

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No UP-43-09

(UNFAIR LABOR PRACTICE)

MICHAEL BARKLEY and AFSCME)	
LOCAL 2451,)	
)	
Complainants,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
CITY OF KLAMATH FALLS,)	
)	
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued on May 3, 2011 by Administrative Law Judge (ALJ) Peter A. Rader, following a hearing held before ALJ B. Carlton Grew on May 11, 2010, in Salem, Oregon. The record closed on July 6, 2010, on receipt of the parties' post-hearing briefs.

Allison Hassler, Attorney at Law, Oregon AFSCME, Council 75, Eugene, Oregon, represented Complainants.

Adam S. Collier, Attorney at Law, Bullard Smith Jernstedt Wilson, Portland, Oregon, represented Respondent.

On September 14, 2009, Michael Barkley (Barkley) and AFSCME Local 2451 (Union) filed this complaint alleging that the City of Klamath Falls (City) violated ORS 243.672(1)(a), (b), (c), (d), (e), and (f) in its dealings with Barkley, the President of Local 2451. The Union also alleged the City violated ORS 243.672(1)(e) and (f) by refusing to implement the terms of a settlement agreement regarding City employee Dan Aspera (Aspera).

At the ALJ's request, the Union amended its complaint on November 17, 2009, to add a claim under ORS 243.672(1)(g) on Aspera's behalf. In a letter ruling dated December 11, 2009, which is addressed more fully below in the Rulings section, the ALJ dismissed all of Barkley's claims and the ORS 243.672(1)(e) and (f) claims filed on Aspera's behalf. The ALJ permitted Aspera's claim under ORS 243.672(1)(g) to go forward. The City filed a timely answer on April 18, 2010.

The issues in this case are:

1. Did the City of Klamath Falls reinstate Dan Aspera without his seniority in violation of a reinstatement agreement? If so, did the City violate ORS 243.672(1)(g)?

RULINGS

1. Dismissal of Claims Prior to Hearing

In a letter dated October 30, 2009, the ALJ offered Barkley the opportunity to show cause why his claims should not be dismissed as untimely under ORS 243.672(3). The letter also advised that Aspera's claims under ORS 243.672(1)(e) and (f) were either inapplicable or untimely and also subject to dismissal. The Union filed an amended complaint on November 17, 2009, but it did not cure the timeliness issues for Barkley's claims. The amended complaint properly added a claim under ORS 243.672(1)(g) alleging that the City breached the Aspera settlement agreement, but it did not cure the timeliness problem for Aspera's ORS 243.672(1)(e) claim. On December 11, 2009, the ALJ notified complainants that he would not accept evidence at hearing regarding any of Barkley's claims or Aspera's ORS 243.672(1)(e) claim and would recommend that the Board dismiss them. The complainants did not challenge the exclusion of evidence or the recommended dismissal of the claims in its post-hearing brief, by way of objections to the Recommended Order, or in any other way. We adopt the ALJ's rulings and dismiss the claims. Accordingly, the case properly proceeded to hearing solely on the issue of whether the City violated the terms of Aspera's settlement agreement in violation of ORS 243.672(1)(g).

2. Admissibility of Offers of Compromise

At hearing, the ALJ permitted, but reserved ruling on the admissibility of, testimony regarding the City's offer of compromise. The City presented evidence that the Union rejected an offer of compromise that would have theoretically disposed of the claim. The Union objected to the testimony on the grounds that Rule 408(1)(a) of the Oregon Rules of Evidence (ORE), as codified in ORS 40.190, generally precludes evidence of compromise or offers to compromise "to prove liability for or invalidity of

the claim or its amount.” Subsection (1)(b) of that rule also precludes “[e]vidence of conduct or statements made in compromise negotiations * * *.” Subsection (2)(b), however, does not require exclusion when the evidence is offered for another purpose. The City argues that the evidence is not offered to disprove liability, but to prove the Union’s bad faith by refusing an offer that provided the remedy being sought in the complaint. We disagree. For reasons discussed below, we conclude the evidence is properly excluded.

The evidentiary standard in administrative proceedings is more expansive than in the ORE, but this Board frequently defers to the ORE regarding the admissibility of certain kinds of evidence. OAR 115-010-0050(1) allows “[e]vidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs * * *.” Subsection (2) excludes “[i]rrelevant, immaterial or unduly repetitious evidence * * *.” Offers of compromise may be admissible depending on the nature of the evidence offered, its relevance to the claims being litigated, and the timing of the offer. In a case involving surface bargaining, evidence of proposals rejected in mediation was relevant to show the parties’ bargaining process and was therefore admissible. *City of Portland v. Portland Police Commanding Officers Association* and *Portland Police Commanding Officers Association v. City of Portland*, Case Nos. UP-19/26-90, 12 PECBR 424, 428 (1990). In another case, correspondence that allegedly contained offers of compromise was admitted because the nature of the statements and their context indicate that the Union was clarifying its own position and attempting to clarify the City’s position regarding arbitration. *International Union of Operating Engineers, Local 701 v. City of Portland*, Case No. UP-50-96, 17 PECBR 385, 386 (1997). Similarly, we concluded that an exchange of correspondence between counsel for the parties was relevant as evidence of the City’s willingness to engage in bargaining. *International Association of Fire Fighters, Local 1489 v. City of Roseburg*, Case No. UP-9-87, 10 PECBR 504, 505 (1998).

The offer of compromise in this case, however, differs markedly from the foregoing examples. The offer was made long after the events which gave rise to the unfair labor practice, making its relevance and probative value dubious. It did not help clarify the factual basis of the claim, and it did not tend to prove any fact relevant to this case. The City’s argument that the Union rejected the offer in bad faith was unsupported by any evidence in the record, and in any event, the admissibility of this evidence has no impact on the outcome of this case. Accordingly, we conclude that the evidence is inadmissible.

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

FINDINGS OF FACT

1. The Union is a labor organization and the exclusive representative of a bargaining unit of employees who work for the City, a public employer.

The Parties' Contract

2. The Union and the City were parties to a Collective Bargaining Agreement (Contract) in effect from July 1, 2009 to June 30, 2011.

Article 6 of the Contract contains a four-step grievance process that culminates in binding arbitration.

Article 9.1 of the parties' Contract defines seniority as "a regular employee's length of continuous service dating from his/her last date of hire with the City in any Bargaining Unit position."

Article 9.3 of the Contract explains the effect on an employee's seniority in the event of voluntary or involuntary termination:

"(a) An employee shall lose all seniority credit in the event of voluntary or involuntary termination, provided the involuntary termination is not overturned by the grievance procedure."

Article 13.3 of the Contract addresses the payment of accumulated vacation in the event of termination:

"In the event of the termination or death of an employee who has completed his/her probationary period, all accumulated vacation, up to the cap amounts, shall be paid either to the employee or to his/her heirs * * *."

Facts Giving Rise to Aspera's Termination

3. At the time of the relevant events, Joel Kuhl was the City's Director of Human Resources and Jeff Ball was the City Manager. Daniel Burdis was the Oregon AFSCME Council 75 Representative and Larry Hayes was a Union Steward and a Union Executive Board Member. Aspera was an Equipment Operator II who had worked for the City for six years in the Union bargaining unit.

4. On December 29, 2008, Aspera was involved in an off-duty physical altercation with his live-in girlfriend, who was a temporary employee of the City. She received a "fat bloody lip" as a result of the incident. Shortly thereafter, Aspera telephoned another City employee and made obscene and threatening statements to him. Aspera was subsequently arrested and jailed on charges of "Assault IV/Simple Assault and Harassment/Obscene Phone Calls." He was released from jail and ordered by the court to have no contact with his girlfriend.

5. The City commenced termination proceedings against Aspera for violating the City's Workplace Violence Policy. The Union and the City negotiated a last chance agreement that was to take effect on January 7, 2009 that would allow Aspera to continue his employment with the City. The Union and City representatives signed the agreement, but Aspera requested additional time to review its terms.

6. On January 11, 2009, before Aspera had signed the last chance agreement, he was arrested for violating the court's no-contact order with his girlfriend. The City placed him on administrative leave effective January 14, 2009.

7. On February 9, 2009, following a meeting with Aspera, Union Steward Larry Hayes, and HR Director Joel Kuhl, the City terminated Aspera's employment. The City sent him a check for his accrued wages, vacation, and leave time as required by Article 13.3 of the parties' Contract.¹

8. On February 11, 2009, the Union filed a grievance on Aspera's behalf. At a Step 3 grievance hearing on February 25, 2009, the Union, the City, and Aspera agreed that Aspera could be reinstated if he met certain conditions, including treatment for anger management and alcohol abuse.

Negotiations for the Reinstatement Letter and Last Chance Agreement

9. On February 26, 2009,² the City sent Aspera a draft of a revised last chance agreement setting out certain conditions he needed to fulfill before being allowed to return to work. The draft agreement refers to Aspera's "unpaid leave of absence" while seeking counseling/treatment.

¹The Union agrees that the City issued Aspera a check for his accrued leave balances. In its closing brief, the Union argues that the City never terminated Aspera because it paid his health insurance premiums while Aspera underwent treatment. The Union offered no credible evidence to establish that Aspera returned the check, re-purchased his leave upon his return to work, or that this arrangement arose out of the negotiations for the last chance agreement. In any case, the City terminated Aspera and issued him a check for his accrued leave in accordance with the Contract.

²The letter marked as Exhibit C-2 is dated January 26, 2009, but HR Manager Kuhl testified that the actual date of the letter was February 26, 2009. In light of the factual context in which the letter was written, we conclude that the accurate date was February 26, 2009.

10. Between February 27 and March 5, 2009, negotiations regarding the last chance agreement continued via telephone, in-person, and through e-mail, primarily between HR Director Kuhl and Field Representative Daniel Burdis. Numerous issues, proposals, conditions, and stipulations were raised, discussed, agreed to, or rejected during the negotiations, including Aspera's demotion, leave accrual, seniority, leave of absence, voluntary termination, and the length and type of counseling/treatment.

11. Seniority became an issue because it determines the order employees are laid off, their priority in shift bidding, and the order of preference in scheduling vacation and extra days off.

12. On February 27, 2009, Burdis and Kuhl exchanged the following e-mails:

Burdis wrote:

"We discussed in the meeting yesterday that he [Aspera] would not accrue sick and vacation leave, but that he would accrue seniority. This section now states that not only does he not accrue seniority, but that he loses all other rights and benefits that he has. What is the rationale for changing this from where we were at yesterday and adding the additional stipulations?"

Kuhl wrote:

"This section was written to say he would not accrue any leave (sick, vacation, etc.) or holiday time. It was then written to say he could not take advantage of sick leave donation, 3 months leave of absence (article 12.6) etc. That was the City's intention. I do not read it to say he would not accrue seniority, lose other benefits (what other benefits are you referring to?), nor did I mean to add other stipulations. Is there other language you would suggest to address your concerns?"

Burdis wrote:

"Correct on the 3 months leave of absence component, as that was what we agreed to in the meeting. It was our intent that he be allowed donations should people be willing to give them. Otherwise he is better off being unemployed, collecting unemployment, and us working out some kind of COBRA arrangement. Also, to waive all CBA and/or Personnel Rules is concerning. We think it should read to only note what is excluded. As for the donations, we'll discuss it from our end and I'll get back to you. I think we can agree with the City on the point of donations."

Kuhl wrote:

“It is the City’s position that Dan deal with this issue on his own merits - aka, he cannot rely on others to cover him financially....aka, he can use his own accruals, etc....but he cannot use donations from other City employee’s, [sic] or take advantage of other provisions of the personnel rules or union contract as noted above.”

Kuhl wrote:

“If Dan returns the check he has, everything will go back to what it was before his termination. (In essence, Finance will just void the check.) They would then turn around and issue another check to Dan only for wages through his date of dismissal as of the 9th.”

13. On March 5, 2009, an excerpt from an exchange between Burdis and Kuhl indicates that at that point the parties were still talking about an unpaid suspension or leave of absence for Aspera while he underwent counseling/treatment. Burdis wrote:

“He has already received enough economic sanctions by the City. He will be paying treatment copays, and will have had a lengthy unpaid suspension
* * *.”

14. Before the last chance agreement was finalized, Aspera, Kuhl, and Union Steward Hayes met to discuss whether Aspera would use accrued or unpaid leave during his counseling/treatment period or whether he would voluntarily terminate his employment. On the Union’s advice, Aspera chose voluntary termination because he believed it would help him obtain unemployment benefits while undergoing counseling/treatment.³ Over the City’s objections, Aspera ultimately received more than \$8,600 of unemployment benefits.

³Aspera did not recall having the option presented to him at that meeting, but Kuhl testified that it was discussed and that Aspera agreed to it. We credit Kuhl’s testimony on this issue because it is consistent with prior e-mail communications between Burdis and Kuhl in which Burdis suggested that Aspera might be better off being unemployed. Furthermore, a voluntary termination under Article 9.3 of the parties’ Contract automatically triggers a loss of seniority, an important issue that increases the likelihood that it was discussed with Aspera at that meeting.

15. On March 9, 2009, Aspera, Kuhl, Hayes, City Manager Jeff Ball, and City Attorney Rick Whitlock signed a reinstatement letter which references Aspera's termination. The letter sets out the conditions under which Aspera could return to work but omits any reference to his seniority. The letter states:

- “• You [Aspera] will be reinstated as an employe only upon successful completion of a FFDE [Fitness for Duty Evaluation] with Dr. Ross.
- “• Your reinstatement with the City will include a demotion to an Equipment Operator I. This demotion will last for a minimum of one year from the date these documents are signed, and you will not be eligible for promotion to Equipment Operator II until that time period has lapsed and an Equipment Operator II position is open/available.
- “• You will remain terminated by the City for the purpose of seeking counseling/treatment for anger management and alcohol abuse related issues through Solutions EAP [Employee Assistance Program]. You shall have no more than 12 weeks for this purpose.
- “• Upon approval/recommendation in the sole discretion of Solutions EAP, within the 12 week period, you will be referred to a Fitness for Duty Evaluation (FFDE) with Dr. Ross. A tentative appointment shall be scheduled toward the end of the 12 week period; however, you can only attend this appointment if Solutions EAP refers you for the FFDE. If you are not referred to the FFDE, or you do not pass, you will remain terminated and will not be reinstated as an employee.
- “• You will be placed on a 'Last Chance Agreement' (attached) for a period of two years starting upon the date it is signed and failure to strictly adhere to all terms and conditions of this agreement will result in your not being reinstated to employment, or, if reinstated, your termination from City employment.
- “• During the period that you are not employed by the City, but for no more than 12 weeks, the City will continue to pay your health insurance premium. If you are unsuccessful in passing a FFDE, you will be responsible, at your option, for your continuing insurance premium under the City's COBRA program.
- “• Upon the City's previous decision to terminate you as of February 9, 2009, you were mailed a check that cashed out all your accrued leave balances per Union contract and City Personnel Policies. At your option, you may keep said funds, or you may purchase back your leave accruals at the following rates:

"VACATION	\$2,561.76	136 hours vacation time
"FLOATING HOLIDAY	\$ 188.37	10 hours floating holiday time
"SICK LEAVE	\$1,167.86	248 hours sick time
"	\$3,971.99	394 hours total accrued time

"You will be required to sign both this letter and the attached Last Chance Agreement. If you have any questions about either document, or the expectations outlined therein, please feel free to contact, [*sic*] myself, either of your Union representatives, or City Manager Jeff Ball.

"This agreement and the terms therein shall be non-precedent setting between the parties." (Emphasis in original.)

16. On March 9, 2009, the same parties, plus Burdis, signed a last chance agreement. The agreement establishes conditions Aspera must meet to get "a final opportunity for continuing employment." That agreement, which lasts for two years, does not refer to Aspera's seniority but does state that "[e]mployee will remain terminated for up to 12 weeks for the purpose of seeking counseling/treatment through Solutions EAP." The agreement also includes the following integration clause:

"I fully understand the terms and conditions of this Agreement and acknowledge that there are no other agreements with the City, expressed or implied, that vary these terms. I also understand that, except as expressly stated in this Agreement, any other terms and conditions of my employment will be determined by the City's Policies, and the Collective Bargaining Contract between the City and the Union."

17. On May 29, 2009, Kuhl wrote to Aspera confirming his termination and acknowledging his successful completion of counseling/treatment with Solutions EAP. The letter reminded Aspera that he was still required to pass the FFDE scheduled with Dr. Amy Ross before being reinstated.

"Per your agreement with the City, you were terminated with the City and were given a period of no more that 12 weeks for the purpose of seeking counseling/treatment for anger management and alcohol abuse related issues. According to Wendy Strode from Solutions EAP, you have been participating in said counseling/treatment to the point that she has recommended/referred you for a Fitness For Duty Evaluation (FFDE).

"A FFDE has been scheduled for you with Dr. Amy Ross. Your appointment is scheduled for 1:00 PM, Monday, June 1, 2009 * * *. Please keep in mind, as per the 'Decision following Step 3 grievance hearing' sent to you March 9, 2009, if you fail to attend or pass this FFDE, you will remain terminated and will not be reinstated as a City employee."

18. On June 19, 2009, five weeks after the reinstatement letter and last chance agreement were signed, Kuhl and Burdis had the following e-mail exchange:

Burdis wrote:

"Also, I checked my notes, and my recollection was correct. We did discuss seniority, and those discussions were that Dan would be retaining it. We did not discuss details, so we'd need to figure out whether the time he was out of work would count toward his seniority or not. Since he was receiving treatment for a FMLA [Family Medical Leave Act] covered illness it would make sense to treat it the same as unpaid sick leave in Article 12.6. Let us know."

Kuhl wrote:

"None of the City's notes say anything about Dan retaining seniority. I do not know if Rick or Jeff's recollection would be the same or not, and I will defer to them. Otherwise, my position remains unaltered, Dan voluntarily terminated and therefore, under the contract forfeits all seniority rights.

"If Jeff or Rick remember differently, my position would be that Dan's seniority needs to be adjusted by the amount of time he was out. I have difficulty to your reference to again [*sic*] as it was Dan's decision to terminate, therefore, as he was no longer considered an employee at that time, there is no FMLA protection."

19. Aspera passed his FFDE and returned to work on June 22, 2009. He was directed to report to the Human Resources office to undergo the process for all new hires.

20. On July 2, 2009, the Union filed a grievance challenging the loss of Aspera's seniority but, following City Manager Jeff Ball's denial at Step 3 of the grievance process, the Union declined to pursue binding arbitration under the grievance procedure.

21. On September 1, 2009, Ball wrote to Aspera informing him of his reasons for denying the grievance:

"Of greatest concern was the suggestion that Joel Kuhl, former HR Manager, may have suggested that seniority would be restricted during the prior Step 3 proceedings. City Attorney Rick Whitlock did contact Mr. Kuhl and Larry Hayes and determined that the only discussions about seniority restoration involved Mr. Aspera's option to remain a City employee under suspended status, an option he did not choose.

"Under these circumstances, I agree with the prior Step 1 and Step 2 Decisions of Mr. Cox and Mr. Willrett for the reasons they stated. The bottom line is that the language of the CBA is clear and ignoring it in this instance would be to the detriment of at least two other Streets employees.

"I do appreciate your position that the prior disciplinary action may not have survived an arbitration. Challenging the termination beyond Step 3 certainly was an option for Mr. Aspera. However, it was an option not taken and I do not see its relevance now."

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The City did not violate ORS 243.672(1)(g) when it reinstated Dan Aspera without restoring his seniority.

DISCUSSION

This is a dispute about seniority. Aspera, a member of the Union bargaining unit, worked for the City for 6 years. He was involved in an off-duty domestic dispute with his live-in girlfriend and was jailed on charges of assault and harassment. The City began proceedings to dismiss him. The City and the Union negotiated a last chance agreement that would allow Aspera to continue working, but before the parties signed it, Aspera was arrested for violating a court-ordered condition of his release.

The City fired Aspera and the Union filed a grievance. The parties continued negotiations and agreed to reinstate Aspera if he met specified conditions, including anger management counseling and treatment for alcohol abuse. Early in the negotiations, the parties discussed Aspera's working conditions if he were to be reinstated, including

his right to “accrue seniority.” Before the parties signed the agreement, the City offered Aspera the option to use either unpaid leave during the period of his counseling and treatment, or instead to voluntarily terminate his employment. Aspera chose to voluntarily terminate his employment with the City to enhance his chances to receive unemployment benefits while he was in treatment.

The parties agreed to and signed both a reinstatement letter and a last chance agreement. The documents contain conditions for Aspera’s reinstatement and his continuing employment. Neither mentions seniority. Aspera met the conditions and was reinstated. The City refuses to restore the seniority Aspera accrued before he chose to voluntarily terminate his employment. Article 9.3 of the parties’ collective bargaining agreement provides that an employee who voluntarily terminates employment loses all accumulated seniority.

The Union asserts that the City’s refusal to restore Aspera’s seniority violates both the reinstatement letter and the last chance agreement. According to the Union, the City’s actions violate ORS 243.672(1)(g), which makes it an unfair labor practice for a public employer to breach the terms of a written contract. The Union challenges the loss of Aspera’s seniority based on representations the City made during negotiations for the reinstatement letter and last chance agreement. It contends those negotiations clearly reflect the City’s promise to restore Aspera’s seniority. The Union also argues that the automatic loss of seniority, which occurs as a result of termination under Article 9.3 of the parties’ Contract, does not apply to terminations that are overturned through the grievance process. Finally, the Union contends that if Aspera were truly terminated, he would not have been given the option of repurchasing his leave balances or have his health care premiums paid while undergoing counseling/treatment.

The City argues that 1) the negotiated last chance agreement makes no reference to preserving Aspera’s seniority; 2) the last chance agreement states that any terms and conditions of employment not covered by the agreement will be determined by the parties’ Contract, which provides for the loss of seniority in the event of voluntary termination; 3) Aspera made an informed decision to voluntarily terminate his employment, rather than use accrued or unpaid leave, in order to increase his chances of obtaining unemployment benefits; and 4) the City processed Aspera’s termination as it would for any other terminated employee.

The City also raised, for the first time in its closing brief, the affirmative defense that the Union failed to exhaust its administrative remedies by not pursuing the grievance to binding arbitration under Article 6 of the Collective Bargaining Agreement. That affirmative defense was not pled in the City’s Answer. It is therefore untimely and we will not consider it. OAR 115-035-0035(1); *Lebanon Education Association/OEA v. Lebanon Community School District*, UP-4-06, 22 PECBR 323, 325 (2008).

The Union asserts the City violated ORS 243.672(1)(g). Subsection (1)(g) makes it an unfair labor practice for a public employer or its designated representative to “[v]iolate the provisions of any written contract with respect to employment relations * * *.” A written grievance settlement is a “contract with respect to employment relations” within the meaning of subsection (1)(g). *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County*, Case No. UP-77-96, 17 PECBR 451, 462 (1997). Contracts arising out of the collective bargaining process are interpreted in the same manner as other contracts. *Portland Fire Fighters’ Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491 (2002) (citing *OSEA v. Rainier School Dist. No. 13*, 311 Or 188, 194, 808 P2d 83 (1991)).

To interpret a contract, we follow the three-part analysis we described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005). We first examine the text of the disputed contract language in the context of the document as a whole and, if the provision is clear, the analysis ends. Unambiguous contracts must be enforced according to their terms. *Portland Fire Fighters’ Assn.* at 91. Contract language is ambiguous if it can be given more than one plausible interpretation. *Id.* If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties’ intent. “[W]e will examine the parties’ prior actions or practice as an aid to contract interpretation *only if* the contract language is ambiguous.” *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09, 23 PECBR 416, 425 (2009) (emphasis in original). Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 364, 937 P2d 1019 (1997).

Accordingly, we first look to the language of the reinstatement letter and last chance agreement for evidence of the parties’ intent regarding Aspera’s status while undergoing counseling/treatment and his seniority upon his return to work. As a general rule, parties are strictly bound to agreements they have signed, and this Board will not rewrite or reconstitute the language of those agreements. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4 and Larson*, Case No. C-184-78, 5 PECBR 2889, 2895 (1980), *remanded for further proceedings on other matters*, 52 Or App 881, 630 P2d 1304 (1981), *order on remand*, 6 PECBR 4953 (1981).

At the outset, it is important to understand the scope of the Union’s arguments. It does not (and could not successfully) argue that the statements the City made during negotiations regarding Aspera’s seniority are themselves enforceable agreements under subsection (1)(g). Subsection (1)(g) applies only to “written agreements,” and the Union concedes that seniority is not addressed in the parties’ written agreements. Instead, the Union argues that the statements in negotiations are “extrinsic evidence” of the parties’ intent. (Complainant’s Closing Brief at 4.) As explained earlier, we consider extrinsic

evidence only when the language of an agreement is ambiguous. For reasons discussed below, we conclude that the language of the parties' agreement is unambiguous, and the law therefore precludes us from considering extrinsic evidence of the parties' intent.

Neither the reinstatement letter nor the last chance agreement address Aspera's seniority, but both documents refer numerous times to his termination. The reinstatement letter—signed by Aspera, Union Steward Hayes, HR Director Kuhl, and the City's Manager and Attorney—refers to Aspera's termination in four separate clauses. It refers to his reinstatement three times, but only upon successful completion of certain conditions. The last chance agreement similarly refers to Aspera's employment status as terminated pending successful completion of all agreed-upon conditions. The letter expressly states that Aspera will remain terminated if he fails to meet the conditions.

Although the last chance agreement is silent as to Aspera's seniority, it states that any terms of employment not addressed in that agreement will be determined by the parties' Contract. The integration clause of the last chance agreement further states that there are no other agreements, express or implied, that vary its terms, and that any other terms of employment will be determined by the parties' Contract. Article 9.1 of the Contract provides that seniority is based on *continuous* service. Article 9.3 states that an employee shall lose all seniority credit in the event of *voluntary or involuntary* termination, unless the *involuntary* termination is overturned by the grievance process. Based on the parties' Contract, Aspera's *continuous* service ended when he elected to *voluntarily terminate* his employment in order to increase his chances of receiving unemployment benefits. Accordingly, we find nothing ambiguous in either the reinstatement letter or last chance agreement regarding Aspera's status as a terminated employee. Likewise, there is nothing ambiguous under the Contract about the automatic loss of seniority that occurs when an employee voluntarily terminates employment.

As a result, we need not proceed to the second step of the contract analysis, and thus will not consider extrinsic evidence of the parties' intent.⁴ In the context of collective bargaining, this Board has held that negotiating is a process of give and take in which proposals may be advanced at one stage of negotiations and withdrawn at another, depending upon their relationship to other proposals before the parties. *Redmond Education Association v. Redmond School District 2J*, Case No. C-5-78, 4 PECBR 2086, 2091 (1978), *aff'd* 42 Or App 523, 600 P2d 943, *rev den*, 288 Or 173 (1979). The parties' initial negotiations regarding the retention of Aspera's

⁴In any event, the proffered extrinsic evidence does not help the Union. The parties' discussion concerned whether Aspera "would accrue seniority" when he was reinstated. This appears to address his right to accrue seniority from the date of his reinstatement and into the future; it does not address his right to retain the seniority he previously accumulated with the City before he voluntarily terminated his employment.

seniority were based on the assumption that he was using accrued or unpaid leave during counseling/treatment. Aspera's decision to voluntarily terminate his employment changed that.

The fact that negotiations surrounding Aspera's termination resulted in certain conditions favorable to him, such as the option to buy back his accrued leave and the City's continued payment of his health care premiums for a short period, does not alter the fact that he agreed to terminate his employment. We find nothing in this record which indicates that these conditions were intended to change his terminated status.

Finally, we find no merit to the Union's contention that under the Contract, Aspera retains his accumulated seniority because his termination was overturned by the grievance process. Article 9.3(a) of the parties' Contract provides: "An employee shall lose all seniority credit in the event of voluntary or involuntary termination, provided the involuntary termination is not overturned by the grievance procedure." This language is clear. An employee loses accumulated seniority in the event of a voluntary or involuntary termination. The seniority can be restored only if the *involuntary* termination is overturned through the grievance process. Here, Aspera chose to *voluntarily* terminate his employment, so the grievance exception in the Contract does not apply.

Based on the foregoing, the Union did not meet its burden to prove by a preponderance of the evidence that the City violated ORS 243.672(1)(g) when it refused to restore Aspera's seniority following his voluntary termination. Accordingly, we will dismiss the complaint.

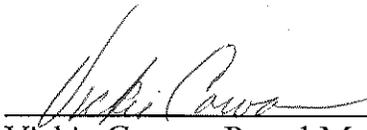
ORDER

The complaint is dismissed.

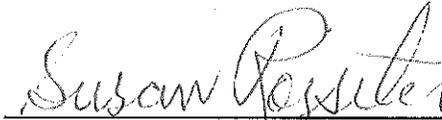
DATED this 17 day of October 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.