

FILED: December 10, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CITY OF PORTLAND,
Petitioner,

v.

PORTLAND FIRE FIGHTERS' ASSOCIATION,
Respondent.

Employment Relations Board
UP1310

A153360

Argued and submitted on February 05, 2014.

Harry Auerbach argued the cause and filed the briefs for petitioner.

Barbara J. Diamond argued the cause for respondent. With her on the brief was Diamond Law.

Before Ortega, Presiding Judge, and DeVore, Judge, and Schuman, Senior Judge.

DEVORE, J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
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1 DEVORE, J.

2 The City of Portland (city) petitions for judicial review of a compliance
3 order issued by the Employment Relations Board (ERB). ERB ordered the city to
4 comply with an arbitration award and grant retirement and pension "service credit" to an
5 employee. In a related case issued today, *Portland Fire Fighters' Association v. City of*
6 *Portland*, ___ Or App ___, ___ P3d ___ (Dec 10, 2014), we affirmed ERB's order on a
7 complaint charging an unfair labor practice (ULP). That order required the city to
8 comply with the same arbitration award by compensating the employee for disability
9 benefits he had not received from the Fire and Police Disability and Retirement Fund
10 (fund). In this compliance proceeding, ERB determined that the arbitrator's "make-
11 whole" award required the city to grant service credit toward the employee's retirement
12 and pension during the period that he was not receiving disability benefits. The city
13 seeks judicial review of that order. We affirm.

14 The facts here supplement those recounted in the related case.¹ On January
15 21, 2010, an arbitrator upheld a grievance filed by the Portland Fire Fighters' Association
16 (association) on behalf of Tom Hurley, a disabled firefighter. The arbitrator found that
17 Hurley was discharged without just cause, ordered rescission of Hurley's discharge, and
18 required the city to compensate him for the amount of disability benefits that he lost
19 when the fund terminated those benefits. The city refused to uphold the latter part of the

¹ The arbitration award and initial ERB proceedings are described in detail in *Portland Fire Fighters' Assoc.*, ___ Or App at ___ (slip op at 2-9).

1 award, claiming that the arbitrator exceeded his authority in ordering the city to make
2 those payments. The association filed a ULP complaint. ERB upheld the award and
3 ordered the city to comply with it. We affirmed.

4 Following the association's initial grievance, Hurley returned to work as a
5 Low Hazard Inspector. In May 2012, he requested a pension estimate from the fund and
6 discovered that he had not earned service credit towards retirement during the three years
7 that his disability benefits were terminated. Under section 5-302 of the Portland City
8 Charter, a firefighter is given service credit for (1) periods of service during active
9 employment as a City of Portland firefighter, (2) periods of time in the military service of
10 the United States, if he or she returns to active duty as a firefighter, and (3) periods
11 during which the member receives disability benefits. Because the fund discontinued
12 Hurley's disability benefits on April 5, 2007, and Hurley did not return to work until
13 December 22, 2010, the city concluded that Hurley did not meet any of the criteria for
14 earning service credit during that time. He did not receive 1,358 days of service credit.

15 The association filed a motion with ERB under ORS 243.766(4), arguing
16 that the city had failed to comply with ERB's order on the ULP complaint involving the
17 arbitration award. The association requested that ERB initiate enforcement proceedings
18 in circuit court.² The city responded that Hurley was not eligible for service credit under
19 the criteria in the city charter and that it had no authority to order the fund to grant Hurley

² Under ORS 243.766(4), ERB may "[p]etition the appropriate circuit court for enforcement of any order issued by the board pursuant to ORS 243.650 to 243.782."

1 service credit. The city contended that ERB and the arbitrator had not ordered the city to
2 rescind the fund's decision terminating Hurley's disability benefits nor ordered the city to
3 restore Hurley's retirement service credit.

4 ERB determined that the issue was not whether the fund must grant the
5 requisite service credit, but whether the city is responsible under the arbitrator's award to
6 treat Hurley as if he had earned service credit during that period of time. The arbitrator
7 had granted Hurley a make-whole remedy that required the city to treat Hurley, as the
8 arbitrator phrased it, "as though [Hurley] had been reinstated as a fund member and
9 entitled to receive disability benefits from the Fund." ERB concluded, "To fully
10 effectuate the arbitrator's remedy, the City must treat [Hurley] as if he had received
11 service credit * * *."

12 The city seeks judicial review of ERB's order. The city reprises its
13 arguments that it could not restore service credit through the fund and that it was not told
14 to do so. The city also repeats its argument from the related case that the arbitrator
15 exceeded his authority in fashioning the award. We rejected the latter argument in
16 *Portland Fire Fighters' Assoc.*, ___ Or App at ___ (slip op at 11), and decline to address
17 it again here. For its part, the association interposes procedural objections to the city's
18 judicial review, which we reject without further discussion; ERB's compliance order is
19 subject to review under ORS 183.482. There are no disputed issues of fact that would
20 call for a review for substantial evidence. ORS 183.482(8)(c) (substantial evidence
21 standard). Therefore, we review the compliance order for substantial reason and errors of

1 law. *See* ORS 183.482(8); *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App
2 616, 627, 16 P3d 1189 (2000) (examining the reasoning that leads ERB from the facts it
3 has found to the conclusions that it draws from those facts).

4 ERB is granted general authority under ORS 240.115 to "maintain such
5 action or proceeding at law or in equity as it considers necessary or appropriate to secure
6 compliance with this chapter and its rules and orders thereunder." The ERB's duties
7 under ORS 240.086(2) require it to review and enforce arbitration awards. Under ORS
8 243.676(2)(c), ERB may, upon finding that an unfair labor practice has occurred, "[t]ake
9 such affirmative action, * * * as necessary to effectuate the purposes of * * * [ORS]
10 243.650 to 243.782[, the Public Employee Collective Bargaining Act * * *][.]"

11 ERB issued the compliance order consistently with this record and ERB's
12 statutory authority. The arbitrator's award provided, among other things, that

13 " [t]he City shall reverse the termination of Grievant's employment
14 *and reinstate whatever rights Grievant had as an employee before his*
15 *termination.*"

16 (Emphasis added.) The arbitrator made plain that the remedy was intended as a "make-
17 whole" award. In construing that award, ERB permissibly interpreted the arbitrator's
18 award as including service credit to Hurley. ERB observed on reconsideration of the
19 arbitration award that "the arbitrator did not reinstate Hurley as a Fund member" but only
20 ordered the city to compensate him "as though [he] had been reinstated." We find
21 substantial reason and no error of law in that interpretation of the arbitration award. ERB
22 did not err.

1

Affirmed.