

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-40-08

(UNFAIR LABOR PRACTICE)

TEAMSTERS LOCAL 670,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
CITY OF ONTARIO,	)	CONCLUSIONS OF LAW,
	)	AND ORDER
Respondent.	)	
_____	)	

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy Greenwald on March 24, 2009, after the matter was submitted to ALJ Larry L. Witherell by a joint stipulation of facts and accompanying exhibits on January 15, 2009. The record closed on February 9, 2009, following receipt of the parties' post-hearing briefs.

Adam S. Arms, Attorney at Law, McKanna Bishop Joffe & Arms, LLP, Portland, Oregon, represented Complainant.

Diana L. Moffat, Executive Director, Local Government Personnel Institute, Salem, Oregon, represented Respondent.

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On October 15, 2008, Teamsters Local 670 (Union) filed this unfair labor practice complaint against the City of Ontario (City), alleging that the City violated ORS 243.672(1)(g) by refusing to arbitrate four grievances. The City filed a timely answer.

The issue presented is:

Did the City violate ORS 243.672(1)(g) by refusing to arbitrate Union Grievance Nos. 08-01, 08-02, 08-03, and 08-04?

### RULINGS

The rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

1. The Union is a labor organization and the exclusive representative of a bargaining unit of all full-time employees working in the City's Street Department, Utility Maintenance Department, Water and Wastewater Treatment Plants, Shop Department, Parks and Cemetery Departments, Golf Course Department, and Engineering Department. The City is a public employer.

2. The City and the Union are parties to a collective bargaining agreement effective July 1, 2004 to June 30, 2007, which includes "ARTICLE 9 - GRIEVANCE PROCEDURE." Article 9 establishes a four-step grievance process which includes presentation of a grievance to a supervisor, the public works director, and the city manager before the grievance may be appealed to binding arbitration. Article 9 also provides:

"Section 1: Grievance Defined. A grievance for the purpose of this agreement is defined as a dispute regarding the meaning or interpretation of a particular clause of this agreement or change in City procedure or an alleged violation of this agreement. Should such a dispute arise, the following procedure shall be used:

"Section 2: Grievance Steps.

"\* \* \* \* \*

"Fourth Step: Arbitration:

"1) Upon receipt of a written request for arbitration, the office of the Federal Mediation and Conciliation Service shall be requested jointly by the parties to submit a list of five (5) proposed arbitrators. The City and the Union shall each alternately strike from the list one name at

a time until only one name shall remain upon the list. The name of the arbitrator remaining on the list shall be accepted by both parties.

“2) The decision of the arbitrator shall be final and binding. Such decision shall not add to or otherwise modify the language of this Agreement.

“\* \* \* \* \*

“Section 3: Grievance Procedures.

“A. All time periods specified in this article may be extended by mutual consent of the Union representative and the Management representative.

“\* \* \* \* \*

“C. A grievance shall be considered untimely if not presented by the employee within ten (10) calendar days of the alleged grievance or his knowledge thereof.

“D. During the process of the grievance procedure there shall be no strike or lock-out. The decision of the arbitrator shall be final upon the parties and neither party to the dispute shall seek judicial review. Should either party fail to promptly proceed with the steps of this grievance procedure or fail to [*sic*] refuse to abide by the decision of the arbitrator, the other party shall be free to take whatever action it deems necessary, and such action will not be considered in violation of this agreement.” (*Id.* at 6-7.)

3. On January 25, 2008, the Union filed Grievance No. 08-01 on behalf of one of its members (Grievant), who was employed by the City. On February 6, 2008, the Union filed Grievance No. 08-02 as a class action grievance, which included the Grievant. The parties processed Grievance Nos. 08-01 and 08-02 through the initial steps of the grievance process. On February 22, 2008, the City denied these grievances at Step 3

By separate letters dated March 3, 2008, Union Business Representative Dan Ferry notified the City that the Union was moving these grievances to Step 4 arbitration. By letter dated March 11, the City’s attorney/labor relations consultant, Diana Moffat,

notified Ferry that she would be representing the City on the two grievances in arbitration and requested that he address future correspondence on these matters to her.

4. On February 20 and February 29, 2008 respectively, the Union filed Grievance Nos. 08-03 and 08-04 on the Grievant's behalf. The parties processed Grievance Nos. 08-03 and 08-04 through the initial steps of the grievance process. The City denied these grievances on April 25, 2008 at Step 3. By separate letters dated May 5, 2008, Ferry notified the City that the Union was moving these grievances to Step 4.

5. By letter dated May 14, 2008, Moffat notified Ferry that she would be representing the City on Union Grievance Nos. 08-01, 08-02, 08-03, and 08-04, and proposed options the parties could follow to obtain a list of arbitrators.

6. On May 27, 2008, Union Attorney Adam Arms notified Moffat by e-mail that the Union wished to combine the four grievances for a single arbitration.

7. In a May 27, 2008 e-mail, Moffat told Arms that the City would not agree to combine the four grievances for arbitration, proposed that they talk about the order of presenting the grievances, and also told Arms that she wanted to schedule the grievance arbitrations as soon as possible. Arms did not respond to Moffat's e-mail.

8. On June 15, 2008, Moffat e-mailed Arms and asked that he respond to her prior e-mail. She reminded Arms that the City wanted to proceed with the arbitration process because of its exposure to ongoing damages. That same week, Moffat left a voice-mail message for Arms requesting that he call her as soon as possible regarding the scheduling of the grievance arbitrations. Arms did not respond to Moffat's e-mail or voice-mail messages.<sup>1</sup>

9. On July 7, 2008, Moffat sent Arms, Ferry, and another Union representative a letter describing the parties' prior communications regarding the four grievances, and stating:

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<sup>1</sup>The parties stipulated that (1) Interim City Manager Mike Kee would testify that around this same time he told Ferry that the Union's delay was not acceptable and requested that the Union get these matters moving, and (2) Ferry would testify that he had no recollection of this conversation. When parties submit a case through a stipulation of facts, this Board does not resolve such factual conflicts. In addition, the resolution of this conflict is not necessary for our decision.

“The City takes the position that all of these grievances have now been abandoned by the Union. It has now been 64 days since Dan [Ferry] filed the notices of intent to move to arbitration. The delay in moving forward with the request for a list of arbitrators is more than negligent, especially given the fact that the City is exposed to continuing damages.

“The City is now exercising its rights under Article 9 of the Collective Bargaining Agreement: *‘Should either party fail to promptly proceed with the steps of this grievance procedure . . . the other party shall be free to take whatever action it deems necessary, and such action will not be considered in violation of this agreement.’*” (Emphasis in original )

10. By letter dated July 10, 2008, Arms notified Moffat that he represented the Union with regard to the four grievances, and Arms then suggested various arrangements for scheduling the arbitration hearings.

11. On July 26, 2008, Moffat sent Arms an e-mail in which she reaffirmed that the City would not arbitrate the four grievances, stating:

“Our position remains that the Union has violated the CBA [collective bargaining agreement] by not pursuing these grievances in a timely manner. The delay has caused the City to be exposed to increased damages and additional lawyer fees, just to name a few. Under the CBA it is incumbent on both parties to abide by the negotiated contract. Teamsters negotiated-in the clause which the City has now invoked. I would expect Teamsters to do the same if the City had caused such a lengthy delay. A contract works both ways, so to speak. Both parties should be ‘entitled to the benefit of the bargain.’ The City, and I, did everything in our power to keep the process moving in a timely manner. All of our efforts were met with silence.”

12. In a telephone conversation on July 28, 2008, Moffat again told Arms that the City refused to arbitrate the four grievances.

13. By letter dated July 28, 2008, Arms told Moffat that the City’s refusal to arbitrate constituted an unfair labor practice under ORS 243.672(1)(g) and urged the City to reconsider its position, stating in part:

“I write to inform you that your client’s action constitutes an Unfair Labor Practice under ORS 243.672(1)(g). As I understand it, the City of Ontario claims that the grievances are not arbitrable because of an alleged

procedural violation. To be clear, Teamsters Local 670 maintains that the matters are arbitrable. Such disagreements are properly resolved by an arbitrator, not by unilateral action by one party or the other

“The Oregon Employment Relations Board addressed a similar refusal-to-bargain factual scenario in *AFSCME Local 2064 v. Benton County*, 16 PECBR 281 (1995). In that case, the ERB found that the employer committed an Unfair Labor Practice by refusing to proceed to arbitration. The ERB highlighted its longstanding rule that the ERB will not look at the facts to decide whether a grievance has been abandoned; resolution of procedural questions such as timeliness are to be left to an arbitrator. *Id.* at 285.”

14. By letter dated August 26, 2008, Arms again asked the City to move the four grievances to arbitration. Arms stated further that if the City did not agree to arbitrate the grievances by September 5, 2008, it would conclude that the City was refusing to arbitrate and would file an unfair labor practice complaint against the City.

15. By letter dated September 5, 2008, Moffat wrote Arms to confirm that the City would not proceed to arbitration on any of the pending grievances.

#### CONCLUSIONS OF LAW

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

2. The City violated ORS 243.672(1)(g) when it refused to arbitrate Union Grievance Nos. 08-01, 08-02, 08-03, and 08-04.

The Union alleges that the City’s refusal to arbitrate the Union grievances violated ORS 243.672(1)(g), which makes it an unfair labor practice for a public employer to “[v]iolate the provision of any written contract with respect to employment relations including an agreement to arbitrate \* \* \*.” The City admits it refused to arbitrate the grievances, but contends that the grievances are not substantively arbitrable. The City asserts that when the Union failed to promptly proceed with processing the grievances, the City was entitled to take “whatever action it deems necessary” and that any such action was not subject to the grievance procedure under Article 9, Section 3, D of the contract. According to the City, the Union’s only remedy is to file a new grievance to seek a factual determination as to whether the Union promptly processed the grievance.

We determine questions of substantive arbitrability under a “positive assurance” test first articulated in *Luoto and Long Creek Education Association v. Long Creek School District No. 17*, Case No. UP-16-86, 9 PECBR 9314, *aff’d*, 89 Or App 34, 747 P2d 370 (1987), *rev den*, 305 Or 576, 753 P2d 1382 (1988). We apply the following principles in our analysis:

“\* \* \* (1) arbitration is a matter of agreement, (2) the question of arbitrability is an issue for this Board, not the arbitrator, (3) this Board, however, in deciding whether arbitration should or should not be ordered will not rule on the merits of the underlying claim, and (4) arbitration will be ordered unless it can be said with positive assurance that the underlying dispute is not arbitrable.” *Portland Association of Teachers v. Portland School District No. 1*, Case No. UP-114-86, 10 PECBR 216, 227 (1987), *appeal dismissed as moot*, 94 Or App 215, 765 P2d 965 (1988).

The positive assurance test creates a “presumption of arbitrability,” under which we order arbitration when a contract contains a broad arbitration clause, unless we find express contract language or other forceful evidence that the parties intended to exclude the grievance at issue from arbitration. *Long Creek School District*, 9 PECBR at 9325.

In applying this analysis to the parties’ contract, we cannot conclude with positive assurance that the parties intended to exclude the grievances at issue from arbitration. The parties’ contract includes a broad arbitration clause which defines a “grievance” as “a dispute regarding the meaning or interpretation of a particular clause of this agreement or change in City procedure or an alleged violation of this agreement.”

The City asserts, however, that the language in Article 9, Section 3, D is evidence that the parties intended to exclude the grievances at issue from arbitration. According to the City, this language allows the City to take whatever action it wishes if the Union fails to promptly pursue a grievance, and denies an arbitrator the authority to conclude that any such action violates the contract. The Union challenges the City’s interpretation of Article 9, Section 3, D contending that it requires an arbitrator to determine whether the Union promptly proceeded with the grievance. The arguments of each party have some support in the contract language. Under the parties’ agreement, it is up to an arbitrator to resolve this dispute over the meaning or interpretation of the language. Under subsection (1)(g), we must enforce the parties’ agreement to arbitrate. In doing so, we will not rule on the merits of a grievance in deciding whether to order arbitration. As stated in *Long Creek School District*, “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. The language in Article 9, Section 3, D does not expressly exclude the subject matter of the underlying grievances from arbitration and we conclude that the grievances are substantively arbitrable.

The City also objects to arbitrating the grievances on procedural grounds, contending that the Union abandoned the underlying grievances when it failed to timely pursue necessary steps in the grievance procedure.

Once we conclude a grievance is substantively arbitrable, procedural questions, such as timeliness, will be left to the arbitrator. *Oregon State Employees Association v. Executive Department, Labor Relations Division, and Demusiak*, Case No. C-154-80, 5 PECBR 4196, 4199 (1980). See also *AFSCME Local 2064 v. Benton County*, Case No. UP-36-95, 16 PECBR 281 (1995); *Oregon Public Employees Union v. Linn County and Linn County Clerk*, UP-19-87, 9 PECBR 9430 (1987); *International Brotherhood of Electrical Workers, Local Union No. 125 v. City of Monmouth*, Case No. C-251-83, 7 PECBR 6535 (1984). While we have not previously considered the issue of arbitrability in relation to the particular contract language in Article 9, Section 3, D, we see no reason to treat this matter differently than other cases raising procedural objections to arbitration based on timeliness. Where resolution of a procedural issue depends on the interpretation of contract language, as it does here, “[i]t is not, however, this Board’s province to make such constructions of contract terms in the first instance. That is properly the job of an arbitrator.” *AFSCME Council 75 v. Labor Relations Division*, 8 PECBR at 8463. The parties have agreed to resolve their contract disputes through arbitration. The issue of whether the grievances are timely under the contract will be for an arbitrator to determine.

The City also asserts that the Union’s delay caused additional and unnecessary back pay liability to accrue. The City is certainly free to urge the arbitrator to refuse to award any back pay for the period of the Union’s delay. Such delay does not, however, permit the City to refuse to arbitrate.

### Remedy

We will order the City to cease and desist from refusing to arbitrate the underlying grievances. ORS 243.676(2)(b).

The Union also seeks a civil penalty. We may award a civil penalty to a prevailing party when we find 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

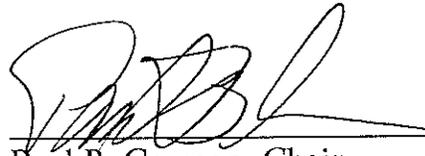
egregious.” OAR 115-035-0075(1)(a). The Union contends that a civil penalty is appropriate because the duty to arbitrate is well-established under the Public Employee Collective Bargaining Act (PECBA), and the City’s refusal to arbitrate is a knowing violation of the law.

Here, the contract language at issue is different from prior cases and unlike any we have previously considered. Accordingly, the City did not knowingly violate the PECBA and a civil penalty is not appropriate. *See McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40*, Case No. UP-4-97, 17 PECBR 539, 547-48 (1998).

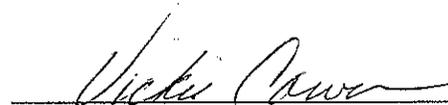
ORDER

The City shall cease and desist from refusing to arbitrate Union Grievance Nos. 08-01, 08-02, 08-03, and 08-04.

DATED this 26<sup>th</sup> day of June 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.