

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-07-09

(UNFAIR LABOR PRACTICE)

INTERNATIONAL ASSOCIATION OF)	
FIREFIGHTERS, LOCAL #890,)	
)	
Complainant,)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
KLAMATH COUNTY FIRE DISTRICT)	AND ORDER
NO. 1,)	
)	
Respondent.)	
_____)	

On October 12, 2009, this Board heard oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on August 6, 2009, following the parties' submission of the case on stipulated facts. The record closed on June 10, 2009, upon receipt of the parties' post-hearing briefs.

Michael Tedesco and Sarah Drescher, Attorneys at Law, Law Office of Michael Tedesco, Lake Oswego, Oregon, represented Complainant.

C. Akin Blitz and Jennifer A. Sabovik, Attorneys at Law, Bullard Smith Jernstedt Wilson, Portland, Oregon, represented Respondent.

On February 4, 2009, the International Association of Firefighters, Local #890 (Association) filed this unfair labor practice complaint against the Klamath County Fire District No. 1 (District), alleging that the District violated ORS 243.672(1)(e), (f), and (g) by refusing to implement an arbitration award ordering the District to give a firefighter his disciplinary records. The District filed a timely answer.

The issues presented by the parties' stipulation are:

1. Did the District refuse to accept, implement, or comply with the arbitrator's award in violation of ORS 243.672(1)(e), (f), or (g)?
2. If the District violated ORS 243.672(1)(e), (f), and/or (g), what is the appropriate remedy?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT¹

1. The Association is a labor organization and the exclusive bargaining representative of all full-time paid captains, firefighters, and deputy fire marshals employed by the District, a public employer.

2. The Association and the District are parties to a collective bargaining agreement effective July 1, 2006 to June 30, 2009.

3. The parties' collective bargaining agreement provides for a grievance procedure culminating in binding arbitration. Article 11.1 states that "[g]rievances, which may arise during the term of this Agreement, shall be resolved through the procedures set forth in this Article." Step IV of the grievance procedure provides in relevant part:

"If the Union finds the decision of the Board of Directors to be unacceptable, the Union will, within ten (10) business days of the receipt of the Board of Director's response, notify the District of their intent to submit the grievance to arbitration. * * * The arbitrator may interpret this Agreement and apply it to a particular case, but shall have no authority to amend, modify, ignore, or add provisions to the Agreement, and shall be limited to the case presented."

4. Article 10.1 of the parties' agreement, which addresses discipline, provides in part:

¹The Findings of Facts are derived from the parties' joint stipulation and exhibits.

“Disciplinary action or measures may be processed as a grievance through the regular grievance procedure. * * * All disciplinary action shall be removed from the employee’s personnel file at the request of the employee as outlined below.

- “1. Oral reprimand 12 months
- “2. Written reprimand 18 months
- “3. Suspension 24 months
- “4. Suspension (second) 48 months
 - “a. Suspension of more than 1 day and/or with a last chance agreement
 - “b. Demotion

“No disciplinary action shall be removed from employees [*sic*] personnel file if such discipline is directly related and referenced to other subsequent discipline in their file.”

5. Article 12 of the parties’ agreement, provides in relevant part:

- “d. Removal of items from an employees [*sic*] personnel file shall be as outlined in Article 10.1 of the Collective Bargaining Agreement. The only exception is the Drug and Alcohol article.
- “f. Material removed from and file shall be given to the employee and the District shall not retain any
- “g. With exception of chief officers (not acting), the employee, or a court order, no employee’s files shall be subject to review by personnel within the department or people outside the department or as required by law.
- “k. Completed investigations where discipline was not issued, the investigation file shall be sealed. Access shall be the same as item 7 [Section 12.g].”² (Emphasis in original.)

²The arbitrator noted that during the 2006 bargaining, the parties had changed the manner in which they denoted the subsections in Article 12 from numbers to letters. The arbitrator found that “item 7” in Article 12.k. referred to the prior Article 12.7, which is now Article 12.g.

6. In September 2007, the District reprimanded an Association-represented firefighter. The Association grieved the reprimand on behalf of the firefighter. During the grievance process, the District discovered new information and decided to rescind the discipline. The District removed the disciplinary investigation records from the firefighter's personnel file and placed them in a separate sealed file. On October 18, 2007, the Association filed a grievance alleging that the District violated the collective bargaining agreement when it failed to give the disciplinary records to the firefighter and destroy the District's copy.

7. On June 28, 2008, the parties submitted the grievance to arbitration in accordance with Article 11 of the collective bargaining agreement. The issue before the arbitrator was whether the District violated Articles 10.1 and 12 of the collective bargaining agreement when the District retained the disciplinary information it removed from the employee's personnel file. If the arbitrator found that the District violated the contract, the arbitrator was to decide the appropriate remedy.

8. On or about December 7, 2008, the arbitrator issued his award and held that the District violated Article 12.f when it retained, in a sealed file, the rescinded disciplinary documents that it removed from the employee's personnel file.

9. During the arbitration, the District asked the arbitrator to address the conflict between the Association's assertion that the parties' agreement required the District to immediately remove and destroy the employee's disciplinary records and the three-year public record retention requirement for such documents under OAR 166-150-0160(6)(c).³ The arbitrator addressed this issue as follows:

"Without prejudice to the Union [*sic*] assertion of lack of jurisdiction, we turn next to the District's contention that there is a statutory prohibition against the delivery of the rescinded discipline records which prevents or excuses its failure to comply with the express terms of the CBA [collective bargaining agreement]. The District asserts that unfounded disciplinary investigations are to be retained for a period of three (3) years according to ORS 192.105 and OAR 166-150-0160 (6)(c) and that the statute and administrative rules have primacy over the CBA and the relationship of the parties as contemplated by the Public Employee Collective Bargaining Act (PECBA). A reading of the cited statute and rule does reveal the time limitations asserted, but fails to resolve the apparent underlying conflict.

³OAR 166-150-0160(6)(c) provides that unfounded disciplinary investigation records must be retained for a minimum of three years.

“While acknowledging that some rulings of the ERB have held that county civil service rules and regulations were superseded by PECBA, the District maintains that the ERB has also held that when the Legislature has specifically directed the State to establish procedures through an independent instrumentality, that those rules cannot be changed through collective bargaining.

“Reliance on such holding is misplaced however, for several reasons. First, in the OSPOA case, the delegation of authority to the Department of Administrative Services (DAS) to set parking rates was preemptive due to the specific mandate of ORS 276.004 which provided in relevant part that **notwithstanding any other provision of law**, DAS shall manage and control the utilization of parking facilities (emphasis added). In the case at issue, ORS 192.105 provides no such preemptive delegation.

“Next, the 2001 ERB decision between these parties adjudicated an allegation that a newly promulgated District rule concerning removal of documents from personnel files constituted a unilateral change in a mandatory subject of bargaining where a removal practice was extant in the CBA. The practice called for removal of letters of reprimand and disciplinary action at the request of the employee after eighteen (18) months. The District’s final brief to the ERB did not cite OAR 166-150-0160 as a defense to the unfair labor practice allegation brought by the Union; nor did the decision of the ERB find any impediment to using the language of the CBA as the basis for finding a duty to bargain changes in the language (insofar as ‘minimum fairness’ standards require).

“Additionally, at no time during the previous relationship of the parties, in existence for more than two decades according to the memory of President Malone, has any representative of the District; be it Chief or legal counsel, advanced the view that compliance with the CBA language in Article 12 is prohibited by law.

“Finally, the parties have stipulated that they have in the past removed unfounded discipline and given it to the affected employee(s) without the passage of the newly asserted three year minimum time period.

“The Union has advanced cogent arguments in support of its claim that the Arbitrator in this case **cannot**, or **should not** attempt to consider what it deems ‘external factors’ in deciding this matter. After due consideration, on this record, in this case, the Arbitrator is persuaded by the efficacy of those Union arguments and finds a violation of the contract based upon traditional contract interpretation guidelines.” (Emphasis in original.)

10. The arbitrator’s remedy stated:

“The District shall immediately remove the rescinded discipline documents from the sealed file and give the documents to the firefighter whose discipline was rescinded.”

11. By letter dated January 21, 2009, the District’s attorney, William Gourley, notified the Association president that the District would not comply with the arbitrator’s award. The letter states:

“Pursuant to ORS 243.702(1), the Klamath County Fire District No. 1 (District) is requesting the reopening of the above stated sections of the CBA. As the employer, the District is unable to perform to the terms of the agreement contained in those sections. It is clear that the District and the IAFF have options best resolved at the table. The District will not remove and destroy or return personnel file records. The Local’s option, of course, is to file an ULP. The more practical solution is to agree to a contract change. Records removed from the personnel file of an employee would be maintained in a separate system of records not identifiable by name of the employee which the District could use in litigation or arbitration to show, for example, that appropriate training is provided and that the District was not negligent in that regard, or to show forewarning and foreknowledge of an employee. The records could not be used for progressive discipline purposes to justify an increased level of discipline.

“Records retention is a permissive subject of bargaining. Discipline is a mandatory subject. This sort of change will address fully and fairly the needs of the Local and the District, and will allow us to move forward in a positive and cooperative manner.

“The District is committed to bargaining in good faith regarding these sections, and is fully prepared to enter into the expedited bargaining process.

12. On January 29, 2009, the Association president responded to the District:

“I have received William Gourley’s letter regarding the District’s position on [the arbitrator’s]-remedy to the retention of personnel records. Local 890 IAFF has considered the two proposals for remedy offered by Mr. Gourley; (1) Enter into an expedited bargaining or (2) file an Unfair Labor Practice Petition.”

“I have instructed IAFF Local 890 Legal Counsel Michael Tedesco to proceed in movement of this issue to an Unfair Labor Practice hearing and declining the offer of [*sic*] to enter into expedited bargaining.”

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The District did not violate ORS 243.672(1)(g) when it refused to implement an arbitration award ordering the District to give a firefighter disciplinary records.⁴

As the result of a grievance arbitration, the arbitrator concluded that the District violated the parties' collective bargaining agreement when it removed documents concerning an investigation into possible disciplinary action from an employee's personnel file, but retained the documents in a separate sealed file. The arbitrator determined that the collective bargaining agreement required the District to return the original documents to the employee and destroy any copies retained by the District. In his award, the arbitrator ordered the District to return the original documents to the employee and to destroy any remaining copies. The District refused to comply asserting that to do so would violate Public Records Law contrary to public policy.

The issue is whether the arbitrator's award is contrary to public policy because it would require the District to violate the law.

This dispute involves two statutory schemes—the Public Employee Collective Bargaining Act (PECBA) and the Public Records Law, ORS 192.410 through 192.505, and the potentially conflicting policies embodied in each. We recently addressed a public employer's obligation to retain public records when we ordered the employer to "purge" certain records from its files. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752 (2008), *recons*, 22 PECBR 908 (2009). Just as in this case, the employer argued that our order would violate public records retention laws in contravention of public policy. We did not have to directly address the issue, however, because we agreed with the union's interpretation that "purge" did not require the employer to destroy the documents, but allowed it to remove the documents from its files and set them aside for destruction pursuant to law. 22 PECBR at 909. This case requires that we now directly address a possible conflict between the PECBA and Public Records Law.

⁴In its complaint, the Association also alleged that the District violated ORS 243.672(1)(e) and (f) by refusing to implement the arbitrator's award. Neither party addressed these allegations at the hearing or in their closing briefs. We will dismiss these additional allegations without discussion.

The PECBA provides that it is an unfair labor practice for a public employer to violate “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.” ORS 243.672(1)(g).

Because arbitration provides an efficient and economical way for the parties to resolve their disputes with less disruption to public services, Oregon has adopted a strong public policy favoring arbitration. *Fed. Of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 563, 679 P2d 868, *rev den*, 297 Or 458 (1984). To carry out this policy, the legislature charged this Board with enforcing arbitration awards. ORS 240.086(2) requires that we “review and enforce arbitration awards involving employees in certified or recognized appropriate bargaining units.”

When the parties agree to arbitrate their disputes, they also agree to accept the arbitrator’s interpretation of their contract and to abide by the arbitrator’s award. *Clackamas County Employees Association v. Clackamas County*, Case No. UP-4-08, 22 PECBR 404, 411, (2008), AWOP, 228 Or App 368, 208 P3d 1057 (2009). Therefore, we generally enforce an arbitrator’s decision even if we are convinced the arbitrator was wrong. *Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08, 23 PECBR 671, 687 (2010).

Our deference to an arbitrator’s award however, is not unlimited. We will not enforce an arbitration decision that is in violation of the law (ORS 240.086(2)(g)) or that is contrary to public policy. *Willamina School District 30J v. Willamina Education Association*, 60 Or App 629, 655 P2d 189 (1982).

Public Records Law

The legislature has determined that “the decision as to what records are retained or destroyed is a matter of statewide public policy.” ORS 192.001(1)(a). To enforce this policy the legislature enacted a comprehensive statutory scheme to regulate the retention and destruction of public records—ORS 192.001 through ORS 192.170. The legislature vested the State Archivist, under the direction and supervision of the Secretary of State, with issuing rules and regulations to carry out this policy. ORS 357.895.

Pursuant to ORS 357.895, the State Archivist adopted a comprehensive framework of administrative rules to provide procedures for the orderly retention and disposition of public records.⁵ OAR chapter 166.

⁵ORS 192.055(4) defines the term “[p]olitical subdivision” to include “a city, county, district or any other municipal or public corporation in this state.”

The District's responsibility for retention and destruction of public records in general is addressed in OAR 166-020-0010(1) and requires the District to maintain its public records in conformance with a schedule established by the State Archivist. Retention and destruction of disciplinary records, such as the ones at issue here, are addressed in OAR 166-150-0160.⁶ Section 6 of that administrative rules states:

Section 6 of OAR 166-150-0160, which applies to special districts, establishes the retention periods for the District's disciplinary records.⁷ The section of that rule at issue here provides:

"(6) Disciplinary Action Records. Records documenting termination, suspension, progressive disciplinary measures, and other actions against employees. May include statements, investigative records, interview and hearing records, findings, and related records. May be filed with Employee Personnel Records. (Minimum retention: (a) Retain investigations resulting in termination: 10 years after employee separation (b) Retain investigations resulting in disciplinary action or exoneration: 3 years after resolution (c) Retain unfounded investigations: 3 years)".

The State Archivist establishes both general and special schedules for the destruction of public records. OAR 166-030-0027. Unlawful destruction or disposal of public records in violation of these schedules constitutes a Class A misdemeanor. OAR 166-005-0000; ORS 162.305.

Here, there is no dispute that the parties agreed to accept the arbitrator's award, that the documents are public records subject to ORS 192.105 *et seq.* and OAR Chapter 166, and that the arbitrator's award requires the District to dispose of the documents in contravention of the Public Records statute and administrative rules. The dispute is whether the arbitrator's award is unlawful and against public policy. The Association asserts that although the award may violate the Public Records Law, the award is not unlawful because the collective bargaining provisions of the PECBA supersede the Public Records statute and rules, and, additionally, the District can obtain permission from the State Archivist to destroy the records prior to the expiration of the three year retention period.

⁶Valid administrative rules have the effect of statutory law. *State v. Norris*, 188 Or App 318, 343, 72 P2d 103 (2003).

⁷OAR 166-005-0010(9) defines "retention period" as "the length of time a public record must be retained as authorized by an applicable records retention schedule produced and approved by The State Archivist."

When analyzing an arbitrator's award to determine if it violates public policy, we narrow our focus. We only analyze the award itself to determine whether the award "order[s] something that either the legislature or the courts have determined to be contrary to public policy." *Salem-Keizer Assn v. Salem-Keizer Sch. Dist.* 24J, 186 Or App 19, 25, 61 P3d 970 (2003). Since only the legislature and the courts may establish public policy, we will enforce an arbitration award unless enforcement of the award would require an action that is expressly forbidden by statute or would forbid an action that is required by statute. *Amalgamated Transit Union Division 757 (AFL-CIO) v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-64-03, 21 PECBR 443, 468 (2006), *aff'd*, 222 Or App 293, 195 P3d 389, *recons*, 224 Or App 173, 197 P3d 60 (2008).

To determine whether the arbitrator's award requires an action forbidden by statute, we begin by interpreting the statutes applicable to this case.

Our goal in interpreting a statute is to determine the legislature's intent. ORS 174.020(1)(a). To do so, we apply the methodology established in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as subsequently modified by ORS 174.020 and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). We first examine the text and context of the statute and then consider any relevant legislative history offered by the parties.⁸ If we cannot determine the legislature's intent after examining the statute's text, context, and legislative history, we apply standard maxims of statutory construction. *Marion County Law Enforcement Association v. Marion County*, 23 PECBR at 687 (2010) citing *PGE*, 317 Or at 612.

We apply these principles to consider the Association's argument that ORS 192.105(1) permits the District to obtain authorization from the State Archivist to do what the arbitrator ordered: give the firefighter the records at issue. ORS 192.105(1) provides:

"Except as otherwise provided by law, the State Archivist may grant to public officials of the state or any political subdivision specific or continuing authorization for the retention or disposition of public records that are in their custody, after the records have been in existence for a specified period of time."

ORS 192.005(4) defines "political subdivision" as a city, county, district, or any other municipal or public corporation in this state. The District falls within this definition. The statute also does not define "retention". Therefore, we give it its ordinary

⁸Because neither party offered any legislative history, we need not consider it.

meaning. *Webster's Third New International Dictionary 1938* (unabridged ed.1971) defines "retention" as "the act of retaining or state of being retained; keeping in one's own possession or control, the state of being kept in one place."

From the text and context of this statute we conclude that the legislature intended that unless the law provides otherwise,⁹ the State Archivist can only grant permission for public officials to dispose of public records after the records have been retained for a specified period of time. OAR 166-150-0160(6) specifies how long a political subdivision must keep certain records; it requires that the records at issue here be retained for three years. The Association points to no statute or constitutional provision that provides an exception to this requirement. Accordingly, the District could not obtain authorization from the State Archivist to comply with the arbitrator's award and give the firefighter his disciplinary records before the expiration of the three-year period.

The Association argues, however, that the question of the enforceability of the arbitrator's award is one of legislative intent. According to the Association, no statutory provision voids the award and we must examine the legislature's intent based on "the terms of the statute, its objective, the evil it was enacted to remedy, and the effect of holding agreements in violation of it void." *Uhlmann v. Kin Daw*, 97 Or 681, 689-90, 193 P 435 (1920) (cited in *Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp.*, 209 Or App 528, 540, 149 P3d 150 (2006), *rev den*, 342 Or 727, 160 P3d 992 (2007) and *Grimmett Excavating Contractors v. Farmers & Merchants Bank*, 64 Or App 399, 402, 668 P2d 439 (1983)).

The underlying premise of the Association's argument is that we are declaring a provision of the contract void. The Association's argument mistakes the issue in this proceeding. The validity of the contract is not before us. The only question is whether the arbitrator's award requires the District to act in violation of law. As the Court of Appeals explained: we examine "the legality of the end-product of the arbitration" and do not consider the legal reasoning in the arbitrator's decision. *Fed. of Ore. Parole Officers v. Corrections Division*, 67 Or App 559, 562, 679 P2d 868, *rev den*, 297 Or 458, 683 P2d 1371 (1984).

Here, our only role is to determine whether the arbitrator's award, which requires the District to remove the rescinded disciplinary documents from the sealed file and give the documents to the grievant, violates public record retention statutes and rules.

⁹The Attorney General states that only the constitution or another statute may provide an exception to the requirements of ORS 192.105. 1986 Ore. AG LEXIS 73. Attorney General opinions are persuasive authority on the interpretation of the Public Records Law. *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 444, 447 (2008).

We turn next to the Association's argument that the public records retention statutes and rules do not supercede the parties' contractual rights under the PECBA. It cites *AFSCME v. Clackamas County*, 69 Or App 488, 687 P2d 1102 (1984) in support of its argument. In *Clackamas County*, the Court held that the PECBA's bargaining obligation regarding mandatory subjects of employment superceded enabling legislation, ORS 192.001 to ORS 192.170 and OAR 166-150-0160(6), which permitted counties to adopt a civil service system on similar employment subjects. The court was able to harmonize the statutes at issue by concluding that the county must exercise its discretion to adopt civil service rules in a manner that complied with the PECBA. Here, however, Public Records Law requires that the District retain the records at issue for a specified period. Enforcing the arbitrator's award would require the District to violate this law. Thus, we cannot do what the court did in *Clackamas County* and harmonize two legal obligations.

Nor do we find persuasive the Association's reliance on *State Executive Dept. v. OPEU*, 91 Or App 124, 754 P2d 582 (1988). In that case, the Court of Appeals upheld this Board's enforcement of an arbitration award which required the employer to fill vacancies first by lateral transfer. The employer argued that the contract language was contrary to public policy because it would require the employer to violate affirmative action statutes—ORS 243.305, 240.306, and 240.321. The Court interpreted ORS 240.321 to mean that the PECBA covered all employment matters for represented state employees except for the recruitment and selection of applicants for initial State employment which was covered by ORS 243.305 and ORS 240.306. Since the case was about lateral transfer of current employees and not about initial hires of new employees, the Court concluded that the contract provision did not violate affirmative action statutes and was thus lawful. In any event, ORS 240.321 applies only to state employees and thus has no application to the District.

While we generally attempt to harmonize other statutes with the parties' PECBA rights we cannot harmonize the statute with the arbitrator's award here. The arbitrator's award is contrary to public policy because it requires the commission of an unlawful act. The legislature provides that "the decision as to what records are retained or destroyed is a matter of statewide public policy." We do not believe the parties can, by private agreement, contravene this policy. The legislature has also specifically provided that public records are to be maintained "for a specified period of time". Pursuant to delegated authority, the State Archivist established the specified retention period of time for the records here to be three years. The arbitrator's award requires the District to dispose of the records prior to the expiration of this three-year period. Accordingly, the District did not violate ORS 243.672(1)(g) when it refused to comply with the arbitration award. We will dismiss the complaint.

REMEDY

Having concluded that the arbitrator's award cannot be lawfully enforced, we consider an appropriate remedy. We may dismiss the complaint, refer the matter back to the arbitrator, or modify the arbitrator's award. *In the Matter of the Arbitration of a Dispute Between Services Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Office of Services for Children and Families*, Case No. AR-3-03, 20 PECBR 829, 848 (2005). We conclude that the arbitrator's award can be modified to address the parties' concerns.

It is clear that the arbitrator intended to prevent the District from using the disciplinary materials against the grievant. Immediate destruction of the documents, however, would be unlawful. To address this concern, we will order the District to maintain the disciplinary documents in a sealed file separate from grievant's personnel file for the three-year retention period. The file and its contents shall be inaccessible except as required by law. Once the three-year period has expired, the District shall provide the original documents to the grievant and destroy any remaining copies in accordance with the law.

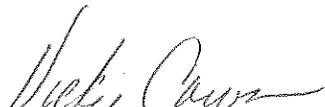
ORDER

1. The District shall maintain the rescinded disciplinary documents in a confidential sealed file separate from grievant's personnel file. The file and its contents shall be inaccessible except as required by law.

2. Upon expiration of the three-year retention period, the District shall give the original documents to the grievant and destroy any copies in accordance with the law.

DATED this 28 day of September, 2010.

**Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

****Chair Gamson Dissenting**

The Union asks us to enforce an arbitration award. The award requires the District to remove certain “discipline documents” from its file and give them to the grievant. The District refuses to comply on grounds that the award requires it to relinquish documents that statutes and an administrative rule require it to retain. I agree with the general principle that we cannot enforce an arbitration award that requires the District to violate the law. I disagree with the majority’s application of that principle to the facts and law of this case. In my view, the majority makes an incomplete and inaccurate analysis of whether this arbitration award requires the District to violate the law. I conclude it does not.

The majority appropriately begins its analysis by parsing the controlling statute. The majority correctly observes that ORS 357.895 requires public employers to retain documents as specified in rules promulgated by the State Archivist. It is thus the Archivist’s rules that control here. The majority quotes these rules but makes no attempt to analyze them. It nevertheless declares that the rules conflict with the arbitrator’s award. I disagree.

We construe administrative rules by using the same analytical framework we use to interpret statutes. *Stanley v. DMV*, 193 Or App 202, 205, 89 P3d 1186 (2004). Our goal is to give effect to the intent of the body that enacted the rule. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485, 940 P2d 1219 (1997). We begin by examining the text and context of the rule. *Id.*

The District argues, and the majority agrees, that the arbitrator’s award violates OAR 166-150-0160(6)¹⁰, which states:

¹⁰OAR 166-150-0160(6) is the only administrative rule the District relies on, and the majority appropriately confines its consideration to whether that rule conflicts with the arbitrator’s award. We do not decide whether some other rule or statute not raised by the District might make the award unlawful. Similarly, we do not decide whether some other statute not raised by the Union might authorize the award. *E.g.*, ORS 240.750 (a disciplinary action that has been reduced or eliminated through collective bargaining, grievance or personnel process may not be retained in the employee’s personnel file unless the employer and employee mutually agree to it); ORS 652.750(3) (requiring employers, including public employers, to retain an employee’s personnel records for at least 60 days after termination); or ORS 243.676(2)(c) (authorizing this Board, after finding that a party has committed an unfair labor practice, to “[t]ake such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as necessary to effectuate the purposes of” the PECBA). This Board has frequently in the past ordered a public employer to purge or expunge documents from its files as a remedy for an unfair labor practice. *E.g.*, *Polk County Deputy Sheriff’s Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 86-87 (1995); *Oregon School Employees Association v. Lake County School District*, Case No. C-202-83, 9 PECBR 9501, 9504 (1987) (Order on Remand), *aff’d* 93 Or App 481, 763 P2d 160 (1988).

“(6) **Disciplinary Action Records** Records documenting termination, suspension, progressive disciplinary measures, and other actions against employees. May include statements, investigative records, interview and hearing records, findings, and related records. May be filed with Employee Personnel Records. (Minimum retention: (a) Retain investigations resulting in termination: 10 years after employee separation (b) Retain investigations resulting in disciplinary action or exoneration: 3 years after resolution (c) Retain unfounded investigations: 3 years)”.

The rule’s structure is puzzling. It begins with a list of certain types of records, but then abandons any further mention of the records on the list. The rule does not require retention of the listed documents. What is clear, however, is that the rule prescribes retention periods for three types of “investigations”—“investigations resulting in termination”; “investigations resulting in disciplinary action or exoneration”; and “unfounded investigations.” It is thus “investigations” that must be retained. The dispositive question in this case is whether the arbitrator’s award requires the District to relinquish “investigations” before the end of the prescribed retention period. In my view, it does not.

Neither the statute nor the rule defines “investigations.” We therefore give the term its ordinary meaning. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). The dictionary defines “investigation” as “1 : the action or process of investigating : detailed examination * * * 2 : a searching inquiry * * * : an official probe.” *Webster’s Third New Int’l Dictionary* 1189 (unabridged ed 1971).

Thus, the District must retain its “detailed examination” or its “official probe.” On its face, the rule requires no more. Documents that are not part of the examination or probe are not covered by the rule. For example, as pertinent here, disciplinary documents are not themselves part of the examination or probe, so they are not covered by the rule. A disciplinary document is one possible *result* of an investigation, but it is not part of the investigation.

The language of the rule bolsters this interpretation. The rule requires retention of “investigations *resulting in* termination” and “investigations *resulting in* disciplinary action or exoneration.” Under this plain language, “disciplinary action or exoneration” are possible *results* of an investigation; they are not the same as the investigation itself. Stated differently, the rule identifies those “investigations” which must be retained based

on the result. The result is something that comes after the investigation and is separate from it.¹¹ The rule, by its plain terms, requires retention of the investigation, but not the result of the investigation (*i.e.*, not the disciplinary action or exoneration).¹²

When interpreting an administrative rule, we may not insert what has been omitted or omit what has been inserted. *See PGE v. Bureau of Labor and Industries*, 317 Or at 611. Here, the rule specifically mentions both investigations and disciplinary actions, but it requires retention of investigations only. It does not require retention of disciplinary actions, and I believe the majority inappropriately inserts such a requirement into the rule.

Having construed the rule, the next analytical step is to determine the meaning of the arbitrator's award.¹³ We can then compare the requirements of the award with the requirements of the administrative rule to see if they are congruent.

The language of the award itself is the starting point in determining its meaning. The arbitrator ordered the District to "immediately remove *discipline documents* from the sealed file and give the documents to the firefighter whose discipline was rescinded." (Emphasis added.) Significantly, the arbitrator did not order the District to relinquish the "investigation." The award applies only to "discipline documents." The award is thus consistent with the administrative rule the majority relies on. As discussed above, the rule requires the District to retain "investigations," and the award does not require it to do otherwise.

The scope of the award becomes even clearer when we examine the contract language the arbitrator was applying. The contract article at issue (Article 10, quoted in

¹¹This interpretation is consistent with how we normally talk about issues of cause and effect. For example, a hurricane may result in destruction, but the destruction is not the same thing as the hurricane. A crime may result in jail time, but jail time is not the same thing as the crime. Similarly, an investigation may result in disciplinary action, but the disciplinary action is not the same thing as the investigation. The rule requires retention of "investigations." It does not require retention of the results of the investigation.

¹²We also must consider any administrative history of the rule presented by the parties. *See State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009). The parties have presented none, so there is nothing to consider.

¹³To determine whether to enforce an arbitration award, we look only at the award itself, and not to the arbitrator's underlying factual findings or legal reasoning. *E.g., Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08, 23 PECBR 671 (2010).

full in Finding of Fact 4) permits the removal of only “disciplinary action.” The article lists the specific types of disciplinary actions that can be removed from an employee’s personnel file—oral reprimand, written reprimand, suspension and demotion. The article makes no mention of removing the investigation that led up to the discipline.¹⁴ The arbitrator was interpreting this contract language. Given this context, it seems extraordinarily likely that when the arbitrator ordered the District to remove “discipline documents” from its file, he was referring solely to the specific types of documents listed in the contract, *i.e.*, reprimands, suspensions or demotions. This is another strong indication that the arbitration award does not require the District to relinquish or destroy “investigations.”¹⁵

The last step in the analysis is to apply the administrative rule to the arbitrator’s award. The rule requires retention of “investigations.” The award requires the District to relinquish “discipline documents” but does not mention the investigation. The arbitration award is therefore consistent with the administrative rule and is enforceable. I dissent from my colleagues’ conclusion to the contrary.



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¹⁴A separate contract provision (Article 12.k, quoted in Finding of Fact 5) contains the contract’s only pertinent reference to investigations. It requires the District to seal an investigation file and limit access to it after a completed investigation that does not result in discipline. The contract article does not require the District to relinquish or destroy the investigation, and neither does the arbitration award. All the arbitrator ordered the District to do is open the sealed file, remove the “discipline documents” from the file and give them to the grievant. The award does not mention anything about the investigation that led to the discipline.

¹⁵The majority fails to analyze the arbitration award, and as a consequence, it completely misconstrues the issue before us. For reasons it fails to explain, the majority assumes that the award compels the District to turn over the entire contents of the sealed file. This assumption has absolutely no basis in the language of the award itself. The award requires the District to “immediately remove discipline documents from the sealed file.” Contrary to the majority’s assertion, the award does not require the District to turn over the entire sealed file, but only the “discipline documents” in it. As described above, this award is consistent with the administrative rule. The majority reaches a different conclusion only by reading into the arbitrator’s award a requirement to turn over the entire sealed file, a requirement that has no basis in the language of the award.