

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-6-03

(MANAGEMENT SERVICE REMOVAL)

PAMELA S. NASS,	)	
	)	
Appellant,	)	
	)	
v.	)	ORDER ON MOTION TO
	)	ENFORCE REMEDY
STATE OF OREGON,	)	
EMPLOYMENT DEPARTMENT,	)	
	)	
Respondent.	)	
_____	)	

The Board issued its initial Order in this matter on February 13, 2004. We held that the State of Oregon, Employment Department (Department) violated ORS 240.570(3) when it removed Pamela Nass from her position in management service. As a remedy, we ordered the Department to rescind its removal, restore Nass to her former position, and make Nass whole for any loss of pay and benefits she suffered because of her unlawful removal. On July 9, 2007, Nass filed a motion that asks us to enforce the make-whole portion of the remedy.<sup>1</sup> Specifically, Nass contends that the Department

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<sup>1</sup>Although neither party raises the question, this Board clearly has authority to enforce awards we issue under the State Personnel Relations Law (SPRL). Under SPRL, we have authority to order make-whole remedies such as back pay *Tupper v. Fairview*, 276 Or 657, 666, 556 P2d 1340 (1976). Inherent in our right to award such a remedy is the authority to take action to ensure the parties comply with it. We regularly order compliance with back pay awards in cases under the Public Employee Collective Bargaining Act *E.g., Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 533 (2006) (supplemental order); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 300 (2006) (Clarification of Remedy); *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 792 (1998) (Compliance Order).

failed to comply with our award when it reduced her back pay by the amount of unemployment benefits she received after her removal. She asks us to order the Department to pay her \$21,060 it withheld, plus 9 percent interest. For the reasons stated below, we agree and will order the Department to pay Nass an additional \$21,060.

There is no dispute over the amount of pay and benefits Nass lost as a result of her removal.<sup>2</sup> On May 17, 2004, the Department sent Nass's attorney a check for that amount minus \$21,060, the total Nass received in unemployment benefits after the Department removed her from her position. Nass cashed the check, but Nass's attorney asserted that the Department was not entitled to deduct unemployment benefits from the back pay award. Between July and October 2005, the parties engaged in negotiations in an attempt to settle their dispute over the Department's deduction of unemployment benefits from the back pay it owed Nass. The parties did not resolve their dispute, and they had no further contact until June 2007.<sup>3</sup> On July 9, 2007, Nass filed this motion.

The Department opposes Nass's motion. Notably, it does not argue that it was entitled to deduct unemployment benefits from Nass's back pay award. Given the Supreme Court's recent decision in *Zottola v. Three Rivers School District*, 342 Or 118, 149 P3d 115 (2006), it could not prevail on such an argument. *See also Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 300, 303-04 (2006) (unemployment benefits may not be deducted from a back pay award issued under the Public Employee Collective Bargaining Act); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-22-00, 19 PECBR 437 (2001) (same). Instead, the Department raises a variety of arguments that Nass's motion is untimely.

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<sup>2</sup>The facts pertinent to this motion occurred after we issued our Order. We derive the facts we rely on here from the pleadings and affidavits both parties submitted on this motion as well as the record developed when the case was originally before us. The Department concedes there is no dispute over the material facts, and Nass does not assert there is a factual dispute. Neither party requested a hearing. We conclude there is no dispute over the material facts that would warrant a hearing, and we decide the motion on the record presented.

<sup>3</sup>In her affidavit, Nass's attorney states her "understanding" that the negotiations stopped because the parties were awaiting a decision in a case pending before the Oregon Supreme Court that presented the issue of whether an employer was entitled to deduct unemployment benefits from a back pay award. The affidavit from the Department's attorney denies any agreement to suspend negotiations. We need not determine the reason for Nass's silence between October 2005 and June 2007 because it is not relevant to our resolution of the dispute.

First, the Department argues that Nass's motion is late because it is, in effect, a new case that is subject to the 30-day time limit to file an appeal under the State Personnel Relations Law (SPRL). OAR 115-045-0005. We disagree. This is not a new case; it is an enforcement action concerning an existing case and is therefore not subject to the 30-day filing deadline. There is no specific statute of limitations to enforce a SPRL award. We similarly reject the Department's contention that this is a motion to reconsider our original Order which is subject to the 14-day time limit in OAR 115-045-0040(4), or that it is a petition for judicial review which is subject to the 60-day time limit in ORS 183.482(1).

The Department next argues that Nass, through her delay, has abandoned her claim. The only authority it cites is *Black's Law Dictionary* (6<sup>th</sup> ed. 1990) which, according to the Department, defines "abandonment" as the intent to abandon plus an act which carries the intent into effect.

We have reviewed Oregon caselaw and conclude that Nass did not abandon her claim. In a legal sense, abandonment usually means the relinquishment of rights in real or personal property. *Kaneko v. Jones*, 192 Or 523, 529-30, 235 P2d 768 (1951). Even if we assume, without deciding, that the principles of abandonment can apply to an award of back pay, the Department's claim nevertheless fails. The burden to prove abandonment rests on the party asserting it. *Dober v. Ukase Investment Co.*, 139 Or 626, 630, 10 P2d 356 (1932). Here, that is the Department. The Department has failed to carry its burden. Abandonment requires proof of an intent to abandon. *Dober* at 629. Intent to abandon is determined by all the surrounding facts and circumstances; it cannot be established solely by lapse of time. *Id.* Here, the Department's sole proof of Nass's intent to abandon her claim is the lapse of time: "the intent to abandon was demonstrated by no further contact after October 2005." (Respondent's Brief at 2). The Department has failed to prove that Nass abandoned her claim to the \$21,060 the Department deducted from her back pay award.

The Department's final defense is laches. Because there is no statutory time limit on enforcement of Board orders, we must determine whether Nass's motion exceeds an equitable time limit imposed under the doctrine of laches. "Laches is an equitable doctrine which has three required elements: The party against whom the defense is asserted must have delayed filing the claim for an unreasonable period of time; that delay must have occurred while the party had full knowledge of the relevant facts; [and] the delay must have resulted in such substantial prejudice to the adverse party that it would be inequitable to grant the relief sought." *Teamsters Union Local No. 57 v. City of Brookings*, Case No. UP-141-93, 16 PECBR 267, 274 n. 4 (1995) (citing *Stephan v. Equitable Savings and Loan Association*, 268 Or 544, 522 P2d 478 (1974)).

The first element of laches is an unreasonable delay. To determine whether a delay is unreasonable for purposes of laches, a court “ordinarily is guided by the most closely analogous statute of limitations.” *Oregon State Bar v. Wright*, 309 Or 37, 41, 785 P2d 340 (1990), *cert. denied* 498 US 829 (1991). In *Wright*, for example, the Court held that laches in enforcing a restraining order or injunction is most closely analogous to the statute of limitations for criminal misdemeanors. *See also Mattson v. Commercial Credit Business Loans*, 301 Or 407, 420, 723 P2d 996 (1986) (laches in a conversion action is most closely analogous to the statute of limitations for noncontractual injury); *Albino v. Albino*, 279 Or 537, 554 (1977) (laches in asserting a constructive trust is most closely analogous to the statute of limitations for asserting an implied contract). When an action is brought within the analogous statute of limitations, the party asserting it must prove laches; when the action is brought after the analogous statute of limitations has expired, the party bringing the action must disprove laches. *Albino v. Albino*, 279 Or at 553.

The Department makes no attempt to suggest an analogous statute of limitations. It asserts, with no reasoning or citation to authority, that three years and five months from the Order is an unreasonable delay. For her part, Nass suggests that there is no applicable time limit. In our view, both parties are wrong. This matter is most closely analogous to an action for remedies on a judgment in a civil case. The statute of limitations for such an action is 10 years from entry of the judgment. ORS 18.180(3). We issued our award less than 10 years ago, so Nass’s motion to enforce the award is presumptively timely. As such, the Department has the burden to prove laches.

One element of the Department’s burden is to prove that it suffered substantial prejudice due to Nass’s delay in pursuing her claim. In general, the type of prejudice necessary to prove laches is either a disadvantageous change in position or the loss of witnesses or other critical evidence. *Mattson v. Commercial Credit Business Loans*, 301 Or 407, 420, 723 P2d 996 (1986). *See, e.g., Norton v. MacDonald*, 194 Or App 174, 181, 93 P3d 804 (2004) (delay which renders parties unable to provide relevant financial information constitutes substantial prejudice for the purpose of establishing laches).

The Department does not assert that it suffered any prejudice other than stating it reasonably believed the matter was complete. The Department’s response to Nass’s motion also includes a cryptic footnote which states that “budgeting for state agencies occurs on a biennial basis.” (Respondent’s Brief at 4 n. 12.) The Department never explains how this might cause it substantial prejudice. We conclude that the

Department failed to prove it suffered substantial prejudice as a result of Nass's delay. Nass's motion is not barred by laches.<sup>4</sup>

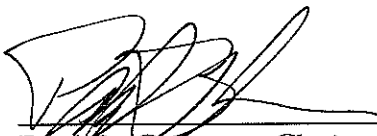
The Department has not established a valid defense to its failure to pay Nass the entire amount of back pay it owed her. We will therefore order the Department to pay Nass \$21,060 in addition to the amount it has already paid.

Nass also asks us to award interest on the \$21,060. We conclude that interest is not appropriate in these circumstances. Although we do not find that Nass's delay precludes her from pursuing this matter, we nevertheless encourage parties to promptly pursue and resolve their disputes. Here, Nass delayed pursuing her claim for several years, and we therefore will not award interest.

ORDER

Within 21 days of the date of this Order, the Department will pay Nass \$21,060.

DATED this 22<sup>nd</sup> day of October 2007.




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Paul B. Gamson, Chair

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\*Vickie Cowan, Board Member



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Susan Rossiter, Board Member

\*Board Member Cowan has recused herself.

This Order may be appealed pursuant to ORS 183.482.

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<sup>4</sup>The Department has the burden to prove all three elements of laches. Because the Department has failed to prove the "prejudice" element, its claim fails and we need not decide whether it met the "knowledge" element of laches.