LABOR UPDATES

NOTABLE OREGON ERB CASES

OREGON EMPLOYMENT RELATIONS BOARD (ERB) CASES

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***Portland Firefighters' Association, IAFF, Local 43 v. City of Portland*, UP-063-23 (May 20, 2024)**

ERB ruled the City committed an unfair labor practice by refusing to comply with an arbitration award ordering the reinstatement of a firefighter regardless of the City's public policy arguments.

Arbitration decision: The City dismissed an employee following seven allegations of on- and off-duty misconduct. The crux of the City's public policy argument focused on the arbitrator's finding that the employee had met a woman online, engaged in daily messaging with her, and exchanged fully clothed pictures of their children. The unknown woman proposed a "child swap" for sexual purposes and the employee failed to report the matter to the police or State Children Services Department even though he was a mandatory reporter. He continued to communicate with the woman, until his wife found out, stating that he had "wanted to pursue her more" and "hook up" with her.

The arbitrator concluded that the City had established that the employee engaged in off-duty misconduct but determined that discharge was unreasonable based on: 1) the nature of the misconduct; 2) the employee's lack of prior discipline; and 3) evidence of the City's disparate treatment. Specifically, the arbitrator considered that the misconduct had occurred in 2014, seven years prior to the dismissal. The arbitrator also took into consideration that the employee had accepted responsibility for the behavior and that the employee's actions were isolated incidents of poor judgment that were attributable to a dysfunctional marriage. In addition, the arbitrator found that other City employees had engaged in far more egregious conduct but were not discharged and had received varying levels of progressive discipline instead.

ERB rejects public policy argument: The City argued that the arbitrator's decision violated public policy under ORS 243.706(1). That statute specifies that "[a]s a condition of enforceability, any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work."

The ERB applied a three-part test in assessing whether the award violated public policy. In doing so, it concluded the City had met the first two parts of the test, concluding 1) the arbitrator had concluded the misconduct had occurred; and 2) the arbitrator had "reinstated or otherwise relieved the employee of responsibility for the misconduct." However, the ERB found the City had failed to satisfy the third part of the test as it was unable to establish that the award violated a "clearly defined public policy expressed in statutes or judicial decisions."

In rejecting the City's public policy argument, the ERB concluded:

1. There was no statute or judicial decision prohibiting employment of a firefighter for failure to mandatorily report child abuse. (Perhaps this would have turned out differently had the employee engaged in illegal activity related to the woman's request to "swap" children for sexual purposes. Ultimately, no criminal charges were brought, and the Oregon Department of Human Services (DHS) concluded any charges against the employee were unfounded.)
2. There was no statutory or judicial requirement that all firefighters employed by a political subdivision must have "moral character," and regardless, such a reason was not the basis for the dismissal.
3. The City could not rely on ORS 243.706(1)(a) as a basis for not complying with the arbitration award because the arbitration award did not include a finding that the misconduct was "egregious" and because the City's disparate treatment was not the determinative issue in the case, but only a factor.

KEY TAKEAWAYS

ERB applies an extremely high bar for employers refusing to comply with arbitration awards on the basis that the award violates public policy. The employer must demonstrate the award itself, not the employee's conduct, violates public policy and that public policy "must be found in statutes and judicial decisions." The ERB will not consider public policy arguments found in "administrative rules, employment manuals, office policies, or proclamations by administrative officials."

Oregon AFSCME, Council 75, Local 1422 v. Yamhill County, UP-042-23 (April 1, 2024)

ERB ruled the County did not engage in direct dealing or breach its duty to negotiate in good faith by sending the employee Americans with Disabilities Act (ADA) paperwork, advising him that they wanted to reengage in the interactive process, and attempting to reach a reasonable accommodation.

An employee, an equipment operator, was injured during work. He was able to continue working with reasonable accommodations. Over the next few months, the parties engaged in the ADA interactive process. As part of that process, the County sought the employee's assistance in obtaining medical information from his doctor, attempted to reach an agreement on a reasonable accommodation, and continued to meet to resolve issues related to the employee's reasonable accommodation. The American Federation of

State, County & Municipal Employees (AFSCME) filed a grievance alleging that the County violated the terms of the collective bargaining agreement (CBA) and discriminated against the employee for requesting ADA accommodations.

During the grievance process, the County's human resource representatives contacted the employee to obtain completed paperwork regarding his medical condition and sought information about an incident in which he was reinjured. AFSCME filed an unfair labor practice alleging that HR's contacts were an attempt to resolve the grievance and constituted direct dealing and a failure to bargain with the Union.

ERB concluded that:

1. The County did not engage in direct dealing in violation of ORS 243.672(1)(b) when it sent the employee ADA paperwork and advised him that they wanted to reengage in the interactive process.
2. The County did not breach its duty to negotiate in good faith in violation of ORS 243.672(1)(e) by proposing a resolution of a pending grievance with an employee represented by AFSCME without first proposing the resolution to the Union.
3. The employer's contacts addressed the employee's subsequent injury and medical status, as opposed to the grievance and did not seek to resolve the grievance. ERB also concluded that the County's representative, who contacted the employee, was not even aware of the grievance until the employee mentioned it at the end of their meeting.
4. There was no evidence of intent to bypass the exclusive representative. AFSCME argued that the intent of the employer is not relevant to determine a violation of ORS 243.672(1)(b), but that the Union must only establish that there is evidence of "impact" on the grievance, such as granting a partial or total remedy. ERB concluded it did not need to reach the question of intent because the evidence established the employer did not take the action to resolve or address the grievance.
5. The County did not breach its duty to negotiate in good faith, in violation of ORS 243.672(1)(e), because the contacts in question did not address the grievance or try to resolve it.

KEY TAKEAWAY

Employers may continue to engage with employees in the ADA interactive process (and other standard HR or operational processes) but should proceed with caution when action taken could affect a pending grievance, such as granting a partial or total remedy. It is uncertain to what extent ERB will rely on the intent of the employer to impact a pending grievance, or evidence that the employer did (or did not) take action to resolve or address the pending grievance.

Oregon Nurses Association v. Oregon Health Sciences University, Case No. UP-039-22 (Nov. 20, 2023)

ERB considered whether Oregon Health & Science University (OHSU) committed an unfair labor practice by violating both the "because of" and "in the exercise of" protected activity prongs of ORS 243.672(1)(a) when management met with a bargaining unit member (MC) about her email communications concerning staffing, working conditions, and her prior union protected activity.

MC was a charge nurse in Labor and Delivery, and responsible for overseeing the day-to-day operations of the unit such as managing patient flow and assignments and scheduling staff nurses. Staffing levels are a source of disagreement between OHSU and the Oregon Nurses Association (Association). MC had been outspoken on the matter as a member of the Nurse Staffing Committee and as an Association representative, including having signed a grievance on the subject.

In September 2022, the OHSU Director requested information from MC about patient numbers and staffing levels. MC replied that the unit had three patients and nine nurses. The Director asked about sending nurses home, but MC stated she did not intend to.

After the phone conversation, MC sent the Director an email stating that she felt threatened and bullied by the Director. MC also stated, "we'll be talking about this later." The email communications continued over staffing levels. Eventually, the Director replied to MC's email with an email titled "Professionalism and code of conduct" and requested a meeting to discuss the tone of these communications and expectations.

The parties met virtually. During the meeting, OHSU read the entire Management Rights clause out loud to MC, including the right to discipline and discharge employees. Contrary to OHSU's contentions that this did not violate the statute because OHSU did not take any "adverse action" against MC, based on the overall tone of the meeting, it seemed that the meeting was not about improving MC's communication skills, but was "a veiled threat that MC should tone down her advocacy or face future discipline."

This meeting was distinguishable from *AFSCME Local 88 v. Multnomah County*, Case No. UP-44-98 at 8-9, 18 PECBR 430, 437-38 (2000), because the communications in that case were directed towards the union's council representative, and the communications about the concerning employee behavior were sent by a letter directly to the union council representative. This case was not seen as interference, restraint, or coercion. On the contrary, when compared to calling an employee into a meeting and advising them of management's right to discipline the employee—there were significant distinguishing factors when considering the potential for any chilling effect. As a result, OHSU violated ORS 243.672(1)(a) by threating discipline because of MC's protected activity. ERB also found a violation of the "in" prong of ORS 243.672(1)(a) because the employer's conduct was communicated to other employees and would have the "natural tendency to chill employees in the exercise of protected rights."

In short, this was both a "because of" and "in" violation for the purposes of ORS 243.672(1)(a). ERB based this conclusion on the following: 1) the employee was called into a formal meeting with high-level management; 2) she was effectively put on notice that she was at risk for future discipline; and 3) the employer's representative read the entire management rights clause out loud to the employee including OHSU's right to discipline

and discharge employees. Being called into this meeting could reasonably chill MC from speaking out about the staffing issues, including following contractual staffing requirements, and had the natural and probable effect of deterring employees from engaging in protected activity.

KEY TAKEAWAY

The decision does not have precedential value. However, it is still illustrative of the Board's willingness to find violations of ORS 243.672(1)(a) (even when no discipline is imposed) if the employee's communications are related to protected activities.