

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-045-10

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,)	
LOCAL 1329,)	
)	
Complainant,)	
)	
v.)	RULING ON
)	MOTION TO STAY
)	
CROOK COUNTY ROAD)	
DEPARTMENT,)	
)	
Respondent.)	
_____)	

On October 3, 2012, this Board issued an Order holding that the Crook County Road Department (County) violated ORS 243.672(1)(a), (1)(c), and (1)(g) when it terminated Jennifer Beatty, a steward for Oregon AFSCME Council 75, Local 1329 (AFSCME). 25 PECBR 121 (2012). We ordered the County to: (1) cease and desist from acting unlawfully; (2) offer Ms. Beatty reinstatement, with the ability for the County to issue an oral and written reprimand for two of the allegations included in the termination notice; (3) make Ms. Beatty whole for all lost wages and benefits she would have received but for the unlawful termination, less interim earnings and plus interest; and (4) pay a civil penalty of \$1,000 to AFSCME.

On November 29, 2012, the County filed its petition for judicial review of the Order with the Court of Appeals. AFSCME filed a Motion to Compel Enforcement of the Order on February 15, 2013.¹ On March 6, 2013, the County submitted its response to that motion and also filed a motion for a stay of enforcement of our Order. On March 12, 2013, AFSCME submitted its response in opposition to the motion for a stay. For the reasons discussed below, we deny the County's motion to stay.

¹We will address AFSCME's Motion to Compel Enforcement as a separate matter.

ORS 183.482(3) sets the requirements for a party to obtain a stay of an agency order pending judicial review. It states, in relevant part, that:

“(a) The filing of the petition 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.”

Because it is dispositive, we address only whether the motion establishes “irreparable injury” to the petitioner. The term “irreparable injury” is not defined in statute, but the court has held that an injury is irreparable if the party cannot receive reasonable or complete redress in a court of law. *Arlington Sch. Dist. No. 3 v. Arlington Educ. Ass’n*, 184 Or App 97, 101-102, 55 P3d 546 (2002), citing *Winslow v. Fleischner, et al.*, 110 Or 554, 563, 223 P 922 (1924); accord *Bergerson v. Salem-Keizer School District*, 185 Or App 649, 660, 60 P3d 1126 (2003). Thus, the determination of whether an injury is irreparable “depends not upon the magnitude of the injury, but upon the completeness of the remedy in law.” *Arlington Educ. Ass’n*, 184 Or App at 102. Moreover, a “showing” of irreparable injury requires “proof” in the form of “evidence that satisfies a burden of production or persuasion placed upon the proponent of a fact”; “[p]roof must not leave the existence of the fact at issue to speculation.” *Id.* Therefore, as pertinent here, a “showing” must at least demonstrate that irreparable injury *probably* would result if a stay is denied.” *Id.* (emphasis in original); see also *Portland Fire Fighters’ Association, Local 43, IAFF v. City of Portland*, Case No. UP-13-10, 24 PECBR 809, 810 (2012), citing *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 250, 252 (1997) (Ruling on Petition for Enforcement and Motion to Stay) (speculative claims or allegations of possible harm are not sufficient to make a showing of irreparable injury).

The County is seeking a stay of enforcement of three portions of the Order: (1) the reinstatement of Ms. Beatty to her former position; (2) the requirement that the County provide a “make-whole” remedy, including back pay to Ms. Beatty; and (3) the payment of the civil penalty to AFSCME. Although the County seeks a stay of the portion of our Order requiring that it pay the civil penalty to AFSCME, it does not identify or adequately explain the irreparable injury that would result if we do not stay that portion of the Order. As a result, we will deny that portion of the County’s request without further discussion.

With regard to the remaining portions of the Order, the County claims that it will suffer irreparable injury if the stay is not granted in three primary ways. First, it asserts that if Ms. Beatty is reinstated to her position as a truck driver in the Road Department, she would pose a potential risk to the safety of her coworkers and County residents and subject the County to

possible liability. Second, the County argues that the amount of back pay could “potentially impair the County’s ability to fund all of its needed services to the County, including road work.” Third, it argues that it would be without any real means of recovering the back pay and benefits portion of the award in any timely manner once paid out to Ms. Beatty.

We first address the County’s assertion that Ms. Beatty’s reinstatement would “present a real potential for harm to the citizens of the County and liability to the County.” In support of this assertion, the County contends that our Order “recognized * * * a number of instances where [Ms. Beatty’s] operation of County vehicles ended with accidents or damage to those vehicles or unsafe situations * * *.” According to the County, Ms. Beatty’s “potential involvement” in a future accident “in which [people] are injured or killed” constitutes an irreparable injury.

The County’s assertions regarding *potential* future safety risks of reinstating Ms. Beatty during the pendency of its appeal are not sufficient to meet the requirements of a *showing* of irreparable injury. As set forth in our Order, in most cases, the County chose not to discipline Ms. Beatty at the time of the prior incidents. Further, in holding that the County did not have just cause to terminate Ms. Beatty, we noted that these incidents occurred over the course of more than two and a half years and were reasonably consistent with the number and type of incidents in which other Road Department employees were involved. We held that the County’s arguments that Ms. Beatty engaged in gross misconduct to be neither credible nor well taken. As a result, there is insufficient evidence in the record to establish that the County’s concerns about “potential involvement” amount to more than speculation. *See Arlington Educ. Ass’n.*, 184 Or App at 102. (“Proof must not leave the existence of the fact at issue to speculation.”) Consequently, we find that the County has not “demonstrate[d] that irreparable injury *probably* would result.” *Id.* (emphasis in original); *see also Bergerson*, 185 Or App at 664 (“ORS 183.482(3) requires a showing that, in the absence of a stay, irreparable injury is *probable*.”) (emphasis in original).

We now turn to the County’s assertion that it will suffer irreparable injury if we do not stay the make-whole portion of the remedy. We have consistently rejected this argument in prior cases, holding that providing “make-whole” relief pending appeal does not constitute “irreparable injury” as required by ORS 183.482(3)(a)(A). *State Teachers Education Association/OEA/NEA, et al., and Hurlbert v. Willamette Education Service District, et al.*, 19 PECBR 339, 341-42 (2001), *AWOP*, 188 Or App 112 (2003); *Central School District 13J*, 17 PECBR at 252. We set forth our reasoning for this conclusion in an unpublished, but often cited, ruling in *Payne v. Department of Commerce, Building Codes Division*, Case No. 1294 (1982) (unpublished ruling). There, we stated:

“We are not convinced that the payment of back wages under the circumstances of this case constitutes an ‘irreparable injury.’ If Respondents ultimately prevail in this case it may or may not be necessary to expend time and money in an effort to recover the back pay. Balanced against the possibility that Appellant would be wrongfully deprived of a significant amount of back pay during a lengthy appeal process, we do not view Respondent’s speculation about possible difficulties in recovering the funds to be a sufficient showing of irreparable injury.”

The reasoning in *Payne* applies equally in the present dispute. The County's concern about the length of time it might take to recover the make-whole remedy from Ms. Beatty, should it prevail, does not mean that the County would be unable to receive reasonable or complete redress in a court of law. *See Arlington Educ. Ass'n.*, 184 Or App at 101-102 (an injury is irreparable if the party cannot receive reasonable or complete redress in a court of law); *Bergerson*, 185 Or App at 660 (same).

Finally, the County argues that if it is required to pay Ms. Beatty the back pay required by our Order, it could "potentially impair" the ability of the County to fund the services it provides, including road work. Again, the County's asserted injury is speculative and unsupported by sufficient evidence. The County offers nothing sufficiently specific to establish that it cannot afford to pay the back pay, or how paying the amount would specifically affect services. Accordingly, the County has not made a sufficient showing that irreparable injury would probably occur should the Order not be stayed. *Cf. Von Weidlein/N.W. Bottling v. OLCC*, 16 Or App 81, 88, 514 P2d 560 (1973) (petitioners established irreparable injury where an un rebutted affidavit accompanying the motion to stay showed that petitioners had existing and ongoing contracts, such that petitioners would go bankrupt unless the Order was stayed).

For the reasons set forth above, we find that the County has not shown that it will suffer irreparable injury in the absence of a stay of our Order. Therefore, we deny the motion to stay.

RULING

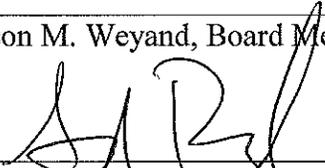
The County's motion to stay is denied.

DATED this 22 day of March 2013.



Kathryn A. Logan, Board Chair

*Jason M. Weyand, Board Member



Adam Rhyndard, Board Member

*Member Weyand did not participate in the decision in this case.

This Order may be appealed pursuant to ORS 183.482.