

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

UP-26-06

(UNFAIR LABOR PRACTICE)

AFSCME COUNCIL 75, LOCAL 3694)	
)	
Complainant,)	
)	
v.)	RULING ON RESPONDENT'S
)	MOTION FOR
)	RECONSIDERATION
)	
JOSEPHINE COUNTY,)	
)	
Respondent.)	
_____)	

On October 30, 2007, this Board issued an Order holding that Josephine County (County) violated ORS 243.672(1)(a) and (b) when it transferred mental health programs, in which employees represented by AFSCME Council 75, Local 3694 (AFSCME) worked, from the County to other organizations. 22 PECBR 61. As a result of the unlawful transfer, a number of AFSCME-represented employees lost their jobs.

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. 22 PECBR 292. We denied the County's request to stay other parts of our original Order.

AFSCME filed a motion to amend our stay, to clarify that the County must continue paying make-whole relief during the pendency of the appeal. On October 23, 2008, we granted AFSCME's motion. 22 PECBR 643.

AFSCME also filed a motion to compel enforcement of certain portions of our October 30 Order that were not stayed. The motion, as amended, stated that the parties disagreed about the amount of back pay and benefits owed to some former AFSCME bargaining unit members and asked that we clarify certain aspects of the remedy we ordered. One of the issues which AFSCME sought to clarify concerned former County employees Glenda Guerrero and Boyd Sherborne. After the County contracted out the mental health programs in which Guerrero and Sherborne worked, these individuals accepted jobs with Options for Southern Oregon, Inc. (Options). Options subsequently discharged Guerrero and Sherborne. Guerrero and Sherborne had no just cause protection in their employment with Options, and AFSCME alleged that Options discharged them without just cause.

The parties submitted additional evidence and argument regarding the issues raised by AFSCME's motion to compel enforcement. In regard to Sherborne and Guerrero, the County contended that it had completely divested itself of mental health services and that programs formerly provided by the County were assumed by Options and other organizations. The County asserted that it had no control over Options' decisions and that this Board lacked jurisdiction over Options' choice to discharge Guerrero and Sherborne. The County contended that there was no issue of fact or law concerning Guerrero and Sherborne's discharges that required a hearing. (County's August 1, 2008 letter to this Board, p. 6)

On October 23, 2008, we ruled on AFSCME's motion to compel enforcement. 22 PECBR 651. In regard to the County's obligation to pay make-whole relief to Guerrero and Sherborne, we used the standard adopted by the National Labor Relations Board (NLRB). Under the NLRB standard, an unlawfully discharged employee is entitled to back pay during the remedy period unless the employee incurs a willful loss of earnings. An employer bears the burden of proving a willful loss of earnings which occurs if the employee is discharged from interim employment for gross or egregious misconduct. 22 PECBR 663. Because the County failed to demonstrate that Sherborne and Guerrero were discharged by Options for gross or egregious misconduct, we ordered the County to pay these two individuals the wages and benefits they would have earned had they continued to work for the County, less any interim earnings.

On November 6, 2008, the County filed a petition for reconsideration of that portion of our October 23 Supplemental Order concerning Guerrero and Sherborne.¹ The County contends that we never requested any information concerning

¹On November 28, 2008, the County moved the Court of Appeals for an order vacating our February 15, 2008 and October 23, 2008 Orders and granting the County's motion to stay

the reasons why Options discharged Guerrero and Sherborne. The County notes that the issue of back pay owed to employees discharged by an interim employer was one of first impression for this Board, and argues that it should have an opportunity to present evidence under the new standard adopted in our Order. The County asserts that after we issued our Supplemental Order, it attempted to obtain information about the reasons for Guerrero and Sherborne's discharges, but that Options refused to release this information without a court order or subpoena.² The County asks that we issue a subpoena to compel Options to produce documents relevant to the discharge of Guerrero and Sherborne. Once it obtains this information, the County requests that we reopen the evidentiary record and give it an opportunity to address the issue of whether Guerrero and Sherborne were discharged for gross or egregious misconduct.

We grant reconsideration to address the issue raised by the County's petition. The heart of the County's argument is its contention that we erred by failing to request additional information about the reasons for Guerrero and Sherborne's discharges. We note, however, that the County provided considerable evidence—sworn affidavits from County officials and other documents—concerning many of the issues raised by AFSCME's motion to compel enforcement of our October 30 Order. The County presented no evidence regarding Options' decision to discharge Sherborne and Guerrero. To the contrary, the County asserted that the discharges presented no issues of fact or law that would require a hearing. (County's August 1, 2008 letter to this Board, p. 6)

We conclude that we did not err by resolving the back-pay dispute regarding Guerrero and Sherborne as presented by the parties. In any event, based on the County's actions, we conclude that it invited any error we purportedly made. The doctrine of "invited error" bars an appellate court from considering an error that an appellant was "actively instrumental" in bringing about. *Lake County v. Teamsters Local Union #223*, 208 Or App 271, 278, 145 P3d 237 (2006), quoting *State v. Ferguson*, 201 Or App 261, 269, 119 P3d 794 (2005). In *Lake County*, the court refused to consider an appellant employer's argument that this Board erred by adding the word "necessary" to the description of a confidential employee's duties under ORS 243.650(6). The court noted that in its closing argument to the administrative law judge, the employer urged

enforcement of our October 30, 2007 Order in its entirety during the pendency of the County's appeal.

²Included with the County's petition for reconsideration was a November 6, 2008, letter from Options' attorney which stated this position regarding the release of records or information concerning Guerrero or Sherborne.

this Board to adopt the very position that on appeal it claimed to be error. The court held that the county was “actively instrumental” in bringing about this Board’s use of the term “necessary” in the definition of a confidential employee, and concluded that the error supposedly made by this Board was invited by the county. 208 Or App at 279. It therefore refused to consider the claimed error.

We apply that principle here. The County cannot ask that we adopt a position and then claim that we erred by doing so. Here, as in *Lake County*, the County has invited the error it now alleges that we made in our October 23 Supplemental Order. The County presented evidence concerning a number of issues raised by AFSCME in its motion to compel enforcement but offered none regarding the reasons why Options discharged Guerrero and Sherborne. The County justified the lack of evidence on this issue by asserting there was no factual dispute that required this Board to consider additional evidence. We relied on this assertion in issuing our Supplemental Order. Under the “invited error” doctrine, the County cannot now claim that we acted in error by relying on its assertion that there was no factual dispute. Accordingly, we will not now require Options to produce information concerning its decision to discharge Guerrero and Sherborne and will not reopen the record.

ORDER

Reconsideration is granted. We deny the County’s request for a subpoena and an opportunity to respond to evidence produced by the subpoena. We adhere to our October 23, 2008, Supplemental Order.

Dated this 5th day of January 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.