

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-1-05

(UNFAIR LABOR PRACTICE)

AFSCME Local 189,)
)
 Complainant,)
)
 v.)
)
 CITY OF PORTLAND,)
 BUREAU OF WATER WORKS,)
)
 Respondent.)
 _____)

ORDER ON RESPONDENT'S
MOTION TO CLARIFY

This Board issued an Order on March 15, 2006,¹ holding that the Respondent (City) violated ORS 243.672(1)(g) by refusing to comply with an arbitrator's award. The award reversed Grievant's dismissal and ordered the City to reinstate him with back pay. To remedy the violation, we directed the City to:

"1. * * * make Grievant whole for any damages he incurred because of the city's unlawful refusal to implement the award and pay back wages from December 23, 2004, to the date the arbitration award is implemented.

¹AFSCME Local 189 v. City of Portland, Case No. UP-1-05, 21 PECBR 273 (2006).

“2. * * * shall pay interest to Grievant in the amount of 9 percent per annum on back pay he would have earned from December 23, 2004, the date of the arbitration award, to the date the arbitration award is implemented.”

On May 10, 2006, Complainant filed a Motion to Compel Enforcement of the Award. The following day, the City filed a Motion to Clarify Order. The parties agree that Grievant's circumstances changed from the time he filed the grievance to the date of our Order. Those changes caused the parties to disagree on how to comply with our Order. In response, we issue this Order based on the motions of both parties.

On June 15, 2006, with the parties' approval, the Board compiled a Findings of Facts to which the parties agreed. Complainant filed a Brief in Support of Motion to Compel on July 13, 2006. The City filed a Supplemental Brief on Motion for Clarification on July 14, 2006.

The parties agreed the Board should decide the following issues:

1. Should the City compensate Grievant for back wages for the period from August 12, 2005 to April 17, 2006, when Grievant received time loss benefits for his workers' compensation claim and was unable to return to the City's employment?
2. Should the City grant Grievant a medical leave under the Federal Medical Leave Act (FMLA) during his medical absence?

In addition to the two issues on which the parties first sought clarification, the City proposed a third issue in its Supplemental Brief:

3. Must the City make an employer contribution to the Public Employee Retirement System (PERS) on Grievant's behalf from the date of his termination to the

present even though Grievant withdrew from PERS?²

FINDINGS OF FACT³

1. On January 29, 2004, the City terminated Grievant's employment. AFSCME filed a grievance to challenge the termination.

2. In 2005, Grievant, following his termination from the City of Portland, began working for Robinson Brothers Construction, Inc., as a truck driver. During his employment he earned approximately \$5,500.

3. On August 11, 2005, Grievant was severely injured in a work-related accident.

4. On December 23, 2004, an arbitrator reversed Grievant's termination and reinstated him with back pay. On March 15, 2006, this Board ordered the City to comply with the arbitration award.

5. On April 17, 2006, the City offered to reinstate Grievant to his former position as Utility Worker II in the Water Bureau.

6. AFSCME's counsel notified the City that Grievant was unable to return to his former City position.

7. On or about April 17, 2006, the City granted Grievant a three-month personal leave of absence and committed to holding his job open during that period of time. The City refused to grant Grievant a medical leave under FMLA on the grounds that Grievant did not work the requisite number of hours prior to his injury to qualify for the leave benefit.

8. Grievant is not able to return to his Utility Worker II position

²Although Complainant did not agree that the Board should consider this issue, both parties briefed it. Because it is clear that the parties want to resolve all outstanding issues, we address this supplemental matter.

³These findings are based on the facts agreed to by the parties and on our March 15, 2006 Order in this matter.

with the Water Bureau due to the on-the-job injuries he suffered while working for Robinson Brothers Construction, Inc.

9. Grievant is not medically stationary and continues to receive ongoing medical care.

10. Grievant is receiving workers' compensation time loss and medical benefits from SAIF for the accepted claim.

11. It is not known if Grievant will be released to return to work within the next 90 days.

12. The City paid Grievant back wages, interest, and overtime compensation from December 23, 2004 through August 11, 2005, the date of the workers' compensation injury. It also credited Grievant with accrued vacation and sick leave for the same period.

13. AFSCME demands that the City pay Grievant for wages lost from August 12, 2005 to April 17, 2006, during the time when the Grievant was receiving workers' compensation benefits.

14. The City refuses to make payment because Grievant is medically unable to work and is not entitled to back pay for that period.

DISCUSSION

Workers' Compensation Time Loss Benefits as an Offset to Back Pay

This Board, in its March 15, 2006 Order, directed the City to make Grievant whole for any damages he incurred because of the City's unlawful refusal to implement an arbitration award. "The goal of a make whole order is to restore an injured party to the status that existed before the violation occurred." *Central Education Association and Alfonso Vilches v. Central School District 13J*, Case No. UP-74-95 17 PECBR 93, 94 (1997), *aff'd* 155 Or App 92, 962 P2d 763 (1998). Put a different way, the purpose of a "make whole remedy" is to restore a Grievant to the same position he enjoyed prior to his unlawful termination.

Here, the City complied with this Board's Order to the extent of paying Grievant back wages, interest, and overtime compensation from December 23, 2004 to August 11, 2005. On that August date, Grievant sustained a critical injury while working for Robinson Brothers Construction, Inc., the company for whom he worked following his termination from the City. Grievant is receiving workers' compensation benefits as a result of this injury. His condition is not medically stationary. It is not known when he will be able to return to regular employment.

The City argues that it should not be required to compensate Grievant beyond August 11 because his on-the-job injury renders him physically unable to return to his former position as a Utility Worker II. The City states that the injury Grievant sustained has no relevance to it because the City "was not the legal cause of the accident" and "an employee is not injured by an employer's contract violation if the employee is not physically able to work." Thus the City believes that it is not required to pay Grievant any additional compensation. In support of its position, the City cites two arbitration awards that refused to order back pay because the grievants were physically unable to return to work. These cases are not on point because they do not address the issue of workers' compensation time loss benefits.

In addition, the City cites tort law and the theory of causation. This ignores the basis of workers' compensation. In *Andrews v. Tektronix, Inc.*, 323 Or 154, 159-160, 915 P2d 972 (1996), the Oregon Supreme Court stated:

"* * * Fault is an idea that has no place in our workers' compensation scheme: Indeed, if our workers' compensation laws stand for anything, it is that fault is irrelevant in determining a worker's entitlement to compensation* * * '[w]hether the cause be the fault of the employer, the fault of the workers, the fault of a third person, or the fault of no one'; *McDonough v. National Hosp. Ass'n*, 134 Or 451, 460, 294 P 351 (1930) (right to compensation 'is not dependent upon any negligence or wrongful act of the employer but is based wholly upon the fact of employment')."

In the alternative, the City argues that if it is required to compensate Grievant beyond the August 11 date of injury, the wages owed should be offset by the time loss benefits Grievant continues to receive from his workers' compensation claim with Robinson Brothers Construction, Inc. Complainant argues that a make whole remedy entitles Grievant to "full back pay during any period of injury caused by an industrial accident."

Both parties' arguments are flawed. The City's position would not make Grievant whole. Workers' compensation benefits replace only 2/3 of his lost wages. The Complainant's argument would give Grievant a windfall. Grievant would receive not only full back pay but also workers' compensation benefits.

This Board previously has not addressed the effect of a workers' compensation time loss benefit on a make whole remedy. However, the National Labor Relations Board (NLRB) has done so in decisions under the Labor Management Relations Act, 28 USC 158 *et seq.* In appropriate circumstances, we look to decisions of the NLRB for guidance. *Elvin v. Oregon Public Employees Union*, 313 Or 165, 175, 832 P2d 36 (1992).

In *American Manufacturing Co. Of Texas and Local 47, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 167 NLRB 520, 66 LRRM 1127 (1966), the NLRB considered the amount of back pay due to an unlawfully discharged employee who sustained an on-the-job injury while working for a subsequent employer. That injury prevented him from accepting immediate reinstatement with his former employer. The NLRB ruled that:

"The origin and causes of infections and organic infirmities, such as influenza and heart attacks, for example, are usually not known and cannot be determined or assumed. It is ordinarily reasonable to assume, however, that absences from work because of such illnesses would probably have occurred even if the employee had not been discharged. As the claimant's loss therefore cannot be said to have a likely relationship to the unlawful discrimination, disallowance of back pay for all periods of unavailability because of such illnesses is proper.

“* * * * *

“The same underlying reasoning does not, however, apply to periods of illness which occur because of industrial accidents suffered during the course of interim employment or are otherwise attributable to the unlawful conduct of the respondent. The causes of such ailments are known and attributable to events which would not have taken place, * * * which would not have been present, had the employee not been unlawfully removed from his employment. * * * Although other extended disabilities might have occurred absent discharge, this is not a normal expectancy, and hence a discriminatee would not reasonably have been expected to suffer the industrially caused ailment and the consequent pay loss if he had retained his former employment.

“* * * * *

“* * * [W]e think that equity and reason require that periods of unavailability for work because of * * * accident must be considered on a case-by-case basis. Where an interim disability is closely related to the nature of the interim employment or arises from the unlawful discharge and is not a usual incident of the hazards of living generally, the period of disability will not be excluded from back pay.

“* * * * *

“* * * But where back pay is awarded for the same period for which wages have already been replaced in part, to continue to hold the wage portion of the award to be nondeductible would result in double payment to the employee for that period, and hence this part is more accurately regarded as deductible interim earnings.” 167 NLRB at 522-523

The NLRB again considered temporary disability payments in *John J. Canova dba Canova Moving & Storage Co. and General Teamsters and Warehousemen, Local 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 261 NLRB 639, 110 LRRM 1124 (1982). There, the NLRB wrote that “temporary disability payments are a substitute for lost wages * * * during the temporary disability period.” 261 NLRB at 640.

We adopt the position of the NLRB, and hold that an employee is entitled to back pay for a period of disability caused by an on-the-job injury sustained during interim employment. However, the employer may offset workers’ compensation time loss payments in back pay calculations.

Here, Grievant sought interim employment to mitigate the damages he suffered when the City unlawfully terminated him from his Utility Worker II position. He went to work for a construction company as a truck driver. Grievant was seriously injured on August 11 and is receiving workers’ compensation benefits. To date he has not been declared medically stationary and remains unable to return to his City job.

We will direct the City to compensate Grievant for his lost income from the date of his injury to the date he is released to return to his Utility Worker II position. However, to avoid a double wage payment, the City may offset the back pay award by the amount of temporary disability payments Grievant has received and will continue to receive during his recovery.

Request for FLMA Leave

The City argues that Grievant is ineligible for FMLA leave because he did not work the requisite number of hours prior to his request for the leave. The reason Grievant did not work the requisite number of hours is because the City wrongfully ended his employment. Both the arbitrator and this Board ordered the City to make Grievant whole. As we stated earlier, that requires the City to return Grievant to the same position and status he would have enjoyed but for the employer’s unlawful act. It includes treating Grievant for all purposes as though he never left his employment with the City.⁴

⁴The purpose of FMLA leave is to preserve an individual’s right to rehire when capable
(continued...)

Having stated that, it is nevertheless beyond the jurisdiction of this Board to determine whether Grievant was wrongly denied the job protection benefits of the FMLA. Such matters must be taken up in the appropriate forum.

City's contribution to Grievant's PERS Account

The City states that Grievant withdrew from PERS on or about June 11, 2004, approximately six months after his unlawful termination. Even if we assume this is true, it does not excuse the City from making Grievant whole for his lost PERS contributions. The City argues, without apparent logic or authority, that without knowing why Grievant withdrew his retirement money, the Board lacks the requisite information to direct the City to make a PERS contribution. In our view, Grievant's reason for withdrawing his PERS money is immaterial.

This Board ordered the City to cease and desist from refusing to accept the terms of Arbitrator Helm's award. Both this Board and the arbitrator directed the City to make Grievant whole for any damages incurred. To comply, the City must restore Grievant to the same position he would be in but for the unlawful termination, including the restoration of any accrued retirements benefits. We will direct the City to pay Grievant personally for the amount of money it would have paid into his PERS account based on his earnings from the date of his termination to August 11, 2005, the date of his injury. From that date, the City is directed to pay Grievant (or contribute to his PERS account when it is reestablished) in accordance with PERS guidelines for individuals receiving workers' compensation time loss benefits and supplemental salary. Such payment or contribution shall continue until Grievant is medically able to return to City employment.

⁴(. continued)

of returning to work. Our earlier order in this accomplishes that end. The FMLA issue, then may be academic.

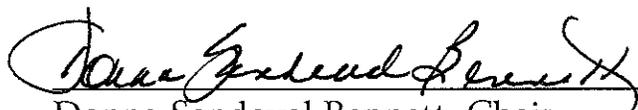
ORDER

The City is directed to comply with our March 15, 2006 Order and to pay Grievant within 20 days of the date of this notice:

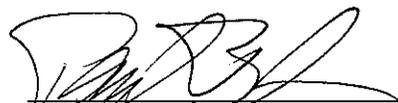
1. Full back pay and benefits, including wages from August 11, 2005, the date Grievant sustained a compensable injury while working for an interim employer, to the date he is medically able to return to his Utility Worker II position. The City may offset the back pay by the payments Grievant has received and continues to receive from his workers' compensation time loss benefits.

2. Compensate Grievant for any PERS contributions he would have received from the date of his termination to August 11, 2005. From that date forward, the City will pay Grievant (or contribute to his PERS account) an amount consistent with PERS guidelines for an individual receiving workers' compensation time loss benefits and supplemental salary. The payment or contribution will continue until the date Grievant is medically able to return to City employment.

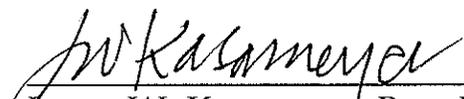
DATED this 16th day of August 2006.



Donna Sandoval Bennett, Chair



Paul B. Gamson, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.