EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-013-10

(UNFAIR LABOR PRACTICE)

PORTLAND FIRE FIGHTERS' ASSOCIATION, LOCAL 43, IAFF,	)	
Complainant,	)	
v.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
CITY OF PORTLAND,	)	
Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) Wendy L. Greenwald on October 20, 2010, in Salem, Oregon. The record closed on December 20, 2010, upon receipt of the parties' post-hearing briefs. The case was transferred to the Board without the issuance of a proposed order.

Barbara J. Diamond, Attorney at Law, Diamond Law, Portland, Oregon, represented Complainant.

Lory J. Kraut, Deputy City Attorney, City of Portland, Portland, Oregon, represented Respondent.

On March 22, 2010, the Portland Fire Fighters' Association, Local 43, IAFF (Association) filed an unfair labor practice complaint against the City of Portland (City) which alleged that the City violated ORS 243.672(1)(g) by refusing to implement the Tom Hurley (Grievant) grievance arbitration award.

The City filed a timely answer to the complaint and asserted that: (1) the Arbitrator exceeded the scope of his authority; (2) the award was an impermissible collateral attack on an administrative agency's decision; and (3) the award violates the law.

The issue presented for hearing is:

Did the City violate ORS 243.672(1)(g) when it failed or refused to comply with the terms of the Hurley grievance arbitration award?

RULINGS

1. The City offered into evidence Exhibits R-8, R-101-138, R-140-191 and R-193-195. The ALJ deferred ruling on their admissibility. These documents consist of transcripts and exhibits from two previously adjudicated Employment Relations Board cases between these parties: UP-14-07, 23 PECBR 23 (2009) and UP-05-08, 23 PECBR 856 (2010). When analyzing a refusal to implement an arbitration award, we limit our focus to the arbitration award itself. Accordingly, these exhibits are not relevant to the Arbitrator's award here and will not be admitted. *See Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206 (2005).

2. The ALJ's remaining rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association is the exclusive representative of a bargaining unit of sworn Fire Bureau (Bureau) personnel employed by the City, a public employer.

2. The Association and the City were parties to a collective bargaining agreement effective July 1, 2007 through June 30, 2010.

3. Article 14 - **GRIEVANCE, COMPLAINTS AND ARBITRATION,** establishes a grievance process which culminates in final and binding arbitration. Article 14 states, in part:

> "The arbitrator's decision shall be final and binding on both parties, but the arbitrator shall have no power to alter in any way the terms of this agreement. The decision of the arbitrator shall be within the scope and terms of this agreement and the arbitrator shall be requested to issue the decision in writing * * *.".

4. Article 26 - DISCIPLINE, provides that "[d]iscipline and discharge of permanent (non-probationary) employees shall be for just cause."

5. On October 4, 2007, the City fired Bureau employee Tom Hurley. On October 28, 2007, the Association grieved Hurley's discharge and the parties proceeded to grievance arbitration before Arbitrator William Reeves.

6. On January 8, 2010, Arbitrator Reeves issued his initial award, and then a revised award on January 21, 2010.

7. The arbitration award sets out the following facts specific to the grievance:

> "Grievant was first employed as a fire fighter by PF&R [Portland Fire & Rescue] in 1980. Grievant suffered at least two disabling work-related injuries during his years working for the City. The first injury was to his knee in approximately 1983. He was on and off work because of his knee injury between 1983 and 1993. During his off-duty time, Grievant received disability benefits from the Fund. In 1992, Grievant injured his back and began receiving full disability benefits from the Fund in 1993 or 1994. At that time, the City did not formally separate from employment those employees who were unable to work and who were receiving disability benefits from the Fund. Instead, the City placed these individuals on injury leave.
>
> "In its discretion, the Fund provides vocational rehabilitation services which can have the goal of returning a disability benefit recipient to work performing a different job than fire and rescue services. An eligibility requirement for the Fund's Vocational Rehabilitation Program is the reasonable expectation that the costs of the vocational rehabilitation services would result in a reduction of the overall benefits that would likely be incurred until the member's disability retirement date.
>
> "Grievant qualified for and received vocational rehabilitation services from the Fund in the form of training and tuition for culinary school. Grievant has worked as a chef since he completed his schooling and training. Following completion of the vocational rehabilitation plan, Grievant's disability benefits were set at 50 percent of the Grievant's rate of Base Pay at disability, and were subject to reduction equal to 25 percent of any wages earned in other employment during the same period. Grievant's minimum disability benefit was 25 percent of his rate of Base Pay, regardless of the amount of wages earned in other employment.
>
> "In 2002, Human Resources began medically separating from employment those Fund recipients who were permanently restricted from working. As part of that process, "medically separated" employees were placed on a medical layoff list for five years. Also in 2002, the Fund Trustees considered subsidizing the wages of police and fire employees who had permanent restrictions if they returned to work at the PF&R or the

Police Bureau. The Trustees referred to the concept as long-term light-duty ('LTLD'), and discussed the idea at a number of meetings from 2002 through 2006. The Association supported the creation of LTLD positions.

"In March 2006, the Trustees passed a resolution directing the Rules Committee to revise the applicable rules to subsidize wages for LTLD positions for permanently restricted employees for up to 24 months. In June 2006, the City advised Grievant and the Association that the City was making 'changes in employment policies and Fund disability benefit policies which may impact some members with long-term restrictions.' The changes were to be part of a Return-to-Work Pilot Project ('RTW Program'). The June 2, 2006 letter stated in part:

> 'In cooperation with the Mayor, City Commissioners and the Fund, the Bureau of Human Resources, Portland Police Bureau and Portland Fire and Rescue have been working to develop opportunities for injured members with long-term restrictions as part of the Return to Work Pilot Project. In addition, the Fund has recently revised its Administrative Rules.
>
> 'It is anticipated that Restricted Duty (RD) assignments will be available in both Police and Fire with the new budget cycle beginning July 1,2006....
>
> 'Not every Fund member with long-term restrictions will be eligible for a RD assignment The details of eligibility requirements and selection processes, if appropriate, are in development. For example, we expect that a bureau member must have permanent status as a City employee to be eligible.
>
> 'The Fund will . . . review and update information about an injured member's restrictions, as necessary. For those of you who are or will be released to work with long-term restrictions, the Return to Work Coordinator and/or bureau will notify you in writing if there is an available assignment for which you are eligible. Return to work in these positions will be considered mandatory for the member provided you are offered an assignment and the requirements of the assignment are within your work restrictions as certified by your attending physician. If you are offered a RD assignment and do not return to the bureau, there are two potential consequences. First, your disability benefits will be

> discontinued. The reason disability benefits may be discontinued is that the Portland City Charter provides that a member is eligible for disability benefits . . . 'when unable to perform the Member's required duties because of an injury or illness. . .' The Fund therefore cannot pay disability benefits to a member who can perform a RD assignment.
>
> 'The second potential consequence is that your employment status with the City will be affected. Decisions about an injured member's return to work and employment status will be made by Police or Fire in consultation with BHR and consistent with program policies, collective bargaining agreements, and City Human Resources Administrative Rules.'

"In October and December 2006, the Fund and PF&R sent notices to Grievant advising him that he was a potential participant in the RTW Program. In an October 30, 2006 letter, Grievant was directed to attend a 5-week training session beginning November 13, 2006. The letter stated that attendance was mandatory, and failure to attend would result in the Fund beginning 'the process of suspension or termination of your benefits.' On December 1, 2006, PF&R advised Grievant that the mandatory training dates were rescheduled to start on December 15, 2006. The same warnings for failing to attend the training were included.

"At this time, Grievant was working 12 to 14 hours a day as an executive chef overseeing a new restaurant in Seattle he had opened in November 2006. Grievant was also traveling to Portland where he was also overseeing a restaurant.

"Grievant did not show up for the mandatory training. On December 18, 2006 the Fund sent a letter to Grievant asking him to explain his failure to attend the mandatory training. Grievant's attorney responded on December 28, 2006. Grievant's attorney claimed the notice was untimely and inadequate because Grievant had just opened up a new restaurant in Seattle, and had many scheduled commitments which were necessary to promote and establish his new business. He also claimed a disabled worker who has undergone vocational retaining and who is actively employed in the field for which they were retrained could not be required to attend retraining as firefighter. The Fund was advised that Grievant would not have refused to attend based on these objection if he could have attended the training without jeopardizing his vocation as a chef. Instead Grievant would have reserved his rights and sought other relief.

"The City agreed Grievant had good cause for not attending the scheduled training, and advised Grievant to contact the Fund by March 9, 2007 and arrange for the mandatory training. The City also advised Grievant that he should expect a return-to-work notice in early March for a return-to-duty date in April 2007. Grievant did not contact the Fund to arrange for training.

"On March 7, 2007, PF&R sent a letter to Grievant directing him to report for duty on April 5, 2007 as a Low Hazard Inspector. Grievant did not report for work. On April 26, 2007, PF&R sent Grievant a letter advising him to either report for duty by May 17, 2007, or explain why he could not return to work. The letter informed Grievant, that if he failed to report or respond by May 17, 2007, the City would consider him to have abandoned his job, and would initiate the termination process.

"Concurrently, on April 13, 2007 the Fund advised Grievant it was terminating his disability benefits because of he refusedl [*sic*] to attend the mandatory RTW training. Grievant was advised he had 14 days to respond, and 60 days to appeal the decision. On April 27, 2007 Grievant's attorney requested the Fund reconsider its decision to terminate Grievant's benefits. The Fund did not respond, and Grievant did not pursue his appeal rights.

"On June 25, 2007, PF&R notified Grievant it was proposing to terminate his employment for failing to return to duty as directed. On October 7, 2007, PF&R terminated his employment based on a finding that Grievant's unauthorized absence since April 5, 2007 constituted job abandonment.

"The Association grieved the dismissal on October 18, 2007, contending PF&R did not have just cause for terminating Grievant. The remedy sought was rescission of Grievant's discharge and 'reinstatement to status as disabled employee receiving benefits through the Fund.' The grievance did not challenge the directive to Grievant to attend mandatory training, which was the reason the Fund terminated Grievant' s disability benefits." (Footnotes omitted.)

8. The Arbitrator recognized that Grievant had been on medical layoff status for more than ten years when he was recalled to work.

9. The award also referred to a related case before this Board, *Portland Fire Fighters' Assoc. v. City of Portland*, Case No. UP-14-07, 23 PECBR 43 (2009), *rev'd and remanded,* 245 Or App 255 (2011), in which the Association alleged that the City refused to bargain in good faith when it implemented the return-to-work program for medically restricted fire fighters, the same basis for Grievant's recall to work.

"In its final order of March 26, 2009 (Order on Reconsideration issued June 1, 2009), ERB found the City's RTW Program concerned a right to assign work and was a permissive subject of bargaining. ERB noted that, while an employer is not required to bargain a decision that concerns a permissive subject for negotiations, an employer is obligated to bargain 'any mandatory impacts of that decision.' Furthermore, an employer must exhaust its duty to bargain about such impacts before implementing a decision.

"ERB found the City's decision to implement the RTW Program affected numerous working conditions that are mandatory subjects for negotiations, including issues relevant to this arbitration such as: 1) Procedures for recalling workers from medical layoff; 2)The order in which employees are recalled from layoff; and 3) Discipline for disabled workers who do not return to work.

"ERB also found meritless the City's argument that it was prohibited from bargaining over matters under the control of the Fund. ERB found: 1) The Fund was created by the City Charter; 2)The Fund, Human Resources, and PF&R are all departments within the City, created by the City, funded by the City, staffed in accordance with City policies, and advised by the City Attorney's Office; 3) The Fund, HR, and PF&R all worked together to implement the RTW Program; and 4) In effect the Fund and PF&R are two parts of the City's governmental structure. ERB concluded it had authority under PECBA to direct the City to require its departments to comply with the good faith bargaining obligation imposed by law; and the City is not prohibited from bargaining about matters under the authority and control of the Disability Fund.

"Based on the above, ERB found the City formally implemented its program without giving the Association notice that it planned to do so, and without giving the Association any opportunity to bargain about 'mandatory impacts' of the RTW Program.

"Thus, ERB concluded:

> '1. City did not violate ORS 243.672(l)(e) by refusing to bargain the decision to create the RTW Program.
>
> '2. City did violate ORS 243.672(l)(e) and (f) by failing to give the Association notice of the RTW Program and refusing to bargain about the impacts of the program.

"As a remedy, ERB ordered the City to cease and desist from refusing to negotiate about the impacts of the RTW Program that concern mandatory subjects for bargaining. However, ERB did not order the City to restore the *status quo* that existed before the City implemented the RTW Program."

10. In making his determination, the Arbitrator applied the "just cause" standard. He concluded that the RTW rules were unlawful and Grievant was justified in not complying with the rules. The Arbitrator held that the City did not have just cause to terminate Grievant's employment. The award states:

> "I find the Association proved Grievant was justified in disobeying the City's unlawful and unreasonable orders requiring him to return-to-work and report for training. Accordingly, I find Grievant's termination was without just cause."

11. The Arbitrator issued the following remedy in the award:

> "1. For the reasons stated herein, the grievance is GRANTED.
>
> "2. The City shall reverse the termination of Grievant's employment and reinstate whatever rights Grievant had as an employee before his termination.
>
> "3. The City shall pay Grievant the amount of compensation Grievant would have received from the Fund in disability benefits had those benefits not been terminated by the Fund. The City shall make these payments retroactive to April 5, 2007, and these payments shall continue to be made by the City as though Grievant had been reinstated as a Fund member and entitled to receive disability benefits from the Fund. The City's obligation to pay Grievant under this Award shall cease upon the Fund reinstating Grievant as a member, and resuming the payment of Grievant's disability benefits."

12. The Arbitrator explained his rationale for that portion of the remedy which requires the City to pay Grievant's disability benefits as follows:

> "The stipulated issue before me at this time regarding the remedy, is: 'Does the arbitrator have authority to issue the remedy sought by the Association.' The remedy sought by the Association is recission [*sic*] of Grievant's discharge and 'reinstatement to status as a disabled employee receiving benefits through the Fund.' I find this remedy is in the nature of a 'make-whole' remedy which is typical in labor arbitrations.
>
> "The City contends the remedy sought by the association is not warranted. Furthermore, the City contends I do not have the power to restore Grievant's disability benefits because the City Charter vests the Fund with the exclusive authority over Grievant's disability benefits.

"Regarding my authority, I note the City made a similar argument before ERB in UP-14-07. In that action, the City argued it was prohibited from bargaining over matters under the Fund's control because the Fund is a separate entity form [*sic*] the City. ERB disagreed with the City, and found:

> 'The Fund is, in fact, a creation of the City. The Fund, the Fire Bureau, the Police Bureau, and the Bureau of Human Resources are all departments within the City, created by the City, funded by the City, staffed in accordance with City policies, and advised by the City Attorney's Office. The City Fire Bureau, the Fund, and Human Resources department worked together to implement the return-to-work program. In effect, the Fire Bureau and the Fund are two parts of the City's governmental structure.'

"I find the CBA does not specifically confer any jurisdiction over the Fund on me. Although, I certainly have jurisdiction over the City. Furthermore I agree with, and specifically adopt through principles of collateral estoppel, ERB's findings that: 1) PF&R, HR, and the Fund worked together to implement the RTW Program; and 2) In effect, PF&R and the Fund are two parts of the City's governmental structure.

"Regarding the City's actions in this case, I found the City's orders requiring Grievant to report for training, and the March 7, 2007 return to work order were unlawful and unreasonable. Additionally, I found Grievant was justified in not obeying those unlawful and unreasonable orders. The City took two actions based on Grievant's refusal to obey these unlawful and unreasonable orders: 1) The City Bureau of Fire and Police Disability and Retirement (i.e., the Fund) terminated Grievant's disability benefits effective April 5, 2007; and 2) The City PF&R 'extinguished Grievant's rights as an employee and terminated Grievant from PF&R and the City of Portland.'

"In fashioning a remedy in this arbitration, I considered whether it was just for Grievant to lose his disability benefits because the Fund's action was based on the City's unlawful and unreasonable orders directing Grievant to report for training. I find that, but for the City's unlawful and unreasonable orders, the Fund would not have had grounds to terminate Grievant's disability benefits. I also find the Fund's termination of Grievant's benefits was not simply an act of the Fund, but part of the City's implementation of the RTW Program. As ERB found in UP-14-07:

> 'The City's refusal to bargain the mandatory impacts of the return-to-work program was part of a course of unlawful conduct that continued over several months and was carried

out by several of the City's bureaus and departments. In addition, it involved a significant number of City representatives. *See* ERB UP-14-07 at 35.'

"Based on the above, I find a just remedy in this matter requires a restoration to *status quo* before the unlawful and unreasonable orders were issued. Accordingly, I find a make-whole remedy is appropriate, along with reversing the termination of Grievant's employment and reinstating whatever rights Grievant had as an employee before his termination.

"I find I have the authority to issue a make-whole award against the City. An arbitrator's source of authority is the labor agreement. As is typical in nearly all labor agreements, the parties' CBA [collective bargaining agreement] does not contain any provision detailing what remedy should be applied as compensation for a particular violation. However, the absence of an explicit jurisdictional grant to fashion a remedy does not deny the existence of an implicit grant of remedial powers. Both the courts and arbitrators have established that if the arbitrator has jurisdiction of the subject matter, he or she has implicit power to fashion an appropriate remedy sufficiently grounded in the contract. Hill and Sinicropi, *Remedies in Arbitration* (BNA 2nd ed., 1991) at 48. See also, *How Arbitration Works, supra*, at 1194.

"Of course, the simplest way to make Grievant whole is for me to direct the City to reinstate Grievant as a Fund member and for the Fund to pay Grievant his disability benefits retroactive to April 5, 2007. However, the City has taken the position that no one, including the City, has the authority to direct the Fund to do anything.

"Accordingly, I direct the City (not the Fund) to pay Grievant the amount of compensation Grievant would have received from the Fund in disability benefits had those benefits not been terminated by the Fund. The City shall make these payments retroactive to April 5,2007, and these payment shall continue to be made by the City as though Grievant had been reinstated as a Fund member and entitled to receive disability benefits from the Fund. The City's obligation to pay Grievant under this Award shall cease upon the Fund reinstating Grievant as a member, and resuming the payment of Grievant' s disability benefits." (Footnotes omitted.)

13. On March 17, 2010, the City Council passed a resolution in which it directed the City not to implement the arbitration award in order "to defend the 2006 voter-approved reforms to the Fire and Police Disability, Retirement, and Death Benefit Plan [FPD&R]." In the resolution, the Council reviewed the history of the FPD&R voter-approved reforms, noted that the arbitration award ordered the City to pay

Grievant's FPD&R disability benefits, and that "FPD&R terminated [Grievant's] continuing disability benefits because he was no longer disabled, failed to comply with FPD&R procedures, failed to return to work, and he did not avail himself of the voter-approved disability appeals process." The Council resolved that the City could take action to mitigate any potential damages resulting from its decision.

14. Since the award was issued, Grievant has not received the payments he would have received if his disability had not been cancelled, has not had his disability status under the Fund restored, has not been notified by the City that he is no longer terminated, and has not been offered a job by the City. The Association also has not been notified that Grievant's termination has been rescinded or that he had been returned to a recall list or other prior status. Grievant received an estimated pension benefit document from the Fund dated June 22, 2010, which reflected a termination date of October 5, 2007, and a last service accrual date of April 4, 2007, which was the date on which his disability benefits had terminated.

15. On May 27, 2005, as a result of a determination that Grievant was unable to return to full duty, the Bureau changed Grievant's status to medically separated, and he was placed on the City's layoff list pursuant to City Human Resources Administrative Rule 7.09, Medical Layoff. That rule provided that

> "After reinstatement/re-employment rights have been exhausted under the Administrative Rule on Injured Employee Return to work, and/or after ADA and FMLA rights have been exhausted, if applicable, the appointing authority may place any permanently appointed employee on medical layoff. Medical layoff is appropriate for employees who cannot perform the essential duties of their regular assignment."

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The City violated ORS 243.672(1)(g) when it refused to implement the arbitration award.

DISCUSSION

The City unilaterally implemented a return-to-work program for disabled employees and ordered Grievant, who had been on disability for over 10 years, to return to work. When Grievant did not return, the Fund terminated his disability payments

and the Bureau discharged him. The Association grieved the discharge through arbitration and requested that the City reinstate Grievant's employment rights and his disabled status under the Fund.

The Arbitrator concluded that the City lacked just cause to discharge Grievant and ordered the City to reinstate him. The Arbitrator also ordered the City to compensate Grievant for the payments he would have received from the Fund had the Fund not terminated his disability benefits. It is important to understand what this dispute is about. The City does not challenge the Arbitrator's order that it reinstate the Grievant to whatever rights the Grievant had as an employee before his termination. The City does however, challenge the Arbitrator's order that it reimburse the Grievant for disability benefits he would have received had he not been terminated. We begin our discussion of the City's claim by examining our standard for review of an arbitrator's award.

Standard

ORS 243.672(1)(g) makes it an unfair labor practice for an employer to refuse to accept the terms of an arbitration award where the parties have agreed to accept such awards as final and binding upon them.

Because of the strong public policy favoring arbitration, our review of an arbitrator's award is limited. *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, 842 (2005); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206 (2005); *Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 679 P2d 868, *rev den*, 297 Or 458, 683 P2d 1371 (1984).

We will enforce an arbitration award unless it is clearly shown that:

(1) the parties did not agree to accept such an award as final and binding upon them (*i.e.*, 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 (*i.e.*, 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). *Willamina Education Assn. and Crowell Lucanio v. Willamina School District No. 30-44-63J*, Case No. C-253-79, 5 PECBR 4086, 4100 (1980).

So long as an arbitrator's award is based on the arbitrator's interpretation of the contract language, the arbitrator is within his or her authority and the parties are bound by the decision. *Clackamas County Employees Association v. Clackamas County*, Case No. UP-4-08, 22 PECBR 404, 411 (2009). We will not engage in a right/wrong analysis of an arbitrator's award, nor will we conduct an "inquest into the arbitrator's analysis." *State of Oregon, Oregon Department of Transportation, Department of Motor Vehicles v. Oregon Public Employees Union*, Case No. AR-1-98, 17 PECBR 814, 825 (1998).

We apply these principles of limited review to the remedy awarded by an arbitrator. "[A]n arbitrator has substantial discretion in formulating an award." *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, 863 (1992) (citing *Woodburn Educ. Assn. and Bradford v. Woodburn Sch. Dist. No. 103C*, Case No. C-126-83, 7 PECBR 6509 (1984); and *North Clackamas Educ. Assn. v. North Clackamas Sch. Dist. No. 12*, Case No. C-275-79, 5 PECBR 4107 (1980), *aff'd*, 54 Or App 211, 634 P2d 1348 (1981); and *State of Oregon, Oregon Department of Transportation, Department of Motor Vehicles v. Oregon Public Employees Union*, Case No. AR-1-98, 17 PECBR 814, 825 (1998). The remedial power of an arbitrator encompasses any relief which the arbitrator finds is reasonably necessary to remedy a contract violation, provided that the remedy does not graft additional language to the contract. *Chenowith Ed. Assn. v. Chenowith Sch. Dist. 9*, Case No. UP-104-94, 16 PECBR 26 (1995), *aff'd*, 141 Or App 422, 918 P2d 854 (1996).

The City accepts the Arbitrator's determination that it had no just cause to terminate Grievant. The City's challenge concerns only that portion of the Arbitrator's order that requires the City to pay Grievant what he would have received had the Fund not terminated his disability benefits. Accordingly we limit our review to only that portion of the remedy which requires the City to pay Grievant.

The City argues that the Arbitrator exceeded his authority when he ordered the City to compensate Grievant for disability payments he would have received from the Fund because:

(1) the Fund is an entity separate from the City, and the City cannot be held liable for the actions of the Fund;

(2) the award violates the City Charter (which provides that the Fund is a separate entity); and

(3) the award circumvents the Fund's administrative appeals process.

We recently examined the relationship between the City and the Fund in two cases: *Portland Fire Fighters' Assoc. v. City of Portland*, UP-14-07, 23 PECBR 43 (2009) *rev'd and remanded*, 245 Or App 255 (2011); and *Portland Police Association v. City of Portland*, Case No. UP-05-08, 23 PECBR 856 (2010), *appeal pending*.

In *Portland Fire Fighters' Assoc.*, 23 PECBR 43, the City implemented a return-to-work program for disabled fire fighters. The Association demanded to bargain both the decision and the mandatory impacts of the program. The City refused to bargain, arguing that it had no PECBA obligation to bargain because the Fund was a separate entity over which the City had no control and the City Charter took precedence over the PECBA. We determined that the Fund was a City department and that the Fire Bureau, Fund, and Human Resource Departments all worked together to implement the City's RTW program. We concluded that although the City's decision was permissive for bargaining, the impact of the decision effected mandatory subjects. Therefore, the City was obligated to bargain those impacts.

The City appealed our decision to the Court of Appeals. The City raised five assignments of error. The City alleged that ERB erred:

(1) in not dismissing the post-retirement medical expense issue as moot;
(2) in concluding that PECBA preempted the City of Portland's authority as a home rule municipality;
(3) in holding that the City is not prohibited from bargaining over subjects that are exclusively within the authority of the Fund as provided by the Portland City Charter;
(4) by not considering evidence of already existing collective bargaining provisions, long standing policies and the parties' course of conduct in its "duty to bargain" rationale; and
(5) in requiring the City to mail notice of the unfair labor practice to bargaining unit members who are on disability status or injury leave.

The Court rejected the first three arguments without discussion and the City conceded its fifth assignment of error. However, the Court reversed and remanded the decision to this Board on the City's fourth assignment of error and instructed this Board to construe the parties' collective bargaining agreement for the purpose of determining whether the CBA authorized the changes and impacts. 245 Or App 255 n 4.

In *Portland Police*, 23 PECBR 856, the City refused to arbitrate an Association grievance which alleged that the City violated the collective bargaining agreement by reducing bargaining unit members' pension benefits. The City argued that it had no obligation to arbitrate because the Fund decided to make the reductions. According to the City, the Fund is a separate entity over which the City has no control; because the City Charter governs the Fund it would violate the City's home-rule authority under the Oregon constitution to interfere with the Fund's decisions. We rejected the City's arguments and concluded that the Fund was a City department created, funded, and

staffed by the City. If the City contractually agreed to provide a certain level of benefits for Association members and a third party ceased to provide those benefits, then the employer may have a contractual obligation to make up the difference. 23 PECBR at 869 n 8, citing *McMinnville Education Association v. McMinnville School District # 40,* 17 PECBR at 546. Because the parties had also contractually agreed to resolve their differences through arbitration, it was the arbitrator's obligation to determine whether the City had, in fact, violated the collective bargaining agreement. We further reiterated that the City Charter does not take precedence over the PECBA. 23 PECBR at 870, citing *Portland Fire Fighters' Assoc.* 23 PECBR at 75-76.

Here, the City contends that the Arbitrator exceeded his authority when he ordered the City to compensate Grievant for disability payments he would have received from the Fund. Once again, the City argues it is not liable for the actions of the Fund. For the same reasons we cited in *Portland Police* and *Portland Fire Fighters' Assoc.,* we disagree and find no compelling reason to change our decision.

The City further argues that the arbitration award allowed Grievant to circumvent the City Charter and the Fund's administrative appeals process. The City's argument is misplaced. The Arbitrator agreed he did not have specific authority over the Fund. The Arbitrator derives his authority from the collective bargaining agreement between the Association and the City. Here, the contract gives an arbitrator broad authority to fashion a remedy. Consequently, the Arbitrator did not exceed any contractual limits on his authority by requiring that the City reimburse the Grievant for disability payments he should have received. Whether we agree with the Arbitrator's choice of remedies is immaterial. As discussed above, our review of an arbitrator's award is extremely limited and we refuse to engage in any "right/wrong" analysis. *SEIU v. Office of Services for Children and Families,* 20 PECBR at 842.

We emphasize that the Arbitrator's award obligates the City, and not the Fund, to pay the Grievant. The Arbitrator did not order the Fund to do anything; the City is free to get the money to pay the Grievant from any department, division, or fund it chooses.

The PECBA requires parties who contractually agree to final and binding arbitration to comply with an arbitration award. Here, the Arbitrator had the authority to require the City to comply with the collective bargaining agreement by compensating Grievant for his loss.

Remedy

The City refused to implement Arbitrator Reeve's award in violation of ORS 243.672(1)(g). As a remedy, we will order the City to cease and desist from

refusing to accept the terms of the award. We will 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 disability benefits.

The Association requests that the City be directed to pay interest on the compensation Grievant would have received had the arbitration award been implemented at the time it was ordered. Adding interest to a monetary remedy will further effectuate the purposes and policies of the PECBA. *Oregon School Employees Association, Chapter 84 v. Redmond School District 2J*, Case No. C-237-80, 6 PECBR 4726, 4739 (1981). We will order the City to pay Grievant interest at 9 percent per annum on the amount of compensation he would have received but for the City's refusal to comply with the Arbitrator's award.

ORDER

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

2. As soon as practicable, the City 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.

3. The City shall pay interest to Grievant in the amount of 9 percent per annum on compensation he would have received had the City not refused to comply with the arbitration award.

DATED this 15 day of November 2011.

*Paul B. Gamson, Chair

Vickie Cowan, Board Member

Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson not available.