

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-24-08

(UNFAIR LABOR PRACTICE)

| | | |
|--------------------------|---|---------------------|
| MARION COUNTY LAW |) | |
| ENFORCEMENT ASSOCIATION, |) | |
| |) | |
| Complainant, |) | RULINGS, |
| |) | FINDINGS OF FACT, |
| v. |) | CONCLUSIONS OF LAW, |
| |) | AND ORDER |
| MARION COUNTY, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

On April 22, 2009, this Board heard oral argument on both parties' objections to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on January 26, 2009, after a hearing held on September 17, 2008, in Portland, Oregon. The record closed on October 29, 2008, with the submission of the last of the parties' post-hearing briefs.¹

David A. Snyder, Attorney at Law, Snyder & Hoag, represented Complainant.

Jeffrey P. Chicoine, Attorney at Law, Miller Nash, represented Respondent.

On July 2, 2008, the Marion County Law Enforcement Association (Association) filed this complaint against Marion County (County). The Association alleges that the

¹Because of the County's duty to assert a public policy barring reinstatement in this case, the parties and ALJ agreed that the County would file an opening brief, the Association a response brief, and the County a reply brief.

County violated ORS 243.672(1)(g) by refusing to implement an arbitrator's award reinstating a corrections deputy, and it seeks a civil penalty against the County.

The County filed a timely answer on September 9, 2008. The answer includes affirmative defenses that complying with the arbitrator's award would violate public policy against mistreatment of prisoners and that the conduct at issue was unjustified and egregious.

The issues in this case are:

1. Did the County refuse to implement an arbitration award in violation of ORS 243.672(1)(g)?
2. Should the County be required to pay a civil penalty to the Association?

RULINGS

1. Prior to hearing, Respondent filed a motion to strike a portion of the Complaint and to prevent the introduction of evidence about events subsequent to the arbitrator's decision at issue here. Complainant alleges in its Complaint that the County rehired the grievant pursuant to the arbitrator's decision but then discharged the grievant before she returned to work for the County. The ALJ denied the motion to strike and permitted the introduction of the evidence at hearing. The ALJ correctly ruled that the evidence was potentially relevant to damages and a civil penalty in the event the Complainant prevailed.

2. The remaining rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of public employees employed by the County, a public employer.

2. The County and the Association were parties to a collective bargaining agreement effective July 1, 2007 through June 30, 2008, which included "Article 34 – Settlement of Disputes." Article 34, Section 1, defines a grievance as

"[a]ny grievance or dispute, which may arise between the parties with regard to the application, meaning or interpretation of this Agreement * * *."

Article 34 establishes a two step grievance procedure. At the first step, the employee and Association present the grievance to the undersheriff of the appropriate division. If the County denies the grievance at this step, the Association may submit the grievance to binding arbitration at the second step of the grievance procedure. Article 34 provides that

“[t]he power of the arbitrator shall be limited to interpreting this Agreement and determining if it has been violated and to resolve the grievance within the terms of this Agreement.

“The decision of the arbitrator shall be binding on both parties.”

Arbitration Opinion and Award: Facts

3. On June 9, 2008, an arbitrator selected by the parties issued an arbitration opinion and award regarding the discharge of grievant Kristine Phillips. The Association and County stipulated that the issues before the arbitrator were:

- “1. Did the County’s suspension of Deputy Kristine Phillips for two days without pay as a result of the Barney Box incident violate Article 28, Section 1 of the collective bargaining agreement? If so, what is the appropriate remedy?
- “2. Did the County’s termination of Deputy Kristine Phillips, as a result of the [Doe] incident, violate Article 28, Section 1 of the collective bargaining agreement? If so, what is the appropriate remedy?”

The following is a summary of the arbitrator’s findings of fact regarding Phillips’ termination.

4. The County operates a minimum security work center facility. Inmates housed at the facility are generally allowed to leave for work, either in outside employment or in crews of inmates directly supervised by deputies. In general, only inmates considered less dangerous are housed in the work center. These are often inmates in the late stages of incarceration.

5. The work center consists of four dorms, A, B, C, and D. A hallway separates the dorms from the control tower, a glassed-in elevated office. There is a

public lobby area outside the control tower/dorm area. The doors of the work center are not locked, but the deputies carry firearms. Inmate residence at the work center is considered a privilege, largely because the conditions of confinement are significantly less onerous than in the jail facility next door. Inmates who violate the work center's rules may be returned to the jail.

6. At the time of her discharge, Phillips had approximately 15 years' experience with the Sheriff's Office, most of it at the jail. Phillips began working at the work center in 2005. Her evaluations generally reflected performance that exceeded expectations.

7. In June 2006, the County reprimanded Phillips for allegedly requiring inmates to exercise (jogging outside the work center) as a form of punishment. Phillips wanted to file a grievance over the reprimand, but accepted Association advice to "take one for the team" by accepting the reprimand rather than fighting it and possibly causing co-workers (who had allegedly engaged in similar acts) to also get in trouble.² The reprimand was noted in her 2007 evaluation, and her evaluator rated Phillips as "needs improvement" in "Decision Making Skills." Phillips' evaluator rated her overall performance as "exceeds expectations," however.

Handcuffing of Inmate Doe

8. In May 2007, Phillips and Deputy Steve Jochums were performing a "count" of the inmates. The County required deputies to count inmates several times per shift in order to make sure that all inmates were present as required and that no one was present in the work center who should not be. As the deputies were taking the count in B-dorm, inmate Doe,³ who "liked to push the envelope," started mouthing off and became "annoying." Doe also refused to sit on his bunk as every inmate is required to do during the "count." Phillips told Doe to get on his bunk, but he did not comply.⁴

²At the arbitration hearing in this case, Phillips contended that the inmates had agreed to exercise, that she had not intended to punish anyone, and that she had supervisory permission to exercise the inmates.

³Doe is a pseudonym.

⁴A common method of dealing with this type of inmate behavior would be to place the inmate in the holding cell. However, that cell was already occupied by two female inmates.

9. Phillips took out her handcuffs and approached Doe, who put his arm up near the post of the double bunk. Phillips cuffed Doe's wrist to the post. Phillips and Jochums continued the count, and as they prepared to exit to count another dorm, Doe dragged the bunk a short distance and said something like "[i]s that all you got?" Phillips returned to Doe and cuffed his other wrist to the neighboring bunk, about three feet away, leaving Doe standing with his arms spread at shoulder height, facing a half wall.

10. Phillips and Jochums went to A-dorm and completed the count there, and then returned to B-dorm to release the two female inmates from the holding cell. Next, Phillips and Jochums went to the control tower to check the inmate count against the log book. After recording the count, Phillips turned out the lights in the dorms.⁵ A few moments later, the deputies heard loud laughter coming from B-dorm. Phillips and Jochums immediately returned to B-dorm with a camera. Phillips went to the bunk to which she had handcuffed Doe because she assumed that he was the reason for the outbreak of laughter. Phillips found Doe cuffed to the bunks with his outer pants down (but still in his underwear) and his shirt pulled over his head. She took two pictures with the camera while Doe's pants were down. Phillips took the pictures because she was "caught up in the moment"—Doe was laughing and everyone was joking. After photographing Doe, Phillips uncuffed him and told him to go to bed. As the deputies left B-dorm, Doe made another remark, and Jochums placed him in the holding cell. Regarding their handling of the Doe incident, Phillips told Jochums immediately afterwards, "[t]hat probably was not our best idea, and it probably shouldn't happen again." Jochums replied, "[y]ou're right."

11. Doe did not complain at the time of the incident. After the County discharged Phillips, however, Doe filed a notice of claim against the County and his attorney threatened to file suit. The County entered into a pre-suit settlement and paid Doe \$60,000 in exchange for a release of claims.

Holding Cell Incident

12. In June 2007, Phillips and Deputies Jochums and Brown were on duty. Two male inmates, Zinc and Tin⁶, were scheduled for release the next day. As a "farewell

⁵The arbitrator did not make an explicit finding regarding whether Phillips and Jochums intended to turn the lights out while Doe remained handcuffed, whether they forgot about him, or whether they intended to release him after the lights were turned off. The arbitrator also made no finding regarding the amount of time that Phillips and Jochums left Doe handcuffed to the bunk bed.

⁶Zinc and Tin are pseudonyms.

gesture” and a “joke,” Phillips placed the two inmates in the holding cell. The holding cell (sometimes referred to as the “Barney Box” because it formerly had a purple door) is a four-by-four room with a steel door used to secure inmates temporarily. Phillips conceded that she had no “official reason” to put the inmates in the holding cell. Rather, she thought it was all a joke: “they had never been in the holding cell before . . . and they thought it was hilarious. I mean, they were laughing and joking.” Although it was Phillips’ idea to put the inmates in the cell, neither of the other two deputies on duty objected. Tin was a registered sex offender and substantially larger than Zinc (6’2” and 235 pounds as compared to Zinc’s 5’7” and about 150 pounds).

13. While Zinc and Tin were in the holding cell, the deputies were working with a webcam that Phillips had brought from home to evaluate as a monitoring device for male and female inmates who worked largely unsupervised in the laundry and multipurpose rooms of the work center. Deputy Jochums connected the webcam to the work center’s video system, where it broadcast images to the video screens in the dorms. It is unclear whether Jochums intended the webcam to broadcast to the dorms or whether he accidentally did so while attempting to hook it up. Deputy Brown took the webcam to the window in the holding cell door and held it there, broadcasting images of Zinc and Tin throughout the facility. After five minutes or so, Brown returned to the control tower and Phillips took the webcam back to the holding cell door, encouraging the inmates to perform for it. Phillips jokingly said, “[l]et’s see a kiss,” and Jochums saw Tin turn his back to the window and “hug himself.” Tin put his hand over Zinc’s mouth and gave him a fake kiss. Zinc “pulled away” and did not seem to be a willing participant, even though they were both laughing and smiling the entire time. After a few minutes, “it just kind of wore itself out” and Phillips unlocked the cell and let Tin and Zinc out. The inmates were in the holding cell for approximately 15 minutes. Neither inmate filed a complaint.

The Investigations

14. On June 26, 2007, jail supervisors learned of the holding cell incident when a deputy reported overhearing inmates talking about it. The Doe handcuffing incident also came to the supervisors’ attention at that time. On June 27, 2001, Sergeant Bronson Hoppe, Jail Supervisor for Internal Affairs Investigations, notified Phillips that he would investigate the incidents and placed her on administrative leave. Lieutenant Meyers recommended that an outside agency investigate possible criminal charges against Phillips. Detective Jeffrey Green of the Clackamas County Sheriff’s Office investigated the holding cell and handcuffing incidents. After interviewing the inmates and deputies involved, Detective Green determined that there appeared to be no basis for criminal

prosecution. Hoppe interviewed Phillips but relied on Detective Green's transcripts of the interviews of the other witnesses.

15. On September 11, 2007, Sergeant Hoppe issued a report to Commander Chris Hoy describing the two incidents and summarizing the witness interviews. Sergeant Hoppe also attached copies of the relevant documents and witness transcripts. Hoppe believed Phillips' conduct constituted nine separate violations of the Marion County Sheriff's Office Code of Conduct, Code of Ethics, and General Orders.

16. Commander Hoy determined that discharge was a potential penalty for the violations, and scheduled a due process hearing for Phillips to respond to the charges. On September 24, 2007, Phillips and Association counsel attended a hearing before Commander Hoy. Phillips provided written materials and answered Hoy's questions. After considering the evidence and Phillips' responses, Commander Hoy decided to suspend Phillips for two days for the holding cell incident. Hoy's decision was based on his conclusion that Phillips violated provision Section III A(10) from the Code of Conduct which requires deputies to "treat all persons with respect and courtesy." Hoy then decided that Phillips should be discharged for the remaining violations of the Code of Conduct.⁷

⁷The arbitrator concluded that the County's separation of the two incidents when considering discipline "seems somewhat artificial to me." The arbitrator stated:

"The [Association] contends that the County only treated the incidents separately to give the 'illusion of progressive discipline' even though the holding cell incident, which resulted in a two-day suspension, occurred *after* the [Doe] incident which resulted in discharge. Moreover, the [Association] notes, and the County concedes (Tr. At 203), that Grievant had no opportunity to correct her behavior between the suspension and the discharge because the two penalties were imposed simultaneously. Thus, the [Association] argues, the County 'contrived an appearance of progressive discipline' without actually affording Grievant an opportunity 'to change her behavior before harsher sanctions [were] imposed for continued misconduct.'" (Italics in original.)

The arbitrator also stated:

"[T]he County's treatment of these alleged violations as justifying two separate disciplinary penalties makes little sense to me, particularly when the County has chosen to impose a suspension for an alleged offense that occurred *after* an offense that the County believes justified termination. The County discovered these allegations of misconduct at the same time, investigated them together, and
(...continued)

17. In reaching these conclusions, Commander Hoy considered the handcuffing and holding cell incidents as well as the prior written reprimand. Hoy believed that there was a common theme to these incidents—that Phillips had abused her power over people under her control, that Phillips never acknowledged what she did wrong, and that there was little hope that she would change her behavior.

Hoy also believed that Phillips' conduct was outrageous.⁸

(...continued)

treated the misconduct of Grievant's co-worker Jochums, who also participated in both incidents, as worthy of a single disciplinary action, not two. In my view, it would have strengthened the County's case to treat Grievant's alleged misconduct in the same fashion. The question then would have been whether the totality of proven misconduct—in the two instances combined—justified termination.

"Be that as it may, the parties have stipulated that I should address the alleged violations separately, and I will do so." (*Italics in original.*)

Although the County now argues that both events should be considered together in reviewing the matter under ORS 243.706(1), we, like the arbitrator, are bound to the form of discipline as imposed by the employer. We do not review the evidence and do not substitute our findings for those of the arbitrator. *Portland Association of Teachers and Jim Hanna v. Portland School District 1J*, Case No. UP-64-99, 18 PECBR 816 (2000), *ruling on motion to stay*, 19 PECBR 25 (2001), *AWOP 178 Or App 634, 39 P3d 292, 293 (2002), rev den 334 Or 121, 47 P3d 484 (2002); Deschutes Cty. Sheriff's Assn. v. Deschutes Cty.*, 169 Or App 445, 452 n 5, 9 P3d 742 (2000), *rev den*, 332 Or 137, 27 P3d 1043 (2001).

⁸In regard to the use of force, the arbitrator stated:

"As the County points out in its brief, it seems contradictory for Grievant to admit she should have filed a use of force report while at the same time contending that the handcuffing of [Doe] was not a use of 'force.' On the other hand, there seemed to be some confusion among the deputies who testified as to whether restraint of an inmate to control behavior constitutes 'force.' That is so despite what seems to me to be a clearly applicable definition in the Use of Force Continuum, General Order 72.1.16.2, i.e. that 'physical force' includes 'the use of . . . objects, [or] instruments . . . to restrain, subdue, control, or compel a person to act or stop acting in a particular way.'" (Brackets in the original quote from County General Order.)

18. For his role in the holding cell and Doe handcuffing incidents, the County gave Jochums a one-day suspension and removed him from the cell extraction team.

Arbitration Opinion and Award

19. In regard to the holding cell incident, the arbitrator concluded:

“[G]iven Jochums’ un rebutted testimony that the two inmates were friends, and given that neither inmate expressed any complaint to Det. Green when interviewed, let alone filed a formal complaint, I cannot say that the record supports a finding that either [Zinc] or [Tin] considered the incident to be disrespectful or discourteous. For all the record discloses, they willingly went along with an incident of ‘horseplay,’ as the [Association’s] brief describes it, and were not offended.

“That is not to say that Grievant acted appropriately. On the contrary, she clearly acted unprofessionally, but to her credit, she readily conceded her lack of professionalism in this incident both during the due process hearing and at the hearing before me. Nor do I intend to imply that the County may not prohibit such conduct. In fact, it may well be that other rules, not cited by the County in the discipline letter, could have appropriately supported some form of disciplinary action because of her conduct. I hold merely that the proof in the record does not meet the County’s burden to establish a violation of the specific rule relied upon in imposing the suspension. I therefore must find that the County lacked just cause to suspend Grievant in connection with the holding cell incident.”

In regard to the handcuffing incident, the arbitrator held:

“The County cited at least eight rules in support of its finding that Grievant should be discharged for handcuffing [Doe]. Given that Grievant has admitted to violating at least four of those rules, it would serve little purpose to examine them one-by-one. It suffices to say that Grievant admits that she acted unprofessionally, that she did not treat inmate [Doe] with courtesy and respect, that she failed to ensure his safety at all times by leaving him restrained in a dorm without a deputy present, that she used County property (a digital camera) for unofficial purposes, and that she failed to file a required Use of Force Report. These are not minor violations.

“I am particularly troubled by the fact that even if the incident started out as a ‘lighthearted’ effort to control [Doe’s] interference with the count, Grievant and Jochums ultimately left inmate [Doe] alone in a dorm full of other inmates, wrists cuffed to the vertical posts of separate double bunks with his arms spread apart, facing a wall, and (at least for a portion of the time) in the dark. At the hearing, the parties sparred over whether this posture left [Doe] ‘defenseless,’ but that semantic issue is beside the point. Grievant and Jochums surely left [Doe] at a substantial disadvantage in defending himself against anyone who might want to do him harm. As it turns out, the only ‘harm’ that befell him (luckily) turned out to be the humiliation of being ‘pantsed’ and having his shirt pulled over his head by a fellow inmate. As if it were not bad enough that Grievant’s actions left [Doe] vulnerable to that indignity (and potentially much worse), she compounded this lapse in judgment by taking digital photographs of the inmate with his pants down. These actions are simply inexcusable from a corrections professional. Therefore, the central issue before me is not whether Grievant committed serious violations of the County’s rules and procedures, but rather whether the penalty imposed for those violations is consistent with principles of just cause and progressive discipline.”

* * * * *

“Progressive discipline does not necessarily require, of course, a lockstep progression from oral warning through gradually increasing levels of discipline, including a suspension, before an Employer has just cause to discharge. The gravity of an individual offense – even a first offense, for that matter – may be sufficient to support termination without intervening levels of discipline. To repeat an earlier observation, however, in each case the most important touchstone is whether, judged in light of the nature of the offense and the employee’s entire record, it can be said with reasonable assurance that further efforts at rehabilitation are likely to fail. Put another way, discipline should be designed primarily to cause changes in future employee behavior, if possible, not merely to punish for past misdeeds.

“In support of discharge, the County cites Grievant’s prior warning for ‘punishing’ inmates by requiring them to exercise, i.e. the County notes that this is not the first time Grievant has been accused of inmate ‘abuse.’ In fact, Commander Hoy testified that he saw a pattern of abusive behavior in the [Doe] and holding cell situations when considered along with the exercise incident. Hoy also judged that Grievant had never owned

up to her responsibility and did not seem to understand what she had done wrong. In addition, the County points to the claim ultimately made against the County on behalf of [Doe], which cost the County \$60,000 to settle.

“On the plus side for Grievant is a consistent work record over a number of years that her superiors judged to ‘exceed expectations.’ Nor can I find that Grievant acted with intent to ‘abuse’ [Doe] or intimidate him. Instead, it appears to me that her ‘joking’ back-and-forth style of inmate supervision simply got out of hand in this instance and she failed to adequately account for the potential danger he faced. I also find it significant that her actions, at least in the beginning, grew out of a legitimate concern about inmate behavior. [Doe] was interfering with the count and virtually asking to be cuffed to his bunk. That does not justify Grievant’s actions, but it helps to put them in a context that is different from simply being a ‘bully’ with no legitimate reason for her actions at all. Another factor that I must take into account is that Deputy Jochums, who was directly involved in the incident and at least partially culpable, was not terminated. Rather, he received a one-day suspension and was removed from the cell-extraction team (a penalty imposed for the holding cell and [Doe] incidents *combined*). This vast difference in the treatment of the two deputies — even taking into account Grievant’s greater experience and greater responsibility for initiating the handcuffing of [Doe] — tends to undermine the County’s argument that it had no choice but to discharge Grievant.

“Finally, and perhaps most importantly, the County apparently felt it necessary to attempt to create a record of ‘progressive discipline’ by separating the holding cell and [Doe] incidents into two distinct disciplinary processes and imposing two distinct penalties. That approach strongly suggests that the County believed that the [Doe] incident standing alone (or even combined with the holding cell incident if treated as one disciplinary event) did not justify discharge. In other words, had the County considered the [Doe] handcuffing incident alone so egregious that it precluded any possibility of rehabilitating Grievant as an effective deputy, it would have been unnecessary to suspend Grievant for two days for the holding cell issue in order to bolster the case for discharge.

“Weighing all these factors, pro and con, I find that the County lacked just cause to discharge Grievant under these precise circumstances. That is so despite the fact that Grievant’s actions were thoroughly

unprofessional, and despite the fact that she failed to account for the extent to which her position of authority over inmates of the work center could lead her to conclude, mistakenly, that the inmates were willing participants in her 'jokes.' She also failed to appreciate the County's exposure to potential liability because of her actions, even if they were not 'malicious.' These are significant failings in a corrections professional. The record does not establish, however, that Grievant is beyond rehabilitation. For example, she recognized immediately — at least in the case of the [Doe] incident — that she had gone too far, and she told Deputy Jochums that they 'shouldn't do that again.' She also readily conceded in the investigatory interviews and the due process hearing that she had acted unprofessionally and she committed that she would not make the same mistakes again. Consequently, with all due respect to Commander Hoy's judgment to the contrary, the record does not establish that we are dealing with an employee who stubbornly insists she has done nothing wrong — and thus an employee who justifies a conclusion that she is unable to make needed changes in behavior.

“Nevertheless, the seriousness of Grievant's departure from the standards of her profession, combined with the prior written reprimand for inappropriate treatment of inmates, justifies a significant disciplinary penalty. I find that the discharge should be reduced to a thirty-day disciplinary suspension without pay, and Grievant should be promptly reinstated and made whole for lost wages and benefits (less amounts earned or earnable with reasonable diligence). Unemployment benefits received by Grievant, if any, shall be treated in accordance with Oregon law. The reinstatement of Grievant shall be subject to any retraining, certification, or fitness for duty requirements customarily required of deputies who have been off work as long as Grievant, and the County may in addition, if it chooses, require Grievant (within the first forty-five (45) days of her reemployment), to complete an appropriate course of training (on work time) related to proper supervision of inmates.”

20. The arbitrator made the following award:

“1. The County did not have just cause to impose a two-day disciplinary suspension on Grievant for the holding cell incident; therefore,

“2. The two-day suspension is rescinded and shall be removed from Grievant's file; further,

“3. The County did not have just cause to discharge Grievant for the [Doe] incident but did have just cause to impose discipline; therefore,

“4. The discharge of Grievant shall be reduced to a thirty-day disciplinary suspension without pay and Grievant shall be promptly reinstated and made whole for lost wages and benefits (less amounts earned or earnable with reasonable diligence); unemployment benefits received by Grievant, if any, shall be treated in accordance with Oregon law;⁹

“5. Reinstatement shall be subject to any retraining, certification, or fitness for duty requirements customarily applied to deputies who have been off work as long as Grievant, and the County may in addition, if it chooses, require Grievant (within the first forty-five (45) days of her reemployment), to complete an appropriate course of training (on work time) related to the proper supervision of inmates;

“6. The Arbitrator will retain jurisdiction to resolve any disputes in connection with implementation of the remedy awarded that the parties are unable to resolve on their own; either party may invoke this reserved jurisdiction by fax sent or letter postmarked within forty-five (45) days of the date of this AWARD (original to the Arbitrator, copy to the other party) or within such reasonable extensions as the parties may mutually agree or that the Arbitrator may order for good cause shown; and

“7. In light of the split AWARD, I cannot designate either party as ‘the loser’ within the meaning of Article 34 of the parties’ Agreement; therefore, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.”

County Response to the Award

21. The arbitrator issued his award by e-mail on Sunday, June 8, 2008. On Tuesday, June 10, Commander Holland met with Association Vice-President Dale Bradley, Phillips, Phillips’ significant other, Association President Mike Beach, and Deputy Fletcher.

⁹In deciding to reinstate Phillips, the arbitrator noted: “[i]n my view, Grievant would be wise to treat this reinstatement as the equivalent of a ‘last chance agreement.’ That is, in the coming years if Grievant exhibits any further serious lapses in judgment, it seems highly unlikely to me that an arbitrator will hold that the County lacks just cause to discharge her.”

22. At the June 10 meeting, Commander Holland stated that he had been instructed by Undersheriff Mike Wilkerson to return Phillips to work. Holland directed Phillips to speak to the Sheriff's payroll administrator and the County Human Resources Department to enroll in the County employee benefit programs, and to tell them how much back pay Phillips believed she was owed. Holland also told Phillips to remain available by telephone. Phillips complied with Holland's directives, and also obtained a new identification card, duty belt, badge number, and new uniforms. The County did not issue Phillips a badge.

23. After meeting with Holland, Phillips quit her job as a full-time casino security guard and also quit an additional part-time position.

24. On June 11, Holland told Bradley that the Sheriff wanted to meet with Phillips when he returned the following week from an out-of-town conference.

25. On June 27, the County informed the Association that it would not reinstate Phillips or otherwise comply with the arbitrator's award.

26. Phillips never met with the Sheriff and was never sworn in by the Sheriff as a deputy. After the arbitration award, Phillips did not perform work for the Sheriff's Office, was not scheduled to perform such work, and was not placed on the payroll or actually enrolled in any employee benefit plan.

27. At the time of hearing, the casino refused to rehire Phillips because she quit her job so suddenly. In addition, the casino maintained a policy of waiting at least six months before rehiring an employee who quit.

CONCLUSIONS OF LAW

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

2. The County violated ORS 243.672(1)(g) when it refused to implement the terms of the arbitration award reinstating Phillips.

DISCUSSION

The issue is whether the law requires this Board to enforce an arbitration award that reinstates Phillips to her job with the County. ORS 243.672(1)(g) makes it an

unfair labor practice for a public employer 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 parties here agreed that the decision of the arbitrator “shall be binding on both sides.” The Association contends that the County’s refusal to accept the arbitrator’s award as binding violated subsection (1)(g). We begin our consideration of the Association’s charge by examining the standards we use to decide if an employer’s refusal to implement an arbitrator’s award is unlawful.

The Public Employee Collective Bargaining Act (PECBA) recognizes the importance of “encouraging practices fundamental to the peaceful adjustment of disputes” between public employers and their employees in order to avoid labor unrest that might impair or interrupt necessary services to the public. ORS 243.656(3). Arbitration is a fast, economical, and efficient way for parties to peacefully resolve their disputes and avoid labor unrest. The arbitration process, and agreements by parties to use it, are therefore encouraged under the PECBA. Because of the strong public policy favoring arbitration, we review arbitration awards under a standard designed to minimize interference with the parties’ agreement to use the process and to accept the award as binding. *Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 563, 679 P2d 868, *rev den*, 297 Or 458 (1984).

When parties agree to grievance arbitration, they consent to accept the arbitrator’s interpretation of their contract. *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). Our job is to ensure the parties get what they bargained for, *i.e.*, a binding decision by the arbitrator. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986). Under the statutory scheme established by the legislature, it is not our job to make sure the arbitrator is right. To the contrary, we must enforce the arbitrator’s award even if we are convinced the arbitrator was wrong. *Brewer v. Allstate Insurance Co.*, 248 Or 558, 562 (1968) (“[n]either a mistake of fact or law vitiates an award.”); *Portland Association of Teachers and Jim Hanna v. Portland School District 1J*, Case No. UP-64-99, 18 PECBR 816, 836-37(2000), *ruling on motion to stay* 19 PECBR 25 (2001), *AWOP* 178 Or App 634, 39 P3d 292, 293, *rev den* 334 Or 121, 47 P3d 484 (2002) (it is not this Board’s role to correct an arbitrator’s decision even if we are convinced it is erroneous); *E. Associated Coal Corp. v. Mine Workers*, 531 US 57, 62 (2000) (the fact that a court may be convinced that a labor arbitrator “committed serious error does not suffice to overturn his [*sic*] decision.”); *United Paperworkers Int’l Union v. Misco, Inc.*,

484 US 29, 38 (1987) (“[c]ourts thus do not sit to hear claims of factual or legal error by an arbitrator * * *”). See also *Seller v. Salem Womens Clinic, Inc.*, 154 Or App 522, 963 P2d 56, rev den 328 Or 40, 977 P2d 1170 (1998) (the appellate court enforced an arbitrator’s award even though a trial court concluded the arbitrator was wrong).

The United States Supreme Court explained why the Courts play such a limited role in reviewing labor arbitration awards under federal law:

“Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than a judge, it is the arbitrator’s view of the facts and the meaning of the contract they have agreed to accept. * * * To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator’s interpretation of the contract. * * * [T]he parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground the arbitrator misread the contract.” *United Paperworkers Int’l* at 37-38 (citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 US 593, 599 (1960)).

The Court’s reasoning is persuasive. If the standard were otherwise and we reviewed the merits of every arbitration award, we “would make meaningless the [contractual] provisions that the arbitrator’s decision is final,” because it never would be. *United Steelworkers* at 599. By refusing to become embroiled in the merits of the dispute, we respect the parties’ agreement to accept the arbitrator’s award as binding, and we further the purposes and policies of the PECBA.

Our deference to an arbitrator’s award, however, is not unlimited. ORS 243.706(1) provides:

“As a condition of enforceability, any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work.”

The County invokes this statutory exception to our usual deference to an arbitrator’s award. According to the County, the award reinstating Phillips is

unenforceable because it does not comply with the public policy requirements specified in ORS 243.706(1). The County's argument is an affirmative defense and the County has the burden of proving it. OAR 115-010-0070(5)(b); OAR 115-035-0035(1).

This Board has examined ORS 243.706(1) in a number of cases. Based on the plain language of the statute, we developed a three-step test to analyze whether an arbitrator's award is unenforceable under the public policy exception: (1) we determine whether the arbitrator found the grievant guilty of the misconduct for which discipline was imposed; (2) if so, we decide if the arbitrator reinstated or otherwise relieved the grievant of responsibility for the misconduct; and (3) if so, we then determine whether there is a clearly defined public policy, as expressed in statutes or judicial decisions, that applies to the award and makes the award unenforceable. *Salem-Keizer Assn. v. Salem-Keizer Sch. Dist. 24J*, Case No. UP-83-99, 19 PECBR 349, 370-71 (2001), *aff'd* 186 Or App 19, 61 P3d 970 (2003). We use this test to analyze the arbitrator's award at issue here, beginning with the holding cell incident.

In regards to the holding cell incident, the County's argument founders at the first step of the analysis. The arbitrator did not find the grievant guilty of the misconduct for which she was charged. *See* Findings of Fact 12, 13, 19, and 20. It is therefore unnecessary to proceed further with our analysis. *See Deschutes Cty. Sheriff's Assn. v. Deschutes Cty.*, 169 Or App 445, 454, 9 P3d 742 (2000), *rev den* 332 Or 137, 27 P3d 1043, 1044 (2001) (court rejects employer's public policy argument because the arbitrator found the employee "not guilty" of the misconduct for which he was disciplined). We will enforce this portion of the award.

In regard to the Doe handcuffing incident, there is no dispute that the first two steps of the test are satisfied. The arbitrator found Phillips guilty of the misconduct for which she was disciplined, and he reinstated her. *See* Findings of Fact 8-11, 19, and 20.

We move to the third step in our analysis, which is the real crux of this dispute. We must determine if a "clearly defined public policy in statutes or judicial decisions" bars enforcement of the award. ORS 243.706(1); *Salem-Keizer Sch. Dist. 24J*, 19 PECBR at 370-71 (2001). This requires us to interpret the relevant language in ORS 243.706(1).

When we interpret a statute, our goal is to determine the legislature's intent. ORS 174.020(1)(a). We use the methodology explained in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as subsequently modified by amendments

to ORS 174.020¹⁰ and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). We begin by examining the text and context of the statute and then consider any relevant legislative history the parties may offer, giving this history the weight we believe it merits. *Id.* 171-72. If the legislature’s intent remains unclear after examining the statute’s text, context, and legislative history, we apply standard maxims of statutory construction. *PGE*, 317 Or at 612.

Accordingly, we begin by analyzing the text and context of ORS 243.706(1). Although the statute does not define “public policy,” it specifically identifies the source of any public policy: it must come from “statutes or judicial decisions.”¹¹ The clear consequence of this language (and perhaps its purpose) is to remove from the equation this Board’s notion of what constitutes good public policy or what is in the public’s best interest. So again, even if this Board was convinced that reinstating the grievant would constitute bad public policy, the statute makes our views of public policy irrelevant. We must follow the legislative mandate and look solely to public policies that are clearly

¹⁰As amended in 2001 (and with amendments italicized), ORS 174.020 provides, in relevant part:

“(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

“(b) *To assist a court in its construction of a statute, a party may offer the legislative history of the statute.*

“* * * * *

“(3) *A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.*”

¹¹The legislature placed this provision into the PECBA in 1995. Or Laws 1995, ch. 286, §5. The drafters of the provision looked to private sector precedent in recognizing the narrow public policy exception to enforcing arbitration awards. Henry H. Drummonds, *A Case Study of the Ex Ante Veto Negotiations Process: The Derfler-Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law*, 32 Willamette L. Rev., 69, 137 (1996). The statutory requirement that a public policy be “clearly defined in statutes or judicial decisions” paraphrases the standard established in earlier US Supreme Court cases. In *W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber*, 461 US 757, 766 (1983), the Court stated that a public policy sufficient to overturn an arbitrator’s award must be “well defined and dominant” and based on “laws and legal precedents.” Because of this similarity, we find helpful guidance in the US Supreme Court cases discussing the public policy exception.

defined in statutes and judicial decisions, the sources specified in ORS 243.706(1). We will refuse to enforce an arbitrator's award only if it orders "something that either the legislature or the courts have determined to be contrary to public policy." *Salem-Keizer Sch. Dist. 24J*, 186 Or App at 25.

We derive several more controlling principles from cases interpreting ORS 243.706(1). When the Oregon Supreme Court interprets a statute, "that interpretation becomes part of the statute as if written into it at the time of its enactment." *Stephens v. Bohlman*, 314 Or 344, 350 n 6, 838 P2d 600 (1992); *State v. Sullens*, 314 Or 436, 443, 839 P2d 708 (1992) (quoting *Walther v. SAIF*, 312 Or 147, 149, 817 P2d 292 (1991)).

The Oregon Supreme Court interpreted ORS 243.706(1) in *Washington Cty. Police Officers' Assn. v. Washington Cty.*, 335 Or 198, 63 P3d 1167 (2003).¹² There, a deputy sheriff who was working as a corrections officer failed a drug test and initially denied any unlawful drug use. He later admitted purchasing and using marijuana off duty. The employer fired the officer because he used drugs and because he lied about it. An arbitrator reinstated the employee but the employer refused to comply with the arbitrator's award. The employer argued that the award was contrary to public policy and was therefore unenforceable under ORS 243.706(1).

The Court began its analysis by examining the words of the statute. It looked at the statutory phrase "clearly defined." It concluded that a public policy is "clearly defined" if a statute or judicial decision establishes it in such a manner that there is "no serious doubt or question respecting the content or import of that policy." *Washington Cty.*, 335 Or at 206.

As most pertinent here, the Court identified the precise question presented in cases under ORS 243.706(1). It concluded that the public policy analysis must

"be directed at the arbitration award itself, not the conduct for which discipline was imposed. Thus, the enforceability of the arbitrator's award does not turn on whether the employee's purchase and personal use of marijuana or being dishonest about it in response to the positive drug test violated some public policy. The proper inquiry, instead, is whether the *award itself* complies with the specified kind of public policy requirements. In other words, does an award ordering *reinstatement* of an employee who

¹²This Board ordered the County to comply with the award. *Washington Cty.*, 19 PECBR 100 (2001). The Court of Appeals reversed our Order. 181 Or App 448, 45 P3d 515 (2002). The Supreme Court reversed and remanded the Court of Appeals' decision.

has purchased and used marijuana and then been dishonest about it fail to comply with some public policy requirements that are clearly defined in the statute or judicial decision? If the reinstatement fails to comply with public policy requirements in that way, then it is unenforceable.” *Washington Cty.*, 335 Or at 205. (Emphasis in original; citation omitted.)¹³

Using this analytical framework, the Court examined ORS 181.662(3) (1999), the statute which the employer relied on to establish public policy. That statute required revocation of the certification of a public safety officer who is convicted of using or possessing a controlled substance. The Court rejected the employer’s argument. It explained:

“Of course, whether or not the employee should continue to be certified is not the question; the award addresses the employee’s *reinstatement*. But ORS 181.662(3) (1999) is not a statute about employment or reinstatement. * * * [E]ven accepting the proposition that ORS 181.662(3) (1999) defined a clear public policy concerning the continued certification of a public safety officer who has been convicted of drug-related offenses, we do not agree that that statute defined a clear public policy respecting the continued certification of a public safety officer who has *not* been convicted of a any offense. *A fortiori*, the statute does not define a clear public policy respecting the separate question of such an officer’s reinstatement.” *Washington Cty.*, 335 Or at 206. (Emphasis in original.)

The Court thus held that the employee’s marijuana use and possession did not prohibit enforcement of the arbitration award on public policy grounds. It remanded the matter to the Court of Appeals to consider whether the employee’s alleged dishonesty violated public policy and prevented enforcement of the award.

On remand, the Court of Appeals held that the officer’s dishonesty did not preclude his reinstatement. *Washington Cty.*, 187 Or App 686, 69 P3d 797 (2003). In light of the Supreme Court opinion, the Court stated that the issue was not whether public policy dictates that public safety officers should be honest, but rather, whether there is a statute or judicial decision that establishes a clear public policy that prohibits reinstatement of an officer who was dishonest. *Id.* at 691-92. The Court found none and accordingly held that the employer’s refusal to comply with the arbitration award lacked justification.

¹³See also *E. Associated Coal*, 531 US at 62-63 (the issue is not whether a grievant’s drug use violates public policy, but whether reinstating him does so).

The Oregon Court of Appeals also considered the public policy exception in *Salem-Keizer Assn. v. Salem-Keizer Sch. Dist. 24J*, Case No. UP-83-99, 19 PECBR 349, 370-71 (2001), *aff'd* 186 Or App 19, 61 P3d 970 (2003). At issue was this Board's order upholding an arbitrator's award that reinstated an instructional assistant who was arrested for, but never charged with, shoplifting (second-degree theft).

The Court affirmed this Board's order. It held that ORS 243.706(1) "unambiguously" required that any public policy analysis be directed at the arbitrator's award and not the underlying conduct for which discipline was imposed. *Id.* at 24. The Court explained:

"[T]he issue in this case is whether the reinstatement of an instructional assistant who has admitted to, but who has not been convicted of, the crime of second-degree theft, ORS 164.045, violates public policy." *Id.*

The Court concluded that the only relevant public policy was found in ORS 326.603(3)(a), which bars school districts from employing individuals convicted of certain listed crimes. The Court held this statutory provision inapplicable to the grievant's situation because second-degree theft is not one of the listed crimes, and because the grievant was never convicted of any crime. *Id.* at 25-26. Accordingly, the Court required the school district to comply with the arbitrator's award and reinstate the grievant.

In addition to the plain language of the statute and the cases interpreting it, we also consider the statute in context. Context includes other provisions of the PECBA. *Jones v. General Motors Corp.*, 325 Or 404, 411, 939 P2d 608 (1997) (other provisions of the same and related statutes provide context). As discussed in detail earlier, the PECBA affords great deference to arbitration awards, and this Board does not review the merits. In this larger context, the public policy exception is necessarily a narrow one. *See E. Associated Coal*, 531 US at 63 ("the public policy exception is narrow"); *Misco*, 484 US at 43 (the exception does not "sanction a broad judicial power to set aside arbitration awards as against public policy."). Otherwise, it would become a back-door way for a losing party to seek our review of the merits of an arbitration award and would swallow up the general rule that we will not second-guess the arbitrator.

Having examined both the text and context of ORS 243.706(1), we turn to the next step in our interpretation of the statute and consider the legislative history offered by the County. Under ORS 174.020(3), we may limit our consideration of legislative history "to the information the parties provide." Further, the statute allows us to give legislative history whatever weight we deem appropriate. As the Supreme Court recognized in *Gaines*, "[a] court need only consider legislative history 'for what it's

worth’—and what it is worth is for the court to determine.” 346 Or at 171. The Court cautioned that the text of a statute continues to be the focus of statutory construction because only the text itself is considered and approved by a majority of the legislature. *Id.*

The County provided legislative history from the 1995 session of the Oregon Legislature which enacted Senate Bill (SB) 750 (1995 Or Laws, ch 286). Section 5 of SB 750 amended ORS 243.706 by adding language in section (1) regarding the public policy exception to enforcement of arbitration awards.¹⁴ The legislative history offered by the County is relatively sparse, consisting of one non-legislator’s testimony and two statements made by the senator who sponsored the bill that became the statutory language at issue. All of the legislative history the County relies on is contained in Board Member Thomas’ concurring and dissenting opinion in *Deschutes Cty. Sheriff’s Assn. v. Deschutes Cty.*, Case No. UP-55-97, 17 PECBR 845, 868-78 (1998), *rev’d and rem’d*, 169 Or App 445, 9 P3d 742 (2000), *rev den*, 332 Or 137, 27 P3d 1043 (2001), *order on remand*, 19 PECBR 321 (2001).

The County relies on the testimony of the Marion County Sheriff at a hearing before the Senate Labor Committee on March 6, 1995. “In general, an examination of legislative history is most useful when it is able to uncover the manifest general

¹⁴The 1995 legislative amendments to the relevant portions of ORS 243.706 are shown in italics:

“(1) A public employer may enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in binding arbitration *or any other dispute resolution process agreed to by the parties. As a condition of enforceability, any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work. In addition, with respect to claims that a grievant should be reinstated or otherwise relieved of responsibility for misconduct based upon the public employer’s alleged previous differential treatment of employees for the same or similar conduct, the arbitration award must conform to the following principles:*

“(a) *Some misconduct is so egregious that no employee can reasonably rely on past treatment for similar offenses as a justification or defense to discharge or other discipline.*”

legislative intent behind an enactment.” *Gaines*, 346 Or at 172-73 n 9. For this reason, courts are “hesitant to ascribe to the Legislative Assembly as a whole the single remark of a single nonlegislator at a committee hearing.” *State v. Stamper*, 197 Or App 413, 424-25, 106 P3d 172 (2005), *rev den*, 339 Or 230, 119 P3d 790 (2005). *See also Linn-Benton-Lincoln Ed. v. Linn-Benton-Lincoln ESD*, 163 Or App 558, 569, 989 P2d 25 (1999) (witness statements “are not direct expressions of legislative intent.”). There is no evidence in the record that the Sheriff represented the group that sponsored the legislation. *See Ram Technical Services, Inc. v. Koresko*, 346 Or 215, 234-35, 208 P3d 950 (2009) (the court relied on testimony of non-legislator representatives from groups that sponsored the legislation at issue to determine the legislature’s intent). We will, nevertheless, consider the Sheriff’s testimony. *See Liberty v. State Dept. Of Transportation*, 200 Or App 607, 617-18, 116 P3d 902 (2005).

The Sheriff’s testimony sheds little light on the legislative intent regarding the public policy exception. We note that the Sheriff’s comments were not directed to the public policy exception. In fact, at the time of the Sheriff’s testimony, the language regarding the public policy exception had not yet been proposed.¹⁵ The Sheriff testified about his frustration in attempting to discharge officers charged with certain types of offensive misconduct. He criticized arbitrators’ awards that reinstated police officers who had sex in their patrol cars while on duty, participated in a ticket-fixing scheme, and possessed cocaine while on duty. *Deschutes County*, 17 PECBR at 873-76. None of those circumstances resemble the facts presented here. The Sheriff’s testimony does not provide any guidance in our analysis.

The County also offered excerpts from two speeches that Senator Neil Bryant, one of the primary sponsors of SB 750, made during the 1995 legislative session. Senator Bryant’s remarks are significant because he was one of the sponsors of SB 750, and he carried the bill on the Senate floor. *See Crooked River Ranch Water Company v. PUC*, 224 Or App 485, 492, 198 P3d 967 (2008) (the court based its conclusion about legislative intent on statements made by the senator who carried a bill on the senate floor).

¹⁵Senator Bryant’s comments of June 1, 1995, quoted in *Deschutes County*, 17 PECBR at 877, indicate that the public policy exception was first added in conference committee. *Compare* the B-engrossed version of SB 750, dated May 3, 1995 (no language regarding the public policy exception), *with* the Conference Committee Amendments to B-engrossed SB 750, dated June 1, 1995 (contains the public policy exception). The Sheriff’s testimony on March 6, 1995, preceded the addition of the public policy exception.

First, at an April 6, 1995 Senate floor session, Senator Bryant explained the A-engrossed Senate version of SB 750. Importantly, this version of the bill did not contain language regarding the public policy exception. As the Senator's remarks indicate, he addressed language in that version of the bill that would prevent an arbitrator from reinstating an employee or reducing discipline based on "the employer's previous different treatment of the same or similar conduct." A-engrossed Senate version of SB 750, as quoted in *Deschutes County Sheriff's Association*, 17 PECBR at 876. The Senator stated:

"Sections six of Senate Bill 750 takes care of a problem that we've all become aware of from the press coverage of a couple years ago when Oregon State Police were required to reinstate two police officers, who admitted to having sex in their police cars while on duty. The arbitrator in those cases . . . in this case relied on . . . [o]n allegations that others in the police agency had not been punished for similar conduct, and the reinstatement of the two officers, based on the alleged disparate . . . treatment. * * * I believe we all agree that public employees must account to a standard which is responsive to the expectations of the Oregon public. Immoral . . . immoral and illegal employee conduct, regardless of how it is handled on a case-by-case basis by the public employer, should not be adjusted by a standard that two wrongs make a right, but that is the standard under current law." *Deschutes County*, 17 PECBR at 877 (ellipses in original).

Because these comments concern an arbitrator's reliance on disparate treatment and do not address the public policy exception, they are not especially helpful here. In addition, the specific example regarding sexual misconduct by police officers does not resemble the facts here. Moreover, the Senator's references to "immoral" conduct and "expectations of the Oregon public" contradicts the plain language of the statute which requires us to rely on "statutes or judicial decisions" rather than the public's or our own notions of good public policy. *See Gaines*, 346 Or at 173 (legislative history cannot overcome unambiguous statutory text). The reference to "illegal employee conduct" does not apply here because Phillips was not charged with or convicted of any criminal misconduct.

We turn to the other comments by Senator Bryant that the County relies on. The Senator addressed these comments to a June 1, 1995 conference committee. At this point, the public policy exception had been added to the bill. Senator Bryant stated:

“This has been reworked to provide that a decision by an arbitrator must comply with what I would call certain public policy requirements. A few examples are listed here and in addition there is a section that says sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct related to work. On the unjustified and egregious use of physical or deadly force, this is in response to a situation in Portland where an arbitrator reinstated a police officer who had fired [shots], I think 25 times, and the chief of police, in his investigation, concluded that no firing was justified.” *Deschutes County*, 17 PECBR at 877-78.

The Senator’s comments paraphrase the requirements of the statute and describe an incident where a police officer unjustifiably fired 25 shots. They add no pertinent new insights.

In addition, although not offered by the parties, we reviewed the floor debates in both the House and Senate on the final version of SB 750. Neither body mentioned the public policy exception. We conclude that the legislative history provides no clarity or guidance on the issues before us.

The text of ORS 243.706(1) and cases interpreting it establish the following principles that are pertinent here:

- (1) This Board cannot enforce an arbitration award that violates public policy;
- (2) A public policy sufficient to justify our refusal to enforce an arbitration award must be derived from statutes or judicial decisions;
- (3) The public policy must be “clearly defined” so that there can be no serious doubt about the content or import of the policy;

(4) The analysis must focus on whether the arbitrator's award violates public policy, and not on whether the employee's conduct does; and

(5) We will refuse to enforce an arbitrator's award of reinstatement only if there is a clear public policy against reinstating someone who acted as the grievant did.

With these principles in mind, we consider the County's arguments. The County contends that a number of public policies bar Phillips' reinstatement. First, the County asserts that the award does not comply with one of the public policy requirements specifically listed in ORS 243.706(1), the policy concerning "unjustified and egregious use of physical or deadly force." Second, the County asserts that even if Phillips' reinstatement does not contravene a public policy requirement specifically enumerated in the statute, the award is nevertheless one that the legislature intended to render unenforceable.

We first consider the County's assertion that Phillips' reinstatement contravenes public policy because she used unjustified and egregious physical force against inmate Doe. The County's argument misses a fundamental point. It continues to focus on Phillips' conduct. In essence, the County asserts that Phillips should not be reinstated because her conduct violates public policy regarding the use of force. The issue is whether clear public policy prevents *reinstating* someone who used unjustified or egregious physical force, and not whether the force itself violated public policy. The County has not provided any authority that establishes a clear public policy against reinstating a corrections officer who used physical force on an inmate.

Even if we assume, *arguendo*, that we can examine Phillips' conduct to determine if she used unjustified and egregious force, the County's argument still fails. The statute uses the conjunctive "and." It thus requires the force to be both unjustified and egregious. Egregious means "conspicuously bad" and "flagrant." *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986), *supplemental order*, 9 PECBR 9354 (1987) (quoting *Webster's New Collegiate Dictionary* (1977)); *Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007).

Here, the arbitrator held that Phillips' conduct violated the County's use of force policy, which defines "physical force" to include "the use of . . . objects, [or] instruments . . . to restrain, subdue, control, or compel a person to act or stop acting in

a particular way.” He did not, however, make any findings or reach any conclusion to indicate Phillips’ use of force was egregious or conspicuously bad. The arbitrator commented that “there seemed to be some confusion among the [County] deputies who testified as to whether restraint of an inmate to control behavior constitutes ‘force.’” The arbitrator’s conclusion that Phillips’ restraint of Doe violated the County’s use of force policy was, literally, a footnote in his award, and Phillips’ use of force was a minor consideration in the arbitrator’s decision to discipline her. The arbitrator’s decision to discipline Phillips was based almost entirely on Phillips’ “serious violations” of County policies other than the one involving the actual use of force—policies regarding reporting the use of force, as well as policies concerning County property and respectful and safe treatment of inmates. Other than noting that Phillips violated the County’s use of force policy, the arbitrator made no other findings that support a conclusion that Phillips’ use of force against Doe was egregious.

As discussed above, we do not critically review evidence considered by the arbitrator and will not substitute our own characterization of the evidence for that of the arbitrator. We accept the arbitrator’s findings of fact concerning Phillips’ actions, and do not re-evaluate these actions or draw our own conclusions about them. The County agrees that this is the appropriate standard for reviewing the arbitrator’s award. In its post-hearing brief, the County explains that it does not ask us to “retry” the arbitrator’s conclusions and analysis, and asks only that we “consider the misconduct as found by the arbitrator.” When we consider the misconduct the arbitrator found, however, we find nothing in the award to indicate that Phillips’ use of force against inmate Doe was “egregious.”

We turn next to the County’s argument that the award is one that the legislature intended to make unenforceable under ORS 243.706(1). In support of this contention, the County points to public policies it derives from provisions in both the Oregon and U.S. Constitutions that prohibit harsh treatment of inmates. The Eighth Amendment to the U.S. Constitution prohibits the infliction of “cruel and unusual punishment.” Courts have held prison officials liable for violation of prisoners’ Eighth Amendment rights when they failed to take action against abusive guards. *Thomas v. District of Columbia*, 887 F. Supp 1 (D.D.C. 1995). In addition, several federal courts have concluded that actions which serve no penological purpose may violate inmates’ Eighth Amendment rights. Among these actions are: placing webcams near closed circuit surveillance cameras (*Demery v. Arpaio*, 378 F3d 1020, 1030 (9th Cir 2004)); cutting an inmate’s hair in the shower (*Pelfrey v. Chambers*, 43 F3d 1034, 1037 (6th Cir 1995)); and strip searching a male prisoner in front of female officers (*Calhoun v. Detella*, 319 F3d 936, 939 (7th Cir 2003)).

Article 13 of the Oregon Constitution provides that “[no] person arrested, or confined in jail, shall be treated with unnecessary rigor.” In addition, one of the general purposes of the Oregon Criminal Code is “[t]o safeguard offenders against excessive, disproportionate or arbitrary punishment.” ORS 161.025(g). Under Oregon law, certain prison practices are recognized as abusive to the extent that they cannot be justified by necessity. *Sterling v. Cupp*, 290 Or 611, 616-617, 625 P2d 123 (1981).

We express no opinion on whether Phillips’ conduct contravened these policies because her actions are not the issue before us. The issue here concerns policies regarding reinstatement. The County has failed to demonstrate that any of these cases or constitutional provisions define a clear public policy that prohibits *reinstatement* of a corrections officer who engages in the specific misconduct in which Phillips engaged. Although the cases cited by the County define a general public policy against abusive or disrespectful treatment of inmates, none of the cases address *reinstatement* of a corrections officer who is guilty of such mistreatment.¹⁶

There is no reason to believe Phillips’ reinstatement would endanger inmates. The arbitrator determined that Phillips was honestly contrite and that she demonstrated an understanding that what she did was wrong. The arbitrator found that Phillips could be rehabilitated (and thus found, at least implicitly, that she was unlikely to repeat her misconduct). The arbitrator authorized the County to require Phillips to complete a course of training on the proper supervision of inmates. In these circumstances, there is no reason to believe that Phillips will engage in similar misconduct in the future or that inmates would be in danger if Phillips is reinstated.

As we discussed above, ORS 243.706(1) bars enforcement of an arbitrator’s award only if a public policy, clearly defined by statutes or case law, prohibits reinstatement of an employee who acted as the grievant did. *Washington Cty.*, 335 Or at 205-206. The County has not identified any such public policy.

¹⁶Many of the cases cited by the County involve corrections officers’ abusive behavior that has no legitimate or penological purpose. The arbitrator distinguished Phillips’ conduct from this type of behavior, however. The arbitrator concluded that, although Phillips’ actions in handcuffing Doe got out of hand, she did not act with any intent to abuse or intimidate Doe. He held that her actions, at least at first, resulted from a legitimate concern about inmate Doe’s behavior in interfering with the “count.” The arbitrator concluded: “That does not justify Grievant’s actions, but it helps to put them in a context that is different from simply being a ‘bully’ with no legitimate reason for her actions at all.” In addition, the arbitrator found that Phillips understood the seriousness of her actions, was sincerely apologetic for what she had done, and indicated she was capable of changing her behavior—a factor which does not seem to have been considered in any of the cases cited by the County.

In support of its position, the County cites *Deschutes County Sheriff's Assn. v. Deschutes County*, Case No. UP-55-97, 17 PECBR 845, 860 (1998), *rev'd and rem'd*, 169 Or App 445, 9 P3d 742 (2000), *rev den*, 332 Or 137, 27 P3d 1043 (2001), *order on remand*, 19 PECBR 321 (2001). There, this Board concluded that an arbitrator's award reinstating a corrections officer who unnecessarily used chemical spray against inmates was unenforceable under ORS 243.706(1) because it was contrary to public policies requiring that prisoners be protected from abuse. On appeal, the Court of Appeals held that we erred because we based our conclusions on misconduct for which the grievant was not disciplined. The Court explained:

"Here, under the parties' collective bargaining agreement and arbitration submissions, * * * the question before the arbitrator was whether Squier [the grievant] engaged in the conduct for which he was disciplined—and not whether he engaged in other conduct for which he could properly have been disciplined but was not. The arbitrator determined that Squier was *not guilty* of the misconduct for which he was disciplined. The arbitrator also found that Squier was not disciplined for other misconduct. It does not matter if the county, ERB or this court agrees with that determination. * * * The point is that the County agreed to resolve labor disputes through binding arbitration, and, subject to certain limitations that do not apply here, it must accept the outcome." *Deschutes Cty.*, 169 Or App at 454-455. (Emphasis in original; citations omitted.)

The Court reversed and remanded the case to us for further proceedings consistent with its decision. *Id.* On remand, we ordered the county to comply with the arbitration award and reinstate the grievant. 19 PECBR 321.

Given the history of this case, the conclusion we reached in our original Order—that reinstating a grievant who unjustifiably used chemical spray against inmates violated the public policy requirements of ORS 243.706(1)—is no longer good law.¹⁷

First, the Court of Appeals reversed the decision. In doing so, it made clear that we never should have considered the public policy issue in the first place because the

¹⁷In fact, *Deschutes County* supports the principle that we are bound by the arbitrator's conclusions regarding a grievant's conduct and cannot substitute our opinion for that of the arbitrator. The Court noted that in our original Order " * * * it appears that ERB did engage in a right/wrong analysis by substituting its findings for those of the arbitrator." *Deschutes Cty.*, 169 Or App 452, n 5.

grievant was not disciplined for the alleged misconduct. Thus, the statement on which the County relies is, at best, mere *dictum*, and we now disavow it. Second, we decided *Deschutes County* several years before the Oregon Supreme Court, in *Washington County*, clarified the appropriate standards. We did not have the benefit of the Court's direction to look for a statute or judicial decision that declares a clear public policy against *reinstating* someone who used chemical spray against inmates. Our decision in *Deschutes County* does not help the County.

In sum, we derived pertinent principles by examining the text and context of ORS 243.706(1), along with cases interpreting it and the legislative history. We applied these principles to frame the issue presented here. We do not decide whether the grievant's actions themselves violate public policy. Instead, we look at the arbitrator's award. The arbitrator ordered the County to reinstate the grievant. The question is whether there is a clearly defined public policy in statutes or judicial decisions that prohibits reinstating an employee who acted as the grievant did.

With the issue properly framed, the answer is clear. As discussed, the County has not identified any judicial decision or statute concerning the employment or reinstatement of a public safety officer who acted as the grievant did. The County cites numerous constitutional provisions, statutes, and judicial decisions. They all suggest that the grievant's actions violated public policy. But as *Washington County*, makes clear, the grievant's actions are not the issue before the Board. The authorities the County cites do not even mention the pertinent issue, *i.e.*, whether public policy prohibits reinstating the grievant—and they certainly do not describe a policy that is clear beyond any serious doubt. For this reason, the County has not established that the award is unenforceable under ORS 243.706(1).

We move now to the County's next defense, which is separate from its public policy defense. The County also contends that Phillips' reinstatement is unenforceable under ORS 243.706(1)(a), which provides that an arbitrator's reinstatement of a grievant that is based on "the public employer's alleged previous differential treatment of employees for the same or similar conduct" must conform to the following principle:

"Some misconduct is so egregious that no employee can reasonably rely on past treatment for similar offenses as a justification or defense to discharge or other discipline."

Jochums was involved with Phillips in the Doe handcuffing incident. The County dismissed Phillips but suspended Jochums for one day. The disparate treatment portion of the statute does not apply here for several reasons. First, the statute applies only to “egregious” misconduct. As discussed earlier, nothing in the arbitrator’s award indicates Phillips’ conduct was egregious. Second, the statute applies to “past treatment for similar offenses.” The actions upon which the County based its discipline of Jochums did not involve past conduct; Jochums and Phillips acted together in the Doe handcuffing incident.¹⁸ Accordingly, the arbitrator did not rely on “past treatment” for “similar offenses” as a basis for his decision to reinstate Phillips. ORS 243.706(1)(a) does not prevent enforcement of the award.

We hold that the County has failed to meet its burden to prove that the arbitrator’s award reinstating Phillips is unenforceable under either the public policy exception or the disparate treatment portion of ORS 243.706(1). We will therefore order the County to comply with the arbitrator’s award and make Phillips whole for any losses she suffered because of the County’s refusal to comply.

We emphasize that our conclusion should not be interpreted as condoning Phillips’ actions or as expressing a willingness to tolerate humiliating, disrespectful, or unsafe treatment of an inmate.¹⁹ In determining whether the arbitrator’s award is unenforceable under ORS 243.706(1), our personal opinions about the grievant’s conduct are irrelevant. Instead, we are obligated to determine the legislature’s intent and to interpret and apply the statutes in a manner that effectuates that intent. In so doing, we begin by recognizing that deferring to arbitrators’ awards furthers the purposes and policies of the PECBA. We then consider the narrow public policy exception to this deference expressed in ORS 243.706(1). We are mindful of the precise words of the statute and how the Oregon courts have interpreted this statutory provision. According to the courts, our task is not to decide if a grievant’s actions violated a public policy.

¹⁸The plain words of the statute prevent only an “employee” from relying on past treatment. They do not prohibit an arbitrator from doing so. In any event, the arbitrator did not rely on past treatment as a defense to the discharge. Rather, the only conclusion he drew from the disparate treatment is that it “tends to undermine the County’s argument that it had no choice but to discharge Grievant.”

¹⁹We also note that the arbitrator did not completely absolve Phillips of responsibility for her conduct. He punished her for the wrongdoing to which she admitted. By imposing a 30-day unpaid suspension, the arbitrator impressed upon Phillips the serious nature of her misconduct. In addition, the arbitrator warned Phillips that she would probably be fired for any future incidents involving poor judgment.

Instead, we must determine if the grievant's reinstatement violates a clear public policy, expressed in statutes or case law, that prohibits reinstatement of an employee for the specific misconduct in which the grievant engaged. Given this mandate, we are not free to independently judge Phillips' conduct, and cannot reject the arbitrator's award because we find Phillips' behavior reprehensible.

Based on our analysis of the legislature's intent through consideration of the text, context, legislative history, and cases interpreting ORS 243.706(1), we conclude that the law requires us to enforce the arbitrator's award.

3. The County is not required to pay a civil penalty to the Association.

The Association requests a civil penalty. We may award a civil penalty when a party commits an unfair labor practice "repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious." ORS 243.676(4)(a)(2). An employer's actions may be egregious if the employer disregards well-established statutory and case law. *Hood River County v. AFSCME Local 2503-2*, Case No. UP-92-94, 16 PECBR 433 (1996), *AWOP 146 Or App 777, 932 P2d 1216 (1997)*.

Here, the County's refusal to implement the award was not repetitive. Nor did the County disregard established case law or act with knowledge that its actions were an unfair labor practice. The County relied in good faith on *Deschutes County*, 17 PECBR 845, where we concluded that reinstating a corrections officer who mistreated inmates violated the public policy requirements of ORS 243.706(1). The Oregon Court of Appeals reversed us on other grounds. In this Order, we held for the first time that our conclusions in *Deschutes County* regarding reinstatement of the corrections officer are no longer good law. Accordingly, the County's refusal to implement the arbitrator's award and reinstate Phillips was not taken with knowledge that it was an unfair labor practice. The County's actions do not meet the statutory standards for a civil penalty.

ORDER

1. The County shall cease and desist from refusing to comply fully with the arbitrator's award dated June 9, 2008.

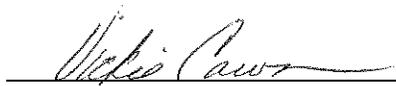
2. As soon as practicable, the County shall reinstate Phillips to the same position she would have occupied had the County promptly complied with the arbitration award, with back pay and benefits as ordered by the arbitrator.

3. The County shall make Phillips whole for any loss or injury she suffered due to the County's failure to promptly implement the arbitration award, including back pay and benefits, minus interim earnings, with interest at 9 percent per annum, from the date of the arbitration award until the County reinstates Phillips to her former position.

DATED this 29th day of March, 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.