



The issue is:

Did the arbitrator exceed his powers in issuing an arbitration award on October 18, 2011, that involved the State and Union in violation of ORS 240.086(2)(d)?

### RULINGS

1. The parties submitted seven proposed exhibits with their briefs, stipulating to the admission of the arbitration award as Exhibit J-1, the Letter of Agreement (LOA) at issue as Exhibit J-2, and the collective bargaining agreement as Exhibit J-7. Exhibits J-1, J-2, and J-7 are received.

2. The State sought to admit Exhibits J-3 and J-4, purporting to be the bargaining history concerning the LOA at issue. The Union objects to these exhibits as irrelevant. The Union sought to admit Exhibits J-5 and J-6, which are the parties' post-hearing briefs submitted to the arbitrator. The State objects to these exhibits as irrelevant.

We previously have held that the only evidence relevant in an action challenging or seeking enforcement of an arbitration award is the parties' contract, the arbitration award, and if a party asserts that an award violates the public policy exception, documents relating to that argument.<sup>1</sup> *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, 293, *rev den*, 334 Or 121, 47 P3d 484 (2002). We recently reaffirmed our prior holding in *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). As Exhibits J-3, J-4, J-5, and J-6 are outside the purview of what we consider to be relevant evidence, they are not admitted.

### FINDINGS OF FACT

#### The Parties

1. The State is a public employer and the Union is a labor organization.
2. The State and the Union were parties to a collective bargaining agreement that expired June 30, 2011.

#### Relevant Contract Language and the Letter of Agreement

3. Article 21 of the contract contains the grievance and arbitration procedure. In relevant part, this Article provides:

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<sup>1</sup>The public policy exception is not at issue in this case.

“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, except for the following Articles:

“Article 2--Recognition

“Article 5--Complete Agreement/Past Practices

“Article 56--Sick Leave (FMLA/OFLA)

“Article 22--No Discrimination

“Article 81--Reclassification Upward, Reclassification Downward, and Reallocation

“\* \* \* \* \*

“Section 5.

“\* \* \* \* \*

“Step 4. Grievances which are not satisfactorily resolved at Step 3 may be appealed to arbitration.

“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 issue his/her decision or award within thirty (30) calendar days of the closing of the hearing record. 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. The arbitration will be handled in accordance with the rules of the American Arbitration Association.”

4. Appendix A to the contract contains various letters of agreement between the parties that are incorporated into the contract. The LOA at issue reads as follows:

“LETTER OF AGREEMENT 27.00-09-190

**“Article 27- - Salary Increase**

**“Salary Eligibility Date–Step Advancement Freeze  
“Includes Article 29-Salary Administration/Article 81-Reclass Up/Down**

“This Letter of Agreement is entered into by the State of Oregon, acting through its Department of Administrative Services, Labor Relations Unit (Employer), and the SEIU Local 503, OPEU (Union).

“This Agreement supersedes all provisions in the Collective Bargaining Agreement pertaining to step advancement upon the affected employees’ Salary Eligibility Date (SED).

“This Agreement suspends the Letter of Agreement dated December 13, 2007, (Letter of Agreement 27.00-09-170) to add and drop steps for each salary range in all job classifications in the bargaining units from September 1, 2009, through August 31, 2010.

“Upon implementation of this Letter of Agreement, the following applies:

- “1. Employees who advance to the new top step of their classification on or after July 1, 2009, through August 31, 2009, as a result of the December 13, 2007 Letter of Agreement, will have their pay reduced to the prior top step. Employees advancing to a higher first step by virtue of the first step being dropped shall not have their pay reduced.
- “2. Employees who advance on the pay scale within their classifications’ salary range on or after July 1, 2009, through August 31, 2009, will be restored to their former step in effect as of June 30, 2009.
- “3. Employees shall not receive any step increases between September 1, 2009, through August 31, 2010, during the freeze period except for initial increases upon promotion and reclassification.
- “4. Employees will continue to receive the initial increase upon promotion and reclassification upward during the freeze period. However, promotions or reclassifications to the new top step shall be subject to #1 above.

“Employees who promote during the freeze will receive an additional step either six (6) months after their promotion or September 1, 2010, whichever is later. Their SED will be adjusted pursuant to Article 29.

- “5. The step freeze will continue for twelve (12) months through August 31, 2010.

6. When the step freeze is lifted:

- (a) An employee who received a step or advanced to the new top step in July or August of 2009, will have that step restored on September 1, 2010 to the higher rate that was in effect through August 31, 2009.
- (b) For initial appointments in state service occurring between July 1 and September 1, 2009, employees shall receive a one (1) step increase on September 1, 2010 and on their SED thereafter pursuant to Article 29.
- (c) All other employees will commence receiving step increases on their SED, effective September 1, 2010.

“This Agreement is effective September 1, 2009.”

#### The Grievance and Arbitration Hearing

5. On September 21, 2010, the Union filed a grievance on behalf of a group of employees who were promoted during the six-month period prior to the effective date of the LOA. The matter proceeded to arbitration, where the parties agreed that it was properly before the arbitrator. The parties further agreed the arbitrator should frame the issue, which he stated as follows:

“Were the employees who received promotions during the six-month period prior to the start of the salary freeze on September 1, 2009, properly paid following the end of the freeze on August 31, 2010? If not, what is the appropriate remedy?”

6. On October 18, 2011, the arbitrator issued his opinion and award. Findings of Fact 7 through 13 are a summary of the arbitrator’s facts, analysis, and conclusion.

7. During negotiations for the 2009-2011 Collective Bargaining Agreement, the State and Union agreed to freeze step (salary) increases from September 1, 2009 through August 31, 2010. They executed the LOA at issue memorializing their agreement.

8. Prior to the salary freeze, two salary increases were involved upon an employee’s promotion: an immediate increase upon promotion and a promotional increase granted six months later. This promotional increase, based upon successful work performance, occurred on the employee’s Salary Eligibility Date (SED).

9. After implementation of the LOA, employees were treated differently based upon when they promoted: 1) employees who promoted during the six months prior to the September 1, 2009 freeze did not receive a promotional salary increase (the grievants in the arbitration); 2) employees who promoted during the first six months of the freeze received a promotional salary increase on September 1, 2010; and 3) employees who promoted during the

second six months of the freeze received a promotional salary increase on their SED after the freeze ended.

10. In the award, the arbitrator recited “Pertinent Contract Provisions,” including Article 21, Section 6(f) and the text of the LOA.

11. The arbitrator determined that:

“Employees in Group 1 received no promotional salary increase during or after the freeze. There is no evidence that the parties identified these employees as a discrete group, or discussed the impact of the freeze on payment of the promotional salary increase for these employees. Absent evidence to the contrary, the Arbitrator presumes that when the parties negotiated the LOA, they unintentionally omitted addressing promotional salary increases for Group 1. While the parties accommodated Group 2 employees in Section 4 of the LOA, there is no evidence that the parties knowingly chose not to accommodate Group 1 employees. This was an inadvertent omission.”

12. Having determined that the parties inadvertently omitted the employees in Group 1 from the LOA, the arbitrator then analyzed his authority under the contract to determine the matter. He concluded:

“Filling the gap: determining the date for Group 1 promotional salary increases

“The Arbitrator must discern the critical difference between, (a) completing a process undertaken by the parties, that is, filling a gap, and (b) acknowledging that silence on a matter was the intention of the parties. In this matter, the evidence shows the intent of the parties was to accommodate employees who did not receive a promotional salary increase during the freeze. The parties created Section 4 of the LOA for employees promoted during the first half of the freeze, Group 2. The parties did not identify nor address the adverse impact of the freeze on similarly situated employees, those persons promoted during the six months prior to the freeze, Group 1. This silence was not intentional. Rather, the silence reflects a complex bargaining process not taken to a reasonable, logical conclusion: that if the parties worked to moderate the adverse impact of the freeze for one group of employees, they would also have done so for a group of similarly situated employees.

“\* \* \* \* \*

“The primary goal of a ‘rights’ arbitrator is to determine and carry out the mutual intent of the parties. It is widely recognized that if a provision of a contract is clear and unambiguous, it must be applied in accordance with its terms despite whatever equity or inequity may be present on either side. However, as here, where the parties unintentionally failed to address the adverse impact of the freeze for one group, while addressing the adverse impact for a similarly situated group,

the Arbitrator is compelled to provide relief. The LOA is ambiguous because it does not specifically address employees promoted in the six months before the freeze.

“\* \* \* \* \*

“A function of ‘rights’ arbitration is to complete a process started by the parties. By filling the gap in this matter, the Arbitrator is not exceeding the authority granted to the Arbitrator in Article 21, Section 6(f).

“In filling the gap, the task for the Arbitrator is to deduce from the evidence what the parties would have done had they addressed the circumstance of Group 1 employees, as well as Group 2 employees. The purpose of the accommodation for Group 2 employees, found in Section 4 of the LOA, was to lessen the adverse impact of the freeze by proving [*sic*] for receipt of a promotional salary increase. Had the parties addressed the matter, the Arbitrator presumes that the parties would have considered Group 1 employees no less deserving of consideration than Group 2 employees. In the absence of evidence to the contrary, it is reasonable to infer that the parties would have applied the provision ‘will receive an additional step either six (6) months after their promotion or September 1, 2010, whichever is later’ (Section 4 of the LOA) to Group 1 as well as Group 2.”

13. The arbitrator issued the following order in his award:

“The grievance is sustained. Employees who received promotions during the six-month period prior to the start of the salary freeze on September 1, 2009, shall be paid a promotional step retroactive to September 1, 2010. By agreement of the parties, the Arbitrator retains jurisdiction in this matter to hear and decide issues pertaining to implementation of the Award.”

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The October 18, 2011 arbitration award does not violate ORS 240.086(2)(d).

#### DISCUSSION

ORS 240.086(2) authorizes this Board to:

“(2) Review and enforce arbitration awards involving employees in certified or recognized appropriate collective bargaining units. The awards shall be enforced unless the party against whom the award is made files written exceptions thereto for any of the following causes:

“\* \* \* \* \*

“(d) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.”

We apply the same standard of review to arbitration awards under ORS 240.086(2) that we apply in reviewing arbitration awards under ORS 243.672(1)(g) and (2)(d). *In the Matter of the Arbitration Between the State of Oregon, Department of Transportation v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. AR-1-06, 21 PECBR 838, 842 (2007), citing *Executive Department, State of Oregon v. Federation of Oregon Parole and Probation Officers*, Case No. AR-1-85, 9 PECBR 8497 (1986). As long as the arbitrator’s award is based on his or her interpretation of the contract language, the parties are bound by that decision. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986). We do not review the decision to determine whether it is right or wrong, and we enforce decisions even if we believe they were erroneous. *Portland School District 1J*, 18 PECBR at 836-37. “Neither a mistake of fact or law vitiates an [arbitration] award.” *Brewer v. Allstate Insurance Co.*, 248 Or 558, 562, 436 P2d 547 (1968).

With this limited scope of review in mind, we turn to the case at hand. The State asserts that the award is unenforceable under ORS 240.086(2)(d) because the arbitrator exceeded the contractual authority granted to him when he applied the provisions of Section 4 of the LOA to the employees in Group 1 who were promoted prior to the step freeze. Specifically, the State objects to the arbitrator using “gap-filling” to decide the case, characterizing his decision as “adding to” the contract in violation of Article 21, Section 6(f).

Gap-filling is a process used by arbitrators when they must resolve disputes and give meaning to contract provisions that are unclear, or when they are faced with situations not specifically foreseen by the negotiators. Elkouri & Elkouri, *How Arbitration Works*, (6<sup>th</sup> ed), at 445, citing *Superior Prods. Co.*, 42 LA 517, 523 (Smith, 1964). Gap-filling is distinct from devising new contract terms. “However, arbitrators may refuse to fill gaps if convinced that to do so ‘would constitute contract-making’ rather than contract interpretation or application.” *Id.* at 445, citing *Labor Standards Ass’n*, 50 LA 1009, 1012 (Kates, 1968).

The concept of gap-filling has been used before with approval in the collective bargaining context. *Harrisburg Ed. Assn. v. Harrisburg Sch. Dist. #7*, 186 Or App 335, 63 P3d 1176 (2003) presented a similar situation to the one before the arbitrator in the present case. In *Harrisburg*, the parties agreed on a concept for an early retirement incentive which would be funded through savings realized by replacing retiring higher-paid full time teachers with newer lower-paid full time teachers. They did not consider the possibility that part-time teachers, either current or new to the district, would be used to replace the retiring teacher. Thus, the specific language agreed to by the parties did not directly cover the issue: what salary levels were to be applied to the equation given the absence of contract language.

The Court, relying upon the *Restatement (Second) of Contracts* section 204 (1981),<sup>2</sup> held that it was appropriate to fill in the gap left in the collective bargaining agreement by the parties. The court stated:

“The *Restatement’s* approach \* \* \* is identical to the one that Oregon courts have adopted in a closely analogous context—that of supplying a reasonable term to fill a contractual gap when the equitable remedy of specific performance is sought. For specific performance to be available a court will not go beyond the agreement struck by the parties or make a new contract for them; the contract therefore must be sufficiently defined to serve as the foundation for a specific judgment.” *Id.* at 346. (Citations omitted.)

In footnote 3 of the decision, the Court specifically notes that gap-filling is particularly appropriate in the collective bargaining context, citing to case law noting the differences between a collective bargaining agreement and a commercial contract:

“The problem that confronts us in this case—that of a contract sufficiently definite to be enforced, but the terms of which do not address the factual circumstance presented—is particularly common in the area of collective bargaining. Unlike a commercial contract, which is designed to be a comprehensive distillation of the parties’ bargain, a collective bargaining agreement is a skeletal, interstitial document. *See generally Steelworkers v. Warrior & Gulf Co.*, 363 US 574, 578, 580-81, 80 S Ct 1347, 4 L Ed 2d 1409 (1960). A collective bargaining agreement is akin to a generalized code designed to cover a whole employment relationship and myriad circumstances that no drafter can fully anticipate. *See generally Swanson v. Van Duyn Choc. Shops*, 282 Or 491, 495-97, 579 [P2d] 239 (1978). Arbitration serves to fill gaps in collective bargaining agreements and arbitrators permissibly may resort to sources other than legal principles (*i.e.*, the ‘common law of the shop’ and the arbitrator’s personal judgment) to supply terms that the parties have omitted from the contract. *Id.* Courts, on the other hand, are limited to general principles of contract law in performing the same gap-filling function. *Id.* at 497. For that reason, it is particularly appropriate to follow the ‘courageous common sense’ principle and *Restatement* section 204 in the area of collective bargaining contracts.” *Id.* at 347 n 3.

In this matter, the arbitrator determined that the parties never intended to eliminate promotional salary increases for the employees in Group 1 who promoted prior to the freeze. Rather, he held that the parties “inadvertently omitted” providing increases to those employees, stating that, “[i]n this matter, the evidence shows the intent of the parties was to accommodate

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<sup>2</sup>This section provides:

“When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.”

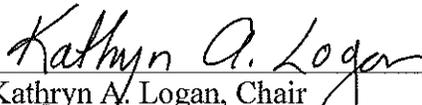
employees who did not receive a promotional salary increase during the freeze.” Arbitration Award at 10. As promotional increases had been given to all other affected employees, the arbitrator decided to fill the gap by granting promotional increases to the employees in Group 1.

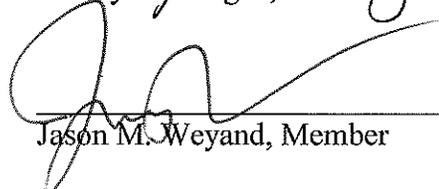
As we have often noted, when parties agree to utilize binding arbitration as the means of resolving disputes, they consent to a speedy, nontechnical, equity oriented, and analytically flexible approach to contract dispute resolution. *American Federation of State, County and Municipal Employees, Local 2067 v. City of Salem*, Case No. C-96-82, 6 PECBR 5532, 5539 (1982), *AWOP*, 64 Or App 855, 669 P2d 843 (1983), *rev den*, 296 Or 350 (1984). Gap-filling under the specific circumstances at issue in this case is a recognized practice consistent with the nature of labor arbitration. As a result, we conclude that the arbitrator, by engaging in gap-filling in this decision, did not exceed his authority under the contract, and we will dismiss the petition.

ORDER

The petition is dismissed.

DATED this 15 day of February, 2013.

  
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Kathryn A. Logan, Chair

  
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Jason M. Weyand, Member

This Order may be appealed pursuant to ORS 183.482.