and thus, it *is* arbitrable. Accordingly, the city committed an unfair labor practice in violation of ORS 243.672(1)(g) by refusing to arbitrate the Association’s grievance regarding retiree health benefits.” 181 Or App at 96. (Emphasis in the original.)

We look first to the broad arbitration clause in the parties' collective bargaining agreement. Under the provisions of Article 10, the Union may take an unresolved grievance to arbitration; Article 10 defines a grievance "as a dispute regarding the meaning of or interpretation of a particular clause of this Agreement, or regarding an alleged violation of this Agreement." These provisions are, under the *Luoto* standards, clearly susceptible to an interpretation that covers the dispute at issue here: whether the City violated the contractual just cause provisions when it discharged Doe.

We next determine whether any contract provision expressly excludes this grievance from arbitration. The City argues that the language of Article 12(D) provides such an express exclusion; this provision precludes an employee from pursuing a claim of discrimination to arbitration if the employee "elects to file a statutory claim of employment discrimination, including harassment prohibited by the employment discrimination laws \* \* \*." The City notes that Doe filed a statutory claim of employment discrimination after she filed her grievance. The City argues that the plain language of the second sentence in Article 12(D)

"indicates that if the statutory claim is filed after the grievance, the grievance shall proceed no further. The language does not say that the 'statutory claim' portion of the grievance shall proceed no further. Instead, the language halts the entire grievance so as to avoid the mess that parties are faced with here; namely, to pick out what portion of the grievance deals with the statutory claim and what portion deals with another section of the collective bargaining agreement." (City Brief, p. 8; emphasis in the original.)

The Union asserts that the restrictions in Article 12(D) apply only to a grievance or portion of a grievance alleging a violation of the non-discrimination language in Article 12(B). In support of its interpretation, the Union looks to the first sentence of Article 12(D) which precludes a bargaining unit member who files a statutory claim of employment discrimination "from pursuing a claim of discrimination under the grievance and arbitration procedures set forth in Article 10." According to the Union, this prevents a grievant only from arbitrating a claim of discrimination; it does not prevent a grievant from arbitrating other alleged violations of the contract. Because the grievant dropped the portion of her grievance that alleged violations of the contractual non-discrimination provisions, the Union contends that the amended grievance—which alleges that the City violated Article 9, the contractual just cause provision—is arbitrable.

Both parties have offered plausible interpretations of Article 12(D). Accordingly, we conclude this contract language is ambiguous. *See Portland Firefighters' Assn.*, 181 Or App at 92 (citing *North Pacific Ins. Co. v. Hamilton*, 332 Or 20, 25, 22 P2d 1246 (1976)) (a contract is ambiguous if it can reasonably be given more than one plausible

interpretation). As discussed above, any ambiguity in the contract language concerning arbitrability shows that it cannot be said with positive assurance that the grievance is *not* arbitrable and, therefore, demonstrates that the grievance *is* arbitrable.<sup>4</sup>

Because we hold that the grievance is arbitrable, it is unnecessary to answer the second question posed by the parties—whether Article 12(D) of the parties collective bargaining agreement is lawful and enforceable.

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<sup>4</sup>We interpret a collective bargaining agreement as we do any other contract. *Portland Firefighters' Assn.*, 181 Or App at 91. Our goal is to determine the parties' intent; to do so we apply a three-part test. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005). We begin by examining the text and context of the disputed language; if the provision is clear, our analysis ends and we enforce the contract's unambiguous terms. If we conclude the provision is ambiguous, we proceed to the second step and examine any extrinsic evidence of the parties' intent. *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09, 23 PECBR 416, 425 (2009). If there is no extrinsic evidence or the contract ambiguity persists after we analyze extrinsic evidence, we proceed to the third step and apply appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 364, 937 P2d 1019 (1997).

Here, the language of Article 12(D) is ambiguous because it is capable of at least two plausible interpretations. The parties have presented us with no extrinsic evidence, such as evidence of past practice or bargaining history, to aid us in resolving the ambiguity. We thus proceed to the third step and apply an appropriate maxim of contract construction: doubts in an arbitration clause should be resolved in favor of coverage. *Portland Firefighters' Assn.*, 181 Or App at 96; *Joseph Education Assn. v. Joseph Sch. Dist. No. 6*, 180 Or App 461, 467, 43 P3d 1187 (2002). Whatever analysis we use, we reach the conclusion that the Doe grievance is arbitrable.

The City argues, however, that the Union intends to present its discrimination claim to the arbitrator in the guise of a just cause grievance. The record does not support this assertion. If the City believes the Union is improperly presenting a discrimination claim at the arbitration hearing, it can raise this issue with the arbitrator. The arbitrator can then determine if the parties intended to exclude such a claim from arbitration. The contract does not define "discrimination." Is the term broad enough to cover retaliation for reporting discrimination? Does it refer solely to grievances brought under the non-discrimination provision of the contract, or is it broad enough to include a claim under the just cause provision? Answering these questions requires interpreting the relevant contract language and applying it to the facts of the grievance. As discussed above, it is the arbitrator's role (and not this Board's) to decide what the contract language at issue means. The arbitrator is in the best position to hear facts, consider arguments and determine what the parties intended by the ambiguous language in Article 12(D).

The City argues, however, that even if we hold that the grievance is arbitrable, we must issue an order preventing the Union from presenting and arguing facts at the arbitration hearing which allege discrimination and harassment. The City argues that “the Union must not be allowed to bootstrap discrimination and retaliation claims under the rubric of just cause.” (City Brief, p. 10.)

The City’s arguments are appropriately made to an arbitrator rather than this Board. They go to the merits of the grievance and not its arbitrability. To do what the City asks, we would have to consider specific claims made in the Doe grievance, and interpret Article 12(D) to determine if the City is entitled to present evidence and argument in support of some of these claims at the arbitration hearing. As discussed above, it is the arbitrator and not this Board that must decide the meaning of the relevant contract language. *Deb Meadows-West, Mid-Valley Bargaining Council; State Teachers Association v. State of Oregon, Department of Education*, Case No. UP-50-97, 17 PECBR 664, 672 (1998); *Teamsters Local 670 v. City of Ontario*, Case No. UP-40-08, 23 PECBR 210, 216 (2009). Our role here is limited to examining the contractual provisions concerning arbitrability and determining if they are susceptible to an interpretation that covers the Doe grievance. We hold that they are, and that the City must proceed to arbitration on the grievance.

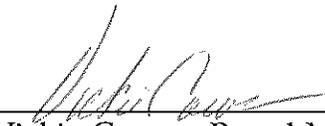
RULING

The Doe grievance is arbitrable.

SIGNED AND DATED this 20 day of June, 2011.



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Paul B. Gamson, Chair



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Vickie Cowan, Board Member



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Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.