

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
)	MOTIONS TO STAY
JOSEPHINE COUNTY,)	
)	
Respondent.)	
_____)	

On October 30, 2007, this Board issued an Order which held that Josephine County (County) violated ORS 243.672(1)(a) and (b) when it contracted out its mental health services. As a remedy, we ordered the County to (1) cease and desist from the unlawful contracting out; (2) reinstate the contracted-out employees to their former positions with the County; (3) make the contracted-out employees whole for their lost wages and benefits, with interest; (4) reimburse AFSCME Council 75, Local 3694 (AFSCME) for all dues and fair share contributions it lost because of the unlawful contracting out; (5) pay a \$1,000 civil penalty; and (6) post a notice of its wrongdoing in each facility where contracted-out employees work.

The County petitioned the Court of Appeals to review our Order and now asks us for a partial stay of the Order until the appeal is complete.¹ Specifically, the County asks us to stay that portion of the Order which reinstates the contracted-out employees. For the reasons discussed below, we grant the stay, with conditions.

The County's motion is governed by ORS 183.482(3) which states:

¹One of the private entities that received the contracted work, Options for Southern Oregon, Inc. (Options), also moved to stay the Order even though it was not a party to the proceedings before this Board. Because we grant the County's motion to stay, we will dismiss Options' motion as moot. We will, however, treat Options as an *amicus curiae* and will consider the arguments and affidavits Options submitted with its motion.

“(3)(a) The filing of the petition [for review with the Court of Appeals] shall not stay enforcement of the agency order, but the agency may do so upon a showing of:

“(A) Irreparable injury to the petitioner; and

“(B) A colorable claim of error in the order.

“(b) When a petitioner makes the showing required by paragraph (a) of this subsection, the agency shall grant the stay unless the agency determines that substantial public harm will result if the order is stayed. If the agency denies the stay, the denial shall be in writing and shall specifically state the substantial public harm that would result from the granting of the stay.

“(c) When the agency grants a stay, the agency may impose such reasonable conditions as the giving of a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within specified reasonable periods of time.

“(d) Agency denial of a motion for stay is subject to review by the Court of Appeals under such rules as the court may establish.”

Under this statute, if the County establishes a colorable claim of error and irreparable injury, we must grant the stay unless doing so would cause substantial harm to the public.

The standard for proving a colorable claim of error is not high. A colorable claim is established unless the petitioner’s arguments are “frivolous or clearly without any support in the law.” *Chemeketa Community College Education Association v. Chemeketa Community College*, Case No. UC-9-99, 18 PECBR 718, 719 (2000). Here, the County identifies at least three colorable claims of error: (1) the record does not support this Board’s conclusion that the County neither closed the Mental Health Division nor transferred its programs; (2) this Board failed to follow its own precedent regarding partial closings; and (3) the remedies of restoring discontinued services and reinstating the laid off employees were not supported by the record and therefore an abuse of this Board’s discretion. Although we disagree with the County’s arguments, we cannot say

they are frivolous or without support in the law. We conclude the County has presented a colorable claim of error.

We next consider whether the County would likely suffer “irreparable injury” unless we stay the Order pending appeal. The statute does not define “irreparable injury.” The Court of Appeals considered the meaning of the phrase in *Arlington School District No. 3 v. Arlington Education Association*, 184 Or App 97 (2002). It held that whether an injury is irreparable “depends not upon the magnitude of the injury, but upon the completeness of the remedy in law.” 184 Or App at 102 (quoting *Winslow v. Fleischner et al.*, 110 Or 554, 563, 223 P 922 (1924)). The Court quoted with approval from *Black’s Law Dictionary* 924-25 (4th ed 1968):

“This phrase does not mean such an injury as is beyond the possibility of repair, or beyond possible compensation in damages, or necessarily great damage, but includes an injury, whether great or small, which ought not to be submitted to, on the one hand, or inflicted, on the other; and which, because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law”
184 Or App at 101

In addition, the party requesting the stay must demonstrate that irreparable injury is *probable* unless the stay is granted. *Id.* at 102. We will not find irreparable injury based on speculative claims or allegations of possible harm. *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 250, 252 (1997).

The County has asserted numerous ways in which immediate enforcement of the Order would cause it irreparable injury, as that term is defined by the cases. We consider only two because we believe they are sufficient. First, the County notes that when it contracted out its mental health services, it got rid of all the infrastructure needed to provide the services. The County does not now have the office space, equipment, computers, furniture, vehicles, or records it would need to reinstate the employees and resume providing the services. The time and money the County would have to spend to rebuild or lease the necessary infrastructure would be substantial. If the Court were then to reverse our Order and permit the County to contract out the services, the County would again dismantle the infrastructure for these services. It does not appear that any party or other entity would be liable to reimburse the County for these

expenses. Thus, the County could not obtain reasonable redress in court for these expenses.

Second, unless we stay the reinstatement Order, the County may not be able to obtain the full relief it seeks from the Court of Appeals. The County essentially asks the Court to approve its contracting out of mental health services. The largest recipient of the contracted work is a private non-profit corporation called Options for Southern Oregon, Inc. (Options). After Options entered the contract with the County, it acquired the necessary equipment, facilities, and staff to do the work. It entered contracts with third parties and obtained additional private grants which provide financial support for its operations. If the Order is enforced and the work is taken from Options and returned to the County, Options would probably breach its agreements with third parties and violate the terms of the grants. It is also probable that Options would be unable to continue paying for and maintaining its new infrastructure. Thus, if the reinstatement Order is enforced at this time, Options may not be in a position to accept the work back from the County if the Court of Appeals reverses our Order and permits the contracting out. In other words, absent a stay, the County would probably be unable to contract out mental health services to Options even if the Court were to approve it.

AFSCME argues that reinstating the employees would not cause the type of disruption the County asserts. According to AFSCME, compliance with the reinstatement Order is a simple change on paper whereby “payroll costs would be paid directly to employees rather than from pass-through money paid to Options.” (Complainant’s Memorandum in Opposition at 3.) This argument ignores several points. First, the provision of mental health services is not solely a payroll issue. An entire infrastructure is necessary. This includes the equipment and the supervisory and support staff needed to implement a mental health program. It is certainly possible that the County could negotiate with Options to use, for a cost, the infrastructure Options has in place. This could be a time-consuming process and there is no certainty the parties would be able to reach an agreement or that they would reach it before the appeals process is complete.

In addition, AFSCME’s argument ignores the fact that Options is not the only third party with whom the County contracted for covered services. The County contracted out 125 positions. Only about 80 to 95 of those positions went to Options. The remainder went to at least three other private and public entities. In some cases, the entity with which the County initially contracted subsequently contracted out the services to yet another organization. AFSCME offers no easy formula for restoring these employees to the County payroll.

AFSCME also argues that we should deny the stay for equitable reasons. It asserts that any difficulties the County would face in complying with the Order are self-inflicted and therefore cannot be used as a shield from liability. It also asserts that the County misrepresented to Options that there were no pending or potential legal claims that might impact the contracting out of services. Although both of AFSCME's assertions about the County's actions appear to be factually correct, they miss the point. The considerations AFSCME raises are important in determining the appropriate remedy to impose; they are, however, irrelevant to the question of whether that remedy should be imposed immediately even though an appeal is pending. Under the statute, the relevant inquiry is whether there is a colorable claim of error and whether the petitioner would suffer irreparable injury if the Order were enforced while the appeal is pending. We conclude both of these standards are met. The equitable considerations AFSCME raises cannot supplant the statutory standards.

Under the statute, once the County shows a colorable claim of error and irreparable injury, we must stay our Order unless doing so would cause substantial harm to the public. AFSCME asserts that the public is harmed because both AFSCME and the displaced employees will suffer if the stay is granted.² The Order makes both AFSCME and the employees whole for the unlawful contracting out, and those portions of the Order will not be stayed. In addition, we are mindful that a vulnerable segment of the community uses the services at issue. The services have already been transferred once, and requiring another switch now, and potentially a third if the County prevails on appeal, seems unnecessarily disruptive. We find that a partial stay would not cause substantial harm to the public. The statute therefore requires us to grant the County's request for a stay pending appeal.

ORS 183.482(3)(c) permits us to place conditions on the grant of a stay. The statute gives several examples, including an obligation to "file all documents necessary to bring the matter to issue before the Court of Appeals within specified reasonable periods of time." We believe that a prompt resolution of the appeal in this matter will further the purposes and policies of the Public Employee Collective Bargaining Act and will serve the public interest. Therefore, as a condition of the stay, we will require the County to file its opening brief no later than 49 days from the date

²AFSCME asserts it will suffer a continuing loss of bargaining power because it lost 125 members from its bargaining unit. It also asserts that several contracted-out employees have been subjected to groundless discipline and discharge and no longer have recourse under the collective bargaining agreement, and that more could suffer the same fate unless they are promptly restored to their County positions and the contractual protections that come with those positions.

of this Order, and thereafter to file any reply brief within the timelines established in statute and court rules, with no extensions of time.

Options has also filed a motion to stay the reinstatement portion of our Order. Although Options was not a party to the proceedings before this Board, it nevertheless appealed this Board's Order. AFSCME has moved to dismiss Options' appeal as well as its motion for a stay. We need not decide the difficult questions surrounding Options' standing to appeal and request for a stay. We have already determined that we must stay the reinstatement portion of the Order pending appeal, so Options' motion for a stay is moot. Accordingly, we will dismiss it.

ORDER

1. The County's motion for a stay pending appeal is granted as to the portion of the Board Order dated October 30, 2007 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.

2. As a condition of the stay, the County will file its opening brief no later than 49 days from the date of this Order, and it will thereafter file any reply brief within the timelines established in statute and court rules, with no extensions of time.

3. Options' motion for a stay is dismissed as moot.

DATED this 15th day of February 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.