

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,)	
)	
Complainant,)	ORDER ON RESPONDENT'S
)	MOTION TO STAY
v.)	
)	
PORTLAND STATE UNIVERSITY,)	
)	
Respondent.)	

On March 19, 2008, this Board issued an Order in the above captioned case in which we concluded that Portland State University (University) violated ORS 243.672(1)(e) and (1)(g) by refusing to provide information to the Portland State University Chapter of the American Association of University Professors (Association) and by refusing to process the Lisa Wilson grievances. On May 15, 2008, the University filed a petition for judicial review of the Order. On June 3, 2008, it filed a motion asking this Board to stay enforcement of the Order pending appeal.

In our Order, we concluded that the University violated ORS 243.672(1)(e) when it refused to provide the Association a copy of the Affirmative Action (AA) investigation report which was relevant to the Wilson grievances. We also held that the University violated ORS 243.672(1)(g) by refusing to process the Wilson grievances. We concluded that the University was required to process the Wilson grievances even though the collective bargaining agreement contained a Resort to Other Procedures (ROP) provision.¹

¹The ROP provision provides that the University is not obligated to process a grievance if a member seeks resolution of the same matter through an outside agency or court.

Under ORS 183.482(3), filing a petition for judicial review of an administrative order does not stay enforcement of the agency's final order. However, if the Petitioner can show that the order contains a colorable claim of error and that enforcement of the order would irreparably injure the petitioner, then this Board may stay enforcement, unless doing so would cause substantial public harm.

Colorable claim of error

A “[c]olorable” claim of error is a claim of error that is substantial and non-frivolous, or seemingly valid, genuine, or plausible. *Bergerson v. Salem-Keizer School District*, 185 Or App 649, 60 P3d 1126 (2003). We require a minimal showing to establish a colorable claim of error. A claim is colorable unless it is frivolous or clearly without support in law. *State Teachers Education Association and Andrews v. Willamette Education Service District and State of Oregon, Department of Education*, Case No. UP-14-99, ruling on motion to stay, 19 PECBR 339, 340 (2001), AWOP, 188 Or App 112, 70 P3d 903 (2003); *State of Oregon, Executive Department and Children Services Division v Oregon Public Employees Union*, Case No. AR-5-85, recons of granting of stay, 9 PECBR 9312 (1987).

Here, the University identifies several alleged errors in the Order including, but not limited to, whether this Board has jurisdiction over the subsection (1)(g) claim, whether the ROP language is invalid, whether the AA investigation report is confidential, and whether there was substantial evidence in the record to support this Board's conclusions. Since our threshold for establishing a colorable claim of error is relatively low, we conclude that the University has met the requisite showing

Irreparable Injury

Unlike the low threshold for showing a “colorable claim of error,” the University's required showing of “irreparable injury” is significantly more difficult. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-19-01, ruling on motion to stay, 19 PECBR 520 (2001). Although irreparable injury is not defined in ORS 183.482, we have adopted the Oregon Supreme Court's definition of the phrase as an injury that “cannot be adequately compensated in damages, or cannot be measured by any certain pecuniary standard.” *STEA and Andrews v. WESD and State of Oregon, Department of Education*, 19 PECBR at 340.

The University asserts four reasons why it would be irreparably harmed unless we stay the order to process the grievances: (1) there is no pecuniary standard to measure the damages it would suffer as a result of processing the grievances or submitting them to arbitration, particularly when the appellate court may reverse this Board's Order to process the grievances; (2) the University would have no way to recover

its arbitration costs; (3) future bargaining discussions will be fundamentally altered because this Board found that the ROP clause is illegal; and (4) the University would be vulnerable to future unfair labor practice complaints from other unions regarding ROP provisions

This Board has previously addressed the University's argument that requiring it to process the grievances and possibly submit them to arbitration would result in irreparable harm. We have consistently held that the time and expense of participating in a grievance arbitration does not constitute irreparable injury. *Arlington School District No. 3 v. Arlington Education Association*, Case No. UP-65-99, *ruling on motion to stay*, 19 PECBR 807 (2002), *motion for stay denied*, 184 Or App 97, 55 P3d 546 (2002); *AFSCME Council 75 v. City of Salem*, Case No. UP-2-91, *ruling on motion to stay*, 13 PECBR 386 (1991), *aff'd*, 113 Or App 21, 830 P2d 603 (1992); *Portland Association of Teachers and Gray v. Portland School District*, Case No. UP-114-86, *ruling on motion to stay*, 10 PECBR 435 (1988). In addition, we note that the grievances filed by the Association on Wilson's behalf are in the early stages of the grievance procedure. The Association has not demanded arbitration. Accordingly, we find no evidence that the University's participation in the early stages of the grievance procedure would cost it so much time and money as to constitute irreparable harm.

The University next asserts that future bargaining sessions would be fundamentally altered because this Board found the ROP clause illegal. The University, however, does not explain how its bargaining position would be negatively impacted. The Order does not require the parties to bargain. In fact, we specifically found that the University did not violate its duty to bargain regarding the ROP language. The parties' contract also contains a separability clause which ensures that the remainder of the contract continues in effect despite the fact that the ROP language is illegal as applied in this case. Of course, nothing precludes the parties from mutually agreeing to negotiate new terms. The University offers no explanation or examples of how future bargaining may be affected by our Order. Thus, its claim is speculative. We will not find irreparable injury when a claim is speculative. *Arlington*, 184 Or App 97.

The University next contends that it will be vulnerable to unfair labor practice complaints from other unions relating to the ROP language. There is nothing in the record indicating that the University has collective bargaining agreements with other unions which contain the same or similar ROP provisions. Again, the University's argument is speculative and we will not find irreparable injury when the claim is speculative. *Arlington*, 184 Or App 97.

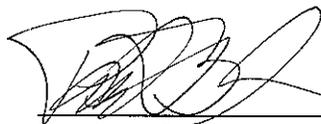
We conclude that the University has failed to demonstrate irreparable harm that would warrant a stay of the Order to process the grievances. We turn next to our order that the University provide a copy of the AA investigation report to the

Association. The University argues that its release of the AA investigation report would violate employee confidentiality but fails to explain how employees will be injured by the release of the documents. The University also alleges that Wilson will retaliate against witnesses named in the report. However, there is no evidence that Wilson ever threatened witnesses. The evidence only shows that Wilson was angered by the University's refusal to process the grievances and disclose the AA report. Further, the evidence shows that Wilson may no longer live in the Portland area. Although any possible harm that could result from disclosure of the names of witnesses appears minimal, it can be cured by the Association's agreement to a protective order that limits distribution of the report. The Association previously agreed to sign a protective order to address the University's concerns and we find this to be an equitable way to resolve this situation. We will modify our order to require the parties to enter into and sign a protective order limiting the distribution of the AA investigation report.

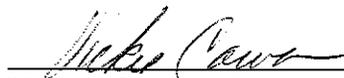
RULING

The University's motion for a stay is denied with the following limitation: prior to the University's release of the AA investigation report, the Association and the University will attempt to mutually agree upon a protective order to limit access to the AA investigation report to certain individuals. The University will immediately release the AA investigation report upon the execution of the protective order. Should the parties not agree to the terms of a protective order, each party will submit to us, within 14 days of this Order, its proposed protective order and written argument why this Board should approve that party's proposed protective order. This Board will then choose one party's proposal.

DATED this 25th day of July 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.