

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-24-08

(UNFAIR LABOR PRACTICE)

MARION COUNTY LAW)	
ENFORCEMENT ASSOCIATION,)	
)	
Complainant,)	
)	COMPLIANCE ORDER
v.)	
)	
MARION COUNTY,)	
)	
Respondent.)	
_____)	

On March 29, 2010, this Board held that Marion County (County) violated ORS 243.672(1)(g) when it refused to comply with an arbitrator’s order to reinstate a discharged employee with back pay, minus a one-month unpaid suspension. 23 PECBR 671. As pertinent here, we ordered the County to comply with the arbitrator’s award and to make the grievant whole for her losses, including “back pay and benefits, minus interim earnings * * *.” 23 PECBR at 703.

The parties have resolved all of the remedy issues except two. The Marion County Law Enforcement Association (Association) asks this Board to compel the County to comply with the Board’s Order on the two remaining issues. The County asserts it has fully complied. The parties submitted documents, affidavits and briefs in support of their positions.

The issues are:

1. Does the County owe back pay after July 2009 when the grievant refused the County’s offer to reinstate her?
2. How much back pay does the County owe the grievant for the overtime hours she would have worked if she had not been wrongfully discharged by the County?

FACTS¹

Reinstatement

1. On September 27, 2007, the County discharged Kristine Phillips from her position as a Deputy Sheriff in the Marion County Sheriff's Department work center. At the time of her discharge, Phillips had worked for the Sheriff's office for approximately 15 years, most of it at the jail. Phillips began working at the work center in 2005.

2. The Association filed a timely grievance over Phillips' discharge. On June 9, 2008, an arbitrator concluded that the County violated the parties' collective bargaining agreement when it discharged Phillips without just cause. The arbitrator ordered the County to reinstate Phillips with back pay and benefits, minus a 30-day suspension without pay.

3. On June 10, 2008, Sheriff's Department Commander Holland met with Phillips, Phillips' significant other, and Association representatives to discuss arrangements for Phillips' return to work. Holland indicated the County would reinstate Phillips and directed her to enroll in the County's employee benefit programs.

4. After meeting with Holland, Phillips quit her full-time job as a casino security guard and also quit an additional part-time position.

5. On June 27, 2008, the County informed the Association that it would not reinstate Phillips or otherwise comply with the arbitrator's award.

6. On July 2, 2008, the Association filed an unfair labor practice complaint alleging that the County violated ORS 243.672(1)(g) by refusing to implement the arbitrator's award reinstating Phillips.

7. On September 17, 2008, Administrative Law Judge (ALJ) B. Carlton Grew held a hearing on the Association's unfair labor practice complaint. On January 26, 2009, the ALJ issued his Recommended Order in which he concluded that the County violated ORS 243.672(1)(g) when it refused to comply with the arbitrator's award reinstating Phillips. The ALJ ordered the County to cease and desist from refusing to comply with the arbitrator's award, to reinstate Phillips to her former position as soon as practicable, and "to make Phillips whole for any loss or injury she

¹We take the facts from the underlying order and from the affidavits and documents the parties submitted in connection with the compliance issues raised in this petition.

suffered due to the County's failure to promptly implement the arbitration award, with the goal of placing Phillips in the same position she would have occupied had the County promptly complied with the award."

8. Both parties objected to the Recommended Order. On April 29, 2009, this Board heard oral argument on these objections.

9. In November 2008, Phillips obtained a full-time position with the City of Salem. The record does not indicate Phillips' salary or benefits for this job.

10. Phillips filed an action against the County in federal court. On June 30, 2009, Phillips, her attorney, and the County's attorney participated in a mediation session.²

11. By letter dated July 1, 2009, County Sheriff Russ Isham notified Phillips that the County would reinstate her to a position as a Deputy Sheriff.

12. On July 6, 2009, Phillips received a letter from Isham outlining her 30-day suspension, and directing her to submit to a psychological examination, attend four classes at the Department of Public Safety Standards and Training (DPSST), qualify on the range, and verify that she possessed current DPSST certification.

13. After receiving Isham's letter, Phillips resigned from her full-time job with the City of Salem.

14. On July 15, 2009, Phillips spoke by phone with County Undersheriff Jason Myers about her return to work. During this conversation, Phillips confirmed her understanding that the County would not withdraw its appeal to this Board or provide back pay until this Board issued its Order. By e-mails dated July 16, 2009, the County's attorney told Phillips' attorney that the County would not pay Phillips back pay or drop its appeal to this Board.

15. Phillips did not return to work for the County because it refused to give her back pay and refused to withdraw its appeal to this Board. On July 23, 2009, Phillips withdrew her resignation from the City of Salem and continued working there.

16. On March 29, 2010, this Board issued a final Order in which it held that the County violated ORS 243.672(1)(g) by refusing to comply with the

²The parties disagree on whether they partially settled the court case during mediation. We do not need to resolve this disagreement in order to decide the issues before us.

arbitrator's award reinstating Phillips. This Board ordered the County to cease and desist from refusing to comply with the arbitrator's award; to reinstate Phillips to the same position she would have occupied had the County promptly complied with the arbitration award, with back pay and benefits as ordered by the arbitrator; and to "make Phillips whole for any loss or injury she suffered due to the County's failure to promptly implement the arbitration award, including back pay and benefits, minus interim earnings, with interest at 9 percent per annum, from the date of the arbitration award until the County reinstates Phillips to her former position."

17. The County reinstated Phillips in April 2010.

18. The County calculated back pay for Phillips until July 2009. It refuses to provide back pay after that time because Phillips rejected the County's offer to reinstate her in July 2009.

Back Pay for Overtime

19. From the 2004 through 2007, Phillips worked the following number of overtime hours:

- 2004—726 hours of overtime
- 2005—573.85 hours of overtime
- 2006—516 hours of overtime
- 2007—251 hours of overtime worked in 6 months.

TOTAL: 2,066.85 hours of overtime worked in 42 months

20. In calculating the amount of back pay owed Phillips for overtime opportunities lost during the period from September 27, 2007 through June 2009, the County examined the actual amount of overtime Phillips earned during the one-year period prior to her discharge. Phillips earned \$20,174.72 in overtime during the year preceding her discharge. The County averaged her overtime earnings over pay periods and then adjusted the average earnings with proportionate increases for wage rate changes.

21. From 2007 through 2009, County Sheriff's deputies in the work center worked the following overtime hours:

	<u>2007</u>	<u>2008</u>	<u>2009</u>
Total annual overtime hours:	3620	3349	1503
Average overtime hours:	453	419	251

CONCLUSIONS OF LAW

1. The County must provide Phillips with back pay and benefits, minus interim earnings, from July 2009 until it reinstated her in April 2010.

ORS 243.676(2)(c) specifically authorizes this Board to award back pay to a party harmed by an unfair labor practice. Our goal in awarding back pay is to restore injured parties to the economic position they would have attained if they had not been unlawfully fired. *See Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 93, 94 (1997) (Order on Reconsideration), *aff'd* 155 Or App 92, 962 P2d 763 (1998).

We begin the back pay calculation with the amount the employee would have earned if the employer had not fired the employee. We then consider mitigation. An injured party is required to seek interim employment to mitigate back pay damages. *AFSCME Local 189 v. City of Portland, Bureau of Water Works*, Case No. UP-1-05, 21 PECBR 542, 543 (2006) (Order on Reconsideration of Remedy); *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 533, 535-36 (2006) (Supplemental Order).³ Back pay is the amount the employee would have earned if not for the unlawful firing, minus the amount the employee actually earned from interim employment. *Central Education Association*, 17 PECBR at 800 n 8 (*quoting NLRB Casehandling Manual*, Section 10530 (1977)).

An employer can raise an affirmative defense that back pay should be reduced because the employee suffered a willful loss of earnings by failing to make reasonable efforts to obtain interim employment. *Millennium Maint. & Elec. Contr., Inc.*, 344 NLRB 516, 517 (2005). An employer has the burden of proving the defense. *Id.*; OAR 115-035-0042(6) (a respondent has the burden of proving an affirmative defense).

³The rule requiring a party injured by an unfair labor practice to seek interim employment has been accepted for at least 70 years. *Phelps Dodge Corp. v. NLRB*, 313 US 177 (1941). The purpose of the rule is "not so much the minimization of damages as the healthy policy of promoting production and employment." *Id.* at 200.

We apply those principles here. Phillips obtained interim employment with the City of Salem. Although the record is unclear on this point, Phillips apparently earned less with the City than she would have with the County.⁴ As a result, her back pay is the difference between what she would have earned with the County and what she actually earned with the City.

The County does not dispute that this calculation applies until July 2009. At that time, it offered to reinstate Phillips. Phillips rejected the County's offer. The County asserts that Phillips' back pay should end when she rejected the County's offer because Phillips willfully lost earnings—she chose to retain the lower-paying job with the City and thereby unnecessarily continued the accrual of damages. In some circumstances, rejection of a valid offer of interim employment may constitute a willful loss of earnings sufficient to toll the back pay period. *Oil, Chem. & Atomic Workers Union v. NLRB*, 547 F2d 598 (178 U.S. App. D.C. 301, 1976). The County has the burden to prove this affirmative defense.

The Association responds that Phillips acted reasonably under the circumstances. We agree. At the time it offered to reinstate Phillips, the County was still pursuing its objections before this Board. In those objections, the County asked us to overturn the arbitrator's reinstatement order and uphold its decision to fire Phillips. Under the County's theory, Phillips would be required to give up her regular employment with the City and accept reinstatement with the County, even though the County was fighting for the right to fire her again. In other words, if Phillips accepted the County's offer of reinstatement, she could again be without a job in the near future.⁵

The Association also notes that on an earlier occasion, shortly after the arbitrator issued the award, the County offered to reinstate Phillips. Phillips quit her interim employment, but the County then changed its mind and rescinded its reinstatement offer. As a result, Phillips was without a job. The Association asserts that Phillips was not required to take such a chance again.

⁴If Phillips earned as much as or more with the City than she would have with the County, this proceeding would be unnecessary. Her City earnings would completely offset the County's back pay obligation. The only reason this dispute would be before us is if Phillips earned less with the City and there was a possibility that the County would need to make up the difference in salary.

⁵Although we ultimately upheld the arbitrator's award, we did not issue the Order until several months after the County offered to reinstate Phillips. We judge the reasonableness of Phillips' decision to turn down the reinstatement offer based on the circumstances that existed at the time she made the decision. At that time, the County was fighting for the right to fire her.

A reinstatement offer must be unconditional in order to toll back pay. *Midwestern Pers. Svcs., Inc. v. Chauffers, Teamsters and Helpers Local Union No. 215*, 346 NLRB 624 (2006), *enfd* 508 F3d 314 (7th Cir 2007). Only a “clearly unjustifiable refusal to take desirable new employment” will toll the back pay. *Phelps Dodge Corp.*, 313 US at 199-200.

We conclude that Phillips acted reasonably and justifiably under the circumstances when she chose to reject the County’s conditional offer of reinstatement and instead retain her interim employment with the City. As noted, the purpose of the mitigation requirement is to promote “production and employment.” *Phelps Dodge Corp. v. NLRB*, 313 US at 200. Phillips has been industrious in finding interim employment. The purposes underlying the mitigation requirement are best furthered by allowing Phillips to remain with the City rather than requiring her to face immediate unemployment if the County again rescinded its reinstatement offer, or unemployment soon thereafter if the County prevailed in its arguments before this Board to overturn the arbitrator’s award and uphold its dismissal of Phillips.

The County will provide Phillips with back pay and benefits, plus interest, for the period from July 2009 until April 2010 when it reinstated her. The back pay is calculated as the difference between what she would have earned if she had remained employed by the County and what she actually earned through her employment with the City.

2. The back pay award includes overtime hours Phillips would have worked if she had not been unlawfully fired, to be calculated based on the average amount of overtime Phillips worked in the 12 months prior to her discharge.

The parties agree that Phillips would have worked overtime hours if she had not been discharged, and that to make her whole, she is entitled to back pay for those lost overtime hours. The parties disagree, however, on the proper way to estimate the number of overtime hours Phillips would have worked.

The parties cite no statute or Board cases addressing this issue. In such circumstances, we often seek guidance from the *NLRB Casehandling Manual*. See *Central Education Association*, 17 PECBR at 800 n 8 (relying on *NLRB Casehandling Manual*); see generally, *Elvin v. Oregon Public Employees Union*, 313 Or 165, 175 and n 7, 832 P2d 36 (1992) (the National Labor Relations Act is similar in structure, language and purpose to the PECBA, and decisions of the NLRB offer guidance in interpreting the PECBA.)

The *NLRB Casehandling Manual*, Section 10540.1⁶ provides three different methods to calculate how many hours an employee would have worked if the employee had not been unlawfully discharged, with instructions to choose the method that best fits the circumstances. We do not need to decide which method best fits here because the parties agree that the appropriate method is to look at the average amount of overtime Phillips worked in a representative period before the County unlawfully fired her.⁷ The dispute is over the length of the representative period we should consider.

The Association asserts we should use the monthly average over the 3 ½ years before the termination. It argues that looking at this longer period gives less effect to temporary fluctuations in overtime hours and provides a truer picture.

The County asserts that we should look at the year prior to the discharge. It notes that the longer period sought by the Association is unrealistic because the amount of overtime has trended down in recent years, due in part to operational changes designed to reduce overtime. The County argues that looking at this shorter period gives a better indication of the overtime hours Phillips most likely would have worked. We agree.

The amount of overtime Phillips worked went down in each of the four years before she was fired, and there is nothing in this record to indicate it would go back up. The Association would have us go back as far as 2004 when Phillips worked 726 hours of overtime. This is at least 150 hours more overtime than Phillips worked in any subsequent year. In addition, Phillips was assigned to work in the jail in 2004, but she had been assigned to the work center for at least two years before she was fired. Nothing in this record indicates that the number of overtime hours Phillips worked in the jail in 2004 would help us predict the number of overtime hours she likely would have worked from 2007 to 2010 in the work center.

For these reasons, we conclude that looking back to the 12 months prior to Phillips' discharge provides a better estimate of the overtime hours Phillips would have worked than the formula suggested by the Association. For the period from

⁶Published at <http://www.nlr.gov/sites/default/documents/44/compliancemanual.pdf> (last visited on July 29, 2011).

⁷In addition to the average hours the employee worked before the firing, the other two methods are based on the hours worked by comparable employees, or the hours worked by replacement employees. The County asserts that it chose the method which produced the most generous results for Phillips. According to the County's calculations, Phillips would receive less under either of the other two methods.

September 27, 2007 until July 2009, the County has already provided Phillips back pay for lost overtime based on the appropriate formula. The County will provide Phillips back pay for lost overtime for the period from July 2009 until the date it reinstated her in April 2010.

ORDER

Within 30 days of the date of this Order, the County will provide Phillips with back pay and benefits that include the period from July 2009 to April 2010. Back pay is the difference between what Phillips would have earned with the County and what she actually earned from interim employment. Back pay for lost overtime will be based on the average amount of overtime Phillips worked during the 12 months before the County fired her. The County will pay interest at the rate of 9 percent per annum from the date the payments were due until they are paid.

DATED this 1 day of August 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.