

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-26-06

(UNFAIR LABOR PRACTICE)

AFSCME COUNCIL 75, LOCAL 3694,	)	
	)	
Complainant,	)	
	)	ORDER ON
v.	)	RECONSIDERATION
	)	UNDER ORS 183.482(6)
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) by transferring employees in the County's mental health division who were represented by AFSCSME Council 75, Local 3694 (AFSCME) to other organizations in retaliation for the employees' strike. We ordered the County, among other things, to reinstate the transferred employees to their former positions within 30 days of the date of the Order, and to make the former employees whole for any wages and benefits they lost from the date of the transfer until 30 days after the date of the Order. 22 PECBR 61. At the joint request of the parties, we extended the reinstatement and make-whole deadlines by 30 days. 22 PECBR 190.

The County petitioned the Court of Appeals to review our Order and also asked that we stay the remedy until the appeal is complete. On February 15, 2008, we granted the County's motion in part. We issued a stay of the portion of our Order that requires the County to cease and desist from contracting out mental health services and to reinstate contracted-out employees to positions they previously held with the County. 22 PECBR 292. We denied the County's request to stay the remaining portions of the Order, including the payment of back wages and benefits.

On August 1, 2008, AFSCME filed a motion asking us to amend our stay to require the County to continue paying employees for the wages and benefits they lost during the pendency of the appeal. On October 23, 2008, we issued an Order in which we clarified our ruling on the County's motion to stay. We ordered the County to continue paying make-whole relief to former employees during pendency of the appeal and until the County reinstated these individuals to the positions they formerly held with the County. 22 PECBR 643. We explained that the issue of continuing make-whole relief arose solely because of the stay of our reinstatement Order, and we therefore found it appropriate to address it as a condition of the stay. *See* ORS 183.482(3)(a) (an agency may impose reasonable conditions on granting a stay).

The Court of Appeals disagreed. By Order dated January 13, 2009, it held that we cannot extend the County's back pay obligation as a condition of granting a stay. It stated that the proper method would be for the Board to withdraw its Order and amend it. Accordingly, under ORS 183.482(6) and Oregon Rules of Appellate Procedure 4.35(1), we withdrew our October 30, 2007 Order to reconsider it in light of the court's January 2009 Order.

#### DISCUSSION

Our October 2007 Order expressed our intent to "make former AFSCME bargaining unit members \* \* \* whole" for the losses they suffered as a result of the County's unlawful conduct. 22 PECBR at 105. We then described the specifics of a remedy that was designed to make employees whole: we ordered the County to reinstate the former employees within 30 days of the Order, and to pay them for lost wages and benefits for 30 days after the date of the Order. 22 PECBR at 105-106. Under this formula, the employees would receive back pay and benefits until the County reinstated them. As described above, the issue of the County's obligation to continue providing make-whole relief arose solely because we granted the County's request to stay the reinstatement portion of the Order pending appeal. By issuing the stay, however, we did not intend to relieve the County of its obligation to make the employees whole until they are reinstated. To make our intent perfectly clear, we will modify our Order to state that the County must make employees whole for lost wages and benefits until the County reinstates them to their former positions.

This modification is consistent with the law and with this Board's long-standing practice. The statute authorizes this Board to award reinstatement with back pay to a party injured by an unfair labor practice if doing so will further the purposes of the Public Employee Collective Bargaining Act (PECBA). ORS 243.676(2)(c). The purposes of the PECBA are furthered by restoring a party injured by an unfair labor practice to the position the party would have occupied if the violation had not occurred.

To accomplish this goal when an employee is unlawfully terminated, we order reinstatement so that the employee will not suffer future losses, and back pay to compensate the employee for losses already suffered. Thus, when we reinstate an employee who was unlawfully discharged, we invariably order the employer to provide make-whole relief from the date of the unlawful action until the date on which the employee is 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 13J*, 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).

We conclude that the former employees injured by the County's unlawful actions will be fully made whole for their injuries only if they receive back wages and benefits during the entire period they are deprived of County employment because of the County's unfair labor practices. Accordingly, we will modify our October 2007 Order to specify that the County must provide make-whole relief for the period that begins on the date the former County employees ceased being AFSCME bargaining unit members and ends on the date the County reinstates them to their former positions.

#### ORDER

We adhere to all portions of our October 30, 2007 Findings of Fact, Conclusions of Law, and Order as written,<sup>1</sup> except for paragraph 3 of our Order, which is amended as to read follows:

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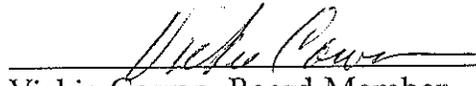
<sup>1</sup>On February 15, 2008, we granted the County's request to stay paragraphs 1 and 2 of our October 2007 Order. This stay remains unaffected by this Order on Reconsideration.

“3. The County will make former AFSCME bargaining unit members who previously worked in the 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, minus 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 these individuals to the positions they formerly held with the County.”

DATED this 12<sup>th</sup> day of March 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.