

IN THE COURT OF APPEALS OF THE STATE OF OREGON

**PORTLAND POLICE
ASSOCIATION,**

RESPONDENT,

v.

CITY OF PORTLAND,

PETITIONER.

Employment Relations Board
Case No. UP-023-12

CA No. A152657

**PETITIONER CITY OF PORTLAND'S OPENING BRIEF
AND EXCERPTS OF RECORD**

Appeal from the Rulings, Findings of Fact,
Conclusions of Law and Order
of the Employment Relations Board
dated September 21, 2012

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<p>The Employment Relations Board erred when it ruled that enforcement of the arbitration award complied with public policy and that the City committed an unfair labor practice by refusing to implement the award. The Board ruled (ER-48):</p> <p>“Although our deference to an arbitrator’s award is not unlimited, until such time as an award violates public policy as outlined in ORS 243.706(1), we are bound to uphold the award.</p> <p>“In this case, the arbitrator determined that [Officer] Frashour did not violate the City’s policies, and therefore did not engage in misconduct. The City does not have a lawful reason for refusing to implement the award. Therefore, the City’s failure to implement it violates ORS 243.672(1)(g).”</p>	
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STATEMENT OF THE CASE

1. NATURE OF THE PROCEEDING AND THE RELIEF SOUGHT

Portland Police Officer Ronald Frashour shot in the back and killed an unarmed, emotionally disturbed man, whose welfare the police were trying to check. After a lengthy and thorough investigation, the Chief of Police of the City of Portland determined that Officer Frashour's use of lethal deadly force violated established policies of the Portland Police Bureau in a number of respects, and, as a result, the City of Portland fired him. Officer Frashour's union, the Portland Police Association, grieved the termination, and an arbitrator ordered the City of Portland to reinstate him.

The City refused to reinstate Officer Frashour, on the ground that the arbitration award was unenforceable under ORS 243.706(1)¹ because it did not comply with public policy. The PPA filed an unfair labor practice complaint, and the Employment Relations Board held that the City committed an unfair labor practice under ORS 243.672(1)(g)² when it refused to implement the arbitration award. The City seeks judicial review of that Order.

¹ The relevant text of ORS 243.706(1) is set out, *infra*, at 10.

² ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to refuse "to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them."

2. NATURE OF THE ORDER

The City of Portland seeks judicial review of a final order in a contested case.

3. STATUTORY BASIS FOR JUDICIAL REVIEW

This Court has jurisdiction under ORS 183.482(1).

4. DATES GOVERNING APPEAL

ERB issued its Rulings, Findings of Fact, Conclusions of Law, and Order on September 21, 2012. The City timely filed and served its Petition for Judicial Review on October 5, 2012.

5. QUESTIONS PRESENTED ON APPEAL

A. What is the scope of the inquiry ERB must perform in order to determine whether enforcement of an arbitration award ordering the reinstatement of a police officer, whose employer found him to have violated the employer's policies with regard to the use of deadly physical force, complies with public policy?

B. Does public policy, as clearly defined in statutes or judicial decisions, require arbitrators and ERB to defer to the City's determination that a police officer's use of deadly physical force did not comply with the City's adopted policies?

6. SUMMARY OF THE ARGUMENT

ORS 243.706(1) requires that “[a]s a condition of enforceability, any arbitration award that orders the reinstatement of a public employee ... shall comply with public policy requirements as clearly defined in statutes or judicial decisions.” It is the award itself, and not Grievant’s underlying conduct or any other consideration, that must comply with public policy requirements. Here, the arbitration award did not comply with the public policy requirement that deference be given to the interpretation and application by the City of its own policies regarding the use of force. That public policy is “clearly defined” by Oregon statute, ORS 181.789(2), and by decisions of this Court and of the Oregon Supreme Court.

The statutory command of ORS 243.706(1) has two consequences for the resolution of this case. First, it was inadequate for ERB to begin and end its inquiry with the determination that the arbitrator decided that Grievant’s conduct did not violate the City’s policies. That is so because the “public policy requirement” with which the City asserts the award does not comply is precisely that the Arbitrator should not have second-guessed the determination by the Chief of Police that the use of force that Grievant concedes he employed was inconsistent with the Bureau’s legitimate expectations, as expressed in its use of force policies.

The second consequence, related to the first, is that, for purposes of the public policy analysis, it does not matter whether the parties agreed to submit the controversy to binding arbitration. ORS 243.706(1) reflects the Legislature's judgment that the public interest precludes a public employer from contracting away some responsibilities it owes *to the public*. Even though the City agreed to submit to binding arbitration whether it had "just cause" to terminate Grievant, the City did not, and could not consistent with ORS 243.706(1), contract away its responsibility to determine whether Grievant's conduct, once established, complied with the City's own policies regarding the use of force.

The Arbitrator did not give due deference to the interpretation and application by the City of Portland and its Chief of Police of the City's own policies regarding the use of deadly force by its police officers. The arbitration award ordering Officer Frashour's reinstatement did not comply with public policy requirements as clearly defined in statute and judicial decisions. It was unenforceable under ORS 243.706(1), and ERB erred in holding that the City committed an unfair labor practice by refusing to implement it.

7. STATEMENT OF THE FACTS

In the course of his employment as a City of Portland police officer, Ronald Frashour shot in the back and killed Aaron Campbell, an unarmed, non-resisting, emotionally disturbed man, whose welfare the police were trying to

check. (ER-34—ER-37). The police had been called to the apartment of Mr. Campbell's friend, Angie Jones, and were told that Mr. Campbell might be in the apartment, that he was suicidal, possessed a gun, had tried to kill himself and may have wanted to "do suicide by police." (ER-34). Mr. Campbell was extremely distraught over the recent death of his brother. (ER-34).

Officer Frashour was not among the officers who initially responded to the call. (ER-34). By the time he arrived, Ms. Jones had left the apartment, had talked to the police, and had told Mr. Campbell that the police wanted him to come out of the apartment. (ER-34). Officer Frashour was designated the "lethal cover" officer, and was armed with an AR15 rifle. (ER-34).

One of the other police officers on the scene was able to establish telephone contact with Mr. Campbell. (ER-35). That officer told Mr. Campbell, "we're out here because we're concerned about your welfare; we received information that you were thinking about hurting yourself, you know, you were having some family problems, you lost your brother this morning, and we're concerned about you; again, you're not in trouble." (Arbitrator's Opinion and Award at 9, ERB Record at 65). Mr. Campbell said that he wanted the police to leave. (ER-35). The officer responded that the police were concerned about the three children who were in the apartment with Mr. Campbell. (ER-35).

At about the same time, the three children emerged from the apartment. (ER-35). At that point, Sergeant Liani Reyna, the sergeant in charge of the

scene, believed that, since Mr. Campbell was then alone in the apartment, the threat he posed had diminished and the police should leave. (Arbitrator's Opinion and Award at 10, ERB Record at 64). Sgt. Birkinbine disagreed. (*Id.*). The sergeants agreed that the police would leave as soon as they could get Mr. Campbell to assure them that he would not hurt himself. (*Id.*).

Suddenly, Mr. Campbell surprised the police by emerging from the apartment. (ER-35). Mr. Campbell put his hands on his head with his hands clasped. He walked backwards toward the officers and stopped 15 to 20 feet from the custody team when he was told to do so. (ER-35).

Officer Ryan Lewton, who was giving commands to Mr. Campbell, told him to put his hands in the air. (ER-36). Mr. Campbell ignored this command. (ER-36). After repeating it several times, Officer Lewton told Mr. Campbell that the police would shoot him if he did not put his hands in the air. (ER-36). Mr. Campbell said, "Go ahead and shoot me, go ahead and fucking shoot me." (ER-36). Officer Frashour did not hear Mr. Campbell say this. (ER-36).

Officer Lewton then shot Mr. Campbell with his "less lethal" bean bag gun, and hit him in his buttocks or thigh. (ER-36). Mr. Campbell stumbled forward, then righted himself to his original standing position with his hands behind his head. (ER-36). He then began to run back in the direction of his apartment and a Volvo parked in front of it. (ER-36). Officer Lewton fired five

more beanbag rounds, at least one of which hit Mr. Campbell in the back of his thigh, above his knee. (ER-36). Mr. Campbell lowered his arms. (ER-36).

Officer Frashour saw Mr. Campbell with his hand completely in his pants below his waistband, beginning to sprint away. (ER-36). Officer Frashour did not perceive Mr. Campbell's actions to be a reaction to being struck by the beanbag rounds. (Arbitrator's Opinion and Award at 20, ERB Record at 54). Officer Frashour believed that Mr. Campbell was reaching for a gun, and was afraid that if Mr. Campbell reached the Volvo, that would have provided him with hard cover from which he could have shot at the officers. (Arbitrator's Opinion and Award at 21, ERB Record at 53). About three seconds after Officer Frashour first saw Mr. Campbell running, Officer Frashour fired one shot from his AR15 rifle, killing Mr. Campbell. (ER-36). Mr. Campbell was not armed; he had left his gun in Ms. Jones's apartment. (ER-37).

The Internal Affairs Division launched an investigation into the shooting. (Arbitrator's Opinion and Award at 30, ERB Record at 44). Subsequently, Lts. Robert King and David Virtue conducted a Training Division Review. (*Id.*). The TRD review concluded that the actions of Officer Frashour, Officer Lewton, Sergeant Birkinbine and Sergeant Reyna were not consistent with their training and were out of policy. (*Id.*). Commander James Ferraris's Commander's Findings and Recommendations found that Officer Frashour's conduct violated Police Bureau policy and recommended his termination. (*Id.*).

A PPB Use of Force Review Board, consisting of assistant chiefs, peer officers and citizen members, reviewed the investigations and findings, concluded that Officer Frashour's use of deadly force was outside of policy, and recommended that he be fired. (Arbitrator's Opinion and Award at 30-31, ERB Record at 44-43). The Review Board also recommended discipline of Officer Lewton, Sergeant Reyna and Sergeant Birkinbine. (*Id.*). Portland Police Chief Michael Reese reviewed all the reports and recommendations, conducted a due process hearing, and discharged Officer Frashour. (Arbitrator's Opinion and Award at 31, ERB Record at 43). He also issued lengthy suspensions to Officer Lewton, Sgt. Reyna and Sgt. Birkinbine. (*Id.*).

ASSIGNMENT OF ERROR

The Employment Relations Board erred when it ruled that enforcement of the arbitration award complied with public policy and that the City committed an unfair labor practice by refusing to implement the award. The Board ruled (ER-48):

“Although our deference to an arbitrator's award is not unlimited, until such time as an award violates public policy as outlined in ORS 243.706(1), we are bound to uphold the award.

“In this case, the arbitrator determined that [Officer] Frashour did not violate the City's policies, and therefore did not engage in misconduct. The City does not have a lawful reason for refusing to implement the award. Therefore, the City's failure to implement it violates ORS 243.672(1)(g).”

A. Preservation of Error

The City preserved its claim of error in its Amended Answer and Affirmative Defenses (ERB Record at 356-50), and in its Response Brief (ER-22—ER-28).

B. Standard of Review

This Court reviews ERB's interpretation of ORS 243.706(1) for legal error. ORS 183.482(8)(a). "The issue of law on review is whether an agency interpretation coincides with the legislative policy which inheres in the meaning of the statute." *Springfield Educ. Ass'n v. School Dist.*, 290 Or 217, 228, 621 P2d 547 (1980); *Jefferson County v. Oregon Public Employees Union*, 174 Or App 12, 21, 23 P3d 401 (2001).

ARGUMENT

The arbitration award ordering the City to reinstate Officer Frashour did not comply with public policy requirements, clearly defined in statute and case law, that deference be given to the determination by the Chief of Police of the City of Portland that Officer Frashour's use of deadly force violated the City's policies. ORS 243.706(1) therefore makes the award unenforceable. ERB erred in holding that the City committed an unfair labor practice by refusing to implement the award. ERB's error largely resulted from the method it used to evaluate enforceability of an award under ORS 243.706(1), because ERB

erroneously began and ended its inquiry with the Arbitrator's finding that Officer Frashour did not engage in misconduct.

It was the Arbitrator's refusal to afford deference to the determination of the Chief of Police that Officer Frashour's killing of an unarmed, non-resisting, emotionally distraught man, on whose welfare the police were trying to check, violated the City's deadly force policies, that failed to comply with public policy requirements. In other words, it was not so much *what* the Arbitrator decided, but rather *how* she decided it that violated public policy. ERB's test and its conclusion in this case are both legally erroneous interpretations of ORS 243.706(1).

A. ERB's Public Policy Test is Incompatible With ORS 243.706(1)

ORS 243.706(1) provides, in pertinent part:

As 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 conduct, related to work.

ERB has "developed a three part test to decide if an arbitrator's award is unenforceable under the public policy exception in ORS 243.706(1)." ER-46:

- (1) we determine whether the arbitrator found that the grievant engaged in the misconduct for which discipline was imposed;
- (2) if so, we then determine if the arbitrator reinstated or

otherwise relieved the grievant of responsibility for the misconduct; and (3) if so, we determine if there is a clearly defined public policy, as expressed in statutes or judicial decisions, that applies to the award and makes it unenforceable.

Id. After noting that the Arbitrator found that “Officer Frashour was not guilty of the misconduct for which discipline was imposed,” ERB said, “Applying the analysis developed in our cases, our review of the current matter is complete. There is no need for further analysis by this Board once the arbitrator determines that the grievant did not engage in misconduct.” (ER-47).

ERB went on to say that, even if it proceeded to the last step of its test, the question would be “whether reinstating an employee who did not engage in misconduct violates the public policy requirements as clearly defined in statutes or judicial decisions. Clearly the award did not.” *Id.*

But the City’s challenge is not simply that the Arbitrator came to the wrong conclusion when she determined that Officer Frashour did not employ excessive force in fatally shooting Aaron Campbell. Rather, it is that the Arbitrator engaged at all in substituting her judgment for that of the responsible City policymakers about the City of Portland’s deadly force policies and about whether or not Officer Frashour’s fatal shooting of Aaron Campbell conformed to them. ERB simply did not meaningfully or adequately assess the City’s public policy challenge because the beginning and end of ERB’s inquiry was

that the Arbitrator found that Officer Frashour was justified in shooting Aaron Campbell.

The public policy requirement of ORS 243.706(1) was added by 1995 Senate Bill 750. The overarching intent, as described by Senator Bryant, was “to find the balance that allows the collective bargaining system to continue, but retains the right of government to manage, make and implement good public policy decisions.” Floor Testimony of Senator Bryant, April 6, 1995 (reprinted as an Appendix in *Deschutes County Sheriff's Ass'n v. Deschutes County*, 17 PECBR 845, 877 (1998), *rev'd* 169 Or App 445, 9 P3d 742 (2000), *rev denied*, 332 Or 137 (2001). Initially, the exception was drafted to address discipline that was overturned on “allegations that others in the police agency had not been punished for similar conduct.” *Id.*

But after the City of Portland experienced an outcome in arbitration similar to what happened here, the language of the requirement was broadened, in part by adding the reference to “unjustified and egregious use of physical or deadly force” in the final version of SB 750. As Senator Bryant explained, this language was added “in response to a situation in Portland where an arbitrator reinstated a police officer who had fired [shots], I think 25 times, and the chief of police, in his investigation, concluded that no firing was justified.”

Testimony of Senator Bryant, Conference Committee, June 1, 1995 (reprinted in *Deschutes County*, 17 PECBR at 877-78).

The case to which Senator Bryant referred was *Portland Police Bureau and Portland Police Association* (Erickson Discharge Grievance) (1995).

There, Arbitrator Martin Henner found that the grievant's use of deadly force (Erickson fired 22 shots at an armed suspect who was fleeing from an altercation on a city bus and could not justify his use of deadly force during the Bureau's review process) was "justified" even though he had some "severe reservations" about the grievant's "faulty tactics." Arbitrator Henner reinstated the grievant and awarded a make-whole remedy.

In *Erickson*, as in this case, an arbitrator overturned a discharge based on the arbitrator's second-guessing the determination by the Chief of Police that a Portland police officer's use of deadly force did not comply with City policy. It is clear from the fact that the *Erickson* arbitration was the impetus for the inclusion of the language regarding "unjustified and egregious use of physical or deadly force" in the 1995 amendment of ORS 243.706(1) that the Legislature intended the "public policy requirements" inquiry to be more searching than simply accepting at face value an arbitrator's decision that the grievant did not engage in "unjustified and egregious use of physical or deadly force." Rather it is clear that the Legislature intended for arbitrators to give deference to plausible assessments by local police agencies of the appropriateness of the use of force by their officers.

ERB's test essentially renders ORS 243.706(1) meaningless. It immunizes all arbitration awards from review for compatibility with public policy, so long as an arbitrator concludes that an employee "did not engage in misconduct." But it was precisely the second-guessing by arbitrators of local agencies' decisions about whether there was or was not misconduct, and particularly about whether force was or was not justified, that occasioned the Legislature to amend ORS 243.706(1) to require awards ordering reinstatement to comply with public policy. The legislative mandate cannot be met if ERB blindly accepts the arbitrator's conclusions.

ERB erroneously interpreted ORS 243.706(1) by applying a public policy analysis that did not allow the Board to look beyond the Arbitrator's conclusion. ORS 243.706(1) required ERB independently to assess whether the Arbitrator gave sufficient deference to the policy determinations by the City and its Chief of Police.

B. Public Policy Requires Deference to the City's Interpretation of Its Own Deadly Force Policies.

The City of Portland discharged Officer Frashour based on the determination by its Chief of Police that Officer Frashour's use of lethal force did not comply with three written policy directives of the Portland Police Bureau: Directive 1010.10 (Deadly Physical Force); Directive 1010.20

(Physical Force); and Directive 315.30 (Unsatisfactory Performance).³ The Arbitrator expressly rejected the City's assertion that she was required to give deference to the City's determination that Officer Frashour's conduct violated those directives. According to the Arbitrator (ER-11):

[T]he Collective Bargaining Agreement's just cause clause requires the Arbitrator to conduct an independent review of the appropriateness of the Grievant's conduct under the Police Bureau's directives. The Arbitrator agrees with the City's contention that some deference should be made to management's decision regarding discipline, but that principle applies only to the level of discipline (e.g., reprimand, suspension, discharge, demotion). It is the Arbitrator's task to decide whether an employer has sustained its burden of proving that it had just cause to issue the discipline in the first place.

The Arbitrator's determination that her "just cause" inquiry required her "to conduct an independent review" of the determination by the Chief regarding whether Officer Frashour's use of lethal force violated the Chief's own policies did not comply with public policy requirements clearly defined by Oregon statute and judicial decisions.

ORS 181.789(2) provides: "A law enforcement agency shall adopt a policy dealing with the use of deadly physical force by its police officers. At a minimum, the policy must include guidelines for the use of deadly physical force." The Legislature thus has entrusted to the City of Portland the setting and

³ The relevant text of these directives is set out at ER-1—ER-3.

application of standards for the use of deadly physical force by its police officers.

The Oregon Supreme Court has stated that the legislature's entrustment of an agency "with setting standards and with applying them can imply that the agency's view of its standards (assuming that they are within their authorizing law and are consistently applied) is to be given some appropriate respect by the courts." *1000 Friends of Oregon v. LCDC (Lane Co.)*, 305 Or 384, 390, 752 P2d 271 (1988). See generally *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 881 P2d 119 (1994) (describing court's deference to agency's interpretation of its own rules). "We defer to the agency's plausible interpretation of its own rule—including an interpretation made in the course of applying the rule—if that interpretation is not inconsistent with the wording of the rule, its context, or any other source of law." *Papas v. OLCC*, 213 Or App 369, 377, 161 P3d 948 (2007).

Middleton v. Dept. of Human Services, 219 Or App 458, 466-67, 183 P3d 1041 (2008).⁴

In enacting ORS 181.789(2), the Legislature entrusted to the City of Portland the setting of standards regarding the use of deadly physical force by Portland police officers. The City's view of those standards, including whether Grievant violated them, is entitled to deference. See *Jordan v. Employment Dept.*, 195 Or App 404, 408, 97 P3d 1273 (2004).

⁴ There is no issue in this case whether the City has "consistently applied" its use of deadly force standards. In any event, ORS 243.706(1)(a) and (b) limit the relevance of consistent application in this context.

The Legislature intended, through ORS 181.789 to 181.796, to give local police agencies the responsibility to adopt, interpret and enforce policies that reduce the use of deadly physical force by local police officers. That statutory scheme, of which ORS 181.789(2) is a part, was enacted as Senate Bill 111 by the 2007 Oregon Legislature. Senator Avel Gordly described the purpose of that Bill:

We seek through this legislation to establish policies that reduce the incidence of police-involved shooting and other uses of lethal force, that provide for improved training, that yield the transparency that families and communities need and demand when these tragedies occur, and that help the public and law enforcement understand each other hopefully more clearly.

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(starting at minute 41:34). Attorney General Hardy Myers explained:

So, given the special nature of that authority [to employ deadly force] and the challenges of using it, deciding when and how to use it, law enforcement and the wider community throughout Oregon, I think, share an interest in at least three important objectives. One is proper training in the use of deadly force. The second one is adequate support for all officers and all individual civilian members of the community who are involved in a deadly force incident, and support for their families, very importantly for their families. And then, thirdly, the third objective is a sound, careful and transparent process for investigating a deadly force incident and determining whether the use of deadly force complies with law and policy. And that's a process in which law enforcement and the wider community can have a very high level of confidence, consistent confidence.

* * *

SB 111 thus seeks to pursue those three objectives I mentioned by trying to nurture local plans and *by respecting local responsibility* and accountability while also establishing certain statewide standards.

Id. (starting at minute 49:40) (emphasis added).

Public policy, clearly defined by statute, ORS 181.789(2), and by the judicial decisions cited above, required the Arbitrator to give deference to the City's plausible interpretation and application of its own use of force directives. This public policy requirement is underscored by federal civil rights statutes, 42 USC §1983⁵ and 42 USC §14141,⁶ and the judicial decisions interpreting them,

⁵ 42 USC §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

⁶ 42 USC §14141 provides:

a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any

