



The County petitioned the Court of Appeals to review our Order and also asked that we stay portions of the remedy. On February 15, 2008, we granted the County's motion for a stay as to that portion of our October 30, 2007 Order that requires the County to reinstate contracted-out employees to positions they previously held with the County. The remainder of the Order is enforceable during the pendency of the appeal. ORS 183.482(3)(a).

On June 30, 2008, AFSCME filed this Motion to Compel Enforcement of the portion of our October 30 Order that was not stayed. AFSCME's motion, as amended, stated that the parties disagreed about the amount of back pay and benefits owed to former AFSCME bargaining unit members and asked that we clarify several aspects of the remedy we ordered. At our request, the parties provided us with additional information concerning their disagreement.<sup>1</sup>

The issues are:

1. Did the County's calculation of back pay violate its "me too" agreement with AFSCME?
2. Should the County reimburse former AFSCME bargaining unit members for lost Public Employee Retirement System (PERS) contributions based on the entire gross salary they would have earned had they continued working for the County, or should it instead be based on the amount that remains after interim earnings are deducted from gross salary?
3. Did the County properly calculate the amount of back pay it owes to former AFSCME bargaining unit members who worked in the County's early intervention program?
4. Did the County improperly offset back-pay awards by the amount of overtime and holiday pay former AFSCME bargaining unit members received in the positions they accepted with other employers after the County contracted out the mental health program?

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<sup>1</sup>By separate Ruling issued on this date, we held that the County must continue to make the employees whole for lost wages and benefits during the pendency of the appeal of the underlying Order 22 PECBR 643.

5. How should the County calculate back pay for former AFSCME bargaining unit members who worked part time for the County and accepted full-time jobs with other employers after the County contracted out mental health programs?

6. How should the County calculate back pay for former AFSCME bargaining unit members who were discharged by their new employers after the County contracted out mental health programs?

7. Is a former AFSCME bargaining unit member who elected to be laid off by the County rather than accept a position with another employer entitled to make-whole payments for lost wages and benefits?

8. How should the County make whole former AFSCME bargaining unit members who lost health insurance benefits when the County contracted out mental health programs?

9. Are any temporary County employees entitled to make-whole payments for lost wages and benefits?

10. Is the County required to reimburse former AFSCME bargaining unit members for the difference between vacation time they earned with the County and vacation time they earned with their new employers?

#### FINDINGS OF FACT

The following facts are undisputed by the parties:

1. On October 30, 2007, this Board issued an Order which held that the County violated ORS 243.672(1)(a) and (b) when it transferred mental health programs from the County to other organizations. AFSCME-represented employees lost their jobs with the County. Among the remedies that were ordered were the following:

“1. The County shall cease and desist from transferring direct mental health, addiction, developmental disability (including region five), and early intervention programs from the County to other organizations.

“2. Unless AFSCME and the County agree otherwise, the County shall, within 30 days of the date of this Order, reinstate former AFSCME bargaining unit

members who previously worked in County direct mental health, addiction, developmental disability (including region five), and early intervention programs to the positions they held prior to the date on which they were transferred out of the AFSCME bargaining unit.

“3. The County will make former AFSCME bargaining unit members who previously worked in County direct mental health, addiction, developmental disability (including region five), and early intervention programs whole for the wages and benefits they would have received if they had continued working for the County, less interim earnings, with interest at 9 percent per annum, for the period beginning on the date they ceased being members of the AFSCME bargaining unit and ending 30 days from the date on which this Order is issued.

“4. The County will make AFSCME whole for any dues and fair share fee payments AFSCME would have received from former AFSCME bargaining unit members who previously worked in County direct mental health, addiction, developmental disability (including region five), and early intervention programs, with interest at 9 percent per annum, for the period beginning on the date the employees ceased being members of the AFSCME bargaining unit and ending 30 days from the date on which this Order is issued. The County may not seek or receive reimbursement for these payments from former, present, or future members of the AFSCME bargaining unit.” 22 PECBR at 105-106.

2. The parties jointly asked that we grant them an additional 30 days—until December 30, 2007—to comply with the portions of our Order that required the County to provide make-whole monetary relief to transferred employees, to reinstate the transferred employees, and to reimburse AFSCME for lost dues and fair share fee payments. The parties represented that the purpose of the requested extension was to give them more time to attempt to negotiate a mutual resolution of these issues. By Order dated November 30, 2007, we granted the parties’ request.

3. On December 21, 2007, the County petitioned for judicial review of our Order.

4. On December 28, 2007, the County filed a motion to stay enforcement of portions of our October 30 and November 30 Orders until the appeals process is complete. Specifically, the County asked that we stay enforcement of the following actions: restoring County mental health programs and reinstating former AFSCME bargaining unit members to the positions they previously held, making former AFSCME bargaining unit members whole for monetary losses they suffered, and reimbursing AFSCME for union dues and fair share fee payments it lost.

5. On February 15, 2008, we granted the County's motion to stay that portion of our October 30, 2007 Order "that requires the County to cease and desist from contracting out specified services and reinstate the contracted out employees to the positions they previously held with the County." 22 PECBR 292, 297 (Rulings on Motion to Stay). We stated that the portion of the Order that makes the employees whole for their losses is not stayed. 22 PECBR at 296. As a condition of the stay, we required the County to file its opening brief "no later than 49 days from the date of this Order" and to file any reply brief "within the timelines established in statute and court rules, with no extensions of time." 22 PECBR 297.<sup>2</sup>

6. By Order dated March 26, 2008, we modified the conditions of the stay to require that the County "promptly file all documents necessary to bring the matter to issue before the Court of Appeals. This includes filing its opening and reply briefs on the schedule established by the Court of Appeals, without undue or unreasonable delay." 22 PECBR 414, 415 (Order Modifying Conditions of Stay).

7. The County paid back wages and benefits to former AFSCME bargaining unit members for the period from July 1, 2006 through December 31, 2007. The County also reimbursed AFSCME for lost union dues and fair share fee payments for the same time period. The County refuses to make payments for back pay that accrued after December 31, 2007.

8. AFSCME moved to amend and clarify our stay. On October 23, 2008, we ruled that the County must continue paying make-whole wages and benefits during the pendency of the appeal.

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<sup>2</sup>Options for Southern Oregon (Options), one of the private entities to which the County transferred mental health programs, also moved to stay our Order, even though it was not a party to the proceedings before this Board. Because we granted the County's motion to stay in part, we dismissed Options' motion as moot

9. A group of non-union County employees sued the County for increased wages and benefits. Some time before the County transferred its mental health programs, AFSCME and the County executed a “me too” agreement which provides that AFSCME bargaining unit members will receive any additional benefits or wage increases received by the non-union County employees under the terms of a settlement or court order in their lawsuit. There has been no final adjudication or settlement in the lawsuit. In an order dated June 7, 2007, the Josephine County Circuit Court dismissed some of the employees’ claims. Trial on the remaining claims is currently scheduled to begin on February 9, 2009.

10. PERS instructed the County concerning payment of PERS contributions for former AFSCME bargaining unit members. The instructions state, in relevant part:

“PERS must receive employee and employer contributions for any pay period the member was an active or inactive member during the settlement period. PERS will apply the salary and contributions data for these periods to adjust affected benefit payments that have been made to these members as necessary. PERS will not accept contributions or use data for any period of non-membership or retirement during the settlement period.

“SPECIFIC SCENARIOS – IF THE MEMBER IS:

“-An active member<sup>[3]</sup> throughout the settlement period, contributions will be accepted for the entire settlement period. (Periods of active membership in any scenario may be subject to offset as described above.)

“-An inactive member<sup>[4]</sup> throughout the settlement period, contributions will be accepted for the entire settlement period.”

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<sup>3</sup>An active member of PERS is one “who is presently employed by a [PERS] participating public employer in a qualifying position and who has completed the six-month period of service required by ORS 238.015 ” ORS 238.005(12)(b).

<sup>4</sup>An inactive member is one who is not employed in a PERS qualifying position, who has not terminated PERS membership by withdrawing contributions, and who is not retired for service or disability ORS 238.005(12)(c).

11. Approximately 125 AFSCME bargaining unit members who formerly worked in the County Mental Health Division were affected by the County's unlawful transfer. They were all members of PERS when they worked for the County. Approximately 92 of those employees obtained other employment where they earned an amount equal to or greater than they would have earned if they had remained with the County. The County did not make any PERS contributions on behalf of these employees. The County made some PERS contributions for the remaining 33 former bargaining unit members. These 33 individuals obtained interim employment that paid them less than they would have received if they remained with the County. The County, however, paid PERS contributions not on the total amount these 33 individuals would have earned with the County; instead, the County based its PERS contributions on the difference between the individuals' new salaries and the salaries they would have received from the County.

12. Prior to July 1, 2006, Josephine County contracted with the Douglas Education Service District (ESD) to provide early intervention (EI) services. On July 1, 2006, this contract was terminated, and the Douglas ESD contracted with the Southern Oregon ESD to offer services formerly provided by the EI staff. All former EI staff members were offered and accepted positions with the Southern Oregon ESD. These employees receive higher wages and better benefits from the Southern Oregon ESD than they received when they worked for the County.

13. Prior to July 1, 2006, Scott Willi worked part time for the County in the Mental Health Division. After the County contracted out mental health programs, Willi accepted a full-time job at an hourly wage that was less than the hourly wage he earned with the County.

14. The collective bargaining agreement between AFSCME and the County prohibits the County from discharging employees without just cause. After the County contracted out mental health programs, former AFSCME bargaining unit members Glenda Guerrero and Boyd Sherborne began working for Options for Southern Oregon (Options). Options discharged Guerrero and Sherborne. Guerrero and Sherborne did not have just cause protection in their jobs with Options. AFSCME asserts they were discharged from Options without just cause.

15. Former AFSCME bargaining unit member Andrew Meyer chose to be laid off by the County rather than accept an available position with a new employer after the County contracted out mental health programs.

16. The County reimbursed former AFSCME bargaining unit members for the difference between the out-of-pocket premium costs for their health care plans

with their new employer and the out-of-pocket premium costs for the County's plans. In addition to the out-of-pocket premium costs, some former AFSCME bargaining unit members may have also incurred out-of-pocket medical expenses under their new plans that they would not have incurred under the County plans. The County has not reimbursed employees for any of these out-of-pocket medical expenses.

17. In November 2007, AFSCME and the County settled a grievance concerning temporary employees. Under the terms of this settlement, one temporary employee—Marcelle Morocco—was found to be a member of the AFSCME bargaining unit who was unlawfully transferred and entitled to make-whole relief in accordance with our October 30 Order.

### DISCUSSION

1. The County did not violate the terms of its “me too” agreement with AFSCME.

A group of non-union County employees sued the County for wage increases and benefits. AFSCME and the County executed a “me too” agreement in which the County agreed to give AFSCME bargaining unit members any additional benefits and salary increases that may result from the settlement or adjudication of the lawsuit. AFSCME asks us to apply the “me too” provision to former AFSCME bargaining unit members.

AFSCME invites us to engage in speculation. We refuse to do so. There has been no final adjudication or settlement of the lawsuit that would trigger application of the “me too” agreement. Accordingly, we have no evidence that the County has violated this agreement by failing to give former AFSCME bargaining unit members any benefits that may be achieved by the lawsuit. If there is a final adjudication or settlement that provides additional wages or benefits to the non-union employees, we can address the issue at that time.

2. The County must reimburse former AFSCME bargaining unit members for lost PERS contributions based on the entire gross salary they would have earned had they continued working for the County.

Approximately 125 individuals lost their County jobs because of the unlawful transfer. When they worked for the County, these employees were members of PERS. The County must make the individuals whole for any PERS contributions they lost. *AFSCME Local 189 v. City of Portland, Bureau of Water Works*, Case No. UP-01-05,

21 PECBR 542, 546 (2006) (Order on Reconsideration of Remedy). AFSCME asserts the County failed to make adequate PERS contributions for any of the transferred employees.

The County made no make-whole PERS contributions for approximately 92 of the former employees. These were all employees who obtained interim employment after the transfer and earned an amount equal to or greater than the amount they would have made with the County. The County correctly observes that PERS benefits are calculated as a percentage of wages. The County then argues that these employees are not entitled to any make-whole payments for lost wages,<sup>5</sup> so it owes no PERS contributions for them.

The remaining 33 former AFSCME bargaining unit members obtained interim employment that paid less than they would have earned with the County. The County made them whole for lost wages by paying them the difference in earnings (*i.e.*, the amount the individual would have earned with the County minus the interim earnings), and also made PERS contributions based on the amount of the make-whole payment.

At issue is the proper way to make employees whole for their lost PERS benefits. AFSCME argues that employees are made whole only if the County reimburses them for PERS contributions on the entire salary they would have earned with the County, without deducting the interim wages. The County, however, argues that according to the instructions provided by PERS, it is obligated to pay PERS contributions only on the amount of back pay it owes *after* it deducts interim earnings. We agree with AFSCME. The County's argument confuses back wages with back PERS benefits. They are not the same. It is true that an employer's back-pay obligation can be offset by interim earnings. *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 533, 537 (2006) (Supplemental Order). Interim wages, however, serve solely to offset the back wages the County owes. They have no bearing on PERS contributions.<sup>6</sup> The employees are entitled to be made whole as though

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<sup>5</sup>Make-whole pay is calculated by subtracting an employee's interim earnings from the amount the employee would have made with the County. *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 533, 536 (2006) (Supplemental Order) (quoting Section 10530 of the *National Labor Relations Board Casehandling Manual* (1977)).

<sup>6</sup>The parties' evidence and arguments deal solely with the method used to calculate the extent and the amount of the County's PERS contributions for former AFSCME bargaining unit members during the settlement period. We have no evidence that any interim employer made

they had continued to work for the County. If the employees had remained with the County, they would have received PERS contributions on their entire gross back pay. They are not made whole unless the County reimburses them for the PERS contributions they would have received. Accordingly, as part of the make-whole remedy, we will order the County to make PERS contributions during the remedy period for all former AFSCME bargaining unit members who remained active or became inactive members of PERS after the County unlawfully contracted-out mental health programs.<sup>7</sup> These PERS contributions must be based on the monthly PERS contribution the County would have made for each employee, had the employee continued to work for the County. These contributions may be adjusted by any monthly amounts the new employer contributes to PERS or a private pension plan for each employee.

3. The County must provide make-whole salary and benefits to former AFSCME bargaining unit members who worked in the County EI program.

AFSCME contends that the County has improperly calculated its back-pay obligations to former EI employees. AFSCME does not specify the nature and extent of the County's error, other than alleging that the County failed to calculate back pay owed to EI employees on a month-by-month basis.

The County, however, denies that it has any obligation to pay make-whole wages and benefits to former County EI employees. The County notes that prior to June 30, 2006, EI employees in the AFSCME bargaining unit worked for the County under a contractual arrangement with the Douglas ESD. The County terminated this contract on June 30, and the Douglas ESD then contracted with the Southern Oregon ESD to provide EI services. The Southern Oregon ESD then hired all former County EI employees. According to the County, EI employees were laid off and not transferred when the County terminated its contract with the Douglas ESD. The County contends that it has no obligation to provide back pay and benefits to these laid off employees. We disagree.

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contributions to PERS or a private pension plan for former AFSCME bargaining unit members during the settlement period. We thus have no occasion to decide whether any such contributions can serve to offset the County's make-whole PERS obligation.

<sup>7</sup>We are not presented with any issue concerning former AFSCME bargaining unit members who may have terminated PERS membership by withdrawing contributions or who may have retired because of disability or service after the County contracted out the mental health programs. If this has occurred, the remedy will be that described in *AFSCME Local 189 v City of Portland*, 21 PECBR 542.

In our original Order, we considered and rejected the County's argument that the County closed the Mental Health Division and got completely out of the business of providing mental health services on June 30, 2006. We concluded that the County unlawfully transferred all mental health programs, including the EI program, to other organizations. 22 PECBR 101 n 12. We will not reconsider this determination as part of this Supplemental Order. Because the County unlawfully transferred the work of the EI program, we will order it to make former AFSCME bargaining unit members whole for lost wages and benefits.

The formula for calculating back pay owed to former AFSCME bargaining unit members in the EI program is well-established. The County must compute the loss of pay for each separate month or part of a month during the remedy period. The County must compare EI employees' interim wages for each month with the wages the employees would have earned for that same month had they continued to work for the County, and pay employees any difference. *Lebanon Association of Classified Employees v. Lebanon Community School District*, 21 PECBR at 538.

4. The County must exclude overtime and holiday pay in the interim earnings used to offset back-pay awards to former AFSCME bargaining unit members.

AFSCME contends that the County incorrectly calculated back-pay amounts because it used holiday and overtime pay former AFSCME bargaining unit members received from their new employers to reduce the amount of back pay awarded under the terms of our Order. The County contends that it *excluded* holiday and overtime pay from its back-pay calculations, and provided credible evidence in support of its position: an affidavit from County Controller Arthur O'Hare. AFSCME admits that it has not seen the figures used by the County to compute back pay.

AFSCME has presented us with conjecture and suspicion, but no evidence that the County incorrectly included holiday and overtime pay in the interim earnings used to offset former AFSCME bargaining unit members' back-pay awards. If AFSCME presents such evidence, we will consider the matter at that time.<sup>8</sup>

5. The County must use the formula developed in *Lebanon Association of Classified Employees v. Lebanon Community School District*, 21 PECBR at 539-40, to

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<sup>8</sup>We note that upon request, the County must provide AFSCME with documentation to support its back-pay calculations either under the Public Records Law, ORS 192.410 through 192.505, or as part of its duty to bargain in good faith under ORS 243.672(1)(e).

calculate back pay for former AFSCME bargaining unit members who worked part time for the County.

In its initial motion, AFSCME alleged that the County improperly calculated back pay owed to employees who worked part time for the County and who accepted full-time jobs with new employers after the County contracted out the mental health programs. According to AFSCME, former part-time employees should be reimbursed for the difference between their earnings as County employees and their earnings in their new employment, based on the number of hours they worked for the County. The County did not dispute the appropriate method of calculating back pay for former part-time employees, but asked that AFSCME identify any affected employees so that it could check its computations. AFSCME subsequently named only Scott Willi as a former AFSCME bargaining unit member for whom the County may have incorrectly calculated back pay.

Although it is unclear whether the parties actually dispute the computation of back pay owed to Willi, in cases of this type we follow the guidance from *Lebanon Association of Classified Employees v. Lebanon Community School District*, 21 PECBR at 539-40. We begin with the pay Willi would have earned had he continued working for the County during the remedy period. Then, on a month-by-month basis, the County may reduce its back-pay obligation to Willi by an amount equal to the hourly salary Willi receives in his new position, multiplied by the number of hours Willi worked for the County. By using this formula, the County will properly make Willi whole for the loss of his County job.

6. The County must provide make-whole salary and benefits for the settlement period to former AFSCME bargaining unit members Glenda Guerrero and Boyd Sherborne, and may not reduce these amounts by any interim earnings they would have received had they continued working for Options.

Two former AFSCME bargaining unit members, Glenda Guerrero and Boyd Sherborne, were discharged by Options, the organization that employed them after the County contracted out mental health programs. AFSCME alleges that these employees were discharged without just cause, and that Guerrero and Sherborne are entitled to back pay during the settlement period, since they lost the just cause protection of the AFSCME contract when they began working for Options. The County disputes its obligation to provide back pay to Sherborne and Guerrero.

We have not had occasion to consider an employer's obligation to provide back pay to an unlawfully discharged employee who subsequently accepts interim

employment, and is then separated from this job. We turn to the National Labor Relations Act (NLRA) for guidance. Under the NLRA, an unlawfully discharged employee is entitled to back pay during the remedy period unless the employee incurs a willful loss of earnings by failing to keep a job, failing to remain in the labor market, failing to diligently search for work, or failing to accept employment. *NLRB v. Mastro Plastics*, 354 F2d 170, 174 n 3 (2<sup>nd</sup> Cir. 1965); *Aircraft & Helicopter Leasing & Sales*, 227 NLRB 644, 645 (1976). An employer bears the burden of proving that an employee incurred a willful loss of earnings. *St. George Warehouse*, 351 NLRB No. 42 (September 30, 2007). Under the NLRA, discharge from interim employment constitutes a willful loss of earnings only if the employer demonstrates that the individual was discharged for “gross” or “egregious” misconduct *NLRB v. Ryder Systems, Inc* , 983 F2d 705, 713 (1993). *See also Newport News Shipbuilding & Dry Dock Co.*, 278 NLRB 1030 n 1(1986) (even though an individual was discharged from interim employment for cause, the individual is entitled to back pay because the employer failed to prove that the discharge was for gross misconduct); *Barberton Plastics Products Inc.*, 146 NLRB 393, 396 (1964) (an individual discharged from interim employment for unsatisfactory performance was not disqualified from back pay because the employer failed to demonstrate that the discharge was due to moral turpitude or malfeasance).

We find the rationale of these cases persuasive and will apply it here. The County has failed to meet its burden to demonstrate that Guerrero and Sherborne incurred any willful loss of earnings when they were discharged from their jobs with Options. Accordingly, the wages and benefits the County owes to Guerrero may not be reduced by the amount they would have earned if they continued to work for Options. We will order the County to pay Guerrero and Sherborne the wages and benefits they would have received had they continued working for the County, less any interim earnings.

7. The County must provide make-whole wages and benefits to Andrew Meyer; it may reduce these amounts by the salary and benefits Meyer would have received had he accepted a job with Options

At the time the County implemented its decision to contract out mental health programs, AFSCME bargaining unit members were offered two options: accept a position with a new employer or accept voluntary lay off. Andrew Meyer chose to be laid off. AFSCME contends that Meyer is entitled to back pay, since he would not have been laid off if the County had not unlawfully transferred mental health programs. The County disagrees, asserting that Meyer is ineligible for any back pay because he turned down new employment.

An employee is required to mitigate back-pay damages by seeking other employment. *AFSCME Local 189 v. City of Portland*, 21 PECBR at 543. By refusing an offer of suitable and available work, Meyer failed to comply with his obligation to mitigate damages. Any back pay and benefits the County owes Meyer will be reduced by the amount of pay and benefits Meyer would have received if he had accepted the available employment.

8. The County must reimburse former AFSCME bargaining unit members for all health care expenses they incurred under plans with their new employers that they would not have incurred under the County plans in effect on June 30, 2006.

The County reimbursed former AFSCME bargaining unit members for lost health insurance benefits based on individuals' out-of-pocket premium costs. The County compared the amount each former AFSCME bargaining unit member paid out-of-pocket for County health insurance premiums with the amount the individual paid out-of-pocket for health insurance premiums with the new employer. It then reimbursed the individual for any difference between the two amounts. The County contends that this method of calculating lost benefits fully compensates former AFSCME bargaining unit members for any change in insurance benefits caused by the County's unlawful actions. AFSCME asserts that the County has not properly compensated individuals for lost benefits, since individuals may have incurred health care expenses under their new health insurance plans that they would not have incurred under the County's plans.

The County incorrectly construes its obligation to make whole former AFSCME bargaining unit members for lost health care benefits. An employer must reimburse employees for all health care expenses they incurred when they have lost benefits due to the employer's unlawful actions. These expenses include not only out-of-pocket premium costs, but also any other out-of-pocket medical expenses that former County employees incur that they would not have incurred under the employer's plans. *Lincoln County Deputy Sheriff's Association v. Lincoln County*, Case No. UP-31-02, 19 PECBR 911, 919 (2002). We will order the County to ask former AFSCME bargaining unit members to submit requests for reimbursement for any out-of-pocket expenses they incurred after July 1, 2006, that they would not have incurred under the County benefit plans in which they were enrolled on July 30, 2006, and to pay employees for all such additional expenses.

9. We will not order the County to provide make-whole wages and benefits to any temporary employees other than Marcelle Morocco.

AFSCME and the County reached agreement in a grievance concerning temporary employees. Under the terms of the agreement, one employee—Marcelle Morocco—was found to be a County employee who was unlawfully transferred to Options and to whom the County paid make-whole wages and benefits. The County contends that it fulfilled its obligations under the terms of the grievance settlement. AFSCME, however, asserts that there may be other employees who are covered by the settlement who did not receive make-whole wages and benefits.

AFSCME has identified no employees who were improperly denied make-whole relief under the terms of the settlement to the temporary employee grievance. If it does so, we will consider the matter at that time.

10. The County must pay former AFSCME bargaining unit members for the difference between vacation time they earned with the County and vacation time they earned with their new employers.

The County paid former AFSCME bargaining unit members for vacation time accrued in their County employment as of June 30, 2006, the date on which the County contracted out mental health programs. Some employees accepted interim employment that provided fewer vacation days than they earned with the County. The County has not compensated employees for any difference between the amount of vacation time they earned with the County and the amount of vacation time they earned with their new employers. AFSCME contends that the County has thus failed to make bargaining unit members completely whole. The County asserts that it need not compensate employees for any such losses because there was no loss of pay associated with the loss of vacation time. We disagree.

The purpose of a make-whole remedy is to restore an injured party to the status that existed before the employer violated the law. *Central Education Association and Vilches v. Central School District*, Case No. UP-74-95, 17 PECBR 93, 94 (Order on Reconsideration), 17 PECBR 250 (1997) (Ruling on enforcement and motion to stay), *aff'd*, 155 Or App 92, 962 P2d 763 (1998). If an employee earned more vacation time working for the County than the employee does working for a new employer, the employee will not be made whole unless compensated for this difference. Otherwise, the employee would need to work more hours to earn the same amount of pay. This would not make them whole. Although we lack authority to order the new employers to give additional vacation time to former AFSCME bargaining unit members, we can order the County to pay employees for vacation time lost as a result of the County's unlawful action. We will order the County to compare the amount of vacation time each individual

earned working for the County on June 30, 2006, with the amount of vacation time the individual earned working for the new employer. The County must then compensate each individual for any difference between these two amounts.

### ORDER

The District's obligation to pay make-whole salary and benefits is clarified as follows:

1. For the remedy period, the County will make PERS contributions for all former AFSCME bargaining unit members who remained active or became inactive members of PERS after the County contracted out mental health programs. These PERS contributions will be calculated on a month-to-month basis, and the County will pay into employees' PERS accounts the amount it would have paid had these employees continued to work for the County. These amounts may be reduced by the amounts of monthly contributions the new employers make to PERS or private pension plans for employees.

2. For the remedy period, the County will make former AFSCME bargaining unit members who previously worked in the EI program whole for the wages and benefits they would have received if they had continued working for the County, less interim earnings, with interest at 9 percent per annum. The County will calculate EI employees' back pay on a month-to-month basis and pay them the difference between the amounts they would have earned each month if they continued to work for the County and their interim earnings for that same month.

3. For the remedy period, the County will pay Scott Willi the difference between the amount he would have earned each month had he continued working for the County and the amount of his interim earnings for the same month. The interim earnings for each month will be calculated by multiplying Willi's hourly salary for that month by the number of hours he worked for the County. The County will pay interest at 9 percent per annum for any amounts paid to Willi.

4. For the remedy period, the County will make Glenda Guerrero and Boyd Sherborne whole for the wages and benefits they would have received if they had continued working for the County, less interim earnings, with interest at 9 percent per annum. The County will calculate Guerrero and Sherborne's back pay on a month-to-month basis and pay them the difference between the amounts they would have earned each month if they continued to work for the County and their interim earnings, if any, for that same month. The County may not reduce the back pay to

Guerrero and Sherborne by any amount they might have earned if they had continued working for Options.

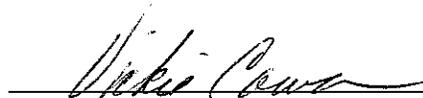
5. The County will notify all former AFSCME bargaining unit members of its obligation to reimburse them for any out-of-pocket medical expenses they incurred after July 1, 2006, that they would not have incurred under the County benefit plans in effect on June 30, 2006. The County will ask that employees submit requests for reimbursement of any such expenses incurred during the remedy period and will pay all such expenses.

6. The County will calculate lost vacation time by comparing the amount of vacation time each employee earned working for the County on June 30, 2006, with the amount of vacation time the employee earns working for the new employer. During the remedy period, the County will compensate each employee for any difference between these two amounts, using the formula by which it calculated payments to employees for vacation time they accrued in their employment with the County.

DATED this 23<sup>rd</sup> day of October 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.