

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-36-05

(UNFAIR LABOR PRACTICE)

PORTLAND STATE UNIVERSITY)	
CHAPTER OF THE AMERICAN)	
ASSOCIATION OF)	
UNIVERSITY PROFESSORS,)	
)	RULINGS,
Complainant,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
v.)	AND ORDER
)	
PORTLAND STATE UNIVERSITY,)	
)	
Respondent.)	
_____)	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on January 25 and 26, 2006, in Portland, Oregon. The hearing closed on July 17, 2006, upon receipt of the parties' post-hearing briefs. On July 20, 2007, the case was transferred to this Board for determination.

Elizabeth A. Joffe, Attorney at Law, McKanna, Bishop, Joffe & Sullivan, 1635 N.W. Johnson Street, Portland, Oregon 97209, represented Complainant.

Helle Rode, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On July 15, 2005, the Portland Chapter of the American Association of University Professors (Association) filed this unfair labor practice complaint alleging that

Portland State University (University) violated ORS 243.672(1)(e) and (g) by refusing to provide information, bargain in good faith, or process the Association's grievance regarding Dr. Lisa Wilson. The University filed a timely answer

The issues presented for hearing were:

1. Did the University refuse to process the Association's grievances regarding Wilson's non-renewal and the University's refusal to provide affirmative action investigation documents? If so, did this conduct violate ORS 243.672(1)(g)?

2. Did the University violate ORS 243.672(1)(e) by refusing to bargain over modifying or replacing an allegedly illegal provision in the collective bargaining agreement?

3. Did the University fail to provide affirmative action investigation documents in response to the Association's information requests? If so, did this conduct violate ORS 243.672(1)(e)?

4. Should the University be required to pay a civil penalty to the Association?

RULINGS

1. The day after the hearing, the University moved to have Exhibit R-35, a copy of the parties' 2001-2003 collective bargaining agreement, admitted into evidence. The parties referred to Exhibit R-35 during the course of the hearing, but the University inadvertently neglected to request its admission at hearing. The following day, the University realized this oversight, and requested that the ALJ admit Exhibit R-35 into evidence. The Association objected because the hearing was closed.

Exhibit R-35 is relevant to show the bargaining history of the Resort to Other Procedures language contained in the collective bargaining agreement. The Association is not adversely affected by our admission of this document. The Association was provided a copy prior to the hearing and the parties referred to the document during the hearing. We will admit Exhibit R-35.

2. The ALJ's remaining rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association is the exclusive representative of a bargaining unit of academic professionals employed by the University, a public employer

2. The University and the Association were parties to a collective bargaining agreement effective September 1, 2003 through August 31, 2005. Relevant portions of the bargaining agreement are as follows:

“Article 6. EXCHANGE OF INFORMATION

“**Section 1.** During the term of this Agreement, the University shall make available to the Association within thirty (30) days after the person designated by the University as described in Section 6 of this article receives a written request therefor, all factual information reasonably required for the Association to administer this Agreement and to negotiate subsequent Agreements.

“The Association may agree to extend the deadline upon receipt of a written request explaining the need for extension.

“* * * * *

“Article 13. NONDISCRIMINATION

“The University and the Association will not discriminate against any member with respect to wages, hours, or any terms or conditions of employment, or in the application of the provisions of this Agreement by reason of age, handicap, marital status, national origin, race, religion, gender, sexual preference, or veteran status, or by reason of membership or nonmembership in the Association. The Association agrees to support the University in the fulfillment of its affirmative action obligations.”

“* * * * *

“Article 18. FIXED-TERM INSTRUCTIONAL AND RESEARCH FACULTY

“Section 1. Introduction

“* * * * *

“(c) Definition of Fixed-Term Faculty. Fixed-term faculty are faculty who are not on tenure-track appointments, but whose appointments are at least .50 FTE annualized. These appointments are primarily for instruction and research as described in the position descriptions. Appointments are for a specific period of time, as set out in the notice of appointment.

“* * * * *

“Article 28. RESOLUTION OF DISPUTES

“Division A. EXPEDITED DISPUTE RESOLUTION

“Section 1. If the Association believes that a provision of this Agreement which confers rights upon it has been violated, misinterpreted, or improperly applied, or if the University believes the Association has violated, misinterpreted, or improperly applied a provision of this Agreement, the complaining party may file with the other a written complaint citing the provision of this Agreement alleged to have been violated, misinterpreted, or improperly applied, the approximate date of the alleged act or omission, the person responsible, and the remedy sought. Such a complaint shall be filed within thirty (30) days of the date of the alleged act or omission.

“* * * * *

“Section 5. The University and the Association agree to use arbitration as the sole method of deciding unresolved disputes alleging violation, misinterpretation, or improper application of the express terms of this Agreement; therefore, the parties hereby waive their respective rights to have such

matters resolved by the Employment Relations Board as provided by ORS 243.672(1)(g) and 243.672(2)(d); except that disputes relating to definition of the bargaining unit shall be resolved by the Employment Relations Board and not by arbitration.

“* * * * *

“Division B. GRIEVANCES

“Section 1. Purpose. The purpose of this Article is to provide a procedure that will promote prompt and efficient investigation and resolution of grievances. The parties encourage informal resolution of grievances whenever possible. The University is not obliged to observe any other procedure for the resolution of grievances as that term is hereby defined.

“Section 2. Resort to Other Procedures. If, prior to seeking resolution of a dispute by presenting a grievance hereunder, or while the grievance proceeding is in progress, a member seeks resolution of the matter through any agency outside the University, whether administrative or judicial, the University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure or pursuant to Division C (ARBITRATION) of this Article.

“Section 3. Definitions.

“(a) The term ‘grievance’ is defined as an allegation that there has been a violation, misinterpretation, or improper application of the provisions of this Agreement. The term ‘grievance’ shall not include complaints related to matters of academic judgment
* * *

“(b) ‘Grievant’ means one or more members of the bargaining unit or the bargaining unit itself alleging damage or injury by the act or omission being grieved.

“* * * * *

“Section 4. General Provisions

“(a) Grievances may be filed only by the Association on behalf of any member or group of members of the bargaining unit.

“* * * * *

“ARTICLE 41. SEPARABILITY

“Notwithstanding the provisions of ORS 243.702(1), it is the expressed intent of the parties that in the event any provisions of this Agreement shall at any time be declared invalid by any court of competent jurisdiction or rendered invalid through federal or state regulation or decree, such action shall not invalidate any remaining provision of this Agreement. All provisions not declared invalid shall remain in full force and effect. Upon the request of either party, both parties shall enter into negotiations for the purpose of attempting to arrive at a mutually satisfactory replacement for such invalidated provision.

“ARTICLE 42. TOTALITY OF AGREEMENT

“The parties acknowledge that during the negotiations which resulted in this Agreement, the Association and the University had the unlimited right and opportunity, consistent with previously adopted ground rules, to present demands and proposals with respect to any and all matters lawfully subject to collective bargaining; that all understandings and agreements negotiated are set forth in this Agreement; and that this Agreement constitutes the entire and sole agreement between the parties for its duration.

“Each party, for the lifetime of this Agreement, agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter, whether or not referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or

contemplation of the parties at the time they negotiated or signed this Agreement.

“Nothing in this Article precludes mutual agreement of the parties to alter, amend, supplement, or otherwise modify in writing any of the provisions of this Agreement. In the event the parties meet to modify this Agreement as provided in this paragraph, student representatives shall be sent timely notice of the meeting and shall be entitled to participate in the manner provided by ORS 243.778.”

3. Dr. Lisa Wilson, a bargaining unit member, was employed by the University as a faculty member in the Graduate School of Education on a fixed-term annual contract basis from September 1998 through June 2004.¹ During the 2003-2004 term, Wilson was employed part-time. Wilson was also employed by separate contract for the summer term of 2004 (June to August).

4. In the fall of 2003, one of Wilson’s colleagues told Wilson that she was being sexually harassed by another faculty member. Subsequently, Wilson raised this issue with her department head.

5. On or about December 8, 2003, the University gave written notice to Wilson that her academic-year contract would not be renewed when it expired on June 15, 2004. The notice provided:

“This letter is to provide you notice that your contract will not be renewed when it expires on June 15, 2004. We do not know if our Department will need your services after this date.

“This notice is not intended to reflect discredit on your service and is being provided at this time to help reduce disruption and facilitate planning. Your employment agreement with the University provides that the University may renew or not renew your fixed term contract and no reason need be given

¹Fixed-term annual contracts cover the academic year (September to June). Summer terms are covered by separate contracts.

“In the event it is later decided your services are required, a new contract executed by the University will be offered to you. If such a decision is made, I will contact you.”

Fixed-term faculty, including Wilson, were regularly given notices of non-renewal in December of each year. Depending upon funding and need, the University might offer new contracts for the subsequent academic year the following spring.

6. During the 2003-2004 academic year, Wilson’s part-time position was funded in full by a grant. In the spring of 2004, the University and Wilson received notification that the grant had not been renewed.

7. Some time around June 2004, Wilson complained to Dean Phyllis Edmundson that the University was retaliating against her because of Wilson’s fall 2003 conversation with the department head about the sexual harassment complaint from Wilson’s colleague. Wilson alleged that she was treated differently than male colleagues, her schedule was altered to her detriment, and she was denied a promotion.

8. On or about July 1, 2004, Wilson met with representatives of the University’s Office of Affirmative Action and Equal Opportunity (AA Office) to discuss filing a formal complaint alleging that the University had retaliated against her for opposing the alleged harassment of her colleague

9. On July 2, 2004, Wilson received a second non-renewal letter from the University confirming that her contract would not be renewed for the 2004-2005 academic term.

10. On July 12, 2004, Wilson delivered to the AA Office a completed and signed complaint against the University’s Graduate School of Education. The AA Office requested additional information which Wilson delivered on July 21, 2004. The AA Office then considered July 21 as the formal filing date.

11. In early July 2004, Wilson spoke with Association representative Dr. Julia Getchell about filing a contract grievance. Getchell told Wilson that the Association needed further information before determining whether to file a grievance. On July 27, 2004, Getchell asked the University for a copy of Wilson’s personnel records, and documents Wilson submitted to the AA Office regarding “sexual harassment complaints re: Counselor Ed faculty members. Dates and reports.”

12. The University provided the requested information to Getchell on August 17 and September 10, 2004.

13. On October 5, 2004, Getchell formally asked the University for a copy of the Affirmative Action (AA) investigation report prepared by the University AA Office detailing the investigation of Wilson's complaint. Getchell attached Wilson's signed release. Getchell also requested an extension of time to file Wilson's grievance until she could review the investigation documents. The University granted the extension.

14. The AA Office notified the Association that it had revised its target date for completing the investigation of Wilson's complaint to December 9, 2004.

15. By letter dated December 17, 2005, Michael Driscoll, vice provost for Academic Personnel and Budget, notified Wilson that the AA investigation was complete, that he had reviewed it, and he was adopting the recommendation that no remedial action be taken.

16. Because she had still not received the AA investigation report on January 14, 2005, Getchell asked for another grievance extension. Getchell's request provided:

"The Association has not yet received the report about Dr. Lisa Wilson's affirmative action complaint that we requested on October 5, 2004. This information is crucial to the grievance investigation the Association is currently conducting on behalf of Dr. Wilson.

"Because the University has not yet provided the Association this information, we must request an extension on the deadline to file Dr. Wilson's grievance. We would like to extend the deadline to 10 working days after the Association receives the affirmative action complaint report from the University.

"If the University has no intention of providing the Association with this information, please let me know right away."

Driscoll granted the Association's request and extended the deadline to file a grievance until January 24, 2005.

17. On January 24, Getchell e-mailed Driscoll again asking for a grievance extension until she could get the requested information. Driscoll responded that he would have a response to the information request the following day and would extend the grievance time line until January 31, 2005.

18. By letter dated January 25, 2005, Driscoll notified Getchell that the University would not provide the Association with Wilson's AA investigation report because it was confidential.

19. By letter dated January 31, 2005, to Kelly Gabliks, the University's attorney, Association Attorney Elizabeth Joffe protested the University's failure to provide the requested information.

20. By letter dated February 3, 2005, Gabliks told Joffe that the University would not provide the requested information because it was irrelevant and confidential. Gabliks' letter stated, in pertinent part:

"It is my understanding that Dr. Wilson's AA/EO complaint revolves around her belief that PSU retaliated against her when she protested the alleged harassment of a Graduate School of Education colleague. However, as Dean Phyllis Edmundson's Step One Response to Dr. Wilson's non-contractual grievance makes clear, Dr. Wilson was non-renewed **before** Dr. Edmundson learned of Dr. Wilson's actions, so there cannot be any retaliation. I have provided a copy of this letter, which sets out Dean Edmundson's response in full, for your review. Given Dean Edmundson's prominent role in the AA/EO investigation, this letter also serves as a summary of the issues covered in the Report, and is provided in an attempt to accommodate your need for this confidential information.

"As the Union's request is not relevant to any possible grievance that you might file on behalf of Dr. Wilson related to her non-renewal, PSU is under no obligation to provide it and so declines to do so." (Emphasis in original; footnote omitted.)

21. On or about February 7, 2005, Wilson completed a pre-complaint intake questionnaire with the Equal Employment Opportunity Commission (EEOC) regarding a potential discrimination complaint protesting her non-renewal. Wilson

mistakenly thought she had filed an actual EEOC complaint. Wilson had waited until February to file an EEOC complaint because Getchell had told her that the collective bargaining agreement prohibited pursuing a grievance once a claim was filed with an outside agency.

22. On February 8, 2005, the Association filed a grievance alleging that the University violated Article 6 of the collective bargaining agreement by failing to provide the Association with the requested information.

23. The parties met on February 23, 2005, to discuss the Wilson grievance. Driscoll stated that the University refused to provide the information because it would have a chilling effect on witnesses' willingness to cooperate with investigations because the University could not guarantee witness anonymity. The University also alleged that Edmundson was afraid of Wilson because Wilson had entered her Edmundson's office on two occasions and was disruptive.² The Association offered to enter into a confidentiality agreement with the University. Driscoll expressed interest and asked Joffe to supply sample confidentiality terms. Following the meeting, Joffe e-mailed proposed confidentiality terms to Gabliks.

24. During the February 23, 2005 meeting, Getchell informed Driscoll that Wilson had filed a discrimination complaint with the EEOC.

25. On February 24, 2005, an EEOC investigator contacted Wilson and explained that any EEOC complaint over Wilson's non-renewal would be untimely. Based on this information, Wilson did not file a formal complaint with EEOC.

26. By letter dated March 14, 2005, Gabliks notified Joffe that the University would not process the Association's failure-to-provide-information grievance because Wilson had filed an EEOC complaint. In support of her position, Gabliks cited Article 28.B.2 "Resort to Other Procedures" (ROP) provision of the collective bargaining agreement which provides that the University has no obligation to process a grievance if the grievant seeks resolution of the same issue through any outside agency.³

²The record indicates that Wilson was agitated when she was in Edmundson's office, but the record does not support the University's allegation that Wilson was an actual threat to Edmundson.

³The ROP language has been in the parties' collective bargaining agreement since 1979. During negotiations for the 2003-2005 and the 2005-2007 agreements, the Association proposed that the language be eliminated and/or modified based on its understanding that the language was

27. In a letter dated March 16, 2005, Joffe reminded Gabliks that it was the Association's position that the ROP language was illegal and unenforceable, and that the Association had tried to renegotiate or remove the language during bargaining for the previous two collective bargaining agreements. Joffe stated that the Association still wanted to negotiate with the University to either remove the language, bargain a modification, and/or negotiate a one-time exception in this case.

28. On March 17, 2005, Wilson filed a complaint with the Oregon Bureau of Labor and Industries (BOLI) alleging that her non-renewal was discriminatory and retaliatory.

29. On March 18, 2005, Getchell, in order to preserve Wilson's rights, grieved Wilson's non-renewal despite the fact that she had not received the AA investigation documents necessary to complete her investigation.

30. By letter dated April 7, 2005, Gabliks informed Joffe that the University would not renegotiate the ROP language. She stated that the parties had an opportunity during the recent collective bargaining negotiation process to negotiate that issue and had agreed to maintain the language.

31. The University never provided the Association with the AA investigation reports. It refuses to process Wilson's non-renewal and refusal-to-provide-information grievances, and/or renegotiate the ROP language.

CONCLUSIONS OF LAW

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

2. The University violated (1)(g) when it refused to process the Association's grievances.

The Association filed two grievances. One alleged that the University violated the collective bargaining agreement when it refused to renew Wilson's fixed-term faculty contract. The second alleged that the University violated the collective bargaining agreement when it refused to give the Association information it requested to assist it in evaluating and pursuing the Wilson grievance. The University refuses to

illegal. The University refused to eliminate or modify the language, and the parties agreed to leave the language as is.

process either grievance. The Association alleges that this refusal violates ORS 243.672(1)(g). That statute 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 * * *.” We have held that an unexcused refusal to process a grievance violates subsection (1)(g). *West Linn Education Association v West Linn School District*, Case No. C-151-77, 3 PECBR 1864 (1978).

The University asserts its refusal is justified because it never agreed to process the grievances. In essence, the University’s argument is that the grievances are not substantively arbitrable. In substantive arbitrability cases, we will compel arbitration unless we can say with “positive assurance” that the dispute is not arbitrable. *Luoto v. Long Creek School District No. 17*, Case No. UP-16-86, 9 PECBR 9314, 9327-29, *aff’d*, 89 Or App 34, 747 P2d 370 (1987), *rev den*, 305 Or 576, 753 P2d 1382 (1988).

The University points to Article 28.B.2 of the collective bargaining agreement, which states:

“Section 2. Resort to Other Procedures. If prior to seeking resolution of a dispute by presenting a grievance hereunder, or while the grievance proceeding is in progress, a member seeks resolution of the matter through any agency outside the University, whether administrative or judicial, the University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure or pursuant to Division C (ARBITRATION) of this Article.”

Here, Wilson commenced proceedings with the EEOC, a federal administrative agency, seeking resolution of her non-renewal, the same dispute presented in the grievance. Under the express and unambiguous terms of the collective bargaining agreement, we can say with positive assurance that the University had no contractual obligation to further process the grievance once Wilson commenced EEOC proceedings.⁴ In addition, after the University stopped processing Wilson’s grievance, she filed a complaint with BOLI, a state administrative agency, regarding her non-renewal. Under the collective bargaining agreement, this complaint would also justify the University’s refusal to continue processing Wilson’s grievance.

⁴Wilson filed an intake questionnaire and spoke with an EEOC investigator. The U.S. Supreme Court recently held that filling out an intake questionnaire can constitute a “charge.” *Federal Express Corporation v. Paul Holowecki*, 552 US ___ (2008) LEXIS 2196 (February 27, 2008)

Normally, we would end our analysis here, The matter is expressly excluded from the grievance procedure, so the grievances are not substantively arbitrable. The Association, however, asserts that the contract provision which excludes these matters from the grievance process is illegal and unenforceable. It relies on state and federal statutes that make it unlawful to discriminate against an employee because the employee filed a complaint with the EEOC or BOLI. It then points to case law which holds that it is unlawfully discriminatory to deny an employee access to a contract grievance procedure solely because the employee filed a complaint with the EEOC. We turn to the Association's argument, beginning with the statutes.

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides that it is unlawful "for an employer to discriminate against any of his employees * * * because he [the employee] has made a charge * * * under this subchapter." ORS 659A.030(1)(f) provides that it is an unlawful employment practice "[f]or any person to discharge, expel or otherwise discriminate against any other person because that other person * * * has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so."

Oregon courts have never considered collective bargaining agreement provisions that restrict an employee's use of a grievance procedure if the employee attempts to resolve a dispute through an outside agency or the courts. However, other courts have repeatedly and consistently found it unlawful to deny an employee access to a contract grievance procedure solely because the employee pursued rights protected by federal anti-discrimination law. In *EEOC v. Board of Governors of State Colleges and Universities*, 957 F2d 424 (7th Cir.), *cert. denied*, 506 US 906 (1992), the court considered a provision in the applicable collective bargaining agreement that denied an employee the right to pursue a grievance if the employee initiated a claim in an administrative or judicial forum. The court concluded that this provision violated Section 4(d) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d), which makes it unlawful for an employer to discriminate against an employee "* * * because such individual * * * has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or litigation under this chapter." The court found that denying the employee the right to file a grievance because the employee filed a discrimination claim under the ADEA was an adverse employment action. The court concluded that the relevant contract language violated Section 4(d) of the ADEA, which "prohibits policies that penalize employees who exercise their statutory rights under the ADEA." *EEOC v. Board of Governors*, at 431.

Other courts have reached the same conclusion and held that an employer unlawfully retaliates against an employee if it denies the employee access to a contract grievance procedure solely because the employee made a complaint to the EEOC. *See*

Owens v. New York City Housing Authority, 1994 U.S. Dist. LEXIS 3348, No. 84 Civ. 4932, 1994 WL 97411, at *3 (S.D.N.Y. March 18, 1994) (employer unlawfully retaliated against an employee when it discontinued negotiations to resolve a contract grievance, solely because the employee filed an ADEA claim); and *Vara v. Mineta*, 2004 U.S. Dist. LEXIS 17961 (S.D.N.Y. Sept. 2, 2004) (employer unlawfully retaliated against an employee when it denied the employee access to a grievance procedure because the employee spoke to an EEOC counselor).⁵

We find the reasoning in these cases persuasive. The ROP provision in Article 28.B.2 of the parties' collective bargaining agreement penalizes an employee who chooses to exercise rights protected under federal and state law by seeking resolution of a discrimination claim with BOLI or the EEOC. For this reason, it constitutes unlawful retaliation under both state and federal law. 42 U.S.C. § 2000e-3(a); and ORS 659A.030(1)(f).

From the perspective of the Public Employee Collective Bargaining Act (PECBA), we understand why parties would negotiate a contract provision such as the ROP. This contract language allows both the employee and the employer to choose the forum in which to pursue a complaint. An employee might prefer the faster, cheaper, and final decision that a grievance process can supply as compared to lengthier and more expensive state or federal administrative and judicial procedures. An employer might also choose the grievance procedure for the same reasons, but has a legitimate concern that it should not have to defend the same claim in more than one forum. By agreeing to the ROP language, the parties compromised in a way that met their needs: the employer agreed to submit complaints to the grievance procedure, but also agreed that the process would cease if the employee sought judicial or administrative resolution of the dispute. Normally, we support such mutually beneficial compromises, since they further the PECBA policy of developing "harmonious and cooperative relationships between government and its employees." ORS 243.656(1). Here, however, the compromise cannot lawfully apply to Title VII complaints.

⁵Courts are divided on the issue of whether it is unlawful for an employer to deny an employee access to the employer's internal grievance policy solely because the employee has filed an EEOC complaint. In *United States v. New York City Transit Authority*, 97 F3d 672, 679 (2d Cir. 1996), the court found that denying an employee access to an internal grievance procedure was not an adverse employment action; the court distinguished between the procedure at issue, which had been adopted by the employer, and one which was guaranteed by a collective bargaining agreement as in *EEOC v. Board of Governors*. However, in *EEOC v. General Motors Corporation*, 826 F Supp 1122 (N.D. Ill., Eastern Div 1993), the court found that an employer unlawfully retaliated against an employee when it refused to allow the employee to use an informal dispute resolution process because the employee had filed a claim with the EEOC.

We have concluded that an employer unlawfully retaliates against an employee if it refuses to process a grievance filed under a collective bargaining agreement solely because the employee tried to resolve the dispute through the EEOC or BOLI. Consequently, we also conclude that the provisions of Article 28.B.2 are unenforceable as applied to the Wilson grievance. As a result, the University has no valid justification for its refusal to process the grievance.⁶

The University also argues that Article 28.A.5 excuses it from processing the Association's grievances. This provision obligates the parties to use arbitration as the sole method of resolving their disputes over the application of the terms of the agreement, and further states that the parties waive their right to have such matters resolved by this Board.

The University's argument is misplaced. An employer may not establish a grievance process as the only means to resolve a dispute and then repudiate the grievance process. *West Linn Education Association v. West Linn School District*, 3 PECBR at 1870. Here, we decide only that the University is obligated to process the Wilson grievances. Such questions of substantive arbitrability are for this Board. *Portland Association of Teachers v. Portland School District No. 1*, Case No. UP-114-86, 10 PECBR 216, 227 (1987), *appeal dismissed as moot*, 94 Or App 215, 764 P2d 965 (1988). We do not resolve the underlying grievances. The resolution of those grievances must be through the grievance process, agreed upon by the parties.

The University's refusal to process the Wilson grievances violated ORS 243.672(1)(g). We will order the University to cease and desist from refusing to process the Wilson grievances.

3. The University did not violate ORS 243.672(1)(e) when it refused to bargain about the ROP language.

⁶We note that our conclusion is consistent with the policy enunciated by the U.S. Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 US 36 (1974). In that case, the Court found that a union could not lawfully waive an employee's right to pursue a discrimination complaint under Title VII by agreeing to language in the collective bargaining agreement that required all such claims to be processed only through the contract grievance procedure. The Court noted that " * * * the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII " *Alexander v. Gardner-Denver* at 59-60

Having determined that the ROP language cannot apply to terminate a gender discrimination grievance, we turn to the issue of whether the University violated ORS 243.672(1)(e) when it refused to renegotiate the ROP language.

ORS 243.702 establishes the standard for renegotiation of an invalid provision in a collective bargaining agreement. The statute provides:

“* * * (1) In the event any words or sections of a collective bargaining agreement are declared to be invalid by any court of competent jurisdiction, by ruling by the Employment Relations Board, by statute or constitutional amendment or by inability of the employer or the employees to perform to the terms of the agreement, then upon request by either party the invalid words or sections of the collective bargaining agreement shall be reopened for negotiation.”⁷

The University contends that at the time the Association made its bargaining demand, neither this Board nor a court of competent jurisdiction had determined that the ROP provision was illegal. It asserts that the statute, therefore, did not require it to renegotiate the provision.

The University is correct. At the time of the Association’s demand to bargain there was no determination that the language was illegal, only the Association’s allegation that it was illegal. The University did not have an obligation to bargain at the time of the demand and did not violate subsection (1)(e) by refusing to renegotiate the ROP provision. Because the Association’s complaint is premature, we will dismiss this allegation.

4. The University violated ORS 243 672(1)(e) when it failed to provide the AA investigation report.

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative.” As part of the duty to bargain in good faith, the parties are required to provide each other with requested information that is of probable or potential relevance to a grievance or other contract administration issue. *Deschutes County 911 Employees Association v. Deschutes County 911 Service District*, Case No. UP-32-04, 21 PECBR 416, 428 (2006).

⁷Renegotiation of a collective bargaining agreement pursuant to this section is subject to the 90-day expedited bargaining process in ORS 243.698.

When analyzing duty-to-provide-information cases, we begin with the premise of full disclosure. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 70 (1999).

The University argues that it has no obligation to provide the AA investigation report and documentation because the information is: (1) confidential; (2) exempt under the public records law and EEOC Guidance; and (3) not relevant to any probable or potential grievance, since the University had no obligation to process Wilson's grievance

Relevance

Relevance is the threshold issue in any duty-to-provide-information case. An employer must provide requested information that is of probable or potential relevance to a grievance. *Washington County School District v. Beaverton Education Association*, Case No. C-169-79, 5 PECBR 4398, 4405 (1981). The AA investigation report contains the results of the University's investigation of Wilson's discrimination allegations, including results of witness statements and other documentation.

In duty-to-provide-information cases, we apply a liberal discovery-type standard. Under this standard, even potential relevance is sufficient. *Deschutes County 911 Employees Association v. Deschutes County 911 Service District*, 21 PECBR at 428. In other words, the information need not be relevant in and of itself, but must merely have the potential to lead to relevant information. It is not up to the University to determine what would be necessary to investigate Wilson's grievance. *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891, 904 (2007).

The University asserts that the requested information is not relevant to Wilson's grievance because Wilson relinquished her grievance rights when she filed EEOC and BOLI complaints. Thus, it argues, there was no grievance, potential or otherwise, to pursue. We have rejected the University's contention that it was permitted to cease processing Wilson's grievances. The grievances are pending and the University's investigation report is clearly relevant to the grievances

Confidentiality

Once we determine that the requested information has probable or potential relevance, we next consider four factors to determine whether the information must be provided: (1) the reason given for the request; (2) the ease or difficulty in producing the data; (3) the kind of information requested; and (4) the history of the

parties' labor-management relations. *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027 (1982).

We have determined that the first factor is met. The information is potentially relevant to the Association's investigation of Wilson's grievance. The University does not contend that it would be difficult to produce the document, nor does it allege a problem with the parties' labor management relations. Therefore, we restrict our analysis to the one remaining factor—the kind of information requested.

The University asserts that the requested information should be confidential because it fears that Wilson will retaliate against the witnesses listed in the investigation report. A party asserting confidentiality has the burden of proving that the requested information need not be provided. *AOCE v. State of Oregon, Department of Corrections*, 18 PECBR at 70.

We have previously considered and rejected this defense. This Board has long held that an employer's interest in protecting potential witnesses against intimidation is not a legitimate basis for infringing upon an employee's PECBA rights. *Thyfault and Oregon Education Association v. Pendleton School District No. 16*, Case No. UP-101-90, 13 PECBR 275, *reconsid.*, 13 PECBR 380 (1991), *AWOP*, 116 Or App 675, 843 P2d 514 (1992), *rev den.*, 316 Or 529, 854 P2d 940 (1993). In addition, there is no basis in the record to believe Wilson would attempt to intimidate or retaliate against witnesses. Wilson was the complainant, not the accused. Generally, the fear is that one *accused* of discrimination and harassment may retaliate against potential witnesses. There is no evidence that any complainant, much less Wilson, has retaliated against a potential witness.

The University also asserts that the EEOC Guidance makes the investigation report confidential. The Guidance provides:

“An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records

relating to harassment complaints should be kept confidential on the same basis.” *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, Section V.C.1.d (June 18, 1999).

In *Beaverton Police Association v. City of Beaverton*, Case No. UP-60-03, 20 PECBR 924 (2005), we addressed the EEOC Guidance in a similar circumstance and found

“* * * the *Guidance* document does not prohibit access to the [requested information]. It is merely aspirational in that it states what the employer ‘should’ do rather than what it must do. By its terms, the *Guidance* recognizes that an employer cannot guarantee confidentiality, and it suggests the information be limited to those who need to know it. The Association needs this information to perform its duties as exclusive representative. The *EEOC Enforcement Guidance* therefore does not apply * * *.” 20 PECBR at 932.

We find no legal prohibition against the release of the information. We will order the University to provide the Association with the requested information.

5. A civil penalty is not warranted.

The Association argues that the University’s refusal to provide the Association with requested information was egregious and warrants the assessment of a civil penalty.

This Board may award a civil penalty when it “finds that the party committing an unfair labor practice did so repetitively, knowing that the action was an unfair labor practice and took such action disregarding that knowledge; or that the action constituting an unfair practice was egregious.” *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 221 (2005). *See also* ORS 243.676(4)(a). In addition, we typically we do not award civil penalties in cases of first impression. *OSEA v. Petersburg School District*, Case No. UP-84-85, 9 PECBR 8612 (1986); and *AFSCME v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 98 (2001).

This is the first time this Board has considered whether a collective bargaining agreement provision is illegal because the provision violates Title VII. Since this is a case of first impression, we decline to award a civil penalty.

ORDER

1. The University will cease and desist from refusing to provide the Association with the requested information.
2. The University will cease and desist from refusing to process Wilson's grievances.
3. The remainder of the complaint is dismissed.

DATED this 19th day of March 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.