

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-1-05

(UNFAIR LABOR PRACTICE)

AFSCME LOCAL 189,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
CITY OF PORTLAND,)	CONCLUSIONS OF LAW
)	AND ORDER
Respondent.)	
)	
_____)	

The Board heard oral argument on December 7, 2005, on objections filed by both parties to a recommended order issued by Administrative Law Judge (ALJ) Vickie Cowan on August 15, 2005. In lieu of an evidentiary hearing, the parties submitted a fact stipulation and exhibits on March 31, 2005. The record closed on May 12, 2005, upon submission of the parties' closing briefs.

Barbara J. Diamond, Attorney at Law, Smith, Diamond & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Complainant.

Lory J. Kraut, Deputy City Attorney, City Attorney's Office, City of Portland, 1221 S.W. 4th Avenue, Suite 430, Portland, Oregon 97204, represented Respondent.

On January 18, 2005, AFSCME Local 189 (Union) filed this unfair labor practice complaint alleging that the City of Portland (City) violated ORS 243.672(1)(g) by refusing to implement an arbitration award issued by Arbitrator Vincent Helm. The City filed a timely answer on March 15, 2005, in which it admitted and denied certain allegations and raised affirmative defenses. In lieu of hearing, the parties submitted a full fact stipulation and exhibits.

The issue presented for determination is: Did the City violate ORS 243.672(1)(g) when it refused to implement Arbitrator Helm's arbitration award?

RULINGS

1. Union Exhibits I, J, and K which are copies of prior arbitration awards and were admitted as evidence in the underlying arbitration case; Exhibit L which are copies of the parties' closing briefs in the arbitration; and Exhibit M, a copy of Grievant's drug screen test, are excluded as evidence based on relevance.
2. City Exhibits N, a February 22, 2005 letter from Lory Kraut to the Office of Drug & Alcohol Policy and Compliance; Exhibit O, March 2, 2005, response to Kraut's letter; Exhibit P, Code of Professional Responsibility for Arbitrators of Labor-Management Disputes; Exhibit Q, a December 5, 2003 letter from Dr. Leveque; Exhibit R, e-mails regarding quantitative levels; and Exhibit S, Grievant's drug test reports, are also excluded based on relevance.
3. The ALJ made no other rulings.

FINDINGS OF FACT

1. The Union is the exclusive representative of a bargaining unit of employees employed by the City, a public employer.
2. Grievant, a member of the union bargaining unit, was a utility worker II in the Water Bureau and was required to have and maintain a commercial driver's license (CDL) as a condition of his employment. As a CDL holder, he was subject to drug and alcohol testing under the Federal Omnibus Transportation Employee Testing Act of 1991.
3. Grievant tested positive for marijuana on November 14, 2003, on a random drug test.
4. Grievant previously tested positive for marijuana and his continued employment was subject to a last chance agreement. That agreement, effective on or about April 28, 2003, provided that Grievant would be evaluated by a substance abuse professional (SAP), would follow the treatment recommendations of the SAP, and would submit to random drug tests for a period of 24 months. The last chance agreement states, in pertinent part:

“6. In the event any of my tests indicate a positive reading for illegal and/or prescription drugs for which I do not have a current, valid prescription, then such tests shall be just cause for my immediate discharge. Or if I have a breath alcohol concentration of more than .000 in any test, then such test shall be just cause for my immediate discharge.

“7a. Any future performance or alcohol and/or substances abuse problems that occur will constitute just cause for termination.

“7b. Any violations of this Agreement will constitute just cause for termination.”

- test.
5. The City discharged Grievant on January 29, 2004, for failing a random drug
 6. The Union grieved the termination.
 7. The Union and the City are parties to a collective bargaining agreement (CBA) effective July 1, 2001 to June 30, 2004. Relevant portions of the CBA provide, in part:

Article 25—Maintenance of Standards:

“Standards of employment related to wages, hours and working conditions which are mandatory for collective bargaining except those standards modified through collective bargaining shall be maintained at not less than the level in effect at the time of the signing of this Agreement. Any disagreement between the union and the City with respect to this section shall be subject to the grievance procedure.”

Article 34.2—Discharge, Demotion, and Suspension:

“The City shall not discharge, demote or suspend any employee without just cause * * *.”

Article 35.3.7—Level Five—Arbitration:

- “c. The arbitrator’s decision shall be final and binding, but the arbitrator shall have no power to alter, modify, amend, add to or detract from the terms of this Agreement. The decision of arbitration shall be within the scope and terms of this Agreement and shall be in writing.”

Article 36—Warrant of Authority:

“It is also recognized by the parties that the only letters of understanding or other agreements considered valid and binding shall be those expressly executed as addenda to this Agreement and agreed to jointly by the District Council of Trade Unions on behalf of the Union(s) and by the Human Resources Director, on behalf of the City.”

8. The parties arbitrated the Grievant’s grievance.

9. On December 23, 2004, Arbitrator Helm issued a 56-page arbitration award in Grievant's case. Relevant portions of the arbitrator's opinion and award are set forth below:

“STATEMENT OF THE ISSUES

“The Arbitrator, after hearing the parties' opening statements and the diametrically opposed views of the issues, advised the parties he would frame the issues. The basic issue is whether the discharge of [PC] (hereinafter the Grievant) was for just cause and, if not, determine a proper remedy. In deciding the basic issue, it must be determined whether the City of Portland (hereinafter the Employer) failed to comply with applicable Federal or Employer rules, regulations or policies when it discharged the Grievant. In addition, the Arbitrator will consider potential violations of the collective bargaining agreement between the Employer and the District Council of Trade Unions, of which AFSCME Local 178 (hereinafter the Union) is a member. It must also be determined whether the Employer failed to provide procedural due process, which would warrant setting aside the Grievant's discharge. Finally, the Union's affirmative defense of second-hand smoke will be considered.

** * * * *

“The Arbitrator's Role in Cases Involving Discharge
“for Violation of a Last Chance Agreement

“Last chance agreements have been an established part of employer-employee and union relationships for a number of years. These agreements provide a means for an employee to become rehabilitated and maintain gainful employment. The agreements allow the employer the opportunity to retain a valued employee in whom it may have a substantial investment. Employers, in spite of the possible advantages to retention and rehabilitation of employees, would be reluctant to enter into these agreements unless they are strictly construed. After all, the Employer is foregoing discharging an employee where it feels it has just cause in the expectation that the employee, given a last chance, will cure his deficiencies leading to the last chance agreement. The employee for his part realizes that but for the last chance agreement his employment in all probability will terminate and should therefore realize the import of a last chance agreement. Employers would understandably be reluctant to enter into such agreements if last chance did not in reality mean last chance.

“As a consequence arbitrators have recognized a limited role in discharge cases arising under the terms of a last chance agreement. There is general acceptance of the proposition that if the employer establishes a violation of a last chance agreement, the arbitrator may not consider mitigating factors such as length of service or past performance or considerations of the severity of employer discipline in relation to the offense.

“Such discharges must nonetheless be for just cause in the sense that the Employer must prove cause in the violation of the agreement and that the employee received procedural and substantive due process. Due process requirements involve substantial adherence to Employer policies and applicable government regulations and fairness in considering the Grievant’s contentions prior to discharge. Minor technical deficiencies with respect to compliance with the regulations will not result in discipline being overturned. See Casper’s Cartage, Inc. 1996WL023029 (Berman) and citations therein. While the Casper’s case did not involve a last chance agreement, the principles set forth therein are applicable to this case. For example in an unpublished opinion involving the Employer and Laborer’s Local 483 (also party to the master agreement involving the parties herein), arbitrator Skratek in a 2002 opinion set aside the discharge of an employee predicated upon violation of a last chance agreement and Employer policies because the Employer failed to provide a confirmation test to the employee after his initial test was positive for breath alcohol concentration. The arbitrator noted that the last chance agreement provided for a confirmation test as did DOT regulations and Employer policy.

“In making a determination in this case, the Arbitrator must first determine if the drug test of the Grievant produced a verified positive result in conformance with DOT regulations and Employer policy. If the answer is in the affirmative, the next question to be considered is whether there were deficiencies in compliance with the DOT regulations or Employer policy which deprived the Grievant of required safeguards. If the answer to the first question is in the negative, the Arbitrator must sustain the grievance and order a remedy in accord with the finding. If the answer to the first question is in the affirmative and the second is in the negative the Arbitrator must fashion an appropriate remedy taking into account the affirmative finding and the second-hand smoke issue. If the answer to the first question is positive and is negative to the second, the grievance must be denied.”

Arbitrator Helm identified and addressed the underlying issues in the arbitration. He found that: (1) the applicable DOT regulations were those in effect at the time of the Grievant's drug test and subsequent thereto, and the Grievant had adequate notice of the requirements; (2) the procedural deficiencies in processing and documenting the drug test were not sufficient to affect the test result; and (3) the Employer's reliance on the memorandum of agreement did not warrant setting aside the Grievant's discharge.

The arbitrator found, however, that the employer's failure to provide the Grievant with the privacy protections afforded by DOT regulations and employer policy required setting aside the Grievant's termination.

“* * * A review of the testimony and the applicable DOT regulations reveals even more serious failures to comply therewith on the part of the Employer which seriously interfered with privacy rights of the Grievant and, in sum, violated basic rights of due process and the protections afforded by the DOT regulations and Employer policy. 49CFR§40.131(c) requires the MRO [medical review officer] to make three efforts to contact the donor relative to a drug test result and to document the date and time of the efforts. In this instance the MRO made only two undocumented attempts. Where the MRO has to contact the Employer in an effort to have the employee contact the MRO §40.131(c)(2) and (d)(1) set forth specific steps required of the MRO and the employer contact. The MRO is to contact the DER [designated employer representative] and only advise the DER to inform the employee to contact the MRO. The DER ‘ . . . using procedures that protect, as much as possible, the confidentiality of the MRO's request that the employee contact the MRO . . . ’ is to contact the employee directly and inform him to contact the MRO. The DER is specifically prohibited by the regulations from telling any other employee that the MRO wants to talk to the employee.

“In this instance, Murray, the DER, rather than contacting the Grievant, contacted Fallon and advised him to tell the Grievant to contact the MRO. Fallon in the presence of an Employer supervisor then told the Grievant to contact the MRO. No explanation was offered by the Employer for its failure to comply with these basic confidentiality and privacy rights provided the Grievant by the DOT regulations and Employer policy. While these failures to comply with the regulations and Employer policy were not cited by the Union, other than the efforts of the MRO to contact the Grievant, the Arbitrator cannot ignore the clear mandate of the regulations and the evidence showing failure to comply therewith.

“* * * * *

“The most egregious violation of the Grievant’s privacy rights, and again not raised by the Union as a defense, involved the release by the MRO of the quantitative results for the Grievant’s confirmed positive urine test. Evidence shows obtaining these results were deemed crucial by Employer representatives in evaluating whether the Grievant’s contentions regarding second-hand smoke had any validity, particularly if he had tested at a level near the cutoff for a positive result. 49CFR§40.163(g) specifically prohibits the MRO from providing quantitative values to the DER for drug or validity test results. At the request of a SAP and for purposes of treatment, the regulations permit the MRO to release quantitative results to the SAP only.

“In this case the specific prohibition was ignored by the MRO who provided the material to Murray at the DER’s request. Murray then compounded this blatant breach of the Grievant’s privacy by disseminating the quantitative results to various members of the Water Bureau supervisor hierarchy who were considering the disposition of the Grievant’s situation. The MRO consistently breached his affirmative obligation under §40.123 of the regulations to protect the confidentiality of drug testing information.

“It must be remembered that in drafting the DOT regulations there was clearly manifested a concern to protect the privacy of the employee to the maximum extent possible consistent with achieving the objectives of the regulations to prevent injuries or accidents. The actions of the Employer in obtaining and reviewing the quantitative test results were a most extreme example of a prohibited invasion of privacy and also served to taint the evaluation of the Grievant prior to discharge by placing information in the hands of the Employer that it was not legally entitled to and which had to heavily influence the Employer in evaluating the course of conduct vis a vis the Grievant. Moreover the Employer at the arbitration hearing and post hearing brief continued to emphasize the quantitative level of the Grievant’s positive test result and certainly impacted the Arbitrator’s evaluation of this case. As opposed to the other deficiencies cited concerning failure to literally comply with DOT regulations, where efforts had been undertaken to substantially comply, these deficiencies constituted a total failure to comply. Whether these failures resulted from ignorance or intent, the end result is the same and cannot be ignored by the Arbitrator.

“The blatant disregard of the Grievant’s rights exemplified in this case transcend the Grievant’s particular case. The Employer has

an obligation to adhere to the DOT regulations and its own policies incorporating adherence to those regulations in order for its employees and their bargaining representatives to have confidence in, and respect for, the Employer's administration of those regulations and policies. The invasion of rights of privacy to which the Grievant was clearly entitled, coupled with the failure to comply fully with other provisions of the DOT regulations referenced herein, culminating in the consideration of prohibited evidence of the Grievant's use of controlled substances requires the finding the Grievant was not discharged for just cause. This conclusion is reinforced by a prior arbitration award involving this Employer which put it on notice of the necessity of compliance with Federal and Employer regulations or policies if a discharge for violation of a last chance agreement is to be sustained."

In lieu of termination, the arbitrator ordered that Grievant be reinstated to his former position with accumulated seniority, but without back pay from his termination date, subject to a new last chance agreement. The period off work was to be regarded as a disciplinary suspension.

10. On or about January 3, 2005, the Union tendered to the City a signed copy of the last chance agreement drafted by the arbitrator for signature by the parties.

11. On or about January 10, 2005, Union counsel Barbara Diamond wrote to City counsel Lory Kraut to ask about the status of the case.

12. On or about January 14, 2005, the City notified the Union that the award was not enforceable and for that reason the City refused to implement it.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The City refused to implement Arbitrator Helm's award in violation of ORS 243.672(1)(g).

This case involves a last chance agreement which provides that a positive drug test constitutes "just cause" for termination. Although the arbitrator found that the Grievant violated the last chance agreement, he also found that the City violated DOT regulations and its own policies regarding the employee's privacy. Because of the City's violations, the arbitrator held that Grievant was not terminated for just cause. He reduced the termination to an unpaid suspension and subjected Grievant to a new last chance agreement, which he drafted for the parties. The City has refused to comply with the arbitrator's award.

City's Argument

The City first argues that the last chance agreement was a settlement agreement voluntarily agreed to by all the parties. As such, the last chance agreement modified the collective bargaining agreement as it applied to the Grievant. The arbitrator therefore erred when he went beyond the last chance agreement in determining just cause. The City cites several private sector arbitration cases, federal court cases, and treatises in support of its argument.

Second, the City argues that the arbitration was not fair or regular because the arbitrator reinstated the Grievant based on the arbitrator's *sua sponte* determination that the City had violated DOT reporting protocols by having a supervisor contact the Grievant to call the MRO rather than the DER contacting the Grievant directly and obtaining the quantitative results of Grievant's drug test.

Finally, the City contends that the arbitration award violates public policy, asserting that it is not arbitration which is favored, but rather final adjustment of differences by a means selected by the parties. Specifically, the City refers to the "sanctity of contract" as the public policy at issue. None of the cases cited by the City support this last point.

Standard of review

When we review arbitration decisions under the Public Employees Collective Bargaining Act (PECBA), as is the case here, we must turn to ORS 243.672(1)(g). This statute makes it an unfair labor practice for an employer to refuse to accept the terms of an arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them. In a recent case under subsection (1)(g), *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206 (2005), we discussed how this Board formulated its standards for reviewing arbitration awards. We stated:

"In the *Willamina* cases, decided by this Board more than twenty five years ago, ERB adopted its own standards for review of arbitration awards under the PECBA. We stated that this Board would enforce an arbitration award unless it was '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 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).” 21 PECBR at 213.

Under on this standard, our review of an arbitrator’s award is limited in scope. We have consistently held that arbitration awards should be subject only to sparing review. *Lincoln County Education Association; Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 563, 679 P2d 868, *rev den*, 297 Or 458 683 P2d 1371, (1984). We will not engage in a right/wrong analysis of an arbitrator’s award. *SEIU Local 503 v. State of Oregon, Office of Services for Children and Families*, Case Nos. AR-3/4- 03, 20 PECBR 829 (2005); *State of Oregon, Department of Corrections v. AFSCME Council 75*, Case No. AR-1-92, 13 PECBR 846, 858 (1992). Nor will we conduct “an inquest into the arbitrator’s analysis.” *State of Oregon, Department of Transportation v. OPEU*, Case No. AR-1-98, 17 PECBR 814, 825 (1998). 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 bound. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986).

Analysis

This case presents an issue which this Board has not previously directly addressed: whether the language of a last chance agreement can limit an arbitrator’s authority in a subsequent contractual arbitration proceeding.

Arbitrator Helm specifically addressed the last chance agreement and what constitutes just cause. He determined that he was not strictly bound to the terms of the last chance agreement, but rather must incorporate the language of the parties’ collective bargaining agreement. Article 35.3.7(c) of the parties’ collective bargaining agreement provides that “[t]he arbitrator’s decision shall be final and binding, but the arbitrator shall have no power to alter, modify, amend, add to or detract from the terms of this Agreement. The decision of the arbitrator shall be within the scope and terms of this Agreement and shall be in writing.”

This language explicitly gives the arbitrator the authority to make his just-cause determination based on the contract. Since the contract does not define “just cause,” and the last chance agreement did not waive or alter the language of Article 34.2 of the labor contract, the arbitrator is free to utilize the general maxims of “just cause,” and did so in this case.

The City argues that the arbitrator's decision to do so was wrong, in that it violated certain legal holdings of federal courts and other arbitrators. Under our standards of review, however, this argument is irrelevant. As stated previously, this Board does not decide whether the arbitrator's decision is right or wrong. *Lincoln County Education Association*, 21 PECBR at 214; *State of Oregon, Department of Corrections*, 13 PECBR at 858. So long as the arbitrator acted within his authority under the contract, an award will be enforced, regardless of this Board's agreement or disagreement with the reasoning or the result. "Whether the arbitrator correctly interpreted the contract is the very question that neither ERB nor this court canl [*sic*] consider on review." *Willamina School District 30J*, 60 Or App 629, 636, 655 P2d 189 (1982).

The City argues that the arbitrator made an error of law when he made a *sua sponte* decision. The City contends that this decision deprived it of due process and thus violated public policy. The City provided no legal precedent indicating that an arbitrator is prohibited from basing his decision on a position which neither party argued. Indeed, applicable Board precedent is to the contrary. In *SEIU*, we specifically held that an arbitrator may base the award on matters not argued by the parties. There, the arbitrator reinstated an employee, but refused to award back pay. The arbitrator denied the grievant this remedy because the arbitrator was persuaded, based on evidence submitted during the arbitration hearing, that the grievant was guilty of misconduct. The State had not relied on this evidence of misconduct in terminating grievant. We held the arbitrator acted within his authority in denying back pay.

Finally, the City argues that the arbitrator's award violates public policy. It contends that the public policy is not arbitration per se, but rather the sanctity of contract; and specifically, the last chance agreement itself. But the City's argument finds no support under Oregon law. The City argues that the arbitrator violated the sanctity of contracts by ignoring the clear language of the last chance agreement. To accept this argument would require us to interpret the contract language on our own and reject the arbitrator's interpretation because it differs from ours. This is precisely the type of right-wrong review that we will not engage in. The parties agreed to abide by the arbitrator's contract interpretation, and we will enforce that agreement even if we might have reached a different result. Public policy in Oregon strongly favors the finality and efficiency of arbitration. 20 PECBR at 842. The City would have this Board ignore previous court decisions and the express language of ORS 243. 672(1)(g) in order to establish a new standard for the "public policy" exception for last chance agreements. We decline to do so. Arbitrator Helm's decision does not violate public policy. Quite the contrary. It supports this state's public policy favoring the conclusiveness of arbitration awards, as well as the policy favoring compliance with DOT regulations when administering drug or alcohol tests.

Remedy

This Board concludes that the City violated ORS 243.672(1)(g) by refusing to implement Arbitrator Helm's award. As a remedy, we will order the City to cease and desist from refusing to accept the terms of the award. We order the City to implement the terms of the award as soon as is practicable, and to make the Grievant whole for any damages caused by the City's unlawful conduct including payment of back pay from December 23, 2004, the date of Arbitrator Helm's award, to implementation of that award.

The union requests that the City be directed to pay interest on the back pay that Grievant would have received had the arbitration award been implemented at the time it was ordered. "Adding interest to a monetary remedy will effectuate the law's proscription of contract violation in that it will reduce any benefit an employer might gain by holding funds from the date of the breach to the date of satisfying an order; similarly, interest is necessary to make any employe [sic] whole for the loss of use of the funds." *Oregon School Employees Association, Chapter 84 v. Redmond School District 2J*, Case No. C-237-80, 6 PECBR 4726, 4739 (1981). This Board finds that the City's failure to implement the arbitration award denied Grievant the use of such funds and the City should not realize a gain by its actions. Therefore, the City is ordered to pay interest to Grievant in the amount of 9 percent per annum for back pay he would have earned from December 23, 2004, the date of the arbitration award, to the implementation of the award.

The Union requests that this Board award a civil penalty because the City has no "colorable defense" for its conduct in failing to implement the arbitration award. That is not the standard which we apply to determine whether a civil penalty is appropriate. This Board has the discretion, under OAR 115-35-075, to award a civil penalty of up to \$1,000 to a party to redress an unfair labor practice when we conclude that the respondent engaged in an unlawful act repetitively, with the knowledge that its actions were unlawful; or when the respondent's conduct was egregious. The City's actions here were not knowing and repetitive. The City complied with the only other arbitration award which appears in the record. Moreover, this case presents a question which this Board has not previously directly considered. Nor is the City's refusal to comply with Arbitrator Helm's award egregious. *Central Linn Education Association v. Central Linn School District*, Case No. UP-7-96, 17 PECBR 194 (1997). We deny the Union's request for a civil penalty. We also deny the Union's request for reimbursement of its filing fee.

ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(g) by refusing to accept the terms of Arbitrator Helm's award.

2. The City, as soon as is practicable, shall implement the terms of the arbitrator's award, and shall make Grievant whole for any damages he incurred because of the City's unlawful refusal to implement the award and pay back wages from December 23, 2004, to the date the arbitration award is implemented.

3. The City shall pay interest to Grievant in the amount of 9 percent per annum on back pay he would have earned from December 23, 2004, the date of the arbitration award, to the date the arbitration award is implemented.

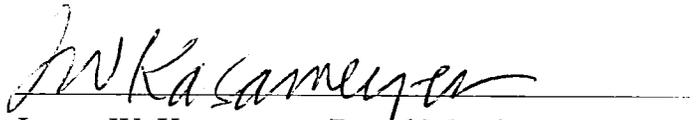
DATED this 15th day of March 2006.



Donna Sandoval Bennett, Chair



Paul B. Gamson, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.