

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-13-10

(UNFAIR LABOR PRACTICE)

PORTLAND FIRE FIGHTERS')	
ASSOCIATION, LOCAL 43, IAFF,)	
)	
Complainant,)	
)	RULING ON
v.)	MOTION TO STAY
)	
CITY OF PORTLAND,)	
)	
Respondent.)	
_____)	

On November 15, 2011, this Board issued an Order that held that the City of Portland (City) violated ORS 243.672(1)(g) when it refused to accept the terms of an arbitration award in which the arbitrator found that the City discharged Tom Hurley (Grievant) without just cause. 24 PECBR 472, *recons*, 24 PECBR 583 (2012). We ordered the City to: (1) cease and desist from refusing to accept the terms of the arbitrator's award; (2) implement the terms of the arbitrator's award and make the grievant whole for any damages he incurred because of the City's unlawful refusal to implement the award; and (3) pay interest to the grievant in the amount of 9 percent per annum on compensation he would have received had the City not refused to comply with the arbitrator's award.

The City petitioned the Court of Appeals to review our Order. On March 27, 2012, the City filed a motion to stay enforcement of our Order pending the outcome of the appeal. The Portland Fire Fighters' Association, Local 43, IAFF (Association) responded to the motion. For the reasons discussed below, we deny the City's motion.

Under ORS 183.482(3)(a), this Board may stay enforcement of an order on appeal only “upon a showing of: (A) Irreparable injury to the petitioner; and (B) A colorable claim of error in the order.” When the petitioner makes the required showing, this Board must grant the stay unless we determine that “substantial public harm will result if the order is stayed.” ORS 183.482(3)(b).

The burden to demonstrate a “colorable claim of error” is not too difficult to meet. A colorable claim is established unless the petitioner’s arguments are “frivolous or clearly without support in the law.” *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). Here, the City notes that it has identified several colorable claims of error, but urges us to “look no further than the City’s primary contention that the arbitrator exceeded his authority by basing his award on something the Union did not grieve.” (City Motion to Stay, p. 3). Although we disagree with the City’s contention, we cannot say it is frivolous or clearly lacking support in the law. *Oregon AFSCME Council 75, Local #2503 v. Hood River County*, Case No. UP-11-08, 23 PECBR 505, 507 (2010), *aff’d*, 248 Or App 293 (2012). Accordingly, the City has demonstrated a “colorable claim of error.”

We next determine whether the City will suffer irreparable injury if we do not stay our Order. Whether an injury is irreparable “depends not upon the magnitude of the injury, but upon the completeness of the remedy in law.” *Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 102, 55 P3d 546 (2002). The party requesting the stay must show that irreparable injury is probable if the stay is not granted; speculative claims or allegations of possible harm are not sufficient to prove irreparable injury. *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).

Here, the City asserts that immediate enforcement of our Order will result in one irreparable injury—layoff of two employees. According to the City, Portland Fire and Rescue (PF & R) faces “significant budget cuts in fiscal year 2012-2013.” (City Motion to Stay, p. 4.) The City contends that implementation of the arbitrator’s award—which requires that the City pay grievant the benefits he would have received from the Fire and Police Disability, Retirement and Death Benefit Plan (Fund) had the Fund not terminated those benefits—will place a substantial financial burden on the PF & R. Although the City contends it cannot calculate the exact amount of disability benefits owed to grievant, it estimates that “the amount at issue currently should be between \$88,869.90 to \$177, 739.81.” (City Motion to Stay, p. 2, taken from the Affidavit of Patricia Rafferty, disability accountant for PF & R.) The City asserts that given the difficult budgetary situation it faces, the only way it can raise the funds to pay the benefits owed to the grievant is to lay off two sworn PF & R employees.

According to the City, the layoff of two sworn employee during the pendency of the appeal will result in injuries for which the employees cannot be adequately compensated, even if the City prevails in its appeal and the employees are ultimately reinstated to their positions. The City contends that the two laid off employees would “have no redress in a court of law for financial reimbursement or for the emotional hardship that they and their families had to endure while they were laid off.” (City Motion to Stay, p. 4.) We disagree that the layoff of employees constitutes an irreparable injury.¹

In *State Teachers Education Association/OEA/NEA v. Willamette Education Service District and State of Oregon, Department of Education*, Case No. UP-14-99, 19 PECBR 339, 341 (2001) (Ruling on Motion to Stay Order), we considered a similar claim. In that case, we ordered the employer to comply with an arbitrator’s award reinstating several employees. The employer petitioned for a stay of our Order, claiming that reinstating the employees would result in irreparable harm because it would require the employer to displace incumbent employees. We rejected the employer’s argument. We explained:

“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.” *Id.*

We noted that the employer’s unlawful acts created the situation that ultimately resulted in displacement of the incumbent employees. We concluded that our order did nothing more than restore the *status quo* that would have existed had the employer not acted illegally. We stated:

“The Complainants have already been injured by the District’s refusal to hire them. There is no reason their injury should be compounded while the District pursues its appeal.” *Id.*

We reach the same conclusion regarding the layoff of PF & R sworn employees as we did regarding the displacement of incumbent employees in *State Teachers Education Association*. We refuse to increase the injury the City caused to the grievant by staying

¹How the City chooses to account for the cost of complying with our Order is its decision. For purposes of this Order, we assume that it chooses to lay off two firefighters.

our Order while the appeal is pending. Our Order restores the *status quo* that would have existed had the City not unlawfully refused to implement the arbitrator's award.

The City contends, however, that the loss of two sworn PF & R employees is comparable to other injuries we have concluded were irreparable under ORS 182.483(3)(a)(A). In support of its position, the City cites *Central Education Association and Vilches v. Central School District 13J*, 17 PECBR 250 (1997) (Ruling on Petition for Enforcement and Motion to Stay) and *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 292 (2008) (Ruling on Motions to Stay). The City's reliance on these cases is misplaced.

In *Central School District 13J*, we stayed an order requiring a school district to reinstate a teacher whose employment was unlawfully terminated. We did so because enforcement of our order would have required the District to reinstate the teacher very late in the school year. We noted that reinstatement of the unlawfully discharged teacher would require the school district to reassign teachers, and that

“[r]eassignment of teachers with only a few weeks to go in the school year likely would be disruptive to students, jeopardizing Respondent's ability to fulfill its responsibilities. These disruptions could not be undone should Respondent prevail in its petition.” 17 PECBR at 252.

In *Josephine County*, we stayed a portion of our order that would have required a county to reinstate 125 individuals formerly employed by the county's mental health services department. We concluded that the county unlawfully contracted out mental health services to various public and private employers. We held that the county had established that failure to stay our order would result in two irreparable injuries. First, we noted that when the county contracted out its mental health services, it eliminated the infrastructure needed to provide these services, such as office space, equipment, computers, and furniture. We concluded that if we returned the unlawfully contracted-out workers to the county, the county would then have to spend a substantial amount of time and money to rebuild the necessary infrastructure. “If the Court were then to reverse our Order and permit the County to contract out the services, the County would again dismantle the infrastructure for these services.” 22 PECBR at 294.

Second, we concluded that if we did not stay our reinstatement order, the county might be unable to obtain full relief from the Court of Appeals. We noted that the largest recipient of the county's contracted-out work was a non-profit corporation, Options. After Options contracted with the county, it developed the infrastructure needed to do the work formerly performed by county employees. If we enforced our reinstatement order, work would be taken from Options and Options would probably be unable to continue paying for the infrastructure it developed to accommodate the

county's work. If the county prevailed on appeal, and the court held it could lawfully contract out work to Options, Options would lack the infrastructure appropriate to again accept the work. 22 PECBR at 295.²

Here, the situation is considerably different from those presented in *Central School District 13J* and *Josephine County*. The City has not alleged that enforcement of the arbitrator's award will require extensive changes in the infrastructure that would be difficult or impossible to reverse if the City prevails on appeal. Nor has the City claimed that enforcing the award will cause irreversible damage to any City residents served by the PF & R. The only injury the City asserts that enforcement of the award will inflict is the layoff of two sworn PF & R employees. Under the circumstances of this case, these layoffs are not an irreparable harm.

RULING

The motion to stay is denied.

DATED this 17 day of May 2012.



Susan Rossiter, Chair

*Paul B. Gamson, Board Member



Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.

²An additional consideration in *Josephine County* was our concern for the county residents who were the recipients of mental health services:

“* * * [W]e are mindful that vulnerable segment of the community uses the services at issue. The services have already been transferred once, and requiring another switch now, and potentially a third if the County prevails on appeal, seems unnecessarily disruptive.” 22 PECBR at 296.

*Member Gamson Concurring

I write separately because the City's arguments regarding irreparable harm strain credulity beyond its limits. The City's basic argument is that it will be harmed because complying with the Board's Order will necessarily require it to lay off two firefighters. As my colleagues recognize, the argument fails because it is entirely speculative. It depends on unknowable future events such as the City's budget for the next fiscal year, the number of upcoming retirements, the number of employees who will leave their City employment for reasons other than retirement, future revenue from business license fees, and complex predictions about the state of the economy. *See Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 102, 55 P3d 546 (2002) (the party requesting a stay must demonstrate that irreparable injury is *probable* unless the stay is granted).

The City's irreparable injury argument also fails for several other more basic reasons not addressed by my colleagues. First, the statute permits us to stay an order pending appeal only on a showing of "[i]rreparable injury to the petitioner." ORS 183.482(3)(a)(A) (emphasis added). The City fails to identify any way in which *its own interests* would be harmed by layoffs. The City does not assert that the layoffs would compromise its ability to perform its basic mission. It does not argue, for example, that houses will burn down or citizens will be unsafe. Instead, the only potentially irreparable harm the City has identified would be to others:

"If the City ultimately were to prevail on appeal, those [laid-off employees] have no redress in a court of law for financial reimbursement or for the emotional hardship that they and their families had to endure while they were laid off. Those [employees] would suffer irreparable injury." (City's Motion to Stay at 4.)

Although layoffs would be unfortunate (and are, in my view, highly unlikely and unnecessary), the City has not even attempted to show they would cause irreparable injury to the City. Absent such a showing, the statute does not allow us to stay our Order pending appeal.

Second, the City's arguments rely on a faulty assumption. The City assumes (without any attempt to justify the assumption) that the arbitration award and our Order require it to pay the grievant out of the Portland Fire & Rescue (PF & R) budget, and more specifically, from the portion of that budget dedicated to firefighter salaries. This assumption is unfounded. Both the arbitration award and our Order simply require the City to make the grievant whole for his losses. Neither specifies where the money should come from. The City can pay out of any fund it chooses. The City makes no

attempt to argue that it would be harmed (irreparably or otherwise) if it paid the money from a source other than the PF & R budget. Thus, on this record, it is not the Board's Order which would cause the harm the City claims, but rather, the City's unjustified assumptions about what our Order requires.

Our Order, properly construed, would not require the City to lay off two employees. The City estimates that it owes the grievant somewhere between \$89,000 and \$178,000. The City's total budget is more than \$3.5 billion (that's the number 35 with eight zeroes after it).³ It includes a general reserve fund of more than \$49 million.⁴ This fund is available for emergencies and one-time, unanticipated expenses.⁵ The City's budget also has contingency funds of more than \$608 million⁶ and a beginning fund balance (*i.e.*, unspent money carried over from the prior fiscal year) of more than \$734 million.⁷ The City could, for example, pay the grievant the money it owes him with an insignificantly small fraction of the general fund reserve or contingency fund, or by an unnoticeably small reduction in its ending fund balance. It defies common sense to believe that the City is unable to find a way to pay this relatively minuscule portion of its multi-billion dollar budget without suffering irreparable harm.⁸

³These numbers are taken from volume 1 of the City's 2011-12 budget document. <http://www.portlandonline.com/omf/index.cfm?c=55390&a=358663> at page 29 (last visited 5/15/12). Even the highest calculation of what the City owes the grievant is just .005% (5/100,000th) of the City's budget.

⁴The information about the general reserve fund is taken from volume 2 of the City's 2011-12 budget document at p. 6. <http://www.portlandonline.com/omf/index.cfm?c=55391&a=358664> (last visited on 5/15/12).

⁵Budget document volume 1 at p. 731 and volume 2 at p. 6.

⁶Budget document volume 1 at p. 29. The budget glossary does not define the contingency fund or its uses.

⁷Budget document volume 1 at p. 29.

⁸On May 3, 2012, Portland Mayor Adams released his proposed budget for 2012-13. According to *The Oregonian*, the budget is "[b]uoyed by \$4 million in additional unexpected resources," and it proposes to "give \$7.5 million to area school districts." *The Oregonian*, May 4, 2012 at p. C1. These facts further indicate the City has funds available in amounts far greater than the \$89,000 to \$178,000 it needs to comply with this Board's Order.

Further, the City has about 5,594 employees.⁹ It seems almost certain that at least two employees will retire or leave the City for other reasons. If the City chose not to replace these employees, it would successfully avoid the need to lay off firefighters or anyone else.

I am not suggesting that the City needs to follow one of the options identified above. My point is that the City has many realistic options available to pay the grievant the money it owes him without the need to lay anyone off. The City's assertion that it *must* lay off two firefighters to comply with the Board Order is simply not credible. If the City lays off a firefighter, it is by choice rather than necessity. Such self-inflicted harm is not the type of irreparable injury that would justify a stay of the Order until the appeal is complete.



*Paul B. Gamson, Board Member

⁹Budget document volume 1 at p. 25.