

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-27-02

(UNFAIR LABOR PRACTICE)

LINCOLN COUNTY)	
EDUCATION ASSOCIATION,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
LINCOLN COUNTY SCHOOL DISTRICT,)	
)	
Respondent.)	
_____)	

The Board¹ heard oral argument on November 19, 2003, on Complainant's and Respondent's objections to a recommended decision issued by Administrative Law Judge (ALJ) William Greer on September 24, 2003, following a hearing on February 21, 2003, in Newport, Oregon. The record closed on April 11, 2003, upon receipt of the parties' closing arguments.

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

Bruce A. Zagar, Attorney at Law, Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, P.O. Box 749, Salem, Oregon 97308-0749, represented Respondent at oral argument; Paul A. Goodwin, Attorney at Law, Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, represented Respondent before the ALJ.

¹Member Gamson did not participate in the hearing or in the deliberations on this matter.

The Lincoln County Education Association (Association) filed this unfair labor practice complaint on May 22, 2002, alleging that the Lincoln County School District (District) had violated ORS 243.672(1)(g) by refusing to arbitrate a retiree/spouse medical insurance coverage grievance and by refusing to provide a vested benefit to retirees, as required by the parties' 1992-1995 and 1995-2000 collective bargaining agreements.

On July 24, 2002, the District filed an answer in which it asserted several affirmative defenses and requested this Board to order the Association to pay a civil penalty and reimburse the District's filing fee. The ALJ set the hearing for November 8.

On October 28, 2002, the Association moved to amend the complaint. In its first amended complaint, the Association also alleged that the District had deducted some insurance premium costs from retirees' stipends and had disqualified one retiree who became covered by Medicare. The District objected to the amendment, in part due to the pendency of the November 8 hearing date. The ALJ allowed the amendment and set over the hearing to December 19.

The District subsequently requested additional time beyond December 19 to process related Association grievances. The ALJ canceled the December 19 hearing, and the parties agreed to a time frame in which the District would respond to the grievances and the Association, if appropriate, would amend its complaint.

On December 30, 2002, the Association filed a second amended complaint, alleging, in addition, that the District had refused to arbitrate grievances over the retiree disputes, in violation of ORS 243.672(1)(g). The Association also requested this Board to order the District to pay a civil penalty to the Association. On January 9, 2003, the District filed an amended answer. The ALJ conducted the hearing on February 21, 2003.

The issues are:²

²In his prehearing order, the ALJ identified several other issues. We address them in our Rulings and in deciding the primary issues.

1. Did the District violate ORS 243.672(1)(g) by refusing to arbitrate medical insurance grievances regarding: (a) retiree spouse coverage; (b) termination of coverage for White and her spouse; and (c) retiree premiums?

2. Did the District violate ORS 243.672(1)(g), and the parties' 1992-1995, 1995-2000, or 2000-2005 collective bargaining agreements, by: (a) terminating medical insurance benefits for retirees' spouses over age 65; (b) terminating medical insurance coverage for White and her spouse; and (c) failing to provide fully paid medical insurance to certain retirees?

3. Is a Board order warranted that orders the District or the Association to pay a civil penalty or reimburse the other party's filing fee?

Summary. On the first issue, we hold that the District's refusal to arbitrate the Association's three medical insurance grievances violated ORS 243.672(1)(g).

On the second issue, the ALJ recommended that we reach the merits of the alleged contract violation and find that the District violated ORS 243.672(1)(g) when it stopped providing certain retiree medical benefits. For the reasons set forth below, we will follow our normal practice of deferring cases of this nature to arbitration to determine the parties' intent.

Finally, we conclude that a Board order directing the District to pay a civil penalty to the Association and to reimburse the Association's complaint filing fees is not appropriate.

RULINGS

1. **Motion to bifurcate hearing.** On February 13, 2003 (eight days before the scheduled hearing date), the District filed a motion to bifurcate the hearing on the arbitrability of the Association's grievances and the underlying merits asserted in those grievances. Later on February 13, the Association objected that the motion was late and stated that the Association was not seeking a Board order directing the District to arbitrate the grievances. On February 14, the ALJ sustained the Association's objections and denied the motion. OAR 115-10-045 contemplates that motions may be made as late as the hearing. As discussed below, this Board's policy is to send grievances raising arguably arbitrable matters to an arbitrator to determine the parties' intent. On the District's motion, the ALJ should have limited the scope of the hearing

and excluded evidence related to the merits of the grievance in this case, as the Board Agent did when such evidence was offered in *Luoto v. Long Creek School District 17*, 9 PECBR 9314 (1987), *aff'd* 89 Or App 34, 747 P2d 370 (1987), *rev den* 305 Or 576, 753 P2d 1382 (1988). We therefore conclude this ruling was erroneous.

2. **District motion to supplement the record.** On March 17, 2003, the District moved to supplement the record with an arbitration opinion and award issued on March 9, 2003, by Arbitrator R. Douglas Collins in a dispute between the parties. Earlier, at hearing, the Association offered and the ALJ received a copy of the underlying grievance and the parties' arbitration briefs. The ALJ received the document offered by the District. We conclude that this award does not assist in resolving the dispute before us. However, we express no view regarding whether the award would be relevant in any future arbitration proceeding.

3. **Association motion to supplement the record.** On July 14, 2003, the Association moved to supplement the record with an arbitration opinion and award issued on June 27, 2003, by Arbitrator Howell Lankford in a dispute between Hood River Education Association and Hood River School District. In addition, the Association attached to its post-hearing brief a copy of an arbitration opinion and award issued on July 6, 2002, by Arbitrator Gary Axon in a dispute between Southern Oregon Bargaining Council and the Jackson County School District No. 6, Central Point School District. The ALJ received those documents. We conclude that neither award assists in resolving the dispute before us. However, we express no view regarding whether either award would be relevant in any future arbitration proceeding.

4. **Other rulings.** The ALJ's other rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association, a labor organization, is the exclusive representative of a bargaining unit of personnel employed by the District. The District is a public employer.

COLLECTIVE BARGAINING AGREEMENTS

2. The parties' collective bargaining agreements have included the following terms in Article 24, "Early Retirement."

1989-1992 Contract:

- "A. In order to qualify for the early retirement program, a teacher must have reached the age of 58 and be qualified for retirement under PERS rules and regulations. Additionally, the teacher must have completed at least ten (10) consecutive years of full-time teaching experience with the Lincoln County School District.
- "B. Early retirement benefit. The District shall pay the premiums for medical insurance coverage only for the early retiree and spouse on the medical insurance program then in effect for the members of the bargaining unit. *The coverage shall commence the first month after the teacher retires and shall continue until and including the month in which the teacher reaches the age of 65 years.* In the event the teacher dies before reaching the age of 65 years, the surviving spouse will continue to receive the District's insurance payment (for single coverage) until the time the deceased teacher would have reached the age of 65 years.
- "C. This program will commence during the second year of this Agreement, 1990-91. In order to be eligible for the early retirement benefit during that year or during the following school year, 1991-92, the teacher must notify the District by March 1 of the year preceding the year of early retirement.
- "D. *The District and the Association expressly agree that this early retirement benefit will only be in effect during the term of the 1989-92 collective bargaining agreement. While the benefits will continue per the above provisions for any teacher who has properly opted for the program during the life of this Agreement, the program and any new teacher eligibility shall terminate on June 30, 1992.* The parties expressly agree that subsequent to the termination of this 1989-92 Agreement, the District will be under no

status quo obligation to maintain this Article. This provision is intended to be given effect by the Employment Relations Board and expresses the agreement of the parties that *the above early retirement program terminates with the termination of this agreement.*" (Emphasis added.)

1992-1995 Contract

- "A. In order to qualify for the early retirement program, a teacher must be qualified for retirement under PERS rules and regulations. Additionally, the teacher must have completed at least ten (10) consecutive years of full-time teaching experience with the Lincoln County School District.
- "B. The District shall provide monthly payments equal to one and one-half percent (1½%) of the yearly salary the retiree would have received if fully employed the following year. Such compensation shall be provided for 60 months or until age 62, whichever occurs first.
- "C. Early retirement benefit. The District shall pay the premiums for medical insurance coverage only for the early retiree and spouse on the medical insurance program then in effect for the members of the bargaining unit. *The coverage shall commence the first month after the teacher retires and shall continue until and including the month in which the teacher reaches the age of 65 years.* In the event the teacher dies before reaching the age of 65 years, the surviving spouse will continue to receive the District's insurance payment (for single coverage) until the time the deceased teacher would have reached the age of 65 years." (Emphasis added)

This language resulted from an interest arbitration in which the arbitrator adopted the Association's proposal which, *inter alia*, deleted the language that had been section D in the prior Agreement.

1995-2000 Contract. The parties continued sections A, B, and C with no change. They added section D, which varied the percentage of the stipend provided in section B depending on the school year in which the teacher retired.

3. **2000-2005 Contract.** In negotiations for a 2000-2005 contract, the parties met, wrote bargaining session notes, exchanged offers, memorialized their communications in writing, and issued newsletters. The parties eventually reached a tentative agreement and ratified it. The final agreement was fully signed as of October 23, 2001.

During the negotiations, the District proposed changes that were designed to reduce the cost of—and eventually eliminate—the early retirement program. The parties changed the title of Article 24 from “Early Retirement” to “Retirement” and modified the language to read:

“A. In order to qualify for the retirement program, a teacher must be qualified for retirement under PERS rules and regulations. Additionally, the teacher must have completed at least ten (10) consecutive years of full-time teaching experience with the Lincoln County School District.

“B. The District shall provide monthly payments equal to 1% of the yearly salary of the retiree on the date of retirement. Such compensation shall be provided for 60 months or until age 62, whichever occurs first.

Effective the date of execution of this Agreement, this stipend will be discontinued

“C. Retirement benefit. The District shall pay up to the ‘cap,’ as set by the provisions of Article 20, Fringe Benefits and Other Allowances, then in effect for the retiree at the time of retirement for medical insurance coverage only for the retiree and spouse on the medical insurance program then in effect for the members of the bargaining unit. This District contribution will not change for the balance of the retiree’s retirement. The coverage shall commence the

first month after the teacher retirees [*sic*] and shall continue until and including the month in which the teacher reaches the age of 65 years. In the event the teacher dies before reaching the age of 65 years, the surviving spouse will continue to receive the District's insurance payment (for single coverage) until the time the deceased teacher would have reached the age of 65 years or until the surviving spouse reaches 65 years, whichever occurs first. This insurance contribution for retirees will be prorated for retirees who were part-time teachers at the time of retirement.

"The teacher must notify the District at least six months prior to the time of retirement.

"This Retirement Benefit (insurance) will cease as of June 30, 2005, and will not be considered to be part of the status quo. However, nothing prevents the Association from proposing supplemental retirement proposals for the successor collective bargaining agreement.

- "D. Effective July 1, 2000, no provision of this Article will be applicable to bargaining unit members hired on and after July 1, 2000.
- "E. Notwithstanding the provisions of section C, above, members of the bargaining unit who have at least a full ten years of continuous and contiguous bargaining unit service to the District on July 1, 2002, and who retire under full PERS benefits within ten years from July 1, 2002, will be eligible for the following benefit:

"The District shall pay up to the contribution rate then in effect on the date of the retiree's retirement for the retiree for medical insurance coverage only for the retiree and spouse on the medical insurance program then in effect for the members of the

bargaining unit. This District contribution amount, or rate, will not change for the balance of the retiree's retirement. The coverage shall commence the first month after the teacher retires and shall continue for up to seven years or until and including the month in which the teacher reaches the qualifying year for Medicare whichever occurs first. * * * (Underlining in original.)

4. **Medical insurance plan.** Before the 2000-2005 contract became effective, the District provided medical insurance coverage through a trust sponsored by JBL&K, an insurance broker. That plan was a "direct write," customized plan, with terms agreed upon by the District and the Association. The JBL&K plan did not exclude from coverage a member whose spouse was over 65 or a member who became eligible for Medicare.

5. During negotiations for the 2000-2005 contract, the Association proposed switching to a health insurance plan sponsored by the Oregon School Boards Association (OSBA), the Red Book plan. That plan has standard terms that cannot be altered by a particular insured. Blue Cross/Blue Shield Marketing Representative Peg Honyak met several times with the District and Association bargaining teams to discuss the possible switch. She provided them with booklets that described the Red Book plan and several other health insurance plans offered by Blue Cross/Blue Shield.

6. The District ultimately agreed to the Association's proposal to switch from the JBL&K plan to the Red Book plan. Article 20 of the 2000-2005 contract provided that this switch would occur "effective as soon as practicable after execution of this Agreement."

7. The Red Book plan, when compared to the JBL&K plan, is less expensive, covers fewer services and expenses, has a higher deductible, and has a higher employee stop-loss.

8. The OSBA Red Book plan provides:

"When You Lose Retiree Eligibility

"If you are retired, your coverage will end on the last day of the monthly period that you turn 65, or on the first day of

the monthly period that you become eligible for Medicare, whichever happens first.

“When Your Dependents Lose Eligibility If You Are Retired
“If you are retired, coverage for your spouse will end *on the last day of the monthly period that he or she turns 65*, is granted a decree of divorce, *or on the first day of the monthly period that he or she becomes eligible for Medicare*, whichever happens first.”
(Bold in original; emphasis added.)

9. While the 1992-1995 and 1995-2000 contracts were in effect, the District paid the full medical insurance premiums for *retirees*, while *active employees* were required to pay premiums above the caps established in the respective contracts.

10. **Grievance procedure.** In Article 11, “Grievance Procedure,” of the parties’ 1992-1995, 1995-2000, and 2000-2005 contracts, the parties stated that the grievance procedure was to secure solutions to grievances “affecting teachers and their rights.”

The parties defined “grievance” as “a claim by a teacher *or the Association* that the terms of the Agreement have been misinterpreted, inequitably applied or violated.” (Emphasis added.) They defined “grievant” as “[a] teacher, group of teachers *or the Association* making the claim or presenting the grievance.” (Emphasis added.) And the contracts define a “party in interest” as “the person or persons making the claim and any person who might be required to take action * * *.”

DISTRICT IMPLEMENTATION OF THE RED BOOK PLAN UNDER THE 2000-2005 CONTRACT

11. In October 2001, to comply with Article 24 of the 2000-2005 collective bargaining agreement, the District provided retired teachers with the opportunity to enroll for coverage in the new OSBA Red Book plan that applied to currently-employed teachers. Neither retired teachers nor active teachers had the option to remain covered by the former JBL&K plan.

12. Some early retirees who enrolled in the Red Book plan were married to individuals who were over age 65. At least one retiree was eligible for Medicare.

13. Under the JBL&K plan, medical insurance coverage for retirees and their spouses continued until the *retiree* reached 65. In a January 2002 memo, the District notified early retirees that the Red Book plan covered a spouse only until the *spouse* reached 65, as follows:

“There is another change in the current medical plan that the District was made aware of after the plan was put into effect and we want to make sure that you, as retirees, are also aware of this change. Health benefits for your spouse will end when they turn 65 - not when the retiree turns 65 as it has been previously. * * *”

14. Upon District request, the Red Book plan carrier granted coverage to retirees affected by that change until the end of February 2002 to give them the opportunity to seek other coverage. At that point, coverage ceased for about 21 retiree spouses who were 65 or older.

RETIREE/SPOUSE COVERAGE GRIEVANCE

15. Former bargaining unit teacher Barbara Utterback retired in June 1999, when she was 57 and her husband was 67. She retired while the 1995-2000 collective bargaining agreement was in effect. The District paid the medical insurance premiums for her and her spouse from the date she retired until this dispute arose.

In January 2002, after Utterback's Red Book plan coverage became effective, the District told her that her spouse's coverage would end as of February 28, 2002, because he was over age 65. His coverage did end on that date. Utterback and her

husband obtained other, lesser coverage for him at their own expense.³ Other retirees affected had similar circumstances.

16. On March 20, the Association filed a grievance asserting that the District violated Article 24 by failing to provide medical insurance coverage "to District retired [*sic*] and spouses 'until and including the month in which the teacher reaches the age of 65 years.'"⁴ (Underlining in original.) On April 1, the District denied the grievance, asserting that the Association, retirees, and retirees' spouses were not proper grievants; the District also denied the grievance on the merits.

17. On April 29, the District refused to arbitrate the grievance, again asserting that the Association, the retirees, and retirees' spouses were not proper grievants.

COVERAGE FOR RETIREES ELIGIBLE FOR MEDICARE—WHITE GRIEVANCE

18. Former bargaining unit member Janice White retired from District employment, due to a disability, effective July 1, 1996. She retired under the terms of the parties' 1995-2000 collective bargaining agreement. The District provided her with medical insurance coverage as of the date of her retirement.

19. In April 1998, after a required two-year waiting period, White began to be covered by Medicare. For about four years, her medical expenses were paid by the coordination of her Medicare and District medical insurance.

³The Association asked Utterback about the effect on her of losing her husband's coverage. The District objected, stating that any financial impact was an issue for a compliance hearing, not the evidentiary hearing. The Association responded that the question was aimed at establishing that the loss of coverage had an egregious effect on Utterback and related to the Association's request for a civil penalty. The civil penalty statute, ORS 243.676(4)(a), provides that this Board can order a respondent to pay a civil penalty upon a Board determination that "the action constituting the unfair labor practice was egregious * * *." The ALJ correctly disallowed the question, ruling that the civil penalty statute involves the question of whether the *unfair labor practice violation* (in this case, the District's refusal to arbitrate or refusal to provide coverage) was egregious, as a matter of law and Board precedents, not whether the *effect of the violation on an individual* was egregious, as a matter of fact.

⁴The Association grievance quoted language that appeared in Article 24 of the parties' 2000-2005, 1995-2000, 1992-1995, and 1989-1992 collective bargaining agreements.

20. Effective October 1, 2002, after the Red Book plan became effective, the carrier terminated coverage for White and her husband.⁵ At that time, White's husband was not covered by Medicare. White and her husband obtained other coverage, at their expense.

21. In October 2002, the Association filed a grievance alleging that the termination of White's medical insurance coverage violated Article 24 of the contract. The District denied the grievance, stating that White did not have standing to file a grievance; the 2000-2005 contract's Red Book plan provided that a retiree's insurance coverage terminates when an individual is eligible for or covered by Medicare; and White was covered by Medicare.

On October 28, the Association processed the grievance to the next step. In November and December 2002, the District denied the grievance, stating that neither the Association nor White, as a retiree, was a proper grievant.

22. By letter dated December 4, the Association moved the grievance to arbitration. On December 20, the Association contacted the District about selecting an arbitrator for the White grievance. On December 23, the District refused to arbitrate the White grievance, asserting that the Association and White, as a retiree, were not proper grievants.

RETIREE MEDICAL INSURANCE PREMIUM CAP GRIEVANCE

23. The District pays early retirement stipends to retirees in the amounts specified by the collective bargaining agreement in effect at the time of their respective retirement dates.⁶

⁵The Association offered testimony about how the termination of District insurance coverage affected White, and the District objected. Because we will not consider the merits of this complaint, we reject the ALJ's ruling to allow an offer of proof on this issue.

⁶Those stipends were: 1992-1995—1½ percent of salary; July 1, 1996-June 30, 1997—1.3 percent; July 1, 1997—1.25 percent; July 1, 1998—1.15 percent; July 1, 1999—0 percent; and up to October 23, 2001 (the effective date of the 2000-2005 contract) 1.0 percent. As noted in the contract language quoted in Finding of Fact 2, over the years the parties changed the base salary on which the stipend was calculated.

24. On September 26, 2002, the District informed early retirees that: (a) Article 24 of the 2000-2005 contract provided that the District would pay up to the medical insurance premium in effect at the time of their retirement; (b) the premiums for their 2002-2003 medical insurance coverage had increased by certain amounts from the premiums for their 2001-02 coverage; and (c) the District would deduct such amounts from the early retirement stipend checks payable to the retirees, depending upon the individual's coverage, unless individual retirees chose to pay such amounts by separate checks.

25. Some early retirees retired under the terms of the parties' 1992-1995 and 1995-2000 collective bargaining agreements. One such retiree sent a letter to the District protesting that, in the contract in effect when she retired, the District had agreed to pay the insurance premiums in full; she also signed a "premium only election form," under protest, agreeing to have amounts deducted from her stipend check pending resolution of the dispute. Acting on behalf of a number of early retirees, that retiree later submitted a letter to the school board and appeared at a school board meeting to pursue a claim that the District's failure to continue paying insurance premiums in full for early retirees violated the contract.

26. In November and December 2002, the District denied the grievance. The District based its decision on its position that the Association and the retirees were not proper grievants. The District also denied the grievance on the merits, stating that the parties were bound by the terms of the Red Book plan.

27. On December 4, the Association moved the retiree insurance cap grievance to arbitration. On December 20, the Association contacted the District about selecting an arbitrator for that grievance. On December 23, the District refused to arbitrate the insurance cap grievance, asserting that the Association, retirees, and retirees' spouses were not proper grievants.

OTHER GRIEVANCES

28. In addition to the grievances that give rise to this dispute, two other grievances over the Red Book plan have arisen under the 2000-2005 agreement. One involved coverage for an active teacher; the other involved coverage for teachers who retired during the term of the 2000-2005 agreement. Both grievances went through the grievance process and concluded in arbitration.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The District's refusal to arbitrate the Association's three retiree medical insurance grievances violates ORS 243.672(1)(g).
3. We will defer to arbitration the question of whether the District's failure to provide coverage and pay medical insurance premiums for Association bargaining unit retirees and their spouses violated the terms of the parties' 1992-1995 and 1995-2000 collective bargaining agreements.
4. A Board order directing the District to pay a civil penalty to the Association and to reimburse the Association's complaint filing fees is not appropriate.

DISCUSSION

REFUSAL TO ARBITRATE

The Association first alleges that the District violated ORS 243.672(1)(g) by refusing to arbitrate medical insurance grievances filed by the Association regarding coverage of retirees' spouses, the termination of White's coverage, and premiums that retirees were required to pay.

Standing. The District argues that the Association does not have standing to pursue a grievance that the District violated the parties' collective bargaining agreement by failing to provide certain retiree medical insurance coverage. For the reasons that follow, we find that argument without merit.

We considered a similar argument in *Portland Fire Fighters' Association v. City of Portland*, 18 PECBR 723 (2000), *rev'd and remanded* 181 Or App 85, 45 P3d 162, *rev den* 334 Or 491, 52 P3d 1056, *order on remand* 20 PECBR 48A (2002). As in this case, the City asserted the Association had no standing to process or arbitrate grievances on behalf of retirees or their spouses. Similar to this case, the grievance procedure in *Portland* permitted a grievance to be filed by the Association or by "the aggrieved employee." A majority of this Board concluded that retirees were not "employees," and thus that a grievance regarding retirement provisions was not arbitrable. It further held

that the City's refusal to arbitrate that grievance therefore did not violate ORS 243.672(1)(g).

On review, the Court of Appeals disagreed with the Board majority and noted that the collective bargaining agreement's stated purpose was to establish terms for "members of the bargaining unit" and also that the parties had agreed that the grievance procedure was "the sole procedure" for resolving "any grievance or complaints" arising out of the application of the contract. 181 Or App at 92. The court expressed concern that, "if the Association could not grieve retiree health insurance disputes, there would be no remedy under the CBA for a violation of the city's obligation to 'make available to a retired employee * * * the same medical, dental and vision coverage offered to active employees.'" 181 Or App at 93. The court further observed, "The CBA's primary focus on the rights of active employees does not necessarily mean that the parties did not intend to permit the Association to grieve any other type of dispute arising out of the CBA, regardless of whom it affects." 181 Or App at 94. The court quoted a maxim that, where the arbitrability of a contract provision is at issue, this Board must order arbitration unless it can say "with *positive assurance* that the arbitration clause is not susceptible [to] an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 181 Or App at 96. The court concluded that the *Portland* contract arbitration provision was ambiguous and that "the ambiguity as to the arbitration provision's coverage demonstrates an absence of positive assurance that the dispute is *not* arbitrable, and, thus, it *is* arbitrable." 181 Or App at 96. (Emphasis in original.) On remand from the Court of Appeals, this Board concluded that the grievance was at least arguably arbitrable and ordered the City to arbitrate the grievance.

This Board's initial decision in *Portland* rested on our earlier decision in *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District*, Case No. UP-78-94, 16 PECBR 107 (1995) (*McMinnville I*). In that case, we determined that, while a grievance filed by individual retirees was not arbitrable, the Association, as a party to the contract, had the right to enforce its terms by filing a complaint under ORS 243.672(1)(g). In particular, we stated that a breach of a contract "constitutes an 'injury' to a contracting party that is actionable under ORS 243.672(1)(g) or (2)(d)." 16 PECBR at 124.⁷ Here, as in *Portland*, the Association, which

⁷See also *Washington County Police Officers Association v. Washington County Sheriff's Office*, Case No. UP-12-02, 20 PECBR 274 (2003), in which this Board ruled that the exclusive
(continued.)

negotiated the collective bargaining agreement, now seeks to enforce its terms. Thus, even if we concluded the grievance was not arbitrable, under *McMinnville I*, the Association would still have standing to seek a remedy for the asserted breach of contract. The Court of Appeals decision in *Portland* strengthens that conclusion.

Scope of grievance procedure and the positive assurance test. The Association filed grievances and claimed that the District violated terms of the parties' 1992-1995 and 1995-2000 contracts, alleging that the terms of those agreements continue to apply to retirees.⁸

ORS 243.672(1)(g) provides that it is 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 * * **" (Emphasis added.)

We analyze refusal-to-arbitrate complaints filed under ORS 243.672 (1)(g) with a broad test which we articulated in *Long Creek School District*. There we wrote:

"The emphasis in applying the positive assurance test is whether the arbitration clause is or is not susceptible to an interpretation that covers the dispute.* * * Where a contract contains what the [C]ourt in AT&T Technologies calls a 'broad' arbitration clause, application of the positive assurance test leads the mind to search for an express provision excluding the particular grievance from arbitration. If such an express exclusion is not found, and barring other 'most forceful evidence of a purpose to exclude the claim,' arbitration will be ordered." 9 PECBR at 9329. (Footnotes omitted. Underlining in original.)

⁷(...continued)

representative of a bargaining unit had standing to challenge the employer's requirement that successful applicants for bargaining unit employment, *before* being hired, sign a training cost agreement that operated *after* personnel left County employment.

⁸In other words, the Association alleged that certain terms of the 1992-1995 contract applied, during its term, to individuals *as active employees*, while other terms continued to apply to those same individuals past the term of that contract, if they retired during the term of that contract, *as retirees*.

“The question presented in [refusal to arbitrate complaints] is whether the parties agreed in their collective bargaining contract to submit the * * * grievance to arbitration. Because of the presumption of arbitrability, we must order arbitration unless we can say with positive assurance that the arbitration provision is not susceptible to an interpretation that covers the asserted dispute.” 9 PECBR at 9331.

“* * * [I]n a refusal-to-arbitrate case, this Board’s jurisdiction is limited to determining the extent of the parties arbitration agreement. We only decide, using the positive assurance test, whether the parties intended to arbitrate concerning the language at issue. We do not decide what the parties intended that language to mean.” 9 PECBR at 9333.

Here, the District argues that the retirees’ disputes are not arbitrable under the parties’ grievance procedure, and argues that *Portland* is distinguishable from this case. The District notes that the definition of “grievance” in *Portland* was broadly phrased as “any grievance or complaints” arising out of the application of the contract. 18 PECBR at 727. The District contends that the broad language in *Portland* would encompass disputes about retiree benefits. In contrast, the District argues that the parties in this case defined “grievance” in their collective bargaining agreements more narrowly: “a claim by a teacher or the Association that the terms of the Agreement have been misinterpreted, inequitably applied or violated.”⁹

The parties’ 1992-1995 and 1995-2000 contract grievance procedures contain no terms that we could interpret, with positive assurance, to exclude retiree grievances from the process. The parties agreed to arbitrate claims that the Agreement’s terms had been “misinterpreted, inequitably applied or violated.” The retirement provisions are among the Agreement’s terms. We therefore conclude the Association’s grievances regarding the District’s compliance with the retirement provisions are arguably arbitrable. The District’s refusal to arbitrate those grievances violated ORS 243.672(1)(g).

⁹The grievance procedure is phrased with identical words in the 1992-1995, 1995-2000, and 2000-2005 contracts; Finding of Fact 8.

THE MERITS OF THE ALLEGED CONTRACT VIOLATION

The Association has withdrawn its request for a Board order directing the District to arbitrate and instead requests this Board to decide the dispute under ORS 243.672(1)(g). The District argues that if it had a duty to arbitrate the grievances, this Board should follow longstanding case law and order the parties to arbitration rather than reach the merits. The ALJ recommended that we reach the merits of these grievances. We will follow our longstanding practice of deferring such disputes to arbitration, for the reasons that follow.

This Board does have jurisdiction to interpret and enforce both collective bargaining contracts and arbitration agreements. In deciding whether we will compel arbitration or determine the merits of a grievance under an ORS 243.672(1)(g) complaint, we apply four basic principles derived from the U.S. Supreme Court in the *Steelworkers Trilogy*:¹⁰

“* * * (1) [A]rbitration is a matter of contract, (2) the question of arbitrability is an issue for this Board, not the arbitrator, (3) this Board, however, in deciding whether arbitration must be ordered, does not rule on the merits of the underlying claim, and (4) arbitration will be ordered unless we can say with positive assurance that the underlying dispute is not arbitrable. The positive assurance test creates a ‘presumption of arbitrability’ that can be overcome only by an express exclusion of the grievance from arbitration or by other most forceful evidence of a purpose to exclude the claim from arbitration.”

Oregon School Employees Association v. Camas Valley School District, Case No. UP-59-86, 9 PECBR 9367, 9376 (1987).

In *Coos Association of Deputy Sheriffs v. Coos County, Board of County Commissioners and Coos County Sheriff's Department*, Case No. C-261-80, 6 PECBR 4626

¹⁰*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 US 574, 46 LRRM 2416 (1960); *Steelworkers v. American Mfg. Co.*, 363 US 564, 46 LRRM 2414 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 US 593, 46 LRRM 2423 (1960).

(1981), this Board denied the union's request that it decide the question raised by a grievance upon finding an unlawful refusal to arbitrate. We stated as a general policy:

“* * * [I]t has been long established that grievances raising arguably arbitrable matters will be sent to an arbitrator, in conformance with the parties' agreement to have disputes submitted to arbitration. This Board will not generally rule on the merits of an arguably arbitrable grievance.” 6 PECBR at 4632, n. 2.¹¹

Consistent with that policy, this Board held in *Long Creek School District 17*, 9 PECBR at 9315:

“It has long been the Board's policy to require parties to resolve breach of contract issues by their agreed-upon contractual grievance arbitration procedure where such procedures are available and where the employer has not repudiated the procedure itself but only contends that a particular grievance is not arbitrable under the contract. In such cases, the Board has determined whether the grievance was arguably arbitrable and, if so, ordered the employer to proceed to arbitration on the merits.”

This Board further held that a contractual agreement to arbitrate grievances “amounts to a waiver of the parties' right to have this Board adjudicate contract violations, * * *” 9 PECBR at 9321, n. 2.¹² In *McMinnville I*, this Board decided the merits only because

¹¹*Compare, Oregon Nurses Association v. Polk County*, Case No. C-133-82, 6 PECBR 5450 (1982) (County notified Association it was terminating the contract, then delayed arbitration by refusing to process clearly arbitrable grievances over unilateral rollback and wage freeze. Because the refusal to arbitrate was based on specious grounds, rather than a bona fide question of arbitrability, this Board ordered arbitration and, as an affirmative remedy, reinstatement of the status quo retroactively; it noted the union could still go to an arbitrator “in order to get a definitive interpretation of the language at issue or because the union believes an arbitrator may award some further relief.”).

¹²*Compare, OSEA Chapter 115 v. Pendleton School District 16R*, 8 PECBR 8223, 8230-8231 (1985), *on remand from* 73 Or App 624, 699 P2d 1155 (1985), *aff'd* 85 Or App 309, (continued...)

the grievance filed by individual retirees was not arbitrable. Thus, the parties had not waived the right to have this Board decide the alleged contract violation raised by the grievance. Here, however, the Association's grievances are arguably arbitrable. The Board would undermine the parties' agreement were it to decide the merits of these grievances.

In *West Linn Education Association v. West Linn School District*, Case No. C-151-77, 3 PECBR 1864 (1978), this Board stated that it excuses a labor organization's exhaustion of a grievance procedure when the employer repudiates the grievance procedure. In those circumstances, this Board will decide a complainant's ORS 243.672(1)(g) contract violation complaint. However, a mere refusal to arbitrate a particular grievance does not constitute repudiation of the grievance procedure. The facts in this case do not establish that the District has repudiated the grievance arbitration procedure, either in general or as applied to the Red Book plan.¹³ On the contrary, the District has processed two other grievances through arbitration, involving benefits for active or recently-retired employees under the Red Book plan.

For all the above reasons, we will order arbitration of the grievances.

¹²(...continued)

736 P2d 204 (1987), *rev den* 304 Or 55, 742 P2d 1186 (1987) (where parties' agreement did not include an internal process for resolving contract disputes, "they in effect agreed to allow this Board to function as the 'arbitrator' of grievances arising under the contract.").

¹³We note that here the District attempted to have arbitrability of the grievances determined by filing a motion to bifurcate the hearing between arbitrability and the merits of the grievances.

CIVIL PENALTY AND FILING FEE REIMBURSEMENT

The Association requests that this Board order the District to pay a civil penalty and reimburse the Association's filing fee, pursuant to ORS 243.676(4),¹⁴ and ORS 243.672(3),¹⁵ and OAR 115-35-075.¹⁶

¹⁴ORS 243.676(4) states:

"(4) The board may award a civil penalty to any person as a result of an unfair labor practice complaint hearing, in the aggregate amount of up to \$1,000 per case, without regard to attorney fees, if:

"(a) The complaint has been affirmed pursuant to subsection (2) of this section and the board finds that the person who has committed, or who is engaging, in an unfair labor practice has done so 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; or

"(b) The complaint has been dismissed pursuant to subsection (3) of this section, and that the complaint was frivolously filed, or filed with the intent to harass the other person, or both."

¹⁵ORS 243.672(3) states:

"(3) An injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice. For each unfair labor practice complaint filed, a fee of \$250 is imposed. For each answer to an unfair labor practice complaint filed, a fee of \$100 is imposed. The Employment Relations Board may, in its discretion, order filing fee reimbursement to the prevailing party in any case in which the complaint or answer is found to have been frivolous or filed in bad faith."

¹⁶OAR 115-35-075 states:

"(1) The Board may award a civil penalty of up to \$1,000 to a prevailing party in an unfair labor practice case when as a result of a hearing:

"(a) The Board finds that the party committing an unfair labor practice did so *repetitively*, knowing that the action taken was an unfair labor practice and took such action disregarding that knowledge; or that the action constituting an unfair practice was *egregious*; or

(continued...)

In paragraph 58 of its amended complaint, the Association's request for a civil penalty states: "The District's refusal to arbitrate the three grievances in this case has no reasonable basis in law or fact. * * * The refusal to arbitrate in this case is in violation of clear law and is thus egregious. ERB should award a civil penalty and filing fees given the District's knowing, egregious, and repetitive unlawful behavior." In paragraph 8 of the remedies sought in its amended complaint, the Association asserts that "the ERB has found the District to be in violation of the PECBA within the past 12 months and this ULP involves multiple actions of unlawful conduct."

The ALJ recommended that this request be denied, based on the requirement in OAR 115-35-075(2) that a request for a civil penalty must contain a "statement as to why a civil penalty is appropriate in the case under these rules, with a clear and concise statement of the facts alleged in support of the statement." We agree with the recommendation to deny the request, but we do so because we conclude the proven violation does not rise to the level required for an award of a civil penalty.

The Association argues that OAR 115-35-075(2) requires only "notice pleading" and that its amended complaint met that standard. It further argues that this Board should amend this rule to require an opposing party to object to a proposed civil penalty if it wishes to preserve the objection.¹⁷ Finally, it argues that this Board's prior

¹⁶(...continued)

"(b) The Board dismisses a complaint and finds that the complaint was frivolously filed or was filed with the intent to harass the prevailing party.

"(2) Pleadings. Any request for a civil penalty must be included in a party's complaint or answer. The request must include a statement as to why a civil penalty is appropriate in the case under these rules, with a clear and concise statement of the facts alleged in support of the statement. A party may move to amend its complaint or answer to request a civil penalty at any time prior to the conclusion of the evidentiary hearing.

"(3) Filing fee reimbursement. The Board may order filing fee reimbursement to the prevailing party in any case in which the complaint or answer is found to have been frivolous or filed in bad faith. A request for filing fee reimbursement must comply with the procedure established in subsection (2) of this rule." (Emphasis added.)

¹⁷The Administrative Procedures Act, ORS 183, governs the process for amending administrative rules. This unfair labor practice proceeding does not provide the notice and
(continued ...)

decisions do not provide sufficient guidance regarding the standard for granting or denying such a request.

The Association argues the District's conduct was "knowing, egregious and repetitive." The District, however, had a colorable defense, based on this Board's decisions in *McMinnville I* and *Portland*, that the grievance procedure language in this contract was not broad enough to reach grievances regarding retiree benefits under expired contracts. The fact that this Board rejects that defense here does not render the District's refusal to arbitrate a "knowing" violation in the narrow, legal sense in which that term is used in the statute and our rules. The thrust of this Board's decisions involving civil penalties is that "egregious" offenses are those which tend to undermine the very nature of the collective bargaining process.¹⁸ A refusal to arbitrate three closely-related grievances, without more, does not meet this standard. A civil penalty based on "repetitive" violations is most likely where the later violation is related to the earlier violation.¹⁹ That is not the case here. We therefore conclude that a civil penalty is not warranted.

Turning to the request for an order to reimburse the Association's filing fee, OAR 115-35-075(3) provides that we may order reimbursement of the filing fee to the prevailing party "in any case in which the complaint or answer is found to have

¹⁷(...continued)

opportunity for comment required for such an amendment to the rules. We therefore will not address the merits of this suggestion.

¹⁸*See, e.g., Monroe Elementary Education Association v. Monroe School District No. 25J*, Case Nos. UP-49/56-90, 13 PECBR 54 (1991) (statement interfering with an employee's protected right to join a union, without which "PECBA becomes superfluous"); *East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9195, n. 14 (1986) (distinguishing "near total disregard for well-established statutory and case law" from violations arising from "ignorance * * * or because of a belief that the law did not apply to their particular case").

¹⁹*See, e.g., Multnomah County Corrections Officers Association v. Multnomah County Sheriff's Office and Multnomah County*, Case No. UP-83-87, 10 PECBR 667, 674 (1988) (refusal to furnish information less than a month after this Board found such a refusal to be unlawful). Compare *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District*, Case No. UP-4-97, 17 PECBR 539 (1998) (*McMinnville III*) (request for civil penalty and filing fees denied; factual scenarios in prior cases within the past year involving retiree benefits were distinct)

been frivolous or filed in bad faith." The record in this case does not demonstrate that the District's answer was either frivolous or filed in bad faith. We therefore will not order reimbursement of the Association's filing fee.

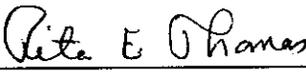
ORDER

1. The District shall cease and desist from refusing to arbitrate grievances filed by the Association regarding retiree/spouse medical insurance coverage.

2. The District shall, as soon as is practicable, proceed with the selection of an arbitrator.

3. The Association's request for a civil penalty and reimbursement of its complaint filing fee is denied.

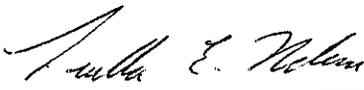
DATED this 7th day of April 2004.



Rita E. Thomas, Chair

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Paul B. Gamson, Board Member



Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Gamson has recused himself from this case.