

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-030-11

(UNFAIR LABOR PRACTICE)

SEAN P. RAREY,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
JOSEPHINE COUNTY,)	CONCLUSIONS OF LAW,
)	AND ORDER
Respondent.)	
)	

Sean P. Rarey, appeared *pro se*.

Steven Schuback, Attorney at Law, Local Government Personnel Institute, Salem, Oregon, represented Respondent.

On May 23, 2011, Sean P. Rarey filed this unfair labor practice complaint alleging he was denied union representation for a disciplinary interview in violation of ORS 243.672(1)(a). He further alleged that Josephine County (County) violated ORS 243.672(1)(e) by unilaterally changing its policy regarding discipline when it transferred him from a patrol deputy position to a corrections deputy position, and by refusing to provide requested documents.

The complaint was assigned to Administrative Law Judge (ALJ) Peter A. Rader. By letter dated May 26, 2012, ALJ Rader informed Rarey that the ORS 243.672(1)(e) claims were subject to dismissal as the “exclusive representative” was not a party to the proceeding.¹ As the investigation continued, ALJ Rader learned that an identical unfair labor practice complaint (UP-001-11) had been filed and withdrawn earlier in the year, based on the parties agreeing that the issues involved were going to be heard by an arbitrator. This matter was then held in abeyance pending the resolution of arbitration proceedings.

¹The exclusive representative of all budgeted full-time employees and some part-time employees who work in the County’s Sheriff’s Office is the Josephine County Sheriffs’ Association (Association). Rarey was a member of that bargaining unit when this complaint was filed.

On November 16, 2012, Arbitrator Howell Lankford issued his award, a copy of which was provided to ALJ Rader. On December 7, ALJ Rader informed Rarey that the arbitration award appeared to address Rarey's claims regarding the denial of union representation and involuntary transfer and therefore this complaint was subject to dismissal under the Board's policy regarding deferral to arbitration awards. ALJ Rader reiterated that the ORS 243.672(1)(e) claims were subject to dismissal as Rarey lacked standing to raise them because he was not the "exclusive representative." Rarey was given until December 20, 2012, to show cause why the complaint should not be dismissed. Rarey did not respond.² Thereafter, ALJ Rader transferred the case to the Board with a recommendation that the appeal be dismissed.

For purposes of this Order, we assume the allegations in the complaint are true. We also rely on undisputed facts discovered during our investigation. *Upton v. Oregon Education Association/Uniserv*, Case No. UP-58-06, 21 PECBR 867 (2007).

ORS 243.672(1)(e) claims

ORS 243.672 (1)(e) provides that it is an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." "'Exclusive representative' means the labor organization that * * * has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit." ORS 243.650(8). The exclusive representative is the Association, not Rarey. The Association is not, and has not been, a party to this proceeding. Rarey does not have standing to raise these claims. *See On'gele and Oregon Association of Corrections Employees v. Department of Corrections, Oregon State Penitentiary*, Case No. UP-42-93, 14 PECBR 825 (1993) (a union alone, not an individual employee, has the right to file a complaint alleging a subsection (1)(e) violation). These two claims will be dismissed.

ORS 243.672(1)(a) claim

Rarey also filed a claim under subsection (1)(a),³ asserting that he was denied union representation at a disciplinary interview conducted by Undersheriff Donald Fasching. What this Board must determine is whether we return the case to the ALJ for hearing or defer to the arbitrator's award and dismiss the complaint.

The standard for deferral to an arbitrator's award is set out 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). We defer to an arbitrator's award in unfair labor practice cases

²The Board could dismiss this complaint solely on the basis of Rarey's failure to respond. *Oregon AFSCME Council 75 v. City of Eugene*, Case No. UP-29-09, 23 PECBR 442 (2009), *recons*, 23 PECBR 580 (2010) (failure of complainant to respond to ALJ's correspondence resulted in dismissal of the complaint for failure to prosecute).

³Under ORS 243.672(1)(a), it is an unfair labor practice for a public employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662."

that allege violations of subsections of ORS 243.672 other than (1)(g) and (2)(d) where the award meets the following four-part test:

“(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 [Public Employee Collective Bargaining Act] 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* at 4160-61.

We review each element in turn. First, we find that the proceedings were fair and regular. The matter went to arbitration as settlement of an unfair labor practice complaint (UP-001-11). According to the arbitrator,

“[t]he hearing was orderly. Each party had the opportunity to present evidence, to call and to cross[-]examine witnesses, and to argue the case. Both parties filed timely post-hearing briefs.” Award at 1.

The parties stipulated to the issue to be heard by the arbitrator. Neither party appealed the arbitrator’s decision to this Board. This supports our finding that the parties agreed to be bound by the arbitrator’s decision.

The arbitrator determined that the County imposed discipline when it transferred Rarey. The arbitrator also found that Rarey had a “reasonable basis for the belief that he was undergoing an investigatory interview associated with possible substantial discipline” when he was interviewed by Fasching. Award at 9. The arbitrator then held that the County violated the collective bargaining agreement by not giving notice of the investigatory interview.⁴ As a remedy, he ordered that Rarey be returned to the patrol unit, Rarey’s patrol seniority be recalculated as if there had been no interruption in his assignment, and any reference to the disciplinary assignment to the jail be removed from Rarey’s personnel file. These findings and conclusions made by Arbitrator Lankford establish that his decision was not repugnant to the PECBA and that the issue involved with the subsection (1)(a) claim was fully decided by the arbitrator and was within his authority and competence.

We conclude that all four elements of the *Greater Albany* deferral test were met by the arbitrator’s award. We therefore defer to the arbitrator’s award and will dismiss the subsection (1)(a) allegation in the complaint.

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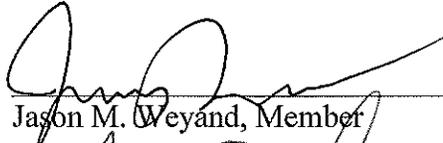
⁴The contract provides that upon notification of an investigatory interview, the involved employee has the right to be represented by a representative of his or her choice.

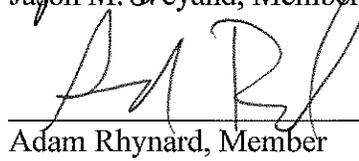
ORDER

The complaint is dismissed.

DATED this 17 day of April, 2013.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.