

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. AR-001-13

(PETITION FOR REVIEW OF ARBITRATION AWARD)

IN THE MATTER OF AN ARBITRATION )  
 BETWEEN THE STATE OF OREGON, )  
 DEPARTMENT OF HUMAN SERVICES, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 SERVICE EMPLOYEES INTERNATIONAL )  
 UNION, LOCAL 503, OPEU, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RULINGS,  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

On March 22, 2013, the State of Oregon, Department of Human Services (DHS), filed a petition for review of a March 11, 2013, grievance arbitration award involving DHS and the Service Employees International Union, Local 503, OPEU (SEIU). SEIU filed a timely answer to the petition. A hearing was conducted by Administrative Law Judge (ALJ) Wendy L. Greenwald on August 6, 2013. The record closed on August 23, 2013 with the submission of the parties' closing briefs. The ALJ drafted the Findings of Fact, and on October 7, 2013, the matter was submitted directly to the Board for decision.

Stephen D. Krohn, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Petitioner.

Christy Te, Legal Counsel, SEIU Local 503, OPEU, Salem, Oregon, represented Respondent.

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DHS alleges that the award is unenforceable under ORS 240.086(2)(d) and ORS 243.706(1) because reinstatement of the grievant would violate public policy as established by ORS 419B.010. SEIU disagrees, arguing that the award ordering the grievant's reinstatement does not violate any clearly defined public policy and must be enforced.

The issue is:

Is the March 11, 2013 arbitration award enforceable under ORS 240.086(2)(d) and ORS 243.706(1)?

For the reasons set forth below, we conclude that the arbitration award is enforceable under ORS 240.086(2)(d) and ORS 243.706(1), and we will deny DHS's petition.

### RULINGS

1. The parties submitted four joint exhibits, including the collective bargaining agreement (J-1), the disputed arbitration award (J-2), DHS's petition (J-3), and SEIU's answer (J-4). These exhibits are received as evidence.

2. DHS also offered several additional exhibits and witness testimony concerning some of those exhibits. SEIU objected to the admission of Exhibits P-6 through P-13, and the testimony of Stacy Ayers and Karyn Schimmels concerning Exhibits P-6, P-7, P-8 and P-9. SEIU contends that the documents and testimony are irrelevant.<sup>1</sup>

In cases reviewing arbitration awards, the only evidence that is relevant is the parties' contract, the arbitration award, and evidence related to any claimed public policy exception. *In the Matter of the Arbitration of a Dispute Between State of Oregon, Department of Human Services, Oregon State Hospital v. American Federation of State, County and Municipal Employees, Local 3295*, Case No. AR-01-08, 23 PECBR 712 (2010), *AWOP*, 244 Or App 137, 257 P3d 1021 (2011), *rev den*, 351 Or 649 (2012). The only sources of public policy that we may rely on are statutes and judicial decisions, and we may not consider "administrative rules, employment manuals, office policies, or proclamations by administrative officials." *Washington Cty. Police Assn. v Washington Cty.*, 335 Or 198, 205-06, 63 P3d 1167 (2003). In addition, the Court of Appeals has ruled that the testimony of witnesses regarding the public policy implications of reinstating a grievant is "entirely irrelevant" to our inquiry. *Salem-Keizer Assn. v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 28, 61 P3d 970 (2003).

Exhibits P-6 through P-9 consist of excerpts of DHS's training manuals and website concerning the obligation to report child abuse. These administrative materials are not relevant to our analysis. Consequently, Exhibits P-6 through P-9 are not admitted, and we will not consider the testimony of Ayers and Schimmels related to those exhibits.

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<sup>1</sup>SEIU did not object to the admission of Exhibit P-5, a copy of the current statutes pertaining to the requirement that certain public and private officials immediately report suspected child abuse to the appropriate authorities (ORS 419B.005 through ORS 419B.050). This exhibit is received.

Exhibits P-10 and P-11 are judicial decisions related to ORS 419B.010, which DHS contends support its public policy argument. As such, the decisions are relevant and are received.<sup>2</sup> Exhibits P-12 and P-13, which include legislative history related to ORS 419B.010, are also received into the record as evidence related to the public policy exception asserted by the State.

FINDINGS OF FACT<sup>3</sup>

1. SEIU, a labor organization, and DHS, a public employer, were parties to a collective bargaining agreement that expired June 30, 2013. The agreement included the following provisions, in relevant part:

**“ARTICLE 20--INVESTIGATIONS, DISCIPLINE, AND DISCHARGE**

**“Section 1.** The principles of progressive discipline shall be used when appropriate. Discipline shall include, but not be limited to: written reprimands; denial of an annual performance pay increase; reduction in pay [footnote deleted]; demotion; suspension without pay [footnote deleted]; and dismissal. Discipline shall be imposed only for just cause.

“\* \* \* \* \*

**“ARTICLE 21--GRIEVANCE AND ARBITRATION PROCEDURE**

[Described a grievance procedure that culminates in binding arbitration and included the following provisions:]

**“Section 1.** Grievances are defined as acts, omissions, applications, or interpretations alleged to be violations of the terms or conditions of this Agreement.

“\* \* \* \* \*

“All grievances shall be processed in accordance with this Article and it shall be the sole and exclusive method of resolving grievances \* \* \*.

“\* \* \* \* \*

**“Section 6. Arbitration Selection and Authority.**

“\* \* \* \* \*

“(f) The Parties agree that the decision or award of the arbitrator shall be final and binding on each of the Parties. \* \* \* The arbitrator shall have no authority to rule contrary to, to amend, add to, subtract from, change or eliminate any of the terms of this Agreement.”

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<sup>2</sup>Judicial decisions are not evidence, and are solely considered as part of the record pertaining to DHS’s public policy arguments.

<sup>3</sup>Findings of Fact 2 through 8 are taken from the arbitration award. The remaining Findings of Fact are taken from the joint exhibits submitted by the parties.

2. DHS employed the grievant from January 1, 1986, until her dismissal on September 1, 2011. During 2011, the grievant was employed as a social services specialist in DHS's Child Welfare Program's Resource Unit. Grievant was a member of the SEIU bargaining unit.

3. As a DHS employee, the grievant was required to immediately report suspected child abuse under ORS 419B.010.<sup>4</sup>

4. On September 1, 2011, DHS terminated the grievant's employment for failure to make a timely report of child abuse under ORS 419B.005 and ORS 419B.010.

5. On October 13, 2011, SEIU filed a timely grievance over the grievant's dismissal. On November 19 and 20, 2012, the parties participated in an arbitration hearing. The parties agreed that the issues before the arbitrator were:

"Was [Grievant] terminated for just cause?"

"If not, what is the appropriate remedy?"

6. On March 11, 2013, the arbitrator issued her award. The arbitrator concluded that DHS met its burden of establishing that the grievant had engaged in misconduct by failing to make a timely report of suspected child abuse as required by ORS 419B.010. The arbitrator summarized her conclusions as follows:

"I have found that the Employer established the misconduct as charged and that Grievant failed to immediately report suspected child abuse. I agree with the Employer that this is a serious offense that cannot be excused for the reasons argued by DHS; and I do not excuse Grievant from her misconduct."

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<sup>4</sup>Under ORS 419B.005(4)(e), DHS employees are included in the group of public and private officials who are required to report suspected child abuse. In turn, ORS 419B.010 states in relevant part that:

"(1) Any public or private official having reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child shall immediately report or cause a report to be made in the manner required in ORS 419B.015. \*\*\*

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"(5) A person who violates subsection (1) of this section commits a Class A violation. Prosecution under this subsection shall be commenced at any time within 18 months after commission of the offense."

7. Having concluded that the grievant had engaged in the misconduct alleged, the arbitrator examined whether there were relevant mitigating factors present. The arbitrator noted that grievant had worked for DHS for 25 years with satisfactory work performance and no disciplinary history, had shown remorse for her actions, and had voluntarily undertaken and completed additional training in recognizing and reporting child abuse. After discussing these mitigating factors, the arbitrator concluded that DHS did not have just cause to terminate the grievant, instead finding “the appropriate discipline to be a 60-day unpaid suspension.”

8. Consistent with her conclusion, the arbitrator issued an award that required DHS to immediately reinstate the grievant and make her whole for lost back pay and benefits, excluding the 60-day unpaid suspension.

9. DHS refused to reinstate the grievant. On March 22, 2013, DHS filed its petition seeking review of the award.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The March 11, 2013 arbitration award is enforceable under ORS 240.086(2)(d) and ORS 243.706(1).

#### DISCUSSION

Under Article 21 of the collective bargaining agreement, DHS and SEIU agreed to resolve disputes arising under that contract by submitting the matter to arbitration, and further agreed that the decision or award issued by the arbitrator would be final and binding on them both. Despite this agreement, DHS now seeks to have this Board declare the arbitration award ordering the grievant’s reinstatement unenforceable.

It is by now axiomatic that public policy strongly favors the use of binding arbitration to resolve labor disputes. *See generally, Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08, 23 PECBR 671, 685-86 (2010) (discussing the public policies served by the use of binding arbitration). When we review arbitration awards under ORS 240.086(2) and ORS 243.672, we may only subject them to “sparing review, in the interests of promoting the efficiency and finality of arbitration as a decision-making process for those who contract to use it.” *Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App 559, 563, 679 P2d 868, *rev den*, 297 Or 458 (1984). Although the present case involves a challenge to an arbitration award under ORS 240.706(1), we see no reason to treat it any differently. Further, we do not review the arbitrator’s decision to determine whether it is right or wrong, and we enforce the decision even if we believe it was erroneous. *Portland Association of Teachers and Hanna v. Portland School District 1J*, Case No. UP-64-99, 18 PECBR 816, 836-37 (2000), *ruling on motion to stay*, 19 PECBR 25 (2001), *AWOP*, 178 Or App 634, 39 P3d 292, *rev den*, 334 Or 121, 47 P3d 484 (2002).

When parties agree to utilize binding arbitration as the sole means of resolving contractual grievances, as DHS and the Union did here, they agree to accept the arbitrator's interpretation of their contract. So long as the arbitrator's award is based on his or her interpretation of the contract language, the parties are bound by that decision unless a statutory exception applies. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986).

However, the deference given to arbitration awards is not without limitations. DHS filed its petition under ORS 240.086(2), which grants this Board authority to review arbitration awards issued in disputes between a state agency and the exclusive representative of the agency's employees.<sup>5</sup> Under this statute, we will enforce arbitration awards unless certain enumerated exceptions are established. DHS argues that the award is unenforceable under the exception set forth under ORS 240.086(2)(d), which precludes enforcement of awards where "[t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."<sup>6</sup> Specifically, DHS contends that the award violates public policy and is unenforceable under ORS 243.706(1), which states that:

"A public employer may enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in binding arbitration or any other dispute resolution process agreed to by the parties. As a condition of enforceability, any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work."

When a party alleges that an arbitration award that reinstates an employee is unenforceable under this public policy exception, we review the claim by applying a three-part analysis. First, we determine whether the arbitrator found that the grievant engaged in the misconduct for which discipline was imposed. If so, we then determine if the arbitrator reinstated or otherwise relieved the grievant of responsibility for the misconduct. If both of these tests are met, we then determine

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<sup>5</sup>This Board also reviews arbitration awards in the context of unfair labor practice complaints alleging violations of ORS 243.672(1)(g) and 243.672(2)(d) (refusal to accept the terms of an arbitration award when the parties have agreed to accept the awards as final and binding). We apply the same "sparing review" standard to arbitration awards under ORS 240.086(2) that we apply in reviewing arbitration awards under subsections (1)(g) and (2)(d). *See Fed. of Ore. Parole Officers v. Corrections Div.*, 67 Or App at 563; *In the Matter of the Arbitration Between the State of Oregon, Department of Transportation v. State Employees International Union Local 503, Oregon Public Employees Union*, Case No. AR-1-06, 21 PECBR 838, 842 (2007).

<sup>6</sup>DHS does not assert a "typical" ORS 240.086(2)(d) claim that the arbitrator lacked the authority to decide the grievance as presented or that a final and definite award was not made on the matter. Rather, the sole contention advanced by DHS is that the arbitration award is contrary to public policy and, therefore, is unenforceable under ORS 243.706(1) and ORS 240.086(2)(d).

if the award violates a clearly defined public policy expressed in statutes or judicial decisions. *Portland Police Association v. City of Portland*, Case No. UP-023-12, 25 PECBR 94, 111 (2012), *appeal pending*; see also *Deschutes County Sheriff's Association v. Deschutes County and Deschutes County Sheriff's Office*, Case No. UP-55-97, 17 PECBR 845, 860 (1998), *rev'd and rem'd*, 169 Or App 445, 9 P3d 742 (2000), *rev den*, 332 Or 137, 27 P3d 1043 (2001), *order on remand*, 19 PECBR 321 (2001).

The courts have narrowly construed this public policy exception. Specifically, the courts have stated that the statute does not permit this Board to overturn an arbitrator's award because we believe that an employee's conduct violates public policy. Rather, "[t]he proper inquiry \* \* \* is whether the *award itself* complies with the specified kind of public policy requirements." *Washington Cty.*, 335 Or at 205 (emphasis in original). In other words, as applied to this case, does an award ordering reinstatement of an employee who did not make a timely mandatory report under ORS 419B.010 "fail to comply with some public policy requirements that are clearly defined in the statute or judicial decision?" *Id.* For us to answer this question in the affirmative, it is not enough for there to be a statute or judicial decision that clearly defines a public policy requiring an individual to comply with the reporting obligations of ORS 419B.010; rather, a statute or judicial decision must contain a clearly defined public policy against reinstating an employee who was has not complied with those reporting obligations. See *Washington Cty. Police Assn. v. Washington Cty.*, 187 Or App 686, 691-92, 69 P3d 767 (2003). Finally, the courts have explained that, to be "clearly defined," the statute or judicial decision "must outline, characterize, or delimit a public policy in such a way as to leave no serious doubt or question respecting the content or import of that policy." *Washington Cty.*, 335 Or at 205-06.

With this limited scope of review in mind, we now apply these standards to the award at issue here. There is no dispute that the arbitrator found that the grievant had engaged in the misconduct for which DHS terminated her: failing to timely report suspected child abuse. In the award, the arbitrator summarized her conclusions, stating that "I have found that the Employer established the misconduct as charged and that Grievant failed to immediately report suspected child abuse. I agree with the Employer that this is a serious offense that cannot be excused for the reasons argued by DHS; and I do not excuse Grievant from her misconduct." There is also no dispute that the arbitrator ordered that the grievant be reinstated, her misconduct notwithstanding. The arbitrator concluded that DHS did not have just cause to terminate the grievant, instead holding that a 60-day unpaid suspension was the appropriate disciplinary sanction. Thus, the first two of the three tests are satisfied and the outcome of our analysis hinges on whether there is a clearly defined public policy that renders the award unenforceable.

DHS claims that the award violates the public policy embodied in ORS 419B.005, 010, and 015, which require certain public and private officials (including the grievant) to immediately report suspected child abuse or face prosecution for a Class A violation. This mandatory reporting requirement reflects the declaration of public policy found in ORS 419B.007, which states that:

“The Legislative Assembly finds that for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child by stabilizing the family and improving parental capacity, it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports.”

To be sure, these statutes establish a clearly defined public policy that required the grievant to immediately report suspected abuse. Additionally, there is no dispute that the arbitration award concluded that the grievant’s conduct violated this clearly defined public policy.

However, the statutes cited by DHS are not statutes “about employment or reinstatement.” See *Washington Cty.*, 335 Or at 206. Moreover, as noted above, the court has told this Board that the “precise question” to be answered “is not whether public policy dictates that” the grievant should have immediately reported the suspected abuse. See *Washington Cty.*, 187 Or App at 691-92; see also *Salem-Keizer Sch. Dist. 24J*, 186 Or App at 25 (“whether the underlying conduct violates public policy is not the relevant inquiry”). Rather, the question before us is whether some statute or judicial opinion outlines, characterizes, or delimits a public policy against reinstating a public or private official (such as the grievant) who has not complied with the reporting requirements of ORS 419B.010. See *Washington Cty.*, 187 Or App at 691-92. Moreover, if there is such a statute or judicial decision, “does the statute or decision articulate that policy in such a way as to leave no serious doubt or question respecting the content or import of that policy”? *Id.*

DHS has not cited (and we have not located) any particular statute or judicial decision that clearly prohibits the reinstatement of a public or private official who fails to comply with the reporting requirements under ORS 419B.010.<sup>7</sup> Therefore, the arbitration award is enforceable. See *Washington Cty.*, 335 Or at 207 (arbitration award is enforceable under ORS 243.706(1), unless a statute or judicial decision “contains a clearly defined public policy that would preclude the employee’s reinstatement”).

Our determination is consistent with previous decisions by the courts. For example, in its order on remand from the Supreme Court in *Washington Cty.*, the Court of Appeals held that an arbitration award that reinstated a public safety officer who admitted to off-duty marijuana use was enforceable because there was no clear statute or judicial decision that prohibited an arbitration award from reinstating a public safety officer who engaged in such conduct. Consequently, the employer committed an unfair labor practice when it refused to implement that arbitration award.

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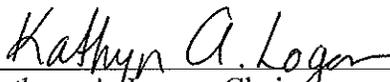
<sup>7</sup>DHS submitted two cases in support of its public policy argument. However, these cases do not involve the question of whether there is a public policy that prohibits an arbitration award from reinstating an employee who fails to comply with ORS 419B.010. Rather, they discuss, in general terms, the importance of the policies underlying the mandatory reporting requirements, which is not in dispute. See *State ex rel Juv. Dept. v. Spencer*, 198 Or App 599, 108 P3d 1189 (2005) (discussing abrogation of the privilege for communications between a psychotherapist and a patient when those communications trigger the therapist’s mandatory reporting obligations); *Malcolm v. Salem-Keizer School District*, Case No. 06C10016, 2006 WL 5359522 (June 12, 2006) (Trial Court Order).

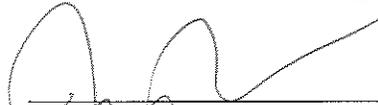
187 Or App at 690-91. Also, in *Salem-Keizer Sch. Dist. 24J*, the Court of Appeals again held that an arbitration award that reinstated an instructional assistant who admitted to, but had not been convicted of, the crime of second-degree theft was enforceable because there was no statute or judicial decision that clearly prohibited such reinstatement. 186 Or App at 19. Because of the limited review allowable under the statutes and the judicial decisions set forth above, we deny the petition.

ORDER

The petition is denied.

DATED this 21 day of November 2013.

  
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Kathryn A. Logan, Chair

  
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Jason M. Weyand, Member

  
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Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.