

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-25/26/27-11

(UNFAIR LABOR PRACTICE)

PORTLAND POLICE ASSOCIATION,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
CITY OF PORTLAND,)	CONCLUSIONS OF LAW,
)	AND ORDER
Respondent.)	
_____)	

On February 25, 2013, the Board heard oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald, by way of a stipulation of facts on September 25, 2012. The record closed on September 26, 2012, following receipt of the parties' briefs.

Anil S. Karia, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Stephanie Harper, Deputy City Attorney, City of Portland, Portland, Oregon, represented Respondent.

On May 2, 2011, the Portland Police Association (Association or PPA) filed three unfair labor practice complaints against the City of Portland (City). The complaints allege that the City imposed unpaid suspensions on Sergeant John Birkinbine (Case No. UP-25-11), Officer Ryan Lewton (Case No. UP-26-11), and Sergeant Liani Reyna (Case No. UP-27-11), contrary to Article 20.1 and 20.2 of the parties' collective bargaining agreement in violation of ORS 243.672(1)(g). Grievances over these disciplinary actions were also submitted to Arbitrator Janet Gaunt. The processing of these complaints was held in abeyance pending the completion of the parties' grievance procedure.

On May 31, 2012, after the arbitrator held that the grievances were not procedurally arbitrable, the Association filed amended complaints in these three cases and requested that this Board proceed with the processing of the complaints.

The ALJ consolidated the three complaints for hearing. She then bifurcated the “procedural” issue concerning the effect of the arbitrator’s decision on the Association’s subsection (1)(g) claim from the “merits” of the alleged contract violations. The City filed a timely answer to the complaints.

The issue presented is:

Should these complaints, alleging that the City’s decision to suspend Sergeant John Birkinbine, Officer Ryan Lewton, and Sergeant Liani Reyna violated ORS 243.672(1)(g), be dismissed as a result of Arbitrator Gaunt’s Opinion and Award holding that the grievances were not procedurally arbitrable?

RULINGS

1. A footnote in the parties’ Fact Stipulation stated that the City was offering a copy of an arbitration award issued by Arbitrator William Greer into the record, the Association was objecting to that offer, and the parties would address the relevance of the award in their briefs. A copy of Arbitrator Greer’s award was attached to the Stipulation as Employer’s Exhibit 1. Because the parties agreed to waive hearing and submit these matters through stipulation, only matters that the parties have agreed on as part of the record will be considered. We also note that the City failed to address the relevance of this award in its brief. Therefore, the ALJ’s ruling that Employer’s Exhibit 1 is not received as part of the record in this proceeding was appropriate.

2. The other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The City of Portland is a public employer under ORS 243.650(20).

2. The Association is a labor organization under ORS 243.650(13).

3. The relevant collective bargaining agreement (Agreement) between the Association and the City is effective July 1, 2010 through June 30, 2013. Articles in that Agreement applicable to this matter include: 1) Article 20.1, which provides that “[d]isciplinary action shall be for just cause * * *”; 2) Article 20.2, which provides that discipline “shall be done in a manner that is least likely to embarrass the officer before other officers or the public”; 3) Article 22.2, which provides that an officer or the Association may grieve a breach of the Agreement; and 4) Article 22, which provides for a four-step grievance and arbitration process (including an obligation that the Association timely notify the City of an intent to arbitrate), culminating in binding arbitration, with “[t]he arbitrator’s decision [being] final and binding * * *”

4. John Birkinbine is employed by the City as a police sergeant and is a member of the Association bargaining unit. The City issued a disciplinary letter dated November 8, 2010, notifying Birkinbine that he would be suspended without pay for 80 hours for an incident that occurred on January 29, 2010. Birkinbine received this letter in person on November 15, 2010.

5. Ryan Lewton is employed by the City as a police officer and is a member of the Association bargaining unit. The City issued a disciplinary letter dated November 8, 2010, notifying Lewton that he would be suspended without pay for 80 hours for an incident that occurred on January 29, 2010. Lewton received this letter in person on November 16, 2010.

6. Liani Reyna is employed by the City as a police sergeant and is a member of the Association bargaining unit. The City issued a disciplinary letter dated November 8, 2010, notifying Reyna that she would be suspended without pay for 80 hours for an incident that occurred on January 29, 2010. Reyna received this letter in person on November 16, 2010.

7. On November 30, 2010, the Association filed grievances for Birkinbine, Lewton, and Reyna (Grievants), asserting that the City's suspensions violated Article 20.1 and 20.2 of the parties' Agreement. The Association stated in the grievances that "[t]he discipline was not for just cause, is disproportionate to any offense committed by Grievant, is out of keeping with the standards of discipline in the Bureau, fails to take into account mitigating circumstances, and violates the principles of progressive discipline." The Association requested that the suspensions be rescinded, references to the suspensions be removed from the Grievants' personnel files, and the Grievants be made whole for lost wages and benefits.

8. By letter dated April 8, 2011, the City notified the Association that the grievances were not procedurally arbitrable because the Association failed to notify the City of its intent to arbitrate the grievances in a timely manner.

9. The parties agreed to consolidate the grievances, bifurcate the proceedings, and proceed to hearing solely for the purpose of deciding the procedural arbitrability issue. On February 10, 2012, Arbitrator Gaunt held an arbitration hearing and heard evidence regarding only the procedural arbitrability issue. During the hearing, the Association acknowledged that it should have provided the City with written notice of intent to arbitrate under Article 22.4 by March 2, 2011. The arbitrator found that the City did not receive the notice until March 31, 2011. The parties did not submit to the arbitrator the issue of whether the City had just cause to discipline the Grievants, and the arbitrator did not hear evidence regarding that issue at the hearing. Had Arbitrator Gaunt ruled that the grievances were procedurally arbitrable, the parties would have submitted the just cause issue and evidence for each Grievant at a second arbitration proceeding.

10. On May 14, 2012, Arbitrator Gaunt issued her opinion and award. Based on her interpretation of the grievance and arbitration provision in the parties' agreement and a prior arbitration award interpreting that same provision, which she decided to treat as controlling precedent, Arbitrator Gaunt concluded that the grievances were not procedurally arbitrable.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The complaints alleging that the Grievants' suspensions violated ORS 243.672(1)(g) are dismissed, as a result of Arbitrator Gaunt's Opinion and Award holding that the grievances were not procedurally arbitrable.

DISCUSSION

This matter comes before us as a result of claims filed by the Association alleging that the City disciplined three employees without just cause contrary to Article 20.1 and 20.2 of the parties' Agreement and in violation of ORS 243.672(1)(g). The Association had previously filed grievances contesting the employees' suspensions under the grievance and arbitration procedure in Article 22 of the parties' Agreement. The arbitrator denied the grievances on the basis that they were not procedurally arbitrable because they were untimely filed. The arbitrator did not address the "just cause" claims because the parties had agreed that this would only occur if the arbitrator found the grievances procedurally arbitrable. The question before us is whether the Association may bring its subsection (1)(g) "just cause" contract claims to us, notwithstanding the arbitration award that the Association's grievances regarding those same claims were not procedurally arbitrable. For the following reasons, we dismiss the Association's subsection (1)(g) claims.

ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where the parties have agreed to accept arbitration awards as final and binding upon them." The Association argues that because it has filed contract violation claims under subsection (1)(g) and is not seeking to enforce an arbitration award, this Board should apply its "deferral" standards in evaluating the effect of the arbitration award on the claims at issue here. The City argues that this Board should apply its "enforcement" standards in cases such as this—*i.e.*, where a party files a contract violation claim under subsections (1)(g) or (2)(d) after an arbitrator has ruled on a grievance concerning that claim. To do otherwise, the City argues, would be the equivalent of giving the Association "two bites of the apple," effectively invalidating certain contract provisions and the finality of the arbitration process.

Enforcement of Arbitration Decisions Under Subsection (1)(g) and (2)(d) Claims

The question of the effect of the arbitration decision on the Association's subsection (1)(g) contract claims arises in the context of this Board's requirement that parties must exhaust their contractual dispute resolution process before a complainant can litigate a contract claim as an unfair labor practice violation under subsection (1)(g) or (2)(d). *West Linn Education Association v. West Linn School District No. 3JT (West Linn)*, Case No. C-151-77,

3 PECBR 1864 (1978).¹ In *West Linn*, this Board relied on the U.S. Supreme Court’s adoption of an exhaustion of administrative remedies doctrine in private sector labor relations cases under Section 301 of the Labor Management Relations Act (LMRA), 29 U. S. C. § 185, in *Republic Steel Corp. v. Maddox*, 379 US 650, 85 S Ct 614, 13 L Ed2d 580 (1965). Section 301, which provides that suits for the enforcement of private sector collective bargaining agreements between an employer and a labor organization may be brought in any district court of the United States, is analogous to a contract violation claim under ORS 243.672(1)(g) and (2)(d). *West Linn*, 3 PECBR at 1870.

In adopting the exhaustion requirement, we explained that,

“[f]or this Board to hear a complaint alleging contract violation as an unfair labor practice without first requiring the complainant to utilize the dispute resolution procedures agreed to in the collective bargaining agreement would undermine the collective bargaining process. This Board concludes that the legislative purpose of the [Public Employee Collective Bargaining Act] PECBA can best be effectuated by adopting the exhaustion of contract remedies doctrine. This doctrine insures the integrity of the collective bargaining process by insuring that parties to collective bargaining agreements follow the procedures they have negotiated for the resolution of contract disputes. It also encourages the parties to negotiate grievance procedures to resolve contract disputes. This Board believes this to be sound labor relations policy. Labor relations stability depends on the parties working together to resolve disputes which directly affect them. The purpose of grievance procedures is to resolve those disputes at the lowest level of the organization, in the least expensive and most expeditious manner. The unfair labor practice action does not meet these purposes. Unfair labor practice actions are more time consuming and are more expensive than the grievance process. In addition, the unfair labor practice, unlike the grievance process, does not bring the parties together and develop the full range of opportunities for the parties to settle, compromise, and otherwise improve their ongoing relationship.” *Id.* at 1869-70.

After the adoption of the *West Linn* exhaustion requirement, we addressed the question of what type of review should be applied to an arbitration award that a party was attempting to enforce under ORS 243.672(1)(g). This Board originally determined that it would review arbitration awards in enforcement proceedings under the deferral standards adopted in

¹The three exceptions to the exhaustion requirement are: (1) the employer repudiates the grievance process; (2) the grievant is precluded from pursuing the grievance in a timely fashion because the exclusive representative did not fairly represent him; and (3) the ultimate decision maker in the grievance process lacks authority to remedy the grievance. *West Linn*, 3 PECBR at 1870. We take official notice of this Board’s records, which show that the three employees, on whose behalf the Association is pursuing the complaints in this matter, filed unfair labor practice complaints against the Association and the City in regard to the suspensions at issue here on October 29, 2012. *Birkinbine v. Portland Police Association and City of Portland*, Case No. FR-5-12; *Reyna v. Portland Police Association and City of Portland*, Case No. FR-6-12; and *Lewton v. Portland Police Association and City of Portland*, Case No. FR-7-12. The Association has not argued that any of the exceptions to the exhaustion requirement have been met.

Siegel v. Gresham Grade Teachers Assn. (Siegel), Case No. C-112-76, 3 PECBR 1390 (1977), *aff'd*, 32 Or App 541, 574 P2d 692 (1978). See also *Eugene Education Association v. Eugene School District 4J (Eugene)*, Case No. C-141-78, 4 PECBR 2598 (1980). Under the *Siegel* deferral standards, the Board enforced an arbitration award if the proceedings were fair and regular, the parties had agreed to be bound thereby, and the decision of the arbitrator was not palpably wrong and, therefore, not repugnant to the PECBA. *Eugene*, 4 PECBR at 2604.

In *Willamina Education Association 30J and Luciano v. Willamina School District No. 30-44-63J (Willamina)*, Case No. C-253-79, 5 PECBR 4086 (1980), however, this Board decided that in the context of enforcement proceedings under subsections (1)(g) and (2)(d), reviewing the merits of an arbitration decision under the third element of the *Siegel* deferral standards was contrary to the state policy favoring binding arbitration of collective bargaining disputes. We also recognized that the *Siegel* deferral standards were substantially different from the arbitration review standards applied by the Oregon appellate courts and the U.S. Supreme Court under Section 301 of the LMRA. We concluded that “that the policies of the PECBA will be better effectuated if [the Board] restricts its review of arbitration awards in (1)(g) and (2)(d) complaints to the stricter standards generally followed by federal and Oregon courts.” 5 PECBR at 4097-98.

Consequently, this Board held that in subsection (1)(g) and (2)(d) complaints it will enforce arbitration awards unless it is clearly shown that either:

“(1) The parties did not, in a written contract, agree to accept such an award as final and binding upon them (for example, an arbitrator finds no violation of the agreement, but upholds a grievance as constituting an unfair labor practice; an arbitrator exceeds a limitation on his authority expressly provided in the collective bargaining agreement); or,

“(2) Enforcement of the award would be contrary to public policy (for example, the award requires the commission of an unlawful act; the arbitration proceedings were not fair and regular and, thus, did not conform to normal due process requirements).” *Id.* at 4099-4100.

We further clarified that “[t]he *Siegel* tests will be applied in ULP cases *charging other than a (1)(g) or (2)(d) violation*,” and then specifically stated that the new *Willamina* “enforcement” test would be used

“*in any case where a party charges only a violation of a contract under ORS 243.672(1)(g) or (2)(d) after an arbitrator has ruled on the issue*. Thus, where a party carries a grievance through arbitration and loses, and then files an unfair labor practice complaint under (1)(g) or (2)(d), this Board will dismiss the complaint so long as the arbitrator’s award meets the ‘enforcement’ tests. The ‘deferral’ tests will not be applied in such cases.” *Id.* at 4106 n 2 and 4 (emphases added).

The Court of Appeals has affirmed our use of the *Willamina* standard, rather than the *Siegel* standard, in reviewing arbitration awards in subsection (1)(g) enforcement proceedings. *Willamina Sch. Dist. 30J v. Willamina Ed. Assn.*, 60 Or App 629, 635, 655 P2d 189 (1982).

Review of Arbitration Decisions in Claims Other Than Subsections (1)(g) and (2)(d)

Conversely, when a union alleges a violation of *non-contractual statutory rights* under subsections of ORS 243.672 *other than (1)(g) and (2)(d)*, this Board does not require parties to exhaust their grievance process. *Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO v. Southwestern Oregon Community College*, Case No. UP-135-92, 14 PECBR 657, 663 (1993); *AFSCME Council 75, Local 1246 v. State of Oregon, Fairview Training Center*, Case No. UP-103-92, 14 PECBR 610, 611 (1993). However, where parties have filed an unfair labor practice complaint alleging such claims and are simultaneously processing a grievance under their contract grievance and arbitration procedure, we generally follow a practice of holding the unfair labor practice complaint in abeyance pending the resolution of the grievance process.² *City of La Grande v. La Grande Police Association, Teamster Local 670*, Case Nos. C-40/45-81, 6 PECBR 4808, 4814 (1981) (it is our policy to postpone processing a subsection (1)(a) complaint while the parties are processing a pending grievance that addresses the issues raised in a complaint); *Oregon School Employees Association v. Astoria School District 1*, Case No. UP-52-91, 13 PECBR 474, 478-80 (1992) (it is this Board's practice to postpone processing a subsection (1)(e) unilateral change claim pending completion of a simultaneous grievance process).

In the previously mentioned *Siegel* decision, 3 PECBR 1390, this Board addressed the effect to be given to a prior arbitration award in cases alleging statutory unfair labor practice violations and we decided to review such arbitration decisions under the "deferral" standards adopted by the National Labor Relations Board (NLRB) in *Spielberg Manufacturing Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955), and *International Harvester Co.*, 138 NLRB 923, 51 LRRM 1155 (1962).³ In *Spielberg*, the NLRB held that it was "not bound, as a matter of law, by an arbitration award." 112 NLRB at 1081. However, it stated it would defer to an arbitration award covering the charges in a complaint alleging violations of the National Labor Relations Act (NLRA) if

²This Board and parties sometimes refer to holding a matter in abeyance pending completion of arbitration as "deferring" to the arbitration process. The use of the term "deferral" in this context must be distinguished from its use in our policy of "deferring" to the arbitration award itself, under which we accept the decision of the arbitrator as dispositive (with limited exceptions) of the unfair labor practice claims.

³The PECBA, which was adopted by the Oregon legislature in 1973, was modeled on the National Labor Relations Act (NLRA). The courts have directed this Board to look to cases decided by the NLRB in determining the legislature's intent, especially those cases decided before the adoption of the PECBA. *Elvin v OPEU*, 313 Or 165, 176 n 7, 177-78, 832 P2d 36 (1992).

“the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators’ award.” *Id.* at 1082.⁴

It is important to note that there is no direct analog to ORS 243.672 (1)(g) and (2)(d) under the NLRA. As a result, although the NLRB has authority to interpret collective bargaining agreements in the context of deciding an unfair labor practice complaint, it “is neither the sole nor the primary source of authority in such matters.” *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 202, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991). As the U.S. Supreme Court explained:

“in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither pre-empting the other. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 268 (1964); *Smith v. Evening News Assn.*, 371 U.S. 195, 197-198 (1962); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 101, n. 9 (1962). Arbitrators and courts are still the principal sources of contract interpretation, but the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. *Smith v. Evening News Assn.*, 371 U.S. 195, 197-198 (1962). It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).” *NLRB v. Strong Roofing & Insulating Co.*, 393 US 357, 360, 89 S. Ct. 541, 21 L. Ed. 2d 546, (1969).

In addition, the unfair labor practice complaints in *Siegel* and *Spielberg* also did not deal with contract claims filed by a union or an employer. The complaint in *Siegel* was filed by three employees alleging that the union had caused the employer to improperly withhold payments in lieu of dues in violation of ORS 243.672(2)(c) and (2)(d), and that the employer had improperly withheld such payments in violation of ORS 243.672(1)(f) and (g). The issue of the effect of an arbitration decision arose because the union asserted that this Board should dismiss the complaint based on a prior arbitration award, which held that the employer’s refusal to withhold the dues from the three employees was a violation of the parties’ collective bargaining agreement. *Spielberg* raised the issue of the effect of an arbitration award on a subsequent claim filed by four employees alleging that the employer violated sections 8(a)(1) and (3) of the

⁴In certain types of unfair labor practice complaints, the NLRB defers its jurisdiction over pending unfair labor practice charges to a binding arbitration process. *Collyer Insulated Wire, a Gulf & Western Systems Co.*, 192 NLRB 837, 77 LRRM 1931 (1971). In addition, the NLRB will hold in abeyance certain charges when the dispute is scheduled for, or pending before, a binding arbitration process. *Dubo Mfg. Corp.*, 142 NLRB 431, 53 LRRM 1070 (1963).

NLRA.⁵ The award, which was raised by the employer as a defense to the complaint, came out of a strike settlement under which the employer and the union had agreed to arbitrate the question of whether the employees should be reinstated.

This Board later reviewed the *Siegel* deferral standards in *Greater Albany Education Association v. Greater Albany School District No. 8J (Greater Albany)*, Case No. C-6-80, 5 PECBR 4158, 4160-61(1980). In that case, the union alleged that the employer had violated ORS 243.672(1)(a), (e), and (f).⁶ The employer moved to dismiss the subsection (1)(e) and (f) charges on the basis that this Board should defer to a prior arbitration award. We first explained:

“Because this Board recently enunciated new standards of review of arbitration awards in proceedings charging violations of ORS 243.672(1)(g) and (2)(d) ([citing *Willamina*]), it is appropriate to clarify the standards that will be applied before the Board will defer to an arbitrator’s award in unfair labor practice (ULP) cases charging violations of *other sections* of ORS 243.672.” 5 PECBR at 4159 (emphasis added).

After reviewing the basis for our post-arbitral deferral standards in cases alleging violations of subsections *other than (1)(g) or (2)(d)*, we noted that federal cases subsequent to *Spielberg* had added the requirement that the issue on which deferral was sought had been clearly presented to and decided by the arbitrator, and that the question was within the arbitrator’s competence. *Banyard v. NLRB*, 505 F. 2d 342 (DC Cir 1974). We concluded that because this Board had “original jurisdiction of, and therefore the primary interest in, unfair labor practices, it would be sound policy and would best effectuate the purposes of the” PECBA to adopt the fourth element identified in *Banyard* as part of our “deferral” test. Therefore, we summarized that:

⁵Sections 8(a)(1) and (3) of the NLRA, which are analogous to subsections (1)(a) and (c) of the PECBA, make it an unfair labor practice for an employer

“(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

“* * * * *

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.”

⁶The union in *Greater Albany* had originally filed a subsection (1)(g) claim, but withdrew that claim at the hearing. 5 PECBR at 4158.

“The four elements that must be present for deferral in ULP cases (other than in enforcement proceedings brought under (1)(g) or (2)(d)), then, are: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound thereby; (3) the arbitrator’s decision was not repugnant to the PECBA; and (4) the issue involved must have been clearly and fully decided by the arbitrator and the question must have been within the arbitrator’s competence.” *Greater Albany*, 5 PECBR at 4160-61.

Application of the Standards of Review to This Case

We conclude that it is appropriate to apply the *Willamina* enforcement standards to determine the effect of a prior arbitration award on contract violation claims filed under ORS 243.672(1)(g) and (2)(d). Unlike the private sector, this Board is authorized under the PECBA to exercise two roles. On one hand, similar to the NLRB, we have authority under subsections of ORS 243.672 other than (1)(g) and (2)(d) to enforce *non-contractual statutory rights*. In such cases, when we consider whether we should defer to an arbitration award interpreting contract rights, we are deciding whether we should accept that award as dispositive of the *non-contractual statutory* issue. For this reason, we apply the *Greater Albany* elements to determine, in part, whether the statutory issue was fully decided by the arbitrator and within the arbitrator’s competence.

On the other hand, similar to the courts under Section 301 of the LMRA, our authority under ORS 243.672(1)(g) and (2)(d) is directed *solely at enforcing the parties’ contractual rights*. Although we exercise this authority pursuant to subsections (1)(g) and (2)(d), our only charge in such cases is to interpret the parties’ contract to determine their intent regarding the contract terms and whether those terms have been violated. In these cases—where the parties have agreed to enforce their contractual rights through a binding dispute resolution process—the issues raised in the grievance before the arbitrator and in the subsection (1)(g) or (2)(d) unfair labor practice claim are identical because they are based on alleged violations of the same contract terms.

As noted above, the court has recognized a distinction in our authority to 1) enforce what are *purely contractual* rights under subsections (1)(g) and (2)(d), and 2) to address complaints raising *non-contractual statutory rights* in which “the underlying conduct itself constitutes an unfair labor practice independent of the fact that it is also a violation of the contract.” See *Willamina*, 60 Or App at 632-33. Based on this distinction, the court allowed for our continued use of the *Siegel* deferral standards when we are reviewing arbitration awards in cases in which a complaint raises non-contractual statutory rights, and the court approved the use of the *Willamina* standards when we exercise our authority to enforce contract rights.

The cases applying the *Willamina* standards before *Greater Albany* addressed the “enforcement” of an arbitration award. However, the rationale for applying the *Willamina* standards in contract-violation cases (under subsections (1)(g) and (2)(d)) beyond the enforcement of such an award is the same. Indeed, we recognized as much in *Willamina* by expressly holding that the *Siegel* “deferral” test would not be applied in cases where a party carries a grievance through arbitration and loses and then files an unfair labor practice complaint under subsection (1)(g) or (2)(d). 5 PECBR at 4099-4100, 4106 n 4.

The Association contends, however, that *Greater Albany* overruled *Willamina*. The basis of that assertion rests on the following passage in *Greater Albany*:

“The four elements that must be present for deferral in ULP cases (*other than in enforcement proceedings* brought under (1)(g) or (2)(d)), then, are: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound thereby; (3) the arbitrator’s decision was not repugnant to the PECBA; and (4) the issue involved must have been clearly and fully decided by the arbitrator and the question must have been within the arbitrator’s competence.” *Greater Albany*, 5 PECBR at 4160-61 (emphasis added).

The Association argues that the above parenthetical in *Greater Albany* overruled *Willamina*’s express holding that the “enforcement” test applied to *all* subsection (1)(g) contract violation claims brought after a party carried a grievance through the arbitration process and lost. According to the Association, *Greater Albany* limited the *Willamina* test to *only* subsection (1)(g) “enforcement proceedings.” Thus, the Association argues that because its subsection (1)(g) claim is not an “enforcement proceeding,” but only a contract violation claim, the *Greater Albany* “deferral” test, and not the *Willamina* test, applies.

We disagree with the Association’s reading of *Greater Albany*. Specifically, we disagree that the mere insertion of the words “enforcement proceedings” was intended to overrule *Willamina*’s holding that the “enforcement” test would extend beyond “enforcement” proceedings and apply “*in any*” subsection (1)(g) and (2)(d) contract-violation claim, where that violation was submitted to arbitration pursuant to a collective bargaining agreement. *See Willamina*, 5 PECBR at 4106 n 4. Given that most post-arbitration subsection (1)(g) and (2)(d) claims would arise in the context of a party seeking to “enforce” an arbitration award, too much should not be read into the parenthetical reference to “enforcement proceedings” in *Greater Albany*. Rather, we find that the phrase “enforcement proceedings” in *Greater Albany* merely represents “loose language” and was not intended to overrule *Willamina*; had *Greater Albany* intended to overrule *Willamina*, as the Association argues, we find it likely that it would have done so explicitly.

Moreover, after *Greater Albany* was issued, we applied the *Willamina* standards in *Clackamas County Employees Association v. Clackamas County*, Case No. UP-4-08, 22 PECBR 404 (2008), *AWOP*, 228 Or App 368, 208 P3d 1057, *rev den*, 347 Or 258, 218 P3d 540 (2009). In that case, the union filed a subsection (1)(g) complaint alleging that the employer had violated the parties’ collective bargaining agreement by refusing to reimburse the union for the arbitration fees and expenses that it had paid pursuant to an arbitration decision requiring each party to pay an equal share of the arbitration fees and expenses. The union relied on the language in the parties’ collective bargaining agreement that required arbitration fees and expenses to be paid by the losing party and argued that the arbitrator had exceeded her authority when she required the union to pay an equal share. Applying the *Willamina* test, this Board dismissed the complaint, concluding that the arbitrator had not exceeded her authority, the parties had agreed to accept the award as final and binding, and no issue had been raised that the enforcement of the award would be contrary to public policy.

In sum, for the foregoing reasons, we disagree with the Association's argument that *Greater Albany* overruled *Willamina*, and we will continue to apply the *Willamina* "enforcement" test "in any case where a party charges only a violation of a contract under ORS 243.672(1)(g) or (2)(d) after an arbitrator has ruled on the issue." *Willamina*, 5 PECBR at 4106 n 4.

We now turn to the Association's argument that, even under the *Willamina* enforcement standards, we should not dismiss the Association's subsection (1)(g) contract claims because the City failed to allege such an affirmative defense. Although the City did not include an affirmative defense labeled "Enforcement," it clearly raised the substance of such a defense in its answers. Under its affirmative defense labeled "Exhaustion," the City alleged the existence of a binding arbitration procedure in the parties' contract and that the Gaunt arbitration decision is enforceable.⁷ The City also stated that it "should not be required to defend itself on a claim that it violated ORS 243.672(1)(g) before [this] Board when it has arbitrated the grievance to an enforceable conclusion before Arbitrator Gaunt." Under its affirmative defense labeled "Deferral," the City stated that this Board "should accept and defer to Arbitrator Gaunt's authority, award and conclusion that the grievance is procedurally not arbitrable and bar Complainant from pursuing its ORS 243.672(1)(g) claim." We find the City's answers and defenses to be sufficiently pled to raise the defense before this Board.

Finally, we disagree with the Association's argument that it should nevertheless be allowed to proceed on its subsection (1)(g) contract claims because the arbitrator determined that the grievances were not "procedurally arbitrable." There is no dispute that the just cause contract violations alleged in the grievances before the arbitrator and in the subsection (1)(g) claims before us are identical. The parties submitted the just cause grievances to the arbitrator under their contractual arbitration process, which provides that "[t]he arbitrator's decision shall be final and binding * * *." The arbitrator concluded that the grievances were not "procedurally arbitrable," reasoning that the circumstances surrounding the Association's untimely processing of the grievances did not provide a "sufficient justification to excuse" the Association's breach of its obligations to timely notify the City of its intent to arbitrate the grievances under the Agreement. The arbitrator's determination and ultimate remedy denying the grievances as not "procedurally arbitrable" do not change the binding nature of the arbitrator's decision on the issues raised in the grievances as a whole. The PECBA policies of encouraging the parties to resolve their disputes through a mutually-agreed-on arbitration process and in favoring binding arbitration would be undermined if this Board allowed the Association to proceed in this matter, after it was unsuccessful in pursuing grievances raising the exact same claims under the parties' grievance process.

⁷Because we conclude that these complaints should be dismissed based on the *Willamina* standards, we do not address the City's argument that the Association is precluded from pursuing a subsection (1)(g) claim because it failed to exhaust the grievance process based on the arbitrator's decision dismissing the grievance as untimely filed.

In conclusion, the parties agreed in their contract to accept the arbitrator's award as final and binding and there is no argument that enforcement of that award would be contrary to public policy. Accordingly, we will dismiss the complaints.

Request for Civil Penalty

The City requests that a civil penalty be ordered under ORS 243.676(4)(b) on the basis that the complaints are frivolous because the law is clear that the Association cannot pursue a subsection (1)(g) claim after failing "to do what is required in order to present the merits of the grievance to an arbitrator." ORS 243.676(4) provides for a civil penalty of up to \$1,000 if the complaint was dismissed and the "complaint was frivolously filed, or filed with the intent to harass the other person, or both."

We deny the City's request for a civil penalty. A pleading is frivolous only if every argument presented

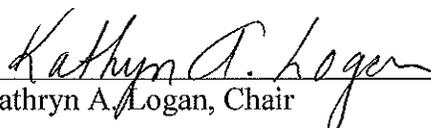
"is one that [1] a reasonable lawyer would know is not well grounded in fact, or that [2] a reasonable lawyer would know is not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law." *SEIU Local 503, OPEU v. State of Oregon, Department of Transportation*, Case No. UP-11-09, 23 PECBR 939, 960 (2010) (quoting *AFSCME Council No. 75 v. City of Forest Grove*, Case Nos. UP-5/25-93, 14 PECBR 796, 797 (1993)).

Although we dismissed the complaints, they raised issues of law that had not directly been addressed by this Board in prior cases. Accordingly, we deny the request for a civil penalty.

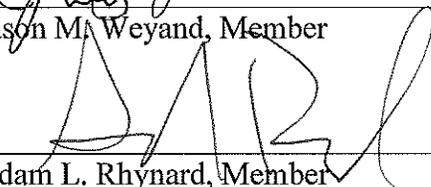
ORDER

The complaints are dismissed.

DATED this 3 day of May, 2013.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.