

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-05-08

(UNFAIR LABOR PRACTICE)

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

On December 14, 2009, this Board heard oral argument on Respondent's objections to a Recommended Order issued on October 5, 2009, by Administrative Law Judge (ALJ) B. Carlton Grew, following a hearing on June 2 and 14, 2009, in Portland, Oregon. The record closed on July 13, 2009, with the submission of the parties' post-hearing briefs.

Will Aitchison, Attorney at Law, Portland, Oregon, represented Complainant.

Lory J. Kraut, Deputy City Attorney, City Attorney's Office, Portland, Oregon, represented Respondent.

On January 24, 2008, the Portland Police Association (PPA or Association), filed this Unfair Labor Practice Complaint against the City of Portland (City). The complaint, as amended on May 12, 2009, alleges that the City violated ORS 243.672(1)(g) by refusing to arbitrate grievances arising from changes in pension benefit calculation rules made by the City's Fire and Police Disability and Retirement Fund Board (FPDR or Fund).

The City filed a timely answer on May 22, 2009. The answer included affirmative defenses that the City Council has no authority to countermand Fund decisions; that

Fund pension benefit decisions are not “employment relations” under the Public Employees Collective Bargaining Act (PECBA); that Fund pension benefit decisions are not “mandatory for collective bargaining” under the parties’ collective bargaining agreement; that this Board lacks jurisdiction over Fund decisions; that the remedy the Association seeks in the grievance would violate the Home Rule amendments to the Oregon Constitution; and that forceful evidence exists that the parties never intended to arbitrate Fund decisions.

The issue is:

Did the City violate ORS 243.672(1)(g) when it refused to process grievances regarding changes to the rules for calculating pension benefits available to Association bargaining unit members?

RULINGS

The rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

History and Structure of the FPDR

1. In 1903, the City Charter created a pension fund for its police officers. It has been revised periodically by City voters.

2. In 1913, police officer Benjamin Branch challenged the benefits provided under the City pension fund, seeking a higher level of benefits which the state legislature had ordered the City to provide. Branch’s challenge was ultimately rejected by the Oregon Supreme Court in *Branch v. Albee*, 71 Or 188, 142 Pac. 598 (1914).

3. By 1942, the City pension fund covered both police and fire employees. Chapter 5 of the City Charter codified the Fund’s structure and activities and gave the Fund its current name, the Fire and Police Disability and Retirement Fund. The Fund receives the money it needs in a given year through a special tax assessment on property in the City.¹ Covered employees also contribute a portion of their wages.

¹This type of pension system is called a “pay-as-you-go” system; a Portland City Club report states that by 2006, the FPDR may have been the last such pension system in the United States.

4. The Fund was governed by an eleven-member board of directors, including the Mayor (who served as Chairperson); City Treasurer; City Auditor; Police and Fire Chiefs (serving on a rotating basis to fill one board position); two active Fire Bureau members; and two active Police Bureau members. The board also included three citizens who were not active or past FPDR members, one nominated by the Mayor and appointed by the City Council, one appointed by the elected board members of the Fire and Police Association/Bureaus, and one appointed by a majority of the members of the Fund Board itself. As a result, at least six of the eleven members of the Fund Board were either Fund beneficiaries or appointed by Fund beneficiaries.

5. By 1973, Oregon required local government police officers and firefighters to join the state Public Employees Retirement System (PERS) unless their public employer "provides retirement benefits * * * that are equal to or better than the retirement benefits that would be provided * * * under the Public Employees Retirement System." ORS 237.620(2).² Portland police and firefighters remained in the Fund pursuant to this provision. The PECBA was also enacted in 1973, and labor organizations representing police officers and firefighters subsequently negotiated collective bargaining agreements with the City under that statute.

6. In 1988, the Portland Firefighters Association proposed in bargaining that the City pay each individual firefighter's contribution to the Fund. The City refused to bargain over the issue, contending that the Home Rule amendments to the Oregon Constitution made the issue permissive for bargaining. This Board agreed with the Association's position that the proposal was mandatory for bargaining. *Petition for Declaratory Ruling Filed Jointly by Portland Fire Fighters Association, Local 43, IAFF and the City of Portland*, Case No. DR-2-88, 10 PECBR 931 (1988), *appeal dismissed as moot* (December 26, 1989).

7. By the late 1980s, if not before, the organization and decisions of the Fund were the subjects of public debate and criticism. Critics focused in part on disability decisions of the Fund. The Fund Board made the initial disability decisions, which critics believed to be unreasonably favorable to Fund beneficiaries. Community activists and organizations such as the City Club of Portland and *The Oregonian* newspaper editorial board argued that the dominance of beneficiaries on the Fund Board led to lax enforcement of the requirements for receiving benefits. Critics were also concerned about projections that the "pay-as-you-go" feature of the Fund would cause a substantial and rapidly increasing financial burden on the City.

²See *Salem Firefighters Local 314 v. PERB*, 300 Or 663, 717 P2d 126 (1986) (discussing the "equal to or better than" standard).

8. In January 2006, in response to the Fund's perceived problems, the City formed the FPDR Reform Committee to review the Fund and propose changes. The Committee was comprised of stakeholders in the Fund, including citizens, City officials, representatives of affected employees, and Association representatives. In May 2006, the Committee recommended that the City alter the structure of the Fund by amending the City Charter. The Committee recommended several changes in the Fund, including a reduction in size and change in composition of the Fund Board so that the beneficiaries would not control the Board.

9. In 2006, in response to the recommendations of the FPDR Reform Committee, the City Council proposed City Ballot Measure No. 26-86. Key provisions of the measure required that: (1) the FPDR Administrator would make individual benefit decisions, with an appeal path to a hearings officer, then to an independent panel of attorneys with experience in disability claims, and finally to circuit and appellate courts, thereby removing disability decisions from the Fund Board; (2) new employees would be placed in PERS, which is an investment-based, and therefore less expensive, pension system; (3) the Fund Board would be cut from eleven members to five; (4) the power of police and fire associations to select Fund Board members would be reduced; and (5) Fund decisions would be independently audited each year.

10. The proposed measure provided that the Fund Administrator would be appointed by the Mayor, approved by the Fund Board, and confirmed by the City Council. The measure gave the Mayor the power to remove the Fund Administrator "for any reason," but only "after seeking the advice of the Board." The Administrator was required to be a qualified disability expert and report jointly to the Mayor and the Fund Board.

11. The voters approved the Ballot Measure on November 7, 2006.

12. On January 1, 2007, the new Fund Board was seated. Pursuant to Measure 26-86, the Fund Board consists of the following: (1) The Mayor or the Mayor's designee, who must be approved by the City Council, and who chairs the board; (2) one active Fund member from the Fire Bureau, elected by the active members in the Fire Bureau; (3) one active member from the Police Bureau, elected by the active members in the Police Bureau; and (4) two City citizens with relevant experience in pension or disability matters, nominated by the Mayor and approved by the City Council. Neither the Mayor, the Mayor's designee, nor either citizen member may be an active or past member or a beneficiary of the Fund or a current or past employee of the Fire or Police Bureaus. Thus, only two of five members of the reorganized Fund Board (the police and

fire appointees) may be either beneficiaries of the Fund or selected exclusively by beneficiaries of the Fund.³

13. Because Mayor Potter was a former Police Bureau employee, he proposed Yvonne Deckard as his designee. Deckard was the City's Director of the Bureau of Human Resources and reported to the Mayor. The police and firefighter labor organizations did not object to Deckard's appointment, and the City Council approved her. The other members of the new Fund Board were citizen trustees and disability benefit experts Justin Delaney and Jeffrey Robinson, Portland Fire Fighters' Association's Bob Lemon, and the Association's Scott Westerman.

14. The Fund Board members and the administrator have a fiduciary responsibility to manage the FPDR in a prudent manner and are indemnified by the Fund for most claims arising from their functions. The Fund Board is responsible for implementing Chapter 5 of the City Charter and has adopted rules and regulations relating to the administration of the system. Fund Board meetings are governed by the Public Meetings Law.

15. Under the City Charter, the City's functions are performed by Departments, such as the Department of Public Affairs, Department of Finance and Administration, and Department of Public Safety. Specific City functions are performed by City Bureaus assigned to the Departments by the Mayor. These include the Bureau of Transportation, the Police Bureau, the Water Bureau, and the Bureau of Parks. The Fund is also a Bureau of the City. The Fund administrator is a City employee, as are her subordinates. The Fund uses City letterhead, City contracting and human resource forms and procedures, and has access to the services of the City Attorney and City Auditor. The City Attorney's office has advised the Fund Board that, for purposes of the Fund Board and Administrator indemnification required by the Charter, Fund trustees are agents of the City covered by the City's risk management program. The City pays the rent for the Fund's office, and does not charge the Fund for using the City Council chambers for Fund meetings. The City Treasurer holds the Fund's money.

16. The City Charter requires City Council approval for some actions of the Fund, such as settling "all or part of its future obligations to any Member, spouse or beneficiary of a Member for disability benefits." (Charter 5-202(g).) The Charter gives the City Council power to create "substantially equivalent" benefits by ordinance if relevant portions of the Charter are declared invalid. (Charter 5-403(e).) In addition, the Charter states:

³If the Mayor is a Fund member, as was Mayor Potter, the Mayor appoints a designee, but that designee must be confirmed by the City Council as a whole.

“If the City of Portland is required by law to extend to the Members additional benefits not described by this Chapter, the Council may provide for such benefits by ordinance and such additional benefits shall be paid from the Fund. Such ordinance may include reductions in corresponding benefits described in this Chapter, which shall override inconsistent provisions of this Chapter.” (Charter 5-403(a).)

Collective Bargaining and the Fund

17. The Association was created in or before 1979. The first Association-City collective bargaining agreement was signed in 1979. The City and Association negotiated or arbitrated subsequent collective bargaining agreements up to the present agreement, which extends from 2006 to 2010. The parties have never collectively bargained over any decision made by the Fund, and the Association did not challenge or seek to collectively bargain any Fund decision until the 2007 disputes that gave rise to this action.

18. The Fund Board has played no direct role in the negotiation of collective bargaining agreements, and has no mechanism in place for doing so.

Current Association-City Collective Bargaining Agreement

19. The 2006-2010 collective bargaining agreement between the Association and City contains the following provisions:

Article 3, entitled “Existing Standards,” provides:⁴

“3.1 Standards of employment related to wages, hours and working conditions which are mandatory for collective bargaining except those standards modified through collective bargaining shall be maintained at not less than the level in effect at the time of the signing of this Agreement. Any disagreement between the Association and the City with respect to this section shall be subject to the grievance procedure.”

Article 22, entitled “Grievance and Arbitration Procedure,” provides in part:

⁴This provision had its origins in the 1979-1981 agreement between the parties. The 1979 version stated: “All conditions of employment relating to wages, hours and working conditions not specifically mentioned in this agreement shall be maintained at not less than the level in effect at the time of the signing of this agreement. Any disagreement between the Association and the City with respect to this section shall be subject to the Grievance Procedure.”

“22.1 To promote better employer/employee relations, both parties pledge their cooperation to settle any grievances or complaints that might arise out of the application of this Contract by the use of this procedure. One purpose of the grievance procedure shall be to attempt to settle grievances at the lowest level possible.

“22.2 Step I. Any officer or the Association claiming a breach of any specific provision of this Contract may refer the matter in writing to the officer’s immediate supervisor outside the bargaining unit.”

The grievance process contains four steps and culminates in binding arbitration. The agreement provides that “[t]he arbitrator’s decision shall be final and binding.”

Article 2, entitled “Management Rights,” provides:

“2.1 The City shall retain the exclusive right to exercise the customary functions of management including, but not limited to, directing the activities of the Bureau, determining the levels of service and methods of operation including subcontracting and the introduction of new equipment; the right to hire, lay off, transfer and promote; to discipline or discharge for cause, to determine work schedules and assign work and any other such rights not specifically referred to in this Contract. Management rights, except where abridged by specific provisions of this Contract or general law, are not subject to the Grievance Procedure.”

20. The 2006-2010 collective bargaining agreement refers to retirees in at least four places: Article 25.3 governs vacation accruals for employees who sign a letter committing to retire in a specific year; Article 26.5 permits retiring employees to convert sick leave to cash; Article 43.14 provides compensation for court appearances by retired employees; and Article 48.4 provides medical insurance coverage for retired employees.

21. The 2006-2010 collective bargaining agreement refers to the Fund in at least four places: Article 24.2, regarding vacation leave accrual, provides that certain Fund-approved disability leave counts towards years of service. Article 26.5.2, regarding the disposition of unused sick leave for FPDR and PERS members after retirement or death, provides that “[i]f the ordinance, statute, or rules for calculating the death benefit of a member of either the Fund or the PERS are amended to include the value of unused sick leave; [sic] this section will be amended to assure that double recovery does not occur.” Article 49.4 provides that an injury or occupational illness is considered “service connected” under the collective bargaining agreement if the Fund or worker’s

compensation makes that determination. Article 57.2.11, regarding "Extra Employment" for a second employer who contracts with the City, provides:

"For purposes of retirement under Chapter 5 of the Portland City Charter (Fire and Police Disability, Retirement and Death Benefit Plan), special duty work outside of an officer's regular work hours constitutes overtime. In the event that the Board of Trustees includes special duty pay in 'base pay' for purposes of retirement under Chapter 5, the parties agree to meet and negotiate a substitute provision."

22. At least ten articles in the 2006-2010 Association-City agreement refer to the grievance procedure, including several which explicitly exclude certain disputes from the grievance procedure: Article 2, Management Rights, states that "management rights * * * are not subject to the Grievance Procedure"; Article 3, the Existing Standards article, quoted above; Article 20, Discipline, makes certain discipline subject to the grievance procedure; Article 21, Discharge and Demotion, permits discharge or demotion grievances to start at Step II of the grievance procedure; Article 22 describes the grievance procedure itself; Article 27, Death Leave, states that discretionary death benefits granted by the Chief are not subject to the grievance procedure; Article 57, Extra Employment, exempts certain special duty assignments from the grievance procedure; Article 61 provides that performance evaluations "are not grievable"; Article 62, Independent Police Review, permits a grievance at Step II of the grievance process to be held in abeyance for up to six months if it is subject to the Independent Police Review process; and Article 66, Overpayment, permits a grievance over an alleged overpayment and holds recoupment in abeyance until the grievance is resolved. In addition, a memorandum of agreement splitting the classifications of Detectives and Sergeants provides that certain matters related to the split are not subject to the grievance process.

Pension Benefit Calculations

23. To determine pension benefits, the Fund first calculates a beneficiary's "base pay," which is the employee's base wages "including premium pay but excluding overtime and payments for unused vacation or sick leave." (Charter 5-303(a).)

24. The Fund then calculates the beneficiary's "final pay," which is defined as "the highest Base Pay *received* * * * during any of the three consecutive 12-month periods *preceding* the month in which the * * * Member retires, dies, or otherwise terminates employment with the Bureau of Fire or Police." (Charter 5-303(b) (emphasis added).) The parties refer to this provision as the lookback period.

25. The Fund then determines the amount of benefits by multiplying the employee's "final pay" by 2.2 percent and by the employee's years of service, subject to a cap set by the Federal Internal Revenue Code.

Change in Lookback Period

26. In March, 2007, the Fund Board reviewed the method the Fund Administrator had been using to calculate an employee's "final pay." Part of that calculation requires the Administrator to determine the lookback period. The Fund Board determined that the Administrator was using the wrong lookback period. The City Charter specifies that the lookback period ends in the month *preceding* an employee's retirement date; the Fund Administrator instead used the *actual* month the employee retired. As a result, any salary increase in the final month of work was typically included in the pension calculations.⁵ On March 27, 2007, the Fund Board directed the Administrator to end the lookback period in the month preceding the month the employee retired. On May 8, the Fund Board learned that the Administrator had not yet implemented this decision, and ordered the Administrator to do so immediately, which she did.

27. In June, 2007, the Association filed a grievance over the decision of "the City" to change the lookback period. The Association alleged that the City violated Article 3, the existing standards clause. The Association sought, as a remedy:

"That the past practice be restored, that impacted employees and retirees be made whole for all lost retirement benefits, together with interest, and that such other relief be awarded as may be appropriate under the circumstances."

Earned vs. Received

28. The City Charter specifies that an employee's "final pay" is the base pay the employee "received." In March 2007, the Fund Board determined that the Fund Administrator had been calculating an employee's final pay by using the amount of base pay the employee "earned." Under the Administrator's formula, the final pay calculation would include such things as retroactive pay increases granted through collective bargaining. The Fund Board investigated the issue and heard public testimony on the matter.

⁵The record does not reveal whether the Fund Board had ever formally approved use of the actual month of retirement in determining the lookback period.

29. In October 2007, the Fund Board directed the Administrator to calculate final pay by using the base pay received by the employee, not the base pay earned by the employee. The change in calculations was implemented on September 1, 2008.

30. After the Association notified the City of its intention to file a grievance over this issue, the parties agreed to hold all grievance filing and processing deadlines in abeyance.

31. On August 3, 2007, the City declined to process or proceed to arbitration on both the lookback grievance and the earned versus received pay grievance. The City contended that decisions by the Fund are not subject to the dispute resolution process of the collective bargaining agreement or the PECBA. The City argued that the Fund's actions "are not subject to City control"; that the Fund is not the employer of Association bargaining unit members; that Fund decisions were protected by the Home Rule amendments to the Oregon Constitution; and that it "can be said with 'positive assurance' that the arbitration clause" of the parties' collective bargaining agreement does not cover the dispute. The City also stated that "the City will not be processing either matter through the parties' CBA grievance procedure." The Association filed this complaint in response.

32. The Fund Board members made their decisions regarding the lookback period and base pay calculation in good faith, based on what they perceived as their duties to the Fund.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The City violated ORS 243.672(1)(g) when it refused to process Association grievances regarding changes in pension benefits available to bargaining unit members.

As part of an effort to reform the pension system to which bargaining unit members belong, the FPDR made two changes to the method it uses to calculate pension benefits. The Association asserts that the changes will reduce the pension benefits available to members of the bargaining unit it represents. The Association filed a separate grievance over each change. Both grievances assert that reducing pension benefits violates Article 3 of the parties' collective bargaining agreement, which states:

"3.1 Standards of employment related to wages, hours and working conditions which are mandatory for collective bargaining except those standards modified through collective bargaining shall be maintained at

not less than the level in effect at the time of the signing of this Agreement. Any disagreement between the Association and the City with respect to this section shall be subject to the grievance procedure.”

The contract also contains a multi-step grievance procedure which culminates in binding arbitration. The procedure applies to “any grievance or complaints that might arise out of the application of this contract * * *.”

The City refused to process the grievances to arbitration. The Association filed this unfair labor practice complaint, alleging that the City’s refusal to process the grievances violated ORS 243.672(1)(g). Subsection (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 * * *.”

The City denies any wrongdoing. It argues that subsection (1)(g) does not apply because the decisions of the Fund are not “employment relations” within the meaning of the statute. It further argues that Fund decisions are outside of the City Council’s control and therefore are not “mandatory for collective bargaining” as that phrase is used in the contract. The City also argues that there is forceful evidence that the parties did not agree to put FPDR decisions before an arbitrator, and that the remedy sought—restoring the pension benefits to the level that existed before the changes—violates the City’s rights under the Home Rule provisions of the Oregon Constitution.

DISCUSSION

The policies of the PECBA strongly favor settling labor disputes through arbitration. *Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08, 23 PECBR 671, 685 (2010). To further those policies, we require parties to arbitrate their contract disputes unless we can say “with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” *Corvallis Sch. Dist. v. Corvallis Education Assn.*, 35 Or App 531, 534, 581 P2d 972 (1978) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 US 574, 582-83 (1960)).

In *J.C. Luoto and Long Creek Education Association v. Long Creek School District, No. 17*, Case No. UP-16-86, 9 PECBR 9314, 9329, *aff’d*, 89 Or App 34, 747 P2d 370 (1987), *rev den*, 305 Or 576 (1988), we explained:

“The emphasis in applying the positive assurance test is whether the *arbitration clause* is or is not susceptible to an interpretation that covers the dispute.* * * Where a contract contains what the [C]ourt in *AT&T Technologies [v. Communications Workers of America]*, 475 US 643 (1986) calls a ‘broad’ arbitration clause, application of the positive assurance test leads the mind to search for an express provision excluding the particular

grievance from arbitration. If such an express exclusion is not found, and barring other 'most forceful evidence of a purpose to exclude the claim,' arbitration will be ordered." (Emphasis in original; footnotes omitted.)

We summarized this Board's task as follows:

"* * * in a refusal-to-arbitrate case, this Board's jurisdiction is limited to determining the extent of the parties' arbitration agreement. We only decide, using the positive assurance test, whether the parties intended to arbitrate concerning the language at issue. We do not decide what the parties intended that language to mean." 9 PECBR at 9333.

We apply those standards here. The FPDR changed its calculation methods in ways that reduce the benefits available to bargaining unit members. The Association grieved the changes, asserting that Article 3 of the parties' collective bargaining agreement guarantees that employees will not have benefits such as these reduced during the life of the agreement. It is not this Board's role to decide whether the Association's assertion is correct. The only issue before us is whether the parties agreed that an arbitrator would resolve the dispute. If so, we will enforce that agreement by ordering the parties to arbitrate.

To determine whether the parties agreed to arbitrate this dispute, we look first at the grievance article in the contract. It contains a broad grievance and arbitration procedure which applies to "*any* grievances or complaints that might arise out of the application of this Contract * * *." (Emphasis added). We must decide whether this grievance language is "susceptible to an interpretation that covers the asserted dispute." *Luoto*, 9 PECBR at 9331. It clearly is. The Association's grievances "arise out of the application of" the contract: they assert that Article 3 applies in these circumstances to prevent a reduction in benefits. We conclude without difficulty that the language of the grievance arbitration provision can reasonably be interpreted to cover the dispute.

If any doubt about coverage remains, Article 3 resolves it. Article 3, which is the basis for the grievances, expressly provides that "[*a*ny disagreement between the Association and the City with respect to this section shall be subject to the grievance procedure." (Emphasis added.) The parties disagree about whether Article 3 prevents the benefits reduction. This is precisely the type of contract dispute the parties expressly agreed to resolve through arbitration. Our job is to ensure the parties get what they bargained for, *i.e.*, a binding decision from the arbitrator. We will enforce the parties' unambiguous agreement to arbitrate these disputes.

The City asserts that despite the unambiguous contract language, there is “most forceful evidence” that it did not agree to arbitrate this dispute.⁶ The City is not a model of clarity regarding the nature of this evidence, but its arguments all seem to flow from a single premise, *viz.*, that the Fund is, in some relevant sense, separate and independent from the City. At the outset, we note that we recently considered and rejected an identical argument about the relationship between the City and the Fund. *Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, Case No. UP-14-07, 23 PECBR 43, 76-77 (2009), *appeal pending*. We held that the Fund is a department of the City, “created by the City, funded by the City, staffed in accordance with City policies, and advised by the City Attorney’s office.”⁷ The City has presented no compelling reason to overturn this recent decision. The *Portland Fire Fighters’* reasoning and decision are dispositive. The major premise underlying the City’s arguments fails, so the arguments themselves fail.

Alternatively, even if the City were correct in its underlying premise that the City and the Fund are separate, it still would not prevail. The City makes three arguments why it would never have agreed to arbitrate Fund decisions. First, the City asserts that it cannot control or countermand decisions of the Fund. From this, the City argues that

⁶A collective bargaining agreement is interpreted in the same manner as any other contract. *OSEA v. Rainier School Dist. No. 13*, 311 Or 188, 194, 808 P2d 83 (1991). We first examine the text of the provision in the context of the document as a whole. *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997). If the contract is unambiguous, we enforce it according to its terms. *Rainier School Dist.*, 311 Or at 194. Here, as described more fully in the text, we conclude that the contract language unambiguously requires the City to arbitrate the grievances. The City’s arguments concern the second tier of analysis which we reach only if the contract language is ambiguous. At the second tier, we review extrinsic evidence of the parties’ intent. *Yogman*, 325 Or at 363. Although we are not required to review extrinsic evidence because the contract language here is unambiguous, we will nevertheless consider the City’s second-tier arguments. As discussed above, this evidence confirms our conclusion that the agreement is unambiguous. But even if we found an ambiguity at the second step, the third step requires us to consider maxims of contract construction. *Id.* at 364. One such maxim is that arbitration clauses should be interpreted in favor of coverage. *Portland Fire Fighters’ Assn. v. City of Portland*, 181 Or App 85, 96, 45 P3d 162 (en banc), *rev den* 334 Or 491 (2002); *Joseph Education Assn. v. Joseph Sch. Dist. No 6*, 180 Or App 461, 467, 43 P3d 1187 (2002). That maxim clearly requires us to conclude that the grievance/arbitration provision in the parties’ contract requires them to arbitrate these disputes. Thus, every level of analysis leads to the same conclusion—the disputes are arbitrable.

⁷See Finding of Fact 15 for additional evidence that the Fund is not separate from the City.

it “defies logic to presume that City Council would agree to *arbitrate FPD&R pension decisions.*” (Respondent’s Memorandum in Aid at 3.) (Emphasis added.)

Second, the City argues that an “agreement by City Council to *arbitrate FPD&R Board decisions* would be ultra vires.” (Respondent’s Memorandum in Aid at 3.) (Emphasis added.) The City Charter makes Fund decisions subject to judicial review, and according to the City, its agreement to instead arbitrate those decisions would violate the Charter.

Third, the City argues that “to *force FPD&R to restore* the prior, inaccurate interpretation” of how it calculates pension benefits would violate the City’s constitutional home-rule authority. (Respondent’s Memorandum In Aid at 4.) (Emphasis added.)

As demonstrated by the italicized portions of the City’s brief quoted above, all of the City’s arguments presume that the grievances seek to arbitrate the Fund’s decisions. This presumption is questionable at best. The grievances ask an arbitrator to determine the City’s obligations under the collective bargaining agreement and require the City to make bargaining unit members whole for any losses they may suffer as a result of the Fund’s decisions. As the Association observes, “even if FPD&R could not be compelled to comply with a remedial order, the City as a whole certainly can restore the *status quo ante* through the implementation of a supplemental retirement benefit.” (PPA’s Memorandum In Aid at 10, n 4.) Stated differently, an arbitrator might reasonably conclude that the grievances do not challenge the Fund’s authority to reduce benefits; instead, they assert that if the Fund reduces benefits, as it did here, then the City is contractually obligated to hold employees harmless from the reduction, even if the City did not cause the reduction. *See McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40*, Case No. UP-4-97, 17 PECBR 539, 546 (1998) (when the collective bargaining agreement promised certain health insurance benefits, and the insurance carrier did not provide one of the promised benefits, the employer was nevertheless obligated to provide the benefit as promised in the collective bargaining agreement).⁸ We reject the City’s arguments because they all incorrectly presume that the grievances necessarily challenge the Fund’s authority to reduce benefits and that the arbitrator would order the Fund to change its calculations.

⁸This same reasoning answers the City’s argument that FPDR is essentially like PERS, and employers do not arbitrate every benefit change PERS makes. This argument misses the point. This case concerns contract rights. If an employer contractually agrees to maintain a certain level of benefits, and a third party ceases providing those benefits, then the employer has a contractual obligation to make up the difference. *See McMinnville Education Association v. McMinnville School District #40*, 17 PECBR at 546. Moreover, the State legislature created the PECBA, and it can exempt PERS or any other issue from its coverage. By contrast, local government bodies lack authority to exempt issues from the requirements of the PECBA.

We reject the City's home-rule argument for two additional reasons. First, this Board recently rejected a nearly identical argument in *Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, 23 PECBR at 75-76. The City offers no compelling reason to overturn that precedent.⁹ Second, the City's argument is speculative. It presumes not only that the Association will prevail in the arbitration, but also that the arbitrator will, as a remedy, order the Fund to make changes. We decide here only that the dispute is subject to arbitration. We will not speculate on the legality of a remedy the arbitrator may or may not impose if the Association prevails.¹⁰ *Service Employees International Union Local 503, Oregon Public Employees Union v. City of Hermiston*, Case No. UP-57-01, 19 PECBR 860, 869 (2002) (“[i]t is not our job, in deciding the initial question of arbitrability, to address the validity of a requested remedy.”).

The City also contends that (1) the parties never bargained over pension benefits, and (2) the Association never before grieved a reduction in pension benefits. The purported lack of negotiations on the subject begs the question. The Association's grievances assert that the maintenance of benefits provision in Article 3 is a negotiated agreement regarding pension benefits. Whether Article 3 applies to pension benefits is a question for the arbitrator to decide. As to the absence of prior grievances, it may mean

⁹If the City's legal theory were correct, every home-rule local government in Oregon could evade all of its bargaining obligations under the PECBA. As counsel for the Association keenly observed, “[c]ould the City, through an amendment to its charter, create the Bureau of Fire and Police Salaries, vesting with the newly-created Bureau the ability to set salaries for PPA members, and thereby eliminate its obligation to negotiate over wages with the PPA? The concept is so antithetical to long-standing law under the PECBA as to border on the absurd; yet, the City's argument in this case is precisely to this effect. A public employer simply cannot avoid its PECBA responsibilities by creating a bureau or a department and attempting to vest with the department decision-making authority over *any* mandatory subject of bargaining, whether that subject be wages, retirement benefits, or disability benefits.” (Association Post-Hearing Brief at 22-23; emphasis in original.)

Such a result would conflict with the Oregon Supreme Court's decision in *City of Roseburg v. Roseburg City Firefighters, Local No. 1489*, 292 Or 266, 639 P2d 90 (1981). The Court there recognized that the PECBA expresses legislative policy judgments about what is best for the state, even though it may affect activities of local government. The PECBA takes the bargaining process out of the hands of local government. “Were it otherwise, local government could cripple the ability of the state to legislate regarding any matter of state policy which affected local governments by the simple expedient of local referendum. The home rule amendments were not intended to have that drastic, general effect.” *Id.* at 288.

¹⁰If the Association prevails and the arbitrator orders the City to act in a way the City believes is unlawful, it can raise a challenge at that time, when we will not need to speculate about hypothetical outcomes. See ORS 243.706(1); *Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08, 23 PECBR 671 (2010).

only that the Association never before disagreed with a benefits decision. The lack of prior grievances certainly does not provide positive assurance that the parties intended to exclude changes in pension benefits from the grievance arbitration procedure.

The City next argues that the pension benefits provided by the Fund are not “employment relations” as defined in the PECBA. According to the City, this has two consequences. First, it removes the dispute from subsection (1)(g); second, it removes the dispute from the contract language. Neither argument is valid.

We begin with the City’s statutory argument. 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 * * *.” The City argues at great length that subsection (1)(g) does not apply here because the pension benefits at issue are not “employment relations” (*i.e.*, they do not concern a mandatory subject for bargaining). The argument misses the point. Under the unfair labor practice complaint before us, it does not matter whether pension benefits constitute “employment relations.” The Association’s complaint does not ask us to enforce an agreement concerning pension benefits. Instead, it asks us to enforce an agreement to arbitrate disputes that arise under the contract. There can be no dispute that the grievance and arbitration procedure constitutes “employment relations.” ORS 243.650(7)(a) (“[e]mployment relations’ includes * * * grievance procedures * * *.”); ORS 243.672(1)(g) (it is an unfair labor practice to violate a written agreement “with respect to employment relations including an agreement to arbitrate * * *.”). Under subsection (1)(g), we can—and in fact must—enforce the parties’ written agreement to arbitrate.

When pressed at oral argument, the City conceded that its position would mean that any provision in a labor agreement concerning a permissive subject for bargaining would be unenforceable. That is an untenable interpretation of the PECBA. ORS 243.650(4) expressly recognizes that parties are free to bargain over, agree upon, and include permissive items in their contract.¹¹ As the court stated in *Central Point Sch. Dist. v. ERB*, 27 Or App 285, 291-92, 555 P2d 1269 (1976), *rev denied*, 277 Or 491 (1977): “[t]he district’s board had no duty to bargain over matters relating to [a permissive subject], nor was it required to agree to arbitrate such matters. Having chosen to do so, it must now abide by the agreement it entered into.”

¹¹ORS 243.650(4) states in pertinent part: “[t]his subsection may not be construed to prohibit a public employer and a certified or recognized representative of its employees from discussing or executing written agreements regarding matters other than mandatory subjects of bargaining that are not prohibited by law as long as there is mutual agreement of the parties to discuss these matters, which are permissive subjects of bargaining.”

Thus, even if we assume for the sake of argument that the City is correct and pension benefits are permissive for bargaining, it does not matter for purposes of the statutory analysis. The City's agreement on the subject, and its agreement to arbitrate disputes concerning it, are enforceable.

We turn now to the City's argument under the contract. The contract provides: "[s]tandards of employment related to wages, hours and working conditions which are mandatory for collective bargaining except those standards modified through collective bargaining shall be maintained at not less than the level in effect at the time of the signing of this Agreement." The City argues that pension benefits are not "mandatory for collective bargaining," and as a consequence, the contract provision does not apply to this dispute. This argument ignores the remainder of that contract provision, which states: "[a]ny disagreement between the Association and the City with respect to this section shall be subject to the grievance procedure." The parties disagree over whether this contract provision applies to pension benefits. This is precisely the type of dispute the parties agreed an arbitrator would decide. We will enforce the parties' agreement to arbitrate this dispute.

For the foregoing reasons, we cannot say with positive assurance that the parties intended to exclude these disputes from arbitration. Accordingly, we conclude that the City's refusal to process these grievances violated ORS 243.672(1)(g).

Remedy

When we conclude that a party committed an unfair labor practice, we must order the party to cease and desist. ORS 243.676(2)(b). We will order the City to cease and desist from refusing to process Association grievances concerning the changes to pension benefits available to bargaining unit members.

The Association also asks that we order the City to post a notice of its wrongdoing. In *Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, 23 PECBR 77-78, we addressed posting requirements as follows:

"In *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984), this Board identified factors for consideration when requiring a respondent to post a notice to employees.

"This Board generally requires the posting of an official notice in situations in which the violation: (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent's personnel; (4) affected a significant

portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge.'

"In order to require the posting of a compliance notice, we need only find that the violation involved one or more of the named factors. *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891, 908 (2007); *Blue Mountain Faculty Association/Oregon Education Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 781-82 (2007)."

The City's refusal to arbitrate these disputes was calculated, was part of a course of unlawful conduct that continued over several months, was carried out by several of the City's bureaus and departments, and affected a significant number of bargaining unit members. For these reasons, we will order the City to post a notice of its wrongdoing.

Many of the employees most immediately affected by the City's conduct are now retired. They might not regularly visit City facilities and are unlikely to see the posting. Accordingly, we will also order that the City mail the notice to those members of the bargaining unit who retired after the Fund's changes in benefit calculations. *See Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, 23 PECBR 78; *Washington County Police Officers Association v. Washington County Sheriff's Office*, Case No. UP-12-02, 20 PECBR 274, 289 (2003).

The Association further asks us to order the City to reimburse its filing fees. Under ORS 243.672(3), this Board has discretion to award filing fees to a prevailing party if the complaint or answer is "frivolous or filed in bad faith." An answer is frivolous if every defense asserted "is one that a reasonable lawyer would know is not well grounded in fact, or that 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." *AFSCME Council No. 75 v. City of Forest Grove*, Case Nos. UP-5/25-93, 14 PECBR 796, 797 (1993) (quoting *Westfall v. Rust International*, 314 Or 553, 559, 840 P2d 700 (1992)). Although we disagree with the City's arguments, we do not find that they are all frivolous or filed in bad faith. We will not order the City to reimburse the Association for its filing fees.

ORDER

1. The City shall cease and desist from refusing to arbitrate changes in pension benefit calculations;

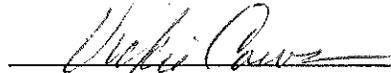
2. Within 30 days of the date of this Order, the City shall sign and post copies of the attached notice to employees for a period of 30 days in prominent places in the Police Bureau and other facilities where members of the bargaining unit are located, as well as in prominent places in the City's Bureau of Human Resources and other administrative offices. The Police Bureau Chief and City Human Resources Director shall sign the notice; and

3. Within 30 days of this Board's final order, the City shall mail a copy of the signed notice to bargaining unit members who retired after May 1, 2007.

DATED this 12 day of August 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.



NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-05-08, *Portland Police Association v. City of Portland*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that:

The Employment Relations Board (ERB) concluded that the City of Portland committed an unfair labor practice under the Public Employee Collective Bargaining Act. ERB held that the City unlawfully failed to arbitrate disputes over changes in the pension benefit calculations by the Fire and Police Disability and Retirement Fund subject to the existing standards provision of the City/Association collective bargaining agreement. To remedy the unfair labor practice, ERB ordered the City to do the following:

1. Cease and desist from refusing to arbitrate disputes regarding changes in pension benefits available to bargaining unit members;
2. Sign and post copies of this Notice to Employees for a period of thirty (30) days in prominent places in the Police Bureau and other facilities where members of the bargaining unit are located, as well as in prominent places in the City's Bureau of Human Resources and other administrative offices; and
3. Mail a copy of this signed notice to those bargaining unit members who retired after May 1, 2007.

The City will comply with ERB's order.

Dated this ____ day of _____ 2010

CITY OF PORTLAND

By: _____
Director, Bureau of Human Resources

By: _____
Chief, Police Bureau

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED