



Thereafter, on January 18, 2006, IRMD moved for expedited hearing on its motion to stay. It alleged that an expedited hearing was required because, on January 12, 2006, Appellant had threatened to file a petition for writ of mandamus unless the State complied immediately with the Board's Order. On January 25, 2006, Appellant filed her response to the motion to stay.<sup>1</sup> On February 23, 2006, IRMD filed a second affidavit by Mr. Korson, in order to counter what the State characterizes as "unsupported assertions" in Appellant's objections to the State's motion.<sup>2</sup> We have considered all of the materials submitted by both parties.

As a preliminary matter, we deny the State's motion for expedited hearing. We have never previously granted an evidentiary hearing in connection with a motion to stay. Speculation regarding possible mandamus proceedings aside, this case offers no occasion to for us to order an evidentiary hearing on IRMD's motion, let alone an expedited one. The memoranda, affidavits and counter-affidavits of the parties more than suffice.

Turning to the merits, we deny Respondent's motion to stay our Order because, although IRMD has established a "colorable claim of error," it has failed to make the showing of "irreparable injury" required by ORS 183.482(3).

ORS 183.482(3)(a) provides in relevant part that the filing of a petition for judicial review "shall not stay enforcement of the agency order, but the agency may do so upon a showing of: (1) Irreparable injury to the petitioner; and (2) A colorable claim of error in the order." ORS 183.482(3)(b) then states that, upon such showing, the agency: "shall grant the stay unless the agency determines that substantial public harm will result if the order is stayed."

The showing required to establish a colorable claim of error is "minimal." In *State Teachers Education Association, OEA/NEA and Char Andrews, et al. v. Willamette Education Service District and State of Oregon, Department of Education*, Case No. UP-14-99, 19 PECBR 339, 340 (2001), we said that "unless the claim of error is frivolous or clearly without support in law, it is colorable." We have found a "colorable claim

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<sup>1</sup>Appellant's response consisted of a memorandum of law and Appellant's affidavit in support thereof. Although it was entitled "Response to Respondent's Motion to Stay and Petition for Enforcement," Appellant makes no specific arguments related to this Board's enforcement of its October 31, 2005 Order. We therefore treat Appellant's response only as a response to IRMD's motion to stay.

<sup>2</sup>In his affidavit, Mr. Korson asserts that the Legislature directed the creation of some 93 positions at the new State Data Center, and the phase-out of existing positions at the "participating agencies." He reasserts that all positions in Fery's former work unit, the General Government Data Center, will be abolished as a result.

of error” in cases in which the decision of this Board was not unanimous, and there was a reasoned dissent. *See, Washington County Police Officers’ Association v. Washington County*, Case No. UP-76-99, 19 PECBR 304 (2001); and *Central Education Association and Alfonso Vilches v. Central School District*, Case No. UP-79-95, 17 PECBR 250 (1997). Our decision in this case is not unanimous, and there is a reasoned dissent. The State has sufficiently established a colorable claim of error.

We next analyze whether Respondent has shown that it will suffer irreparable injury if its request for a stay is denied. In *Arlington School District No. 3 v. Arlington Education Association*, Case No. UP-65-99, 18 PECBR 901 (2000), 184 Or App 97,101-103, 55 P3d 546 (2002), the Court of Appeals applied a two-step analysis to the question of what constitutes “irreparable injury.” First, the proponent must make a “showing” of irreparable injury. ORS 183.480(3). The Court defined a “showing” as “proof or prima facie proof of a matter of fact or law”; it went on to state that “proof must not leave the existence of the fact at issue to speculation.” Therefore, the Court concluded that “a ‘showing’ must at least demonstrate that irreparable injury probably would result if a stay is denied.”

Second, in order to demonstrate that the injury is “irreparable,” the proponent must demonstrate that it cannot receive reasonable or complete redress in a court of law; that is, it cannot be adequately compensated in damages, or no pecuniary standard exists for measuring damages.

We have applied these standards in many cases involving motions to stay. *See, e.g., State Teachers; Astoria Education Association v Astoria School District*, Case No. UP-42-96, 16 PECBR 895(1996), *AWOP* 149 Or App 212, 942 P2d 302, 303 (1997); and *Portland Association of Teachers and Jim Hanna v. Portland School District 1J*, Case No. UP-64-99, 19 PECBR 25 (2001), *AWOP* 178 Or App 634, 39 P3d 292, 293 (2002). We conclude that the State has not made the necessary showing of irreparable injury, and therefore deny its request for a stay. We need not consider the “public harm” factor set forth in the statute.

Respondent makes several arguments in support of its contention that it will suffer irreparable injury if it must reinstate Fery during the pendency of judicial review proceedings. Respondent argues that IRMD cannot reinstate Fery “to an executive/manager E position” pursuant to our Order because of a “dramatic change in the status quo” since issuance of our Order. According to the State, “data center operations for twelve state agencies, including DAS” will be consolidated into a single unit known as the State Data Center, as of April 6, 2006. The State alleges that “these changes in Respondent’s work environment are permanent, not speculative, and the disruption to the work environment,

under these circumstances, would be ongoing.”<sup>3</sup> According to the affidavit of Jeremy Korson, reinstating Ms. Fery under these circumstances “would cause a disruption that could not be undone.” The State likens this case to our decision in *Vilches*, in which we stayed enforcement of an order directing reinstatement of a school teacher from the date of the order, issued with only a few weeks remaining in the school year, until the beginning of the next school year. In addition, the State objects to reinstating Ms. Fery to any position because reinstatement “assumes there is a workload need for Appellant’s skill set. With the abolition of the GGDC, there is no readily available body of work for her.” Finally, IRMD argues that Ms. Fery “would displace others who hold ‘their’ positions, not her former position.” (Respondent’s Memorandum, pp. 9, 10). Respondent does not assert that our back pay remedy creates irreparable injury.

Relying on *State Teachers* and *Vilches*, Appellant responds that neither the prospect of reinstatement, nor the imposition of a back pay obligation, create irreparable injury within the meaning of ORS 183.482(3). According to Appellant, the State has already conceded that there are positions open which Ms. Fery could fill; that even if no vacant positions are currently open, Ms. Fery has bumping rights she could exercise; and, finally, that even if no position currently exists, the State is required to create one. In support of these assertions, Appellant relies on statements made in the Korson affidavit, and also on her own affidavit. Finally, Appellant emphasizes that

“[w]hat is remarkable about [the State’s] arguments, is they are premised on the very same flawed assertions that were rejected by this Board in its decision on the merits. The reason there is not enough workload to create a position for Fery is because the State unlawfully organized Ms. Fery out of her position for disciplinary reasons and gave the work to other employees.” (Appellant’s Memorandum, p. 7 )

We agree with Appellant. In two unpublished decisions involving state employees, this Board specifically held that an employer’s obligation to pay back pay does not rise to the level of irreparable injury. *John W. Whitaker v Oregon Liquor Control Commission*, Case Nos. 961, 972, (1980) (Ruling on Petition for Reconsideration) and *AFSCME Council 75, Local 2623*, Case No. AR-1-92 (1992) (Ruling on Motion to Stay) (1993) (review of arbitration award under ORS 240.086(2)). We have also previously determined that an employer does not suffer irreparable injury because the reinstatement of a wrongfully terminated employee requires displacement of current incumbents, or other personnel adjustments on the employer’s part. *Astoria Teachers Association, Vilches*, and

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<sup>3</sup>The second Korson affidavit only repeats, and embroiders upon, this contention.

*PAT and Hanna v. Portland School District.* As we noted in the *State Teachers* case:

“Where reinstatement or hiring is ordered as part of a remedial order, whether by this Board, an arbitrator, or the courts, it is almost inevitable that individuals will be displaced. Most often, those individuals have had no involvement in either the litigation process, or the employer’s unlawful acts that preceded the litigation. While it may not seem equitable for those individuals to suffer for the employer’s unlawful conduct, that too is basically unavoidable.

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“It is important to remember the purpose of our remedial authority. We are acting to remedy the [employer’s] unlawful actions when it refused to hire several of the individual complainants. Had the District not acted unlawfully in the first place, the current incumbents in the positions would not have been hired, and the individual Complainants would be occupying those positions. By ordering the District to hire the Complainants, we are only restoring the status quo that would have existed but for the District’s own misconduct. The Complainants have already been injured by the District’s refusal to hire them. There is no reason their injury should be compounded while District pursues its appeal.” 19 PECBR at 341.

We ordered Fery reinstated to an IRMD principal executive/manager E position in Salem, Oregon and crafted a “make-whole” remedy. We did not order her reinstated to her former position at the General Government Data Center, a unit of IRMD, in part because the Data Center had been absorbed into the IRMD before Fery was terminated. State agencies, like amoebae, form and reform on a regular basis. Contrary to the State’s assertion, there has been no dramatic change in the status quo. As made clear by the record in this case, as well as the Korson affidavits, continual agency reorganization is the status quo. Data will be processed, and state employees will process it, regardless of the name given the processing agency. The duration and impact of the reorganization due to occur on April 6, 2006, is mere speculation on Respondent’s part. We do not issue stays based on speculation.

To hold that agency reorganizations preclude relief to individuals who have been wrongly terminated, as IRMD urges, would result in the evisceration of the remedies

provided for in the State Personnel Relations Act, the PECBA, and contractual arbitration procedures. The same is true for agency requests to stay relief pending judicial review. In *PAT and Hanna v Portland School District*, we denied the District's request for a stay of our order directing Hanna's reinstatement pursuant to an arbitration award. We stated:

“Denying Complainant the benefit of the arbitration award for however long it takes the judicial review process to be completed inappropriately shifts the burden to Complainant for Respondent's unlawful acts. It must be remembered that the arbitrator concluded that Respondent acted unlawfully in dismissing Complainant, and this Board concluded that Respondent acted unlawfully in refusing to comply with the arbitration award. Respondent is certainly within its rights to seek review of our conclusion, but we see no reason to burden Complainant further while that right is being exercised.” 19 PECBR at 28-29.

IRMD's “disruption” argument also fails, for reasons enunciated in our earlier reference to the *State Teachers* case; and because the disruption to which Respondent refers is not supported by any factual showing to that effect, but only by conclusory statements by Mr. Korson in his first affidavit. (Affidavit, paras. 18, 19.) Put another way, IRMD's contentions are mere speculation.

The *Vilches* decision does not require a contrary result. If anything, it supports our reasoning here. In *Vilches*, as previously noted, we ordered a school district to reinstate a teacher with back pay and benefits. Ruling on the district's request for a stay, we held that reinstatement of a teacher with back pay and benefits did not create irreparable injury. We delayed reinstatement from the end of one school year to the beginning of the next—not because reinstatement during the current school year would cause disruption to teachers, but because of the harm it would cause to students. There is no comparable disruption here. Moreover, in *Vilches*, we denied the District's request that we stay the back pay portion of our order.

RULING

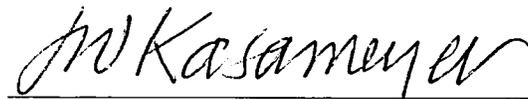
Respondent's motion for a stay is denied.

DATED this 13 day of March 2006.

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\*Donna Sandoval Bennett, Chair



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Paul B. Gamson, Board Member



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James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Chair Bennett is recused in this matter.