

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. AR-001-10

(PETITION FOR REVIEW OF ARBITRATION AWARD)

IN THE MATTER OF AN ARBITRATION )  
DISPUTE BETWEEN STATE OF OREGON,) )  
DEPARTMENT OF HUMAN SERVICES, )

Petitioner, )

v. )

SEIU LOCAL 503, OPEU, )

Respondent. )

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

\_\_\_\_\_ )  
  
This matter was submitted directly to the Board on February 3, 2011. The record closed with the submission of the parties' closing briefs on December 29, 2010.

Francis J. Connell, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Petitioner.

Joel Rosenblit, Legal Counsel, SEIU Local 503, OPEU, Salem, Oregon, represented Respondent.

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On June 17, 2010, the State of Oregon, Department of Human Services (DHS), filed a petition for review of a June 4, 2010 arbitration award in a grievance between DHS and SEIU Local 503, OPEU (SEIU). DHS alleges the award violates ORS 240.086(2)(d) and (e).

The issue is: Did the June 4, 2010 arbitration award violate ORS 240.986(2)(d) or (f)?

RULINGS

The Board made no rulings.

FINDINGS OF FACT<sup>1</sup>

1. SEIU, a labor organization, and DHS, a public employer, were parties to a collective bargaining agreement effective from July 1, 2007 through June 20, 2009. The agreement included the following provisions:

“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; demotion; suspension without pay; 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, except for the following Articles:

“\* \* \* \* \*

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<sup>1</sup>These Findings of Fact are based on the parties’ stipulations and included exhibits.

“Section 6. Arbitration Selection and Authority.

“\* \* \* \* \*

“(f) \* \* \* 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.

“\* \* \* \* \*

“Article 22--No Discrimination

“Section 1. It is the policy of the Employer and the Union not to engage in unlawful discrimination against any employee because of race, color, marital status, religion, sex, national origin, age, mental or physical disability, or any other protected class under State or Federal law.

“\* \* \* \* \*

“Article 56--Sick Leave

“\* \* \* \* \*

“Section 3. Sick Leave Exhausted.

“(a) After earned sick leave has been exhausted, the Agency shall grant sick leave without pay for any job-incurred injury or illness for a period which shall terminate upon demand by the employee for reinstatement accompanied by a certificate issued by the duly licensed attending physician that the employee is physically and/or mentally able to perform the duties of the position.

“(b) After earned sick leave has been exhausted, the Agency [DHS] may grant sick leave without pay for any non-job-incurred injury or illness of a continuous and extended nature to any employee upon request for a period up to one (1) year. Extensions of sick leave without pay for a non-job-incurred injury or illness beyond one (1) year may be approved by the Agency.”

2. DHS employed Hector Lopez (Lopez) as a Human Services Specialist in its Hillsboro Self-Sufficiency office from November 2003 until February 27, 2009. During his employment, Lopez was a member of the SEIU bargaining unit.

3. On May 7, 2008, Lopez sustained an on-the-job injury when a shelf and its contents fell on him. Lopez filed a workers' compensation claim regarding his physical injury. On June 10, 2008, a physician cleared Lopez to return to work on a modified basis. On December 2, 2008, the State Accident Insurance Fund closed Lopez's claim. Lopez and his doctors were dissatisfied with the accommodations DHS provided Lopez for his injury, and were also unhappy with the pace at which these accommodations were provided.

Lopez never filed any workers' compensation claim regarding mental illness.

4. Lopez suffers from bipolar disorder; his symptoms include depression and anxiety. These symptoms compromise his ability to manage everyday life stresses.

5. In July 2008, Lopez exhausted his entitlement to authorized leave of absence under the Family Medical Leave Act (FMLA) and Oregon Family Leave Act (OFLA). From July 2008 through December 8, 2008, DHS accommodated Lopez's mental illness by authorizing numerous absences when they were supported by a doctor's note.

6. In a Memorandum of Expectation dated July 16, 2008, DHS manager Patty Carr reminded Lopez that he had taken over 14 hours of unauthorized leave without pay during the month of June 2008. Carr acknowledged that Lopez told her that the reasons for these absences were back problems, stress, or anxiety. Carr warned Lopez:

"Your unplanned absences cause a hardship for the branch and your coworkers. As discussed with you previously, any leave without pay that is not covered by a doctor's note or pre-approved by me, will be considered unauthorized leave without pay and will result in disciplinary action.

"Please note that your attendance is critical to the operational needs of this branch. It is my expectation that you will be at work on a consistent full time basis. It is also my expectation that you continue to follow the expectations set out in this memo."

7. By letter dated September 12, 2008, DHS reprimanded Lopez for his excessive use of unauthorized leave. The letter noted that Lopez had taken more than 21 hours of unauthorized leave during the period from July 18 through July 31, 2008, and summarized a meeting Carr held with Lopez to discuss his absences as follows:

"During the August 15, 2008 fact finding meeting you stated the majority of the time you were out of the office in July 2008 was due to stress and other factors. You also stated during the meeting that sometimes in the

morning your back locks up and you struggle getting to work. Also there are times when your back locks up at the end of the day and you start feeling the pain.”

The letter warned Lopez:

“You must immediately correct and maintain acceptable behaviors regarding your use of unauthorized leave without pay. Failure to do so will result in further discipline up to and including dismissal from state service.”

8. In late October or early November 2008, Lopez was admitted to the hospital emergency room for a variety of symptoms. He followed up with a visit to his physician, Dr. Todd Gillingham. According to Dr. Gillingham, Lopez’s symptoms were thought to be a reaction to a new medication he was taking for his bipolar disorder.

9. By letter dated November 7, 2008, Dr. Lynn Alvarez, Lopez’s psychiatrist, asked DHS to grant Lopez a one-year medical leave of absence without pay. DHS asked Dr. Alvarez for additional information, and granted Lopez authorized medical leave without pay until December 8, 2008.

10. By letter dated December 4, 2008, DHS Senior Human Resource Manager Ken McGee denied Lopez’s request for a one-year unpaid medical leave and told Lopez that in the future, a doctor’s note would not excuse Lopez’s absences.

11. By letter dated January 9, 2009, DHS imposed a one step, three month salary reduction on Lopez. The reason given for the salary reduction was Lopez’s continued use of unauthorized leave without pay during the period from August 11 through December 19, 2008. The letter noted that DHS Senior Human Resources Manager McGee held two “fact finding meetings” with Lopez to discuss these unauthorized absences, and summarized the results of these meetings and the reason for the disciplinary action as follows:

“During the two fact finding meetings, your responses to unauthorized leave without pay included: out due to ‘employment environment stress,’ could not remember, or out due to medical and disability issues.

“Your responses do not mitigate or provide justification for your absences. Issues regarding ‘employment environment stress’ were reported to DHS Office of Human Resources. The Office of Human Resources investigated the allegations and was unable to find evidence to substantiate your claim.

“The Hillsboro Self Sufficiency Office protocol is to call the attendance line before the start of an employee’s shift to report if they will be out all day or late arrival. On the days you are reported as no call/no show, the attendance records reflect no call received from you.

“You have received prior expectations and discipline with regard to your continued use of unauthorized leave without pay. This discipline is warranted in that you have not corrected or maintained acceptable behaviors regarding your use of unauthorized leave without pay.

“Your continued unplanned absences cause a hardship for the branch and coworkers. Regular attendance is critical to the operational needs of the Hillsboro Self Sufficiency branch.”

12. Lopez never filed a grievance over the July 16 Memorandum of Expectations, the September 12 written reprimand, or the January 9 salary reduction.

13. For four days—from January 12 through 15, 2009—Lopez was absent from work without authorization. Lopez returned to work on January 16, but left work early on that day.

14. By letter dated January 13, 2009, Dr. Alvarez revised her request for medical leave for Lopez. She asked that DHS grant Lopez leave for the period from November 7, 2008 through February 28, 2009. Dr. Alvarez also asked that DHS allow Lopez to begin working 20 hours per week on February 28, 2009. DHS denied this request.

15. By letter dated February 26, 2009, DHS dismissed Lopez from his position because of his failure to report for work as scheduled between December 23, 2008, and January 23, 2009. The dismissal was effective February 27, 2009.

The letter cited, in addition to Lopez’s post-January 9, 2009 absences, other absences or partial absences on December 23, 24, 26, 29, and 31, 2008, and January 2, 6, 7, 8, and 9, 2009. December 23, 24, and 26 were inclement weather days on which other Hillsboro DHS office employees failed to report for work and used accrued vacation, leave without pay, or other authorized leave. The Hillsboro DHS office was closed on December 22 and opened two hours late on December 23 and 24. Lopez worked partial days on December 23 and 24 and did not make it to work on December 26.<sup>2</sup>

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<sup>2</sup>Article 123, Section 2 from the parties’ 2007-2009 collective bargaining agreement provides that if weather conditions are hazardous or inclement, “[e]mployees who are required to report to work by the Employer/Agency [DHS] shall be in leave without pay status if absent, unless otherwise on authorized leave. \* \* \*”

16. On March 15, 2009, SEIU filed a grievance on behalf of Lopez. The grievance alleged that DHS dismissed Lopez without just cause. The parties were unable to resolve their grievance and proceeded to arbitration.

17. An arbitration hearing on Lopez's grievance was held on January 10, 11, and 22, 2010. The parties agreed that the issue submitted to the arbitrator was: "1. Was the Grievant [Lopez] dismissed for just cause? 2. If not, what is the appropriate remedy?" SEIU contested only Lopez's discharge at the arbitration hearing, and did not challenge any of DHS's prior disciplinary actions.

18. On June 4, 2010, the arbitrator issued his award. The arbitrator prefaced his analysis of the parties' contentions with a discussion of two preliminary issues. The first preliminary issue the arbitrator discussed was "Mental Illness and Progressive Discipline." In regard to this issue, the arbitrator stated, in pertinent part:

"The Arbitrator addresses the topic of progressive discipline in an effort to encourage the Parties to rethink how discipline is to be administered in the context of a mental disability. The Parties' Agreement provides that 'The principles of progressive discipline shall be used *when appropriate*' (Article 20 Section 1 emphasis added). \* \* \*

\* \* \* The following are the Arbitrator's thoughts on the concept of 'appropriate' progressive discipline in the context of an employee's mental illness.

"The Arbitrator is not a psychiatrist. Rather, his observations are based on experiences with arbitration disputes involving individuals with mental disabilities. In the Arbitrator's observation, problematic behaviors associated with certain mental disabilities are exacerbated by the receipt of progressive discipline. The mental disabilities to which the Arbitrator is referring are those which commonly include symptoms such as depression, anxiety, or other debilitating incapacity for managing the stresses of everyday life and work. These symptoms, depending on their degree of severity, may compromise an individual's ability to perform the tasks required by his or her employer; most importantly may make it difficult to be in attendance.

"Progressive discipline for just cause is clearly required by the CBA [collective bargaining agreement] \* \* \*. In the event that progressive discipline is issued for misconduct, it is successful when it communicates

to the employee the message that his or her misconduct is expected to be remedied. From the employee's perspective, being placed on notice of misconduct may be stressful; however, it may also constitute the only reason for changing the behavior in question.

“\* \* \* \* \*

“In the event that progressive discipline is issued for an inability to perform due to certain kinds of mental illness, however, it is likely not to function in a remedial manner whatsoever. In the Arbitrator's observation, it is even likely to exacerbate the inability to perform because of the severity of the negative impact it may have on the employee's emotional well-being.

“Unfortunately, [Lopez's] situation is an illustration of the Arbitrator's above observations regarding the difficulties of administering progressive discipline appropriately as contemplated by the CBA.

“\* \* \* \* \*

“Beginning in 2006, the Employer began to be concerned with [Lopez's] absences. According to [Lopez's] undisputed testimony, many of his absences were a direct manifestation of his inability to manage the stresses inherent in a workday. Thus, the problematic behavior of absenteeism was directly the result of [Lopez's] mental state or the state of his illness.” (Citation to exhibit omitted.)

The arbitrator reviewed each of the disciplinary actions DHS took, explained how they exacerbated Lopez's mental illness, and also described the frustration Lopez's psychiatrist experienced in trying to arrange a medical leave of absence for Lopez. The arbitrator concluded his discussion of progressive discipline and mental illness as follows:

“The Arbitrator is convinced that the sum of the above factors placed [Lopez] under such difficult circumstances, that the only thing which would have helped him was the one year medical leave completely away from work, as recommended and requested by Dr. Alvarez. Because [Lopez] was no longer eligible for FMLA/OFLA at the time that Dr. Alvarez made the request, it appears that [Lopez's] only hope at maintaining his job and improving his mental health would have been receiving a lengthy unpaid leave of absence, an option that the CBA places at the discretion of the Employer. (Citation to exhibits omitted.)

19. The second preliminary issue the arbitrator addressed in his decision was “FMLA/Unpaid Medical Leave.” The arbitrator began his discussion by noting that Lopez had used up his FMLA and OFLA leave by July 16, 2008. The arbitrator observed that after Lopez’s FMLA and OFLA leave was exhausted, DHS “continued to extend a great deal of unpaid medical leave to [Lopez], authorizing numerous absences when they were supported by a doctor’s note,” but stopped authorizing additional leave on December 4. DHS also denied Lopez’s request for a one year medical leave of absence. The arbitrator criticized DHS’s actions:

“The unfortunate consequence for [Lopez] of the Employer’s decision not to continue extending his unpaid medical leave of absence beyond that provided by FMLA/OFLA is that he was left with only two possibilities: either to be at work or to face the reality of losing his employment due to his inability to work, even though this inability was the result of a bona fide medical condition.”

20. After addressing the preliminary issues of mental illness and progressive discipline and FMLA/OFLA leave, the arbitrator then considered the issue presented by the parties—whether DHS had just cause to discharge Lopez.

The arbitrator concluded that DHS did not have just cause to discharge Lopez. The arbitrator began his analysis by holding that DHS’s attempts to use progressive discipline to correct Lopez’s absentee problem were ineffective:

“Progressive discipline as it relates to a matter of misconduct assumes that the employee controls the undesired behavior. That is a highly questionable assumption when it comes to the problem of absenteeism cause [*sic*] by an illness, whether mental or physical. Telling an employee with cancer to be at work or he or she will lose his or her employment will not cure cancer. Telling [Lopez] to be at work or he will lose his employment will not cure bipolar and, as outlined above, will probably exacerbate the illness.”

The arbitrator described Lopez’s illness as a “hybrid; in part non work-related and in part work-related \* \* \*.” In support of this conclusion, the arbitrator determined that the following DHS actions contributed to Lopez’ mental illness:

–DHS used “[I]anguage in disciplinary actions that appears to blame him for his illness and sanctions the behavior that is the result of the illness.”

–DHS responded slowly and incompletely to Lopez’s request for

accommodation after the bookcase accident, which exacerbated Lopez' mental illness.

-DHS processed Lopez's request for medical leave in a slow and confusing manner. In particular, DHS created difficulties "with regard to the letter requesting additional information from his physician. \* \* \* Had the Employer been clearer about why it was asking the questions it was asking, much of the confusion might have been eliminated and the physician's response more timely. This all contributed, in the Arbitrator's view, to the level of stress being felt by [Lopez]."

-DHS ordered Lopez to return to work without a doctor's release on December 9, 2008. In so doing, DHS did not "do an adequate job of explaining the fact that a legitimate and well documented illness does not provide job protection once all of the appropriate leaves are exhausted. \* \* \* It is the Arbitrator's conclusion that a lot of the angst and therefore the stress could have been avoided with a more thoughtful and sympathetic explanation of the Employer's right to discharge even when an employee's medical condition does not allow the employee to work."

-DHS penalized Lopez for his absences during the bad weather days in December 2008. "The issue with [Lopez] was his absences cause [*sic*] by his medical condition. The fact that he and most of the office were absent because of a heavy snowstorm has no relationship to the primary problem. \* \* \* The point is that the snow days illustrate an overall pattern of response on the part of the Employer which heightened stress and tension thereby exacerbating [Lopez's] mental illness problem. Again, This [*sic*] is part of the reason why the Arbitrator concludes that the grievance [*sic*] continuing problem with mental illness is partly work related; a hybrid."

21. The arbitrator disagreed with DHS's contention that Article 56, Section (3)(a) did not apply to Lopez's leave request because it did not result from a "job-incurred illness or injury." The arbitrator held:

"\* \* \* the Employer should have granted the request for a one year plus unpaid medical leave of absence and that Article 56, Section (3)(a) does, at least to a limited extent, apply. In part his reasoning is, as set forth above, that his mental illness was exacerbated by a unique set of workplace stressors. This fact is coupled with the requirement of Article 20, Section 1 to apply progressive discipline 'as appropriate.' While the Employer went through the steps of progressive discipline, there was never any hope that

they would have any positive results. As previously discussed, imposing a one day unpaid suspension does not cure cancer and, likewise, imposing a three month salary reduction does not cure bipolar. Dr. Alvarez made it clear that the only reasonable hope for [Lopez] to get on top of his mental health problem was a leave of absence. \* \* \*

“ \* \* \* \*

“Based on all the somewhat unique facts surrounding this case, the Arbitrator concludes that the Employer would not have had just cause for a discharge until it had tried what the physician was requesting. The Employer needed to make a good faith effort to use something that had a chance of working as opposed to a process that clearly was going to have little if any positive results.”

22. The arbitrator ordered DHS to reinstate Lopez within 30 days of the date of his decision, provided that Lopez could provide a statement from his physician that he was ready to resume full-time work at DHS. The arbitrator also stated that

“\* \* \* it needs to be made clear that [Lopez] has exhausted his right to remedial activity and thus if he is not able to maintain regular attendance he can once again be subject to discharge. It may very well be that the nature of [Lopez’s] illness and his job duties are not compatible, but the Arbitrator finds that he is entitled to be given the opportunity to show otherwise.”

23. The arbitrator restored Lopez’s seniority rights but awarded him no back pay or benefits.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The June 4, 2010 arbitration award does not violate ORS 240.086(2)(d) or (e).

ORS 240.086(2), in pertinent part, requires 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.

“\* \* \* \* \*

“(f) The arbitrators awarded on a matter not submitted to them, unless it was a matter not affecting the merits of the decision upon the matters submitted.”

We use the same deferential standards to review arbitration awards challenged under ORS 240.086(2) as we do under the Public Employee Collective Bargaining Act (PECBA). *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, 720 (2010).

Public policy strongly favors arbitration as a fast, economical, and efficient way for parties to resolve their disputes and avoid labor unrest. *Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08, 23 PECBR 671, 685 (2010). For this reason, we “subject [arbitration awards] only to sparing review, in the interest of promoting the efficiency and finality of arbitration as a decision-making process for parties who contract to use it.” *Federation of the Oregon Adult Parole Officers v. Corrections Div.*, 67 Or App 559, 563, 679 P2d 868, *rev den*, 297 Or 458 (1984). When parties agree to a grievance process that culminates in arbitration, they agree to accept the arbitrator’s interpretation of their contract. *Clackamas County Employees Association v. Clackamas County*, Case No. UP-4-08, 22 PECBR 404, 411 (2008), *AWOP*, 228 Or App 368, 208 P3d 1057 (2009). Our role is to make sure the parties get what they bargained for, that is, a binding decision by the arbitrator. *Clatsop Community College Faculty Association v. Clatsop Community College*, Case No. UP-139-85, 9 PECBR 8746, 8761-62 (1986).

As long as a decision is based on the arbitrator’s interpretation of language in the parties’ collective bargaining agreement, “the arbitrator is within his [or her] contractual authority and the parties are bound by the decision.” *Clatsop Community College*, 22 PECBR at 411. We will enforce an arbitrator’s award even if we believe the arbitrator was wrong. “Neither a mistake of fact or law vitiates an [arbitration] award.” *Brewer v. Allstate Insurance Co.*, 248 Or 558, 562, 436 P2d 547 (1968); *Portland Association of Teachers and Jim 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) (it is not this Board's role to correct an arbitrator's decision even if we are convinced it is erroneous); *Eastern Associated Coal Corp. v. Mine Workers*, 531 US 57, 62 (2000) (the fact that a court may be convinced that a labor arbitrator "committed serious error does not suffice to overturn his [*sic*] decision.").

We apply these standards to the arbitrator's award that DHS challenges here. DHS acknowledges that our review of an arbitrator's award is extremely limited. It contends, however, that the arbitrator "exceeded his powers" in violation of ORS 240.086(2)(d) by adding terms to the parties' collective bargaining agreement, and violated ORS 240.086(2)(f) by ruling on issues not submitted to him.

We begin by considering DHS's allegation that the arbitrator exceeded his powers by adding language to the contract. The parties' contract expressly states that "[t]he arbitrator shall have no authority to \* \* \* add to \* \* \* the terms of this Agreement." DHS asserts that the arbitrator added two new requirements to the contract. First, DHS contends that the arbitrator created a "mental illness exception" to the language concerning progressive discipline in Article 20 of the parties' collective bargaining agreement. It argues that the arbitrator's conclusion that DHS inappropriately used progressive discipline in Lopez's case creates a new restriction: DHS is now barred from using progressive discipline with mentally ill employees. Second, DHS asserts that the arbitrator added a new contract term by characterizing Lopez's illness as a "hybrid"—an illness partly non-work related and partly work-related. DHS argues that this conclusion adds a new requirement to Article 56, Section 3: DHS must now consider and grant unpaid medical leave to employees with "hybrid" illnesses or injuries.

We disagree. We conclude that the arbitrator merely interpreted existing contract language and did not add new requirements to the parties' collective bargaining agreement. The arbitrator analyzed the language in Article 20 of the contract that requires DHS to use progressive discipline "when appropriate." The arbitrator concluded that, in these circumstances, DHS's use of progressive discipline was not "appropriate" because of Lopez's mental illness. The arbitrator's conclusion was clearly based on his interpretation of the "when appropriate" contract language. DHS's real disagreement is with the arbitrator's interpretation. As discussed above, this is not a basis for overturning an arbitrator's award. The parties agreed to submit their contract interpretation dispute to the arbitrator. Our role is to make sure the parties get what they bargained for, *i.e.*, an arbitrator's interpretation of their contract. Here, the arbitrator interpreted the contractual just cause and progressive discipline provisions, and we will enforce that award without reviewing whether it is right or wrong.

In regard to the arbitrator's conclusions about the hybrid nature of Lopez's illness, the arbitrator was similarly interpreting the contract. The contract *requires* DHS to grant requests for unpaid leave from employees with job-incurred illness or injuries; it *permits*, but does not require, DHS to grant unpaid leave requests from employees with injuries or illnesses not incurred on the job.

Thus, the obligations that DHS claims the arbitrator added to the contract—a restriction on the use of progressive discipline with mentally ill employees and a requirement that DHS grant unpaid medical leave to employees with certain types of mental illness—resulted from the arbitrator's interpretation of language in the parties' collective bargaining agreement as applied to the unique facts of this case. The arbitrator did not add to the parties' contract, and therefore did not exceed his authority in violation of ORS 240.086(2)(d).

DHS's reliance on *Chenowith Ed. Assn. v. Chenowith School Dist. 9*, 141 Or App 422, 918 P2d 854 (1996) is misplaced. In *Chenowith*, the court refused to enforce an arbitrator's award that ordered a school district to put new language into the collective bargaining agreement based on a proposal that the union made to a preparation time committee. The contract language at issue specified that any decisions made by the committee would be incorporated into the collective bargaining agreement. The court held that the arbitrator exceeded his authority by requiring that a proposal, to which the committee had not agreed, be put in the agreement:

"The arbitrator found that the parties did not agree to the language proposed by the Association. Nevertheless, he ordered the proposal incorporated into the agreement, thereby in effect adding a new, unagreed-to provision to the agreement. For that reason, his order exceeds the authority granted to him by the agreement. He was not authorized to make a new agreement for the parties under the guise of interpreting an existing agreement." *Id.* at 428.

Here, the arbitrator interpreted and applied contract language to which the parties had agreed—a requirement for appropriate use of progressive discipline in Article 20 and provisions for granting unpaid sick leave in Article 56, Section 3(a) and (b). In so doing, the arbitrator clarified existing provisions in the parties' collective bargaining agreement and did not add new or unbargained contract language.

DHS also contends that the arbitrator's decision must be vacated because the arbitrator "awarded on a matter not submitted to him" in violation of ORS 240.086(2)(e). DHS notes that the Union never grieved Lopez's September 12

reprimand, his January 9 salary reduction, or the denial of his request for unpaid leave. According to DHS, the arbitrator exceeded his authority by ruling on the propriety of these actions in his award. We disagree.

The arbitrator did not overturn the actions DHS took prior to discharging Lopez. Instead, the arbitrator analyzed the issue the parties' presented to him—whether Lopez's discharge violated the just cause provision in the parties' contract. The arbitrator found that the attempts DHS made to correct Lopez's attendance problem—reprimanding him and reducing his salary—had little chance of success because of Lopez's mental illness. In addition, the arbitrator held that by refusing to grant Lopez leave, DHS denied him the only possible opportunity to improve his work performance. The arbitrator concluded that DHS's pre-discharge actions were insufficient to provide just cause for DHS's imposition of the most severe form of discipline—discharge.

The arbitrator's award is based on his interpretation of the issue the parties asked him to decide (Lopez's discharge) and the contract language they asked him to consider (the just cause provision in Article 20). The arbitrator did not rule on issues not submitted to him in violation of ORS 240.986(2)(f).<sup>3</sup>

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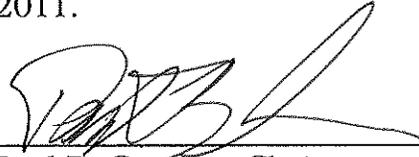
<sup>3</sup>DHS also contends that the arbitrator exceeded the power granted to him by the contract because his "[a]ward is based in part on the Arbitrator's opinion that [DHS] discriminated against Mr. Lopez because of his disability and/or failed reasonably to accommodate that disability." According to DHS, the arbitrator found that DHS discriminated against Lopez on account of his mental illness or physical injury in a number of ways—by denying Lopez's request for sick leave, by using language in written disciplinary actions that appears to blame Lopez for his problems, and by failing to accommodate adequately Lopez's May 2008 physical injury. DHS argues that by concluding that DHS discriminated against Lopez, the arbitrator exceeded the authority granted him under Article 2, Section 1. That contractual provision excludes grievances filed under Article 22, No Discrimination, from arbitration.

Contrary to DHS's assertion, the Union did not file a grievance under Article 22. The Union's grievance alleges that DHS violated the just cause requirement of Article 20. In interpreting this contract provision, the arbitrator held that just cause required DHS to consider the special circumstances of Lopez's mental illness. Thus, any conclusions the arbitrator reached regarding DHS's treatment of Lopez's mental health issues were based on his interpretation of the contract language the parties agreed was at issue. Nowhere in his award did the arbitrator implicitly (or explicitly) find that DHS unlawfully discriminated against Lopez in violation of Article 22.

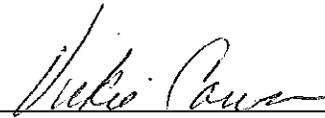
ORDER

The petition is dismissed.

DATED this 18 day of August 2011.



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Paul B. Gamson, Chair



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Vickie Cowan, Board Member



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Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.