

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-11-08

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,)	
LOCAL #2503,)	
)	
Complainant,)	ORDER ON RESPONDENT'S
)	MOTION TO STAY
v.)	
)	
HOOD RIVER COUNTY,)	
)	
Respondent.)	
_____)	

On August 13, 2009, this Board issued an Order which held that Hood River County (County) violated ORS 243.672(1)(b) and (f) when it refused to calculate and withhold union dues and fair share payments from employee paychecks based on a formula established by AFSCME. 23 PECBR 287. As a remedy, we ordered the County to (1) cease and desist from the refusal; (2) reimburse AFSCME for all dues and fair share payments it lost because of the unlawful refusal, with nine percent interest; and (3) post a notice of its wrongdoing in each facility where bargaining unit members work.

The County petitioned the Court of Appeals to review our Order and now asks us to stay the Order until the appeal is complete. AFSCME opposes the stay. For the reasons discussed below, we deny the stay.

The County's motion is governed by ORS 183.482(3) which states:

"(3)(a) The filing of the petition [for review with the Court of Appeals] 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.

“(c) When the agency grants a stay it may impose such reasonable conditions as the giving of a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within specified reasonable periods of time.

“(d) Agency denial of a motion for stay is subject to review by the Court of Appeals under such rules as the court may establish.”

Under this statute, if the County establishes a colorable claim of error and irreparable injury, we must grant the stay unless doing so would cause substantial harm to the public. *Oregon Education Association v. Willamette Education Service District*, Case No. UP-08-07, 22 PECBR 889, 890 (2008) (Order on Respondent’s Motion to Stay).

The standard for proving a colorable claim of error is “modest.” *Chemeketa Community College Education Association v. Chemeketa Community College and Chemeketa Community College Classified Employees Association*, Case No. UC-9-99, 18 PECBR 718, 719 (2000). A colorable claim is established if the petitioner’s arguments are “substantial and nonfrivolous, or seemingly valid, genuine, or plausible, under the circumstances of the case.” *Bergerson v. Salem-Keizer School District*, 185 Or App 649, 660, 60 P3d 1126 (2003).

Here, the County identifies several claims of error that it asserts are colorable. This Board concluded that the County violated ORS 243.672(1)(f)¹ by failing to comply with the dues deduction requirements of ORS 292.055 and ORS 243.776. The County asserts that we erroneously discounted its estimate of the cost to make the deductions, without any evidence to show the estimate was inaccurate. It also asserts that the Board erroneously concluded that an employer must honor a request for dues deductions regardless of how much it costs the employer to comply.

¹ORS 243.672(1)(f) makes it an unfair labor practice for a public employer to “[r]efuse or fail to comply with any provision of” the Public Employee Collective Bargaining Act (PECBA).

This Board also concluded that the County violated ORS 243.672(1)(b)² when it interfered with the administration of the Union by failing to withhold dues from employee paychecks. The County asserts that this Board incorrectly applied its precedent in this regard and that the County's action did not interfere with the Union's operations.³

Although we disagree with the County's arguments, we cannot say they are frivolous or implausible. We conclude the County has presented a colorable claim of error.

We next consider whether the County would likely suffer "irreparable injury" unless we stay the Order pending appeal. The statute does not define "irreparable injury." The Court of Appeals considered the meaning of the phrase in *Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 55 P3d 546 (2002). It held that an injury is irreparable if a party "cannot receive reasonable redress in a court of law." *Id.* at 101. Whether an injury is irreparable "depends not on the magnitude of the injury, but upon the completeness of the remedy in law." *Id.* at 102 (quoting *Winslow v. Fleischner et al.*, 110 Or 554, 563, 223 P. 922 (1924)).

In addition, the party requesting a stay must demonstrate that irreparable injury is *probable* unless the stay is granted. *Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App at 101-102. We will not find irreparable injury based on speculative claims or allegations of possible harm. *Central Education Association and Alfonso Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 250, 252 (1997).

The County asserts it will suffer irreparable injury if it is forced to comply with this Board's Order pending appeal. The Order requires the County to calculate and withhold Union dues from employee paychecks based on a formula established by AFSCME. According to the County, "the only way for the County to accomplish this

²ORS 243.672(1)(b) makes it an unfair labor practice for a public employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization."

³The County also cites ORS 243.672(2)(b) and contends that this Board erred by refusing to recognize a duty for AFSCME to bargain with the County over a change in the formula for dues to be deducted from employee paychecks. Subsection (2)(b) makes it an unfair labor practice for a labor organization to bargain in bad faith with a public employer. The County did not file a complaint alleging that AFSCME bargained in bad faith under subsection (2)(b), so the issue was not before the Board. The County's claim in this regard is not colorable.

would be to purchase a software upgrade that would cost an estimated \$32,000.” (Respondent’s Motion to Stay at 3.) The County argues that if the Court of Appeals reverses this Board’s Order, the County would “be without redress at law to recoup its cost * * *.” (*Id.* at 4.) We conclude that the asserted injury is not probable and we therefore deny the stay.

In the underlying Order, we found that the company that prepares the County payroll estimated it would cost approximately \$32,000 to make the changes necessary to accommodate AFSCME’s new dues structure. The County’s argument, however, rests on the false premise that the *only* way to comply with the Board’s Order is to purchase this software upgrade.

According to the record, AFSCME has approximately 167 public employee locals in Oregon. All employers except the County switched to the new dues formula. No employer except the County expressed concerns about the cost. Umatilla County, for example, made the change for approximately \$400. The County has not provided any reason why it could not use this same reasonably priced method to make the dues deductions.

The new dues formula is not especially complex. It requires only simple arithmetic. The formula requires the County to calculate 1.27 percent of each employee’s base salary,⁴ with a minimum of \$15 and a maximum of \$55. The dues assessment equals the amount derived by applying this percentage, plus \$3. The bargaining unit consists of just 26 employees. As we observed in the underlying Order, for considerably less than \$32,000 “the County could hire someone for a few hours per month to make the calculations by hand.” 23 PECBR at 299. We considered it “improbable that it will cost the County approximately \$1,231 per bargaining unit member to calculate each member’s monthly dues” under the new formula. *Id.*

For these reasons, we conclude that the harm claimed by the County is speculative. The County failed to demonstrate that it would probably need to spend \$32,000 to comply with the Board’s Order pending appeal. The County has not shown that it will probably suffer irreparable injury absent a stay, so we will deny the motion.⁵

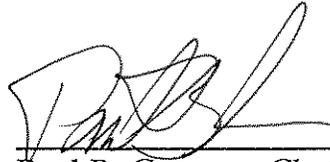
⁴Without any changes or expense to the County, the County’s current payroll system can provide each employee’s base salary.

⁵Although the County’s motion requests a stay of the entire August 13 Order, its arguments focus solely on the portion of the Order that requires it to deduct dues from employee paychecks under the new formula. The County does not argue or otherwise present any basis to stay the portions of the Order that require it to post a notice of its wrongdoing and to make AFSCME whole for any dues it lost because of the County’s refusal to apply the new formula. In the absence of any argument, we will not stay those portions of the Order.

RULING

The County's motion to stay is denied.

DATED this 25th day of January 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.