

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-26-06

(UNFAIR LABOR PRACTICE)

AFSCME COUNCIL 75, LOCAL 3694,)	
)	
Complainant,)	
)	
v.)	RULING ON MOTION
)	TO AMEND STAY
JOSEPHINE COUNTY,)	
)	
Respondent.)	
_____)	

On October 30, 2007, this Board issued an Order holding that Josephine County (County) violated ORS 243.672(1)(a) and (b) when it transferred mental health programs from the County to other organizations. 22 PECBR 61. As a result of the unlawful transfer, a number of employees represented by AFSCME Council 75, Local 3694 (AFSCME) lost their jobs with the County. Accordingly, we ordered the County, among other things, to reinstate the transferred employees to their former positions within 30 days of the Order, and to make the employees whole for any wages and benefits they lost from the date of the transfer until 30 days after the date of the Order.

The County petitioned the Court of Appeals to review our Order and also asked that we stay portions of the remedy until the appeal is complete. On February 15, 2008, we granted a stay of the reinstatement portion of our Order.

On August 1, 2008, AFSCME filed this motion which asks us to amend our stay to require the County to continue paying make-whole relief during the pendency of the appeal. In the alternative, AFSCME asks that we order the County to post a bond to guarantee that the County will be able to pay any make-whole relief that might result from the appellate court's decision. The County opposes AFSCME's motion.

The issue is: Must the County continue make-whole payments for wages and benefits while the appeal is pending?

FINDINGS OF FACT

The following facts are undisputed by the parties:

1. On October 30, 2007, this Board issued an Order which held that the County violated ORS 243.672(1)(a) and (b) when it transferred mental health programs from the County to other organizations. AFSCME-represented employees lost their jobs with the County. As pertinent to this motion, we ordered the following remedies to address these violations:

“1. The County shall cease and desist from transferring direct mental health, addiction, developmental disability (including region five), and early intervention programs from the County to other organizations.

“2. Unless AFSCME and the County agree otherwise, the County shall, within 30 days of the date of this Order, reinstate former AFSCME bargaining unit members who previously worked in County direct mental health, addiction, developmental disability (including region five), and early intervention programs to the positions they held prior to the date on which they were transferred out of the AFSCME bargaining unit.

“3. The County will make former AFSCME bargaining unit members who previously worked in County direct mental health, addiction, developmental disability (including region five), and early intervention programs whole for the wages and benefits they would have received if they had continued working for the County, less interim earnings, with interest at 9 percent per annum, for the period beginning on the date they ceased being members of the AFSCME bargaining unit and ending 30 days from the date on which this Order is issued.

“4. The County will make AFSCME whole for any dues and fair share fee payments AFSCME would have

received from former AFSCME bargaining unit members who previously worked in County direct mental health, addiction, developmental disability (including region five), and early intervention programs, with interest at 9 percent per annum, for the period beginning on the date the employees ceased being members of the AFSCME bargaining unit and ending 30 days from the date on which this Order is issued. The County may not seek or receive reimbursement for these payments from former, present, or future members of the AFSCME bargaining unit. “ 22 PECBR at 105-106.

2. The parties jointly asked that we grant them an additional 30 days—until December 30, 2007—to comply with the portions of our Order that required the County to provide make-whole monetary relief to transferred employees, to reinstate the transferred employees, and to reimburse AFSCME for lost dues and fair share fee payments. The parties represented that the purpose of the requested extension was to give them more time to attempt to negotiate a mutual resolution of these issues. By Order dated November 30, 2007, we granted the parties’ request.

3 On December 21, 2007, the County petitioned for judicial review of our Order.

4. On December 28, 2007, the County filed a motion to stay enforcement of portions of our October 30 and November 30 Orders until the appeals process is complete. Specifically, the County asked that we stay enforcement of the following actions: restoring County mental health programs and reinstating former AFSCME bargaining unit members to the positions they previously held, making former AFSCME bargaining unit members whole for monetary losses they suffered, and reimbursing AFSCME for union dues and fair share fee payments it lost.

5. On February 15, 2008, we granted the County’s motion to stay that portion of our October 30, 2007 Order “that requires the County to cease and desist from contracting out specified services and reinstate the contracted out employees to the positions they previously held with the County.” *Ruling on Motion to Stay*, 22 PECBR 292, 297. We stated that the portion of the Order that makes the employees whole for their losses is not stayed. 22 PECBR at 296. As a condition of the stay, we required the County to file its opening brief “no later than 49 days from the date of this Order” and

to file any reply brief “within the timelines established in statute and court rules, with no extensions of time.” 22 PECBR 297.¹

6. By Order dated March 26, 2008, we modified the conditions of the stay to require that the County “promptly file all documents necessary to bring the matter to issue before the Court of Appeals. This includes filing its opening and reply briefs on the schedule established by the Court of Appeals, without undue or unreasonable delay.” *Order Modifying Conditions of Stay*, 22 PECBR 414, 415.

7. The County paid back wages and benefits to former AFSCME bargaining unit members for the period from July 1, 2006 through December 31, 2007. The County also reimbursed AFSCME for lost union dues and fair share fee payments for the same time period. The County refuses to make payments for back pay that accrued after December 31, 2007.

8. On August 1, 2008, AFSCME filed this motion asking that we amend our Order granting a stay to require that the County continue paying make-whole relief throughout the pendency of its appeal. In the alternative, AFSCME requests that we order the County to post a bond to guarantee that the County would be able to pay any monetary relief ordered by the appellate courts. The County opposes AFSCME’s motion.

DISCUSSION

AFSCME’s motion asks that we amend our Order for a stay to require that the County continue to pay back wages and benefits that accrue while the appeal is pending. The underlying premise of both the motion and the County’s response is that the October 30, 2007 Order does not require the County to pay make-whole relief during the pendency of the appeal. The County arrives at this conclusion by taking a portion of our Order out of context. It notes that we ordered back pay to continue until 30 days after the date of the Order. We then extended the time by 30 days at the parties’ request. Based on this reading of our Order, the County paid make-whole relief through December 31, 2007, but has refused AFSCME’s request to continue payments until the appeal is complete.

We reject the County’s cramped reading of our Order. We instead read the Order as a whole. We expressly stated our intent to “make former AFSCME bargaining

¹Options for Southern Oregon (Options), one of the private entities to which the County transferred mental health programs, also moved to stay our Order, even though it was not a party to the proceedings before this Board. Because we granted the County’s motion to stay in part, we dismissed Options’ motion as moot.

unit members * * * whole” for their losses. 22 PECBR at 105. We then described the specifics of the remedy designed to make the employees whole: we ordered the County to reinstate the employees within 30 days of the Order, and to pay them for lost wages and benefits until 30 days after the Order. 22 PECBR at 105-106. In other words, we ordered the County to provide back pay and benefits up to the date we ordered the employees to be reinstated. Under this formula, the employees would be made whole for their losses. The County argues, in effect, that the stay somehow relieved it of the make-whole obligation. We disagree.

In its motion, the County asked that we stay certain parts of our original Order: the requirement that the County cease and desist from contracting out mental health programs, the requirement that the County restore its former mental health programs, the requirement that the County reinstate former AFSCME bargaining unit members to positions in the Mental Health Division, and the requirement that the County make these former employees whole for lost wages and benefits. We specifically granted the motion *only* for that portion of our Order which required the County to cease and desist from contracting out mental health programs and restore former AFSCME bargaining unit members to the positions they previously held with the County. We expressly noted that the make-whole portions of the remedy would not be stayed. 22 PECBR at 296.

For these reasons, we conclude that our Order requires the County to continue paying back wages and benefits until it reinstates the employees. Nevertheless, in order to avoid any further dispute about our intent, we will modify the stay to clarify that the County must continue its make-whole payments during the pendency of the appeal.

The legislature specifically authorized this Board to award reinstatement with back pay to a party injured by an unfair labor practice, when doing so would further the purposes of the law. ORS 243.676(2)(c). Our goal is to restore an injured party to the position in which the party would have been had the violation not occurred. Towards this end, we typically order reinstatement so the employee will not suffer any further losses in the future, and we order back pay to reimburse the employee for losses already sustained in the past. Thus, when we reinstate employees injured by an employer’s unlawful action, we invariably order the employer to provide back pay and benefits from the date of the unlawful dismissals until the date on which the employees are reinstated. *See, e.g., Woodburn Education Association and Bradford v. Woodburn School District No. 103C*, Case No. C-126-83, 7 PECBR 6509 (1984); *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832 (1986); *Central Education Association and Vilches v. Central School District*, Case No. UP-74-95, 17 PECBR 93, 95 (Order on Reconsideration), 17 PECBR 250 (1997) (Ruling on enforcement and motion to stay), *aff’d*, 155 Or App

92, 962 P2d 763 (1998); *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 533 (2006) (Supplemental Order).

When reinstatement is postponed either by an order extending the deadline for reinstatement or by an appeal, the obligation to implement the make-whole remedy continues. *Central Education Association and Vilches v. Central School District*, 17 PECBR at 253 (although we stayed an order reinstating a teacher for the remainder of several months, the school district's obligation to provide make-whole relief to the teacher continued until the date on which we ordered the district to reinstate the teacher); *Astoria Education Association v. Astoria School District*, Case No. UP-42-96, 16 PECBR 895, 896 (1996) (Order on Motion to Stay), *AWOP*, 149 Or App 212, 942 P2d 302, 303 (1997) (we refused to stay an order requiring a school district to comply with an arbitrator's award to provide back pay and other monetary benefits to a teacher, holding that our order did not create an irreparable injury justifying a stay during the appeal process under ORS 183.482(3)(a)(A)).

Employees are made whole for their injuries only if they receive back wages and benefits for the entire period during which they suffer the effects of the employer's wrongful action. Here, that period runs from the date of the County's unlawful transfer until the date the employees are reinstated to their former jobs with the County. Our stay of the reinstatement order pending appeal does not alter the County's back pay obligation. In order to make employees whole for their injuries, the County must continue to pay them for lost wages and benefits until the issue of the employees' reinstatement is resolved, either by an appellate court decision or by agreement of the parties. As discussed earlier, a monetary obligation such as make-whole payments is not an irreparable injury subject to a stay under ORS 183.482(3)(a)(A). *Astoria Education Association v. Astoria School District*, 16 PECBR at 896.

The County contends, however, that we lack jurisdiction to make the requested clarification by amending our stay. According to the County, we can make the change only by amending our original Order which specifies that the period for providing the make-whole remedies ends 30 days after the issuance of the Order.² The County notes that it has petitioned for judicial review of our Order, and asserts that AFSCME is asking for a change to our Order that we can make only if we withdraw our original Order and suspend the appeal process. ORS 183.482(6). We disagree.

²We extended by 30 days the date by which the County was required to reinstate former AFSCME bargaining unit members to their positions with the County. The County continued to pay make-whole wages and benefits during this 30-day period. By continuing the payments, the County has acknowledged its obligation to pay back wages and benefits until the date that former bargaining unit members are reinstated or the parties reach agreement on this issue.

As described, our original Order establishes a date for reinstatement and further specifies that the County's back pay obligation continues until that date. In other words, the original Order made employees whole. The issue of continuing back pay during the appeal arises solely by virtue of the County's request for a stay. Because the issue arose as a result of the stay, it is appropriate to deal with it by amending the stay. By statute, we have authority not only to stay enforcement of an order during the appeals process but also to impose "reasonable conditions" for any stay which we grant. ORS 183.482(3)(a) and (c). In order to make employees whole for the injuries they suffered because of the County's actions, it is reasonable to clarify our stay to specify that employees will receive make-whole wages and benefits until the appeal process is complete.

In support of its position, the County cites *Scott v. Oregon State Penitentiary*, 117 Or App 182, 184, 843 P2d 512 (1992), and *Evans v. Oregon State Penitentiary*, 93 Or App 18, 20, 760 P2d 894 (1988). The facts here differ significantly from the facts in those cases. Both *Scott* and *Evans* involve inmate appeals of agency disciplinary proceedings which held that inmates violated the institution's rules. While these appeals were pending, the agency then issued a second order in each case that was based on the same underlying facts as the first order; the inmates appealed these second orders. In both cases, the court vacated the second orders, holding that the agency lacked authority to issue them while the first orders were on appeal. 93 Or App at 21, 117 Or App at 184³

The circumstances here differ markedly from those in *Evans* and *Scott*. We are not called upon to reconsider the facts or conclusions of law in our October 30 order. Instead, AFSCME asks that we address an issue that arose solely as a result of the County's request to stay our Order. Under our statutory authority to stay enforcement of an order during the appeals process and impose "reasonable conditions" for any such stay, we have authority to rule on AFSCME's motion. ORS 183.482(3)(a) and (c).

For the foregoing reasons, we will clarify and amend our ruling on the County's motion to stay to specify that the County must continue paying make-whole relief while the appeal is pending.

ORDER

This Board's February 15, 2008 ruling on the County's Motion to Stay is clarified and amended as follows:

³The court in *Evans* noted that its holding was limited to disciplinary proceedings. 93 Or App at 21 n 4.

During the pendency of the appeal, the County will continue to make whole former AFSCME bargaining unit members who previously worked in the County direct mental health, addiction, developmental disability (including region five), and early intervention programs for the wages and benefits they would have received if they had continued working for the County, less interim earnings, with interest at 9 percent per annum, for the period beginning on the date they ceased being members of the AFSCME bargaining unit and ending on the date the County reinstates them to the positions they formerly held with the County.

DATED this 23rd day of October 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.