

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-4-08

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES)	
ASSOCIATION,)	
)	
Complainant,)	
)	
)	
v.)	DISMISSAL ORDER
)	
CLACKAMAS COUNTY,)	
)	
Respondent.)	
)	
_____)	

Kevin Keaney, Attorney at Law, Lloyd Center Towers, 700 N.E. Multnomah Street, Suite 1155, Portland, Oregon 97232, represented Complainant.

Kathleen J. Rastetter, Senior County Counsel, Clackamas County, 2051 Kaen Road, Oregon City, Oregon 97045, represented Respondent.

On January 22, 2008, the Clackamas County Employees Association (Association) filed this unfair labor practice complaint. In its complaint, the Association alleges that Clackamas County (County) failed to comply with the terms of an arbitrator's award concerning the Blaine Schmeer grievance in violation of ORS 243.672(1)(g). On February 5, the County filed an informal response, with a copy to the Association. On February 11, the Administrative Law Judge (ALJ) wrote the Association stating that it appeared that the complaint presented no issue of fact or law that warranted a hearing. The ALJ directed the Association to show cause why the complaint should not be dismissed. On February 25, the Association responded to the ALJ's letter.

After reviewing the complaint, the arguments of the Association and County, and the applicable legal authority, we conclude that the complaint does not present an issue fact or law that warrants a hearing. Accordingly, we will dismiss the complaint. ORS 243.676(1)(b); OAR 115-035-0020.

Discussion

The Association's complaint, alleges, in relevant part:

"1. On or about November 5, 2007, the Association received an arbitration award in which it was the prevailing party. The Association successfully persuaded the arbitrator to reinstate the grievant [Schmeer] to a position from which he had been demoted, with back pay and benefits. The arbitrator also required the grievant to serve a two-day unpaid suspension in lieu of demotion. (Ex. A).

"2. The arbitrator required both parties to pay one-half (1/2) of her fee. The Association requested reconsideration of this part of the award because it exceeded the arbitrator's authority under the contract. The contract requires that 'the party' against whom the decision was adverse, i.e., the County, to pay the arbitrator's fees. (Ex. B).

"3. The County refuses to pay the full amount of the arbitrator fees. In deference to the arbitrator, the Association has paid one-half (1/2). The Association requests an order requiring the County to reimburse the Association. See Chenowith Education Ass'n v. Chenowith School District 9, 141 Or App 422, 918 P2d 854 (1996)."

The complaint contained, as part of Exhibit B, the following language from Article XII, Section 1, Step VI, of the parties' 2006-09 collective bargaining agreement:

"* * * If arbitration is requested, the parties shall forthwith agree upon an arbitrator who shall act as sole arbitrator of the dispute. The parties agree that any decision of the arbitrator which is within the scope of the Agreement shall be final and binding upon them. * * * The arbitrator shall not have authority to modify, add to, alter or detract from the

provisions of this Agreement. The arbitrator shall exercise all powers relating to admissibility of evidence, conduct of the hearing and arbitration procedures, provided that in so doing, he shall not contravene any provisions of this Agreement. The compensation of the arbitrator and all expenses incurred by him shall be borne by the party against whom the arbitrator's decision is adverse."

The complaint also contained, as part of Exhibit A, the following excerpt from a November 5, 2007 arbitration award on the Schmeer grievance:

"2. Appropriate Discipline

"Although I am ordering the County to retract the Grievant's demotion, I believe a substantial level of discipline is appropriate. A written reprimand is too light a penalty in my opinion. * * * I believe a suspension is needed to underscore the seriousness of the offense, the importance of working cooperatively with management and the importance of exercising good judgment in the senior land surveying position. Neither party presented an argument on an appropriate alternative penalty. I therefore relied on my own experience as an arbitrator of disciplinary cases to determine that an unpaid suspension of two working days is the appropriate penalty of the Grievant's misconduct.

"C. Remedy

"As the remedy, I hereby order the County to retract the demotion it issued the Grievant and restore him to his former Land Surveyor, Senior position and to amend his personnel file accordingly. The County may instead issue him and have him serve a two-day unpaid suspension for his misconduct. The County is further ordered to reimburse the Grievant for the pay and other monetary benefits lost by reason of his demotion.

“VII. Award

“Pursuant to the foregoing discussion and analysis, the decision and award of the undersigned Arbitrator is to sustain the grievance in part and deny it in part. The Arbitrator sustains the grievance to the extent that she has found that a demotion is not appropriate discipline for the Grievant’s misconduct. The grievance is denied to the extent the grievance implicitly requests that the Grievant be made whole without monetary penalty. The Arbitrator has found that the imposition of a two-day suspension is an appropriate penalty for the Grievant’s misconduct.

“As a remedy, the Arbitrator orders the County to take the steps set forth in the last paragraph of the preceding section. Pursuant to the stipulation of the parties, the Arbitrator shall retain jurisdiction in this matter for 90 days from the date of this award in order to resolve any issues pertaining to the remedy herein ordered.

“Article XII, Section 1, Step VI, of the Collective Bargaining Agreement states, ‘The compensation of the arbitrator and all expenses incurred by him shall be borne by the party against whom the arbitrator’s decision is adverse.’ Since this award both sustains and denies the grievance, the Arbitrator determines that her decision is equally adverse to each party. Therefore, the Arbitrator orders the parties to share equally her fees and expenses.”

On November 10, 2007, the Association’s counsel wrote to the arbitrator seeking “clarification regarding the award of expenses and fees to the Arbitrator in this case.” In the letter, the Association asserted that it was the “prevailing party” and denied that the arbitrator’s decision was “adverse” to the Association.

On November 14, 2007, the arbitrator responded to the Association’s request for reconsideration.

“* * * I gave thought to this allocation before making the award and determined that neither side was the winner or loser. Therefore, I could not make a determination that

either the Association or the County was the loser, within the meaning of the contract.

“Although I set aside the demotion, I imposed a two-day suspension, which I believe is a significant penalty. Under most progressive discipline schemes, an employee with a two-day suspension may be discharged for certain subsequent offenses that otherwise would not permit discharge. The Association (in its post-hearing brief) did, in fact, concede that some discipline would be appropriate, and I considered that. However, the Association did not concede that a suspension would be appropriate and I inferred from the totality of the evidence that the Association would not concede anything more than a written reprimand. In addition, as the County argues, I rejected several Association arguments that could have mitigated the discipline further had those arguments been successful. Therefore, I could not conclude that the Association was the prevailing party. I continue to adhere to that conclusion.

“Regarding the Association’s argument that the clear contract language does not permit an award that splits the Arbitrator’s fee, I have two responses:

“First, the contract does not say what should happen should an Arbitrator be unable to designate the losing party. This is one of the ‘interstices of the contract’ that the Arbitrator must fill. Many arbitration awards have interpreted similar language to allow the arbitrator to allocate fees between the parties under such circumstances. See generally, Carlton Snow’s discussion on ‘Informing the Silent Remedial Gap’ in *Make Whole and Statutory Remedies*, 1995 Proceedings, National Academy of Arbitrators, 150 et seq., (BNA Books 1996). *Roadway Express*, 87 LA 224 (Cooper, 1986) and *Grossmont Union High School District*, 91 LA 917 (Weiss, 1988) are examples of arbitration decisions splitting the allocation of the arbitrator’ [sic] fees under contract language that also could be read as the Association does—in other words, contract language that does not address the

possibility that the arbitrator cannot determine a winner or loser.

“Second, the parties’ actual contract with an arbitrator is not the Collective Bargaining Agreement because arbitrators is [*sic*] not party to that agreement. Here, the parties’ contractual obligation to this Arbitrator is found in her fee schedule * * *.

“Responsibility: Parties are jointly and severally liable for the all [*sic*] arbitrator fees and expenses. Unless the parties otherwise mutually agree (and the arbitrator is so notified), each party will be billed for one-half of the arbitrator’s fees and expenses.

“The scheduling of a case will constitute the acceptance of these terms. If any of the above fees or conditions are unclear or unsatisfactory, please advise.

“One might argue that the proviso, ‘Unless the parties otherwise mutually agree (and the arbitrator is so notified)’ negates the remainder of that sentence because the parties ‘otherwise agreed’ in their Collective Bargaining Agreement and this Arbitrator obviously was aware of that provision. In my view, however, there are two responses to that argument, both of which related back to my initial responses to the Association’s argument. Either (1) the parties did not precisely ‘otherwise agree’ because they did not address the circumstance where there was no clear winner or loser; or (2) the parties impliedly agreed that the Arbitrator could allocate her fees under such circumstances.

“Accordingly, the Association’s request for reconsideration is denied.” (Emphasis in original.)

The complaint alleges that under the terms of the contract, the County is obligated to pay the full amount of the arbitrator’s fees and that it violated ORS 243.672(1)(g) when it refused to do so. Subsection (1)(g) makes it an unfair labor

practice to “[v]iolate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them.” The Association contends that the arbitrator exceeded her authority when she required the Association and County to share equally her fees and expenses. The Association asserts that the County, as the party “against whom the arbitrator’s decision is adverse,” should be required to pay the full amount of the arbitrator’s fees.

For purposes of a motion to dismiss, we assume that the facts alleged in the complaint are true. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 62 (2007), *appeal pending* (citing *SEIU Local 503 v. State of Oregon, Judicial Department*, Case No. UP-6-04, 20 PECBR 677, 678 (2004)). We can also rely on undisputed facts we discover during our investigation of the complaint. *Upton v. Oregon Education Association*, Case No. UP-58-06, 21 PECBR 867, 868 (2007). Here, the Association asks us to set aside the arbitrator’s award and enforce its interpretation of language in the collective bargaining agreement. We decline to do so.

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

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

¹The Court of Appeals affirmed the Board’s use of this test in a different case between the same parties *Willamina Education Association v. Willamina School District 30J*, Case No. C-93-78, 4 PECBR 2571 (1980), *aff’d*, 60 Or App 629, 655 P2d 189 (1982).

Subsequent cases have reinforced these standards for enforcement of an arbitration award. “The guiding principle * * * is that arbitration awards should be subject only to sparing review, in the interest of promoting the efficiency and finality of arbitration as a decision-making process for parties who contract to use it.” *Federation of the Oregon Adult Parole and Probation Officers, et al, v. State of Oregon, Corrections Division*, 67 Or App 559, 563, 679 P2d 868, *rev den*, 297 Or 458, 683 P2d 1371 (1984).

Our review of the arbitrator’s interpretation of a collective bargaining agreement is extremely limited. “So long as the arbitrator’s decision and award is based upon his [or her] interpretation of the contract language, the arbitrator is within his [or her] contractual authority and the parties are bound by the decision. As is often stated in arbitration enforcement cases, it is the arbitrator’s interpretation of the contract terms which the parties bargained for, and it is that interpretation to which the parties are now bound.” *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986).

Accordingly, we do not review an arbitrator’s interpretation of a collective bargaining agreement to determine if it is right or wrong. *In the Matter of the Arbitration between State of Oregon, Department of Corrections v. AFSCME Council 75, Local 2623*, Case No. AR-1-92, 13 PECBR 846, 858 (1992). We refuse to substitute our judgment for that of an arbitrator, and will not correct a decision just because it is erroneous. *Portland Association of Teachers and Jim Hanna v. Portland School District 1J*, Case No. UP-64-99, 18 PECBR 816, 836-37 (2000), *AWOP*, 178 Or App 634, 39 P3d 292, 293 (2002).

The same principles of limited review apply to an arbitrator’s formulation of remedies, including, in this case, imposing responsibility for paying the arbitrator’s fees and expenses: “Once a violation of the collective bargaining agreement is established, the arbitrator has authority to formulate an appropriate remedy.” *North Clackamas School District No. 12 v. North Clackamas Education Association*, Case No. C-275-79, 5 PECBR 4107 (1980), *aff’d*, 54 Or App 211, 225, 634 P2d 1348 (1981). An arbitrator has “substantial discretion in devising a remedy.” *State of Oregon, Oregon Department of Transportation, Department of Motor Vehicles v. OPEU*, Case No. AR-1-98, 17 PECBR 814, 825 (1998). 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.’” *In the Matter of the Arbitration of a Dispute Between Service Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Office of*

Services for Children and Families, Case Nos AR-3/4-03, 20 PECBR 829, 843 (2005) (quoting *Department of Corrections v. AFSCME*, 13 PECBR at 863). See also *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 214-15 (2005).

Here, we find no basis for concluding that the arbitrator exceeded her authority in ordering the parties to share the cost of her fees and expenses. Neither party alleges that the proceedings were unfair or irregular, or that the arbitrator's award violates public policy. The arbitrator's award is based upon her finding that both parties partially prevailed and on her interpretation of the contract language. She concluded that the contract language on which the Association relies does not require the County to pay the entire arbitrator's fee under the circumstances present here. Consistent with our cases, we will not substitute our judgment for that of the arbitrator regarding the interpretation of the contract. She determined that each side partially prevailed and as part of the remedy, she ordered each side to pay half of the arbitrator's fee. This portion of the remedy is tailored to the violation and does not constitute an abuse of the arbitrator's discretion.

The facts of this case can readily be distinguished from those in *Chenowith Education Association v. Chenowith School District 9*, 141 Or App 422, 918 P2d 854 (1996), where the court refused to enforce an arbitrator's award that required a school district to incorporate a committee proposal into the collective bargaining agreement. The court distinguished its holding in *Chenowith* from that in *Willamina*:

“* * * Here, the arbitrator specifically found that the committee did not reach agreement on the provision that he imposed on the parties. As a result, the arbitrator's remedy created a new and unbargained-for contract obligation. In contrast, *Willamina* is an example of a case in which the arbitrator's interpretation clarified an already existing provision of the agreement. * * *” *Chenowith*, 141 Or App at 428 n 4.

In this case the arbitrator has only interpreted the language concerning payment for the arbitrator's services from Article XII, Section 1, Step VI, of the parties' agreement. Unlike the arbitrator in *Chenowith*, the arbitrator here added no new or unbargained provisions to the parties' contract.

The complaint fails to allege facts which, if true, violate ORS 243.672(1)(g). Accordingly, we will dismiss it.

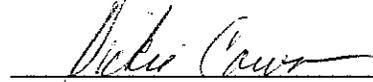
ORDER

The complaint is dismissed.

DATED this 26th day of March 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.