

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-27-06

(UNFAIR LABOR PRACTICE)

ASHLAND POLICE ASSOCIATION,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
CITY OF ASHLAND,)	AND ORDER
)	
Respondent.)	
_____)	

This matter was submitted directly to this Board on stipulated facts. The record closed on September 1, 2006, upon receipt of the parties' closing briefs.

Becky Gallagher, Attorney at Law, Garrettson, Goldberg, Fenrich & Makler, 423 Lincoln Street, Eugene, Oregon 97401, represented Complainant.

Mike Franell, City Attorney, City of Ashland, 20 E Main Street, Ashland, Oregon 97520, represented Respondent.

On June 26, 2006, Ashland Police Association (Association) filed this unfair labor practice complaint against the City of Ashland (City). The complaint alleges that the City violated ORS 243.672(1)(g) by failing and refusing to comply with the terms of a written agreement in settlement of a grievance.

The parties waived the filing of an answer. In lieu of hearing, the parties submitted this matter for consideration based upon a fact stipulation and written argument by both parties.

The issue is: Did the City violate ORS 243.672(1)(g) when it deducted unemployment compensation benefits from back wages owed an employee under the terms of a written grievance settlement agreement?

Having the full record before it, this Board makes the following:

RULINGS

This Board makes no rulings.

FINDINGS OF FACT¹

1. The Ashland Police Association (Association) is the exclusive representative of a bargaining unit of police officers and certain other non-confidential and non-supervisory employees of the City of Ashland Police Department (City), a public employer.

2. The Association and the City are parties to a collective bargaining agreement with a term of July 1, 2003, to June 30, 2006. The parties are in negotiations for a successor collective bargaining agreement.

3. On November 23, 2005, former Ashland Police Department Chief of Police Mike Bianca terminated Officer Rick Spence for misconduct relating to field training officer duties.

4. Unable to resolve the grievance, the Association and the City set an arbitration for May 9, 2006.

5. On May 5, 2006, the parties negotiated a settlement of the grievance which was signed by Association President Steve MacLennan, Grievant Rick Spence, Mayor John Morrison, and City Attorney Mike Franell.

6. The Settlement Agreement provides:

“The City of Ashland (City) and the Ashland Police Association (Ashland) agree that the interests of the citizens of Ashland, the Ashland Police Department and Rick Spence

¹The facts are derived from the parties' stipulation.

(Spence) are best served by the reinstatement of Spence as an Ashland police officer under the following conditions and in lieu of arbitration in this matter:

- “1) Pending successful completion of a criminal record check, driving record check and credit check focusing on the time period November 2005 to the present Spence will return to full duty on May 9, 2006 as a tentative first working day.
- “2) Spence will be entitled to back wages from the date of separation with the City up to his first working day less two weeks time which will represent an unpaid suspension for disciplinary purposes.
- “3) All vacation accruals, sick time accruals, PERS contributions and other benefits will be awarded during the period that Spence was separated from active duty.
- “4) Spence’s seniority within the Association will not be affected by the separation from service period.
- “5) Spence will be removed from the FTO program.
- “6) The City will not be liable for any debt, expense, charge or fee incurred by Spence during his separation from the City, to include but not limited to, health and medical costs, legal or living expenses.
- “7) The City and Association shall share any costs related to the cancellation of the scheduled arbitration.
- “8) Spence shall attend a sexual harassment class.
- “9) By signing below in the indicated spaces, you and your representatives, successors and assigns completely release and forever discharge the City of Ashland, its elected officials, officers, agents, employees, successors and assigns, and each of them (individually referred to

as a 'Releasee' and collectively as the 'Releasees'), from any and all claims, rights, demands, actions, obligations, and causes of action of any and every kind, nature and character, known and unknown, which you may now have, have ever had, or may have in the future against Releasees arising from or in any way connected to your employment, termination from that employment, or lack of employment with the City. This release and discharge includes, but not limited to, all 'constructive discharge' and 'wrongful discharge' claims, all claims relating to discipline, whether expressed or implied, any tort of any nature, any restriction on the City's right to terminate employees, or any federal, state, or City law, rule, regulation or ordinance, including without limitation, State of Oregon employment laws, Bureau of Labor and Industry [sic] regulations, the federal Age Discrimination in Employment Act, as amended, Title VII of the Housing Act, and any other laws and regulations relating to employment discrimination and any and all claims for attorney's fees and cost [sic], excepting those rights and obligations created in this agreement."

7. During the time Spence was in terminated status, he received approximately \$9,548.00 in unemployment insurance benefits.

8. The City is a direct reimbursement employer under ORS 657 505(6) for unemployment compensation purposes. For each dollar of unemployment compensation paid to an employee, the City is required to pay one dollar into the unemployment fund.

9. The City paid Spence his back wages but withheld \$9,548.00, the amount of unemployment compensation he received while unemployed.

10. On June 2, 2006, the Association, through its counsel Becky Gallagher, gave the City written notice that failure to comply with the terms of the settlement agreement by June 9, 2006 would result in litigation.

11. To date the City has not paid Spence the remaining \$9,548.00 of his back wages.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The City violated ORS 243.672(1)(g) when it deducted unemployment compensation benefits from back wages owed Spence under the terms of a written grievance settlement agreement.

DISCUSSION

On November 23, 2005, the City terminated Officer Spence for misconduct. The Association grieved his termination. The parties settled the grievance. The settlement agreement provided that Spence would be reinstated. It provided further that "Spence will be entitled to back wages from the date of separation with the City up to his first working day less two weeks time which will represent an unpaid suspension for disciplinary purposes" and "[a]ll vacation accruals, sick time accruals, PERS contributions and other benefits will be awarded during the period that Spence was separated from active duty." The City paid Spence his back wages but withheld \$9,548.00, the amount of unemployment benefits which Spence had received while unemployed.

The Association filed this complaint under ORS 243.672(1)(g) to compel the City to pay Spence the \$9,548.00 which it unlawfully withheld. The Association argues that the settlement agreement unambiguously entitles Spence to "back wages," not "back wages less unemployment compensation received." The City does not dispute the jurisdiction of this Board, nor the plain language of the agreement.

Instead, the City argues that it should be excused from compliance with the commandment that it pay Spence "back wages" as a matter of equity, because Spence violated workplace policies. The City also argues that, as a direct reimbursement employer under ORS 657.505(6), it may offset unemployment compensation against back wages under decisions of the Court of Appeals in *Filter v. City of Vernonia*, 95 Or App 550, 770 P2d 83 (1989) and in *Zottola v. Three Rivers School District*, 202 Or App 235, 120 P3d 1255 (2005).

The City's "equity offset" argument is without merit. Nor does the Public Employee Collective Bargaining Act (PECBA) permit the City to offset unemployment benefits against back wages required by the Spence settlement agreement.² This Board has consistently held that unemployment benefits are not interim earnings, and so may not be offset against a back-pay award issued under the PECBA. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 300, 303-304 (2006) (*clarification of remedy*); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-22-00, 19 PECBR 437 (2001). See also, *Woodburn Education Association and Bradford v. Woodburn School District*, Case No. C-126-83, 8 PECBR 8362 (1986) (unemployment benefits are not interim earnings and should not, therefore, be deducted from back pay ordered by an arbitrator or this Board).

We see no distinction between back pay ordered by this Board or an arbitrator, and back pay required by a settlement agreement. Unless the settlement agreement specifically so provides, this Board will not allow an employer to offset unemployment benefits against back pay. The settlement agreement in question contains no such provision; hence, the City could not lawfully refuse to pay Spence the sums he received as unemployment benefits.

This Board has previously declined to follow the reasoning of the Court of Appeals in *Filter* or *Zottola*. *Association of Oregon Corrections Employees, Lincoln County*. Instead, we have relied on prior ERB precedent, and on *Seibel v. Liberty Homes, Inc.*, 305 Or 362, 752 P2d 291 (1988). In *Seibel*, the Oregon Supreme Court ruled that social security disability compensation could not be offset against back wages owed an employee as part of his damages for unlawful breach of an employment contract.

As a recent decision of the Oregon Supreme Court demonstrates, this Board was correct to rely on *Seibel* instead of the opinion of the Court of Appeals in *Zottola*. In *Zottola v. Three Rivers School District*, 342 Or 118, 149 P3d 1151 (2006), the Supreme Court reversed the decision of the Court of Appeals. The Supreme Court held that, direct reimbursement employer or no, "[u]nemployment compensation benefits are not wages; they are not payments for labor or services. Rather, they are payments designed to provide interim assistance while a worker seeks to re-enter the labor force." 342 Or at 122-3. The Court specifically rejected the public employer's claim that, as a direct reimbursement employer, it was entitled to offset unemployment compensation benefits against back wages. Applying *Seibel*, the Court held that:

²As far as this Board is concerned, "back pay" and "back wages" mean the same thing.

“* * * Unemployment compensation serves a different purpose from a back-pay award * * *. Likewise, whether or not a dismissed employee is permitted to keep unemployment benefits received after a successful challenge to her dismissal is properly an issue between the Oregon Employment Department and the employee; the district has no stake in the question.” 342 Or at 124.

Under our decisions in *Association of Oregon Corrections Employees and Lincoln County*, the City was not entitled to offset unemployment benefits against its back-wage obligation to Spence. It violated ORS 243.672(1)(g) when it did so. This conclusion is only reinforced by the decision of the Supreme Court in *Zottola*.

ORDER

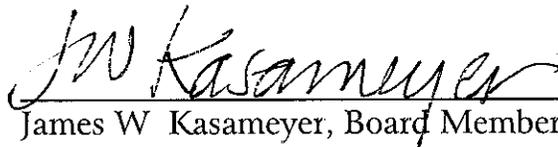
1. The City violated ORS 243.672(1)(g) when it deducted unemployment compensation benefits from back wages owed Spence under the terms of a written grievance settlement agreement.

2. Within twenty-one (21) days of the date of this Order, the City shall pay \$9,548.00 to Spence, together with interest at nine percent per annum from May 5, 2006, until paid.

DATED this 23rd day of May 2007.



Paul B. Gamson, Chair



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.