

Southwest Snohomish County Public Safety Communications Agency (SNOCOM), Decision 11149-B (PECB, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOCOM DISPATCHERS ASSOCIATION,

Complainant,

vs.

SOUTHWEST SNOHOMISH COUNTY
PUBLIC SAFETY COMMUNICATIONS
AGENCY,

Respondent.

CASE 23032-U-10-5868

DECISION 11149-B - PECB

AMENDED ORDER

Cline & Associates, by *Reba Weiss*, Attorney at Law, and *Christopher J. Casillas*, Attorney at Law, for the union.

Summit Law Group PLLC, by *Rodney B. Younker*, Attorney at Law, for the employer.

On August 26, 2011, Examiner Jessica J. Bradley issued a decision finding that, the Southwest Snohomish County Public Safety Communications Agency (SNOCOM or employer) had committed unfair labor practices. *SNOCOM*, Decision 11149 (PECB, 2011). On September 16, 2011, the employer appealed the Examiner's decision to the Commission. On September 26, 2011, the SNOCOM Dispatchers Association (union) cross-appealed. On October 6, 2011, the employer filed its appeal brief with attachments: a declaration, employee Jodi Basim's (Basim) letter of resignation, and additional evidence in support of the portion of its appeal requesting modification of the remedy ordered by the Examiner concerning Basim.

The Commission determined the employer had shown good cause that it may be unable to comply with portions the remedial order and that the new evidence attached to the employer's

appeal brief may be relevant to the remedy. On October 27, 2011, the Commission remanded the case to the Examiner for “the purposes of re-opening the hearing to consider only that portion of the Examiner’s decision regarding the remedy relating to Basim.” *SNOCOM*, Decision 11149-A (PECB, 2012).

On January 31, 2012, the Examiner conducted a remand hearing concerning remedies for Basim. Unfortunately, the court reporter’s equipment did not function properly and part of the transcript from the hearing failed to be recorded. The Examiner re-opened the hearing on May 8, 2012, for the parties to re-create the lost portion of the record. The parties filed post-hearing briefs to complete the record.

ISSUE 1: Should the remedy and order pertaining to Basim be modified in light of changed circumstances that occurred after the close of the original hearing?

The remedy in the original decision is modified in light of Basim’s change in employment status. The employer’s back pay liability for Basim’s lost income from teaching at the CJTC ends on December 17, 2010, the date Basim became ineligible to perform her job as a dispatcher because pending criminal charges prevented her from accessing law enforcement databases. The portion of the original order requiring the employer to reinstate its written endorsement for Basim to teach at the CJTC is rescinded because Basim is no longer employed by the employer.

ISSUE 2: What is the appropriate dollar amount of back pay to make Basim whole for lost income from teaching at the Criminal Justice Training Commission (CJTC)?

Basim is entitled to back pay for courses she would have taught at the CJTC from March 23, 2010, the date the employer informed the CJTC that it was withdrawing its endorsement for Basim to teach at the CJTC, until December 17, 2010. I considered documents and testimony on Basim’s lost teaching wages. Based on these records provided by the CJTC, I find that the employer owes Basim \$1,280 in back pay for income she would have earned from teaching at the CJTC during this time period.

ISSUE 1: SHOULD THE REMEDY AND ORDER BE MODIFIED?Background

In the original decision, Decision 11149, the Examiner found the employer had unlawfully discriminated against Basim in retaliation for protected union activities. One of the employer's actions the Examiner found unlawful was the employer's withdrawal of its endorsement for Basim to teach at the CJTC. An endorsement from an employee's current law enforcement employer is a requirement to teach at the CJTC. The employer's removal of Basim's endorsement caused her to lose her contract to teach at the CJTC and resulted in a loss of income.

In the original decision, to remedy the unlawful discrimination against Basim, the Examiner ordered the employer to:

Make Jodi Basim whole by payment of back pay and benefits in the amounts she would have earned or received from teaching at the Washington State Criminal Justice Training Commission (CJTC) from the date that CJTC terminated her teaching contracts until the date the employer sends a letter to the CJTC specifically retracting the letter that it sent to that agency withdrawing its endorsement for Basim to teach at the CJTC. In this letter the employer will: 1) inform the CJTC that it erred in withdrawing Basim's endorsement; 2) explain that Basim is an employee in good standing; 3) express the employer's support of Basim's teaching at the CJTC; and 4) request that the CJTC rehire Basim.

After the record from the original hearing was closed, Basim's employment status unexpectedly changed. On or around December 17, 2010, Basim was charged with third degree theft in Snohomish County. That same day, the employer gave Basim a memo notifying her that she was being placed on paid administrative leave: "Due to the fact that criminal charges have been filed, you are prevented by State of Washington ACCESS and CJIS rules from using, accessing or viewing any information obtained from confidential ACCESS databases. I am therefore placing you on paid administrative leave effective immediately." (Exhibit 6).

On December 22, 2010, Basim submitted a letter to the employer stating she was resigning from her employment with SNOCOM effective immediately.

Ultimately, Basim resolved the theft charges under the “compromise of misdemeanor” provisions in Chapter 10.22 RCW and was not convicted of any crime. Basim no longer works at SNOCOM.

Impact of Basim’s Resignation on her Teaching Endorsement and Portions of the Original Order

The CJTC requires that its contract instructors have an endorsement from their current law enforcement employer. Starting on December 17, 2010, the employer could no longer provide an effective endorsement for Basim to teach at the CJTC because Basim was not an employee in good standing. Basim’s resignation letter on December 22, 2010, ended her employment relationship with SNOCOM. Because Basim is no longer an employee in good standing, the portion of the original order requiring the employer to send a letter to the CJTC endorsing Basim and requesting that Basim be reinstated as teacher is hereby rescinded.

Impact of Changed Circumstances on Back Pay Liability

The purpose of a back pay remedy is to make the discriminatee whole and put him or her in the same position he or she would have been in if the employer’s unlawful discriminatory actions had not occurred. Basim would only have been eligible to teach for the CJTC while she was an employee in good standing with SNOCOM. On December 17, 2010, the employer learned that Basim was the subject of a criminal charge that made her ineligible to access law enforcement databases necessary to perform her dispatcher job. On December 17, 2010, Basim’s employment status changed, and the employer could have lawfully withdrawn its endorsement for her to teach at the CJTC.

Conclusion

The employer is only responsible to pay Basim back pay for income loss that was caused by the employer’s unlawful discrimination against her. At the point Basim was no longer a law enforcement employee in good standing, she would have lost her ability to teach at the CJTC and the employer would no longer be responsible for her back pay. The amended order in this decision requires the employer to pay Basim for her lost CJTC income from the time the employer withdrew Basim’s teaching endorsement on March 23, 2010, until she was ineligible to retain her endorsement on December 17, 2010.

ISSUE 2: DOLLAR AMOUNT OF BACK PAY

Greg Baxter is the program administration manager for the CJTC and serves as the CJTC's records officer, human resources manager, and labor relations manager. Baxter was the only witness from the CJTC who testified at the hearing. According to Baxter, the CJTC saved a copy of the official course teaching schedule that was current as of March 2010. This document reflects the schedule immediately prior to Basim losing her endorsement and being removed from the CJTC teaching schedule. (Exhibit 10).

Basim testified that Cory Ahrens, a CJTC employee in charge of scheduling, told her that she would have taught several additional courses during the relevant time period. Basim provided a copy of a teaching schedule with several of Basim's handwritten notes reflecting changes in teaching assignments that Basim described as notes from a conversation with Ahrens (Exhibit 2). Ahrens did not testify at the hearing.

In evaluating the discrepancies between the version of the course schedule provided by Basim (Exhibit 2) and the version provided by Baxter in his capacity as records officer for the CJTC, the Examiner credits the version provided by the CJTC (Exhibit 10). The CJTC is an independent third party that does not have an economic interest in the outcome of this dispute. The CJTC is in the best position to provide accurate evidence about the teaching schedules of its contract instructors. The CJTC saved a version of the schedule that was current as of March, 2010, prior to Basim losing her endorsement to teach, and presented it at the hearing. This is significant because testimony from Baxter showed that the schedule is a living document that changes over time as courses are added or deleted and instructors are changed. Although Basim's version may have been provided by the CJTC at some point in time, the Examiner finds that the version scheduled provided by the CJTC (Exhibit 10) is the best evidence available for establishing what courses Basim would have taught had she continued to receive the employer's endorsement to teach at the CJTC during the relevant time period. Additionally, testimony and payroll records showed that at least some of Basim's notes on the schedule she provided were inaccurate, particularly concerning classes that she alleged she was unable to teach. Baxter's testimony on the CJTC's version of the schedule was more credible.

Based on the records provided by the CJTC and testimony from Baxter, from March 23, 2010, (the date the employer informed the CJTC that it was withdrawing its endorsement for Basim to teach at the CJTC), until December 17, 2010, (the date the employer had a lawful reason to withdraw Basim's endorsement to teach at the CJTC), Basim was scheduled to teach at the CJTC as follows (Exhibit 10):

- September 13-16, 2010. Apprentice instructor for CTO course. As an apprentice instructor Basim would have earned \$640 by working 32 hours at a pay rate of \$20 per hour.
- October 28-29, 2010. Instructor for advanced CTO course. As an instructor Basim would have earned \$640 by working 16 hours at a pay rate of \$40 per hour.

Based on the records provided by the CJTC, Basim would have received \$1,280 in compensation from the CJTC for teaching courses between March 23, 2010, and December 17, 2010.

Travel Reimbursements

The union argues that Basim's back pay award should include travel reimbursements she would have received from traveling to teach courses for the CJTC during the relevant back pay period. The CJTC reimburses instructors for mileage, meals, and hotel expenses when they travel to teach courses.

Payments that Basim would have received from the CJTC for reimbursable travel expenses are different than back pay. The purpose of the back pay remedy is to make Basim whole and put her in the same economic position she would have been in absent unlawful discrimination by the employer. The travel costs are not a separate source of income. Rather, travel costs are reimbursements for actual expenses incurred. Basim did not travel to teach courses for the CJTC between March 23, 2010, and December 17, 2010, and did not accrue travel expenses that would require reimbursement during that time period. The order in this decision does not require the employer to pay travel reimbursement as part of the back pay owed to Basim.

Contract for CJTC Curriculum Revision

Basim had two contracts with the CJTC, one to teach courses and the other to revise course curriculum. Basim's personal services contract to teach courses ran from July 1, 2009, through June 30, 2010. In February, 2010, Basim received and signed a renewal of her personal services contract to teach at the CJTC during the 2010-2011 fiscal year, from July 1, 2010, through June 30, 2011. The CJTC renewed this contract on March 15, 2010.

Basim's second contract with the CJTC to revise course curriculum was effective from July 1, 2009, through June 30, 2010. Under this contract Basim would have been paid \$40 per hour for revising certain course curriculum. Baxter testified that even after the employer withdrew its endorsement for Basim to teach at the CJTC on March 23, 2010, Basim was still eligible to complete the curriculum revision work under this contract through June 30, 2010. In the spring of 2010, after the employer withdrew its endorsement, the CJTC contacted Basim to inform her that the CJTC would still like her to perform the curriculum revision work. Nevertheless, Basim did not perform any curriculum revision work for the CJTC from March 23, 2010, through the time the contract expired on June 30, 2010.

The employer argues that Basim should be precluded from receiving back pay for her lost income from teaching at the CJTC because she failed to mitigate her losses when she failed to perform the available curriculum revision work. The employer argues that Basim should have preformed this work from March 23, 2010, through June 30, 2010, to replace her lost income from not teaching. The employer argues that an injured party has a duty to mitigate his or her damages, and relies upon *Pasco Housing Authority*, Decision 6248-A (PECB, 1998), which summarized the duty to mitigate as follows:

The Washington courts use mitigation principles adopted from federal case law, and place the burden on the defendant to show that there were suitable positions available and that the plaintiff failed to use reasonable care and diligence in seeking them. To show a willful loss of earnings which would support a failure to mitigate a claim, an employee must refuse a job "substantially equivalent" to the one denied. *Burnside v. Simpson Paper Company*, 66 Wn.App. 510 (1992). Generally, the doctrine prevents recovery for "damages the injured party could have avoided by reasonable efforts taken after the wrong was committed." See, *Kloss v. Honeywell*, 77 Wn.App. 294 (PECB, 1995). The injured party's duty is to "use such means as are reasonable under the circumstances to avoid or

minimize the damages.” *Cobb v. Snohomish County*, 86 Wn.App. 223 (1997). Under National Labor Relations Board (NLRB) precedent, as well, the duty to mitigate damages includes the obligation to accept a job substantially equivalent to the one denied.

The employer’s mitigation argument fails to take into account the time period of the teaching work that Basim was not able to perform. Basim was scheduled to teach courses on September 13-16, 2010 and October 28-29, 2010. During this time period Basim did not have the option to perform curriculum revision work for the CJTC because her contract to perform this work expired on June 30, 2010, and was not renewed. The fact that the alleged opportunity to mitigate did not occur in the same time period as Basim’s loss of income earning opportunity from teaching courses does not support a finding that she failed to mitigate her damages.

Basim’s teaching and course curriculum revision work were separate and distinct bodies of work and were authorized by separate contracts for separate time periods. The two work assignments were independent of each other and cannot be viewed as substitutes for each other.

In sum, the evidence in the record does not support the conclusion that Basim should be ineligible for back pay or have her back pay reduced because she failed to mitigate her damages. Basim’s decision not to perform curriculum revision work for the CJTC between March 23, 2010, and June 30, 2010, does not constitute a failure to mitigate damages from her ineligibility to teach courses in September and October of 2010.

Interest

The order in the original decision states that back pay will be provided in accordance with WAC 391-45-410. Under WAC 391-45-410(3), back pay recipients are entitled to interest “at the rate which would accrue on a civil judgment of the Washington state courts, from the date of the violation to the date of payment.” The back pay award in this decision shall include interest as provided for in WAC 391-45-410(3).

Conclusion

The Order in the original decision is modified to require the employer to pay Basim \$1,280.00, plus interest, for compensation she would have earned from teaching at the CJTC from March

23, 2010, until December 17, 2010. This dollar amount does not include reimbursement for travel expense payments that Basim might have received if she had actually taught the courses and incurred travel expenses. The portions of the original decision awarding back pay are modified to include interest as required in WAC 391-45-410(3).

FINDINGS OF FACT

The 121 Findings of Fact in Decision 11149 remain unchanged with the following additions:

122. On March 23, 2010, the employer informed the CJTC that it was withdrawing its endorsement for Basim to teach at the CJTC.
123. On December 17, 2010, the employer placed Basim on administrative leave when it learned that Basim was the subject of a criminal charge that made her ineligible to access law enforcement databases that were necessary to perform her dispatcher job.
124. On December 22, 2010, Basim submitted a letter to the employer stating she was resigning from her employment with SNOCOM effective immediately. This terminated her employment relationship with the employer.
125. Greg Baxter is the program administration manager for the CJTC and serves as the CTJC's records officer, human resources manager, and labor relations manager.
126. The CJTC saved a copy of the official course teaching schedule that was current as of March 2010. This document reflects the schedule immediately prior to Basim losing her endorsement and being removed from the CTJC teaching schedule.
127. The teaching schedule described in Finding of Fact 126 is the best evidence available for establishing what courses Basim would have taught during the relevant time period, had she continued to receive the employer's endorsement to teach at the CJTC.

128. From March 23, 2010, the date the employer informed the CJTC that it was withdrawing its endorsement for Basim to teach at the CJTC, until December 17, 2010, the date the employer had a lawful reason to withdraw Basim's endorsement to teach at CJTC, Basim was scheduled to teach as follows:
- September 13-16, 2010. Apprentice instructor for CTO course. As an apprentice instructor Basim would have earned \$640 by working 32 hours at a pay rate of \$20 per hour.
 - October 28-29, 2010. Instructor for advanced CTO course. As an instructor Basim would have earned \$640 by working 16 hours at a pay rate of \$40 per hour.
129. If Basim had continued to teach at the CJTC, Basim would have received \$1,280 in compensation from the CJTC for teaching courses between March 23, 2010, and December 17, 2010.
130. Basim did not travel to teach courses for the CJTC between March 23, 2010, and December 17, 2010, and did not accrue travel expenses that would require reimbursement during that time period.
131. Basim had a personal services contract with CJTC to teach courses from July 1, 2009, through June 30, 2010. In February 2010, Basim received and signed a renewal of her personal services contract to teach at the CJTC during the 2010-2011 fiscal year, from July 1, 2010, through June 30, 2011. The CJTC signed this renewed contract on March 15, 2010.
132. Basim had a second contract with the CJTC to revise course curriculum that was effective from July 1, 2009, through June 30, 2010. Under this contract Basim would have been paid \$40 per hour for revising certain course curriculum. Even after the employer withdrew its endorsement for Basim to teach at the CJTC on March 23, 2010, Basim was

still eligible to complete the curriculum revision work under this contract through June 30, 2010.

133. Basim did not perform any curriculum revision work for the CJTC from March 23, 2010, through the time the contract expired on June 30, 2010.
134. Basim was scheduled to teach courses on September 13-16, 2010, and October 28-29, 2010. During this time period Basim did not have the option to mitigate her damages by performing curriculum revision work for the CJTC because her contract to perform curriculum revision work expired on June 30, 2010, and was not renewed.
135. Basim's teaching and course curriculum revision work were separate and distinct bodies of work and were authorized by separate contracts for separate time periods. The two work assignments were independent of each other and cannot be viewed as substitutes for each other.

ORDER

The order in Decision 11149 remains unchanged, except for sections 2 (d) through (g) which are revised to read as follows:

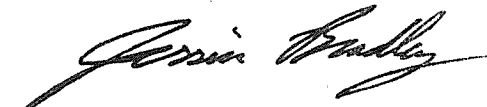
- d. Make Jodi Basim whole by payment of back pay and benefits in the amounts she would have earned or received during the five days of unlawful suspension, announced in the February 19, 2010 disciplinary letter, plus interest. Back pay shall be computed in conformity with WAC 391-45-410.
- e. Make Jodi Basim whole by payment of back pay and benefits in the amounts she would have earned in overtime pay while she was on administrative leave from February 9, 2010, through March 18, 2010, plus interest. The overtime wages will be calculated based on Basim's usual overtime wage rate, plus interest, for the average number of overtime hours that the employer's other dispatch

supervisors worked from February 9, 2010, through March 18, 2010. Back pay shall be computed in conformity with WAC 391-45-410.

- f. Make Jodi Basim whole by payment of back pay and benefits in the amount of \$1,280.00, plus interest, for compensation she would have earned from teaching at the Washington State Criminal Justice Training Commission (CJTC) from March 23, 2010, (the date employer informed the CJTC that it was withdrawing its endorsement for Basim to teach) until December 22, 2010 (the date Basim resigned from her employment with SNOCOM). Back pay shall be computed in conformity with WAC 391-45-410.
- g. Make Margaret Penman whole by payment of back pay and benefits in the amounts she would have earned in overtime pay while she was on administrative leave from February 9, 2010, through March 19, 2010, plus interest. The overtime wages will be calculated based on Penman's usual overtime wage rate, plus interest, for the average number of overtime hours that the employer's other dispatch supervisors worked from February 9, 2010, through March 19, 2010. Back pay shall be computed in conformity with WAC 391-45-410.

ISSUED at Olympia, Washington, this 31st day of July, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JESSICA J. BRADLEY, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist an employee organization (union)
- Bargain collectively with your employer through a union chosen by a majority of employees
- Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision

ON AUGUST 26, 2011, THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION (PERC) ISSUED LEGAL DECISION NUMBER 11149 RULING THAT SNOCOM COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES. ON JULY 31, 2012, PERC ISSUED DECISION NUMBER 11149-B MODIFYING ITS FIRST DECISION. LANGUAGE ADDED TO THE ORIGINAL NOTICE IS UNDERLINED; LANGUAGE DELETED FROM THE ORIGINAL NOTICE IS SHOWN BY A STRIKETHROUGH LINE.

WE UNLAWFULLY:

- Implemented a new work rule prohibiting you from participating in union-related discussions in the workplace without first notifying your union and providing it an opportunity to bargain.
- Interfered with Jodi Basim's right to union representation (*Weingarten* rights) during an investigatory interview on January 14, 2010.
- Discriminated against Jodi Basim by giving her a 5-day unpaid suspension in February 2010.
- Discriminated against Jodi Basim and Margaret (Margie) Penman in February and March 2010 by placing them on paid administrative leave, issuing written reprimands to them, withdrawing Basim's endorsement to teach at the CJTC, and removing Penman from the CAD team.
- Interfered with lawful union activity by prohibiting Basim and Penman from having any contact with bargaining unit employees while they were on administrative leave from February 9, 2010, until February 24, 2010.
- Interfered with Basim's right to engage in union activity by prohibiting her from discussing the discipline she received on March 18, 2010, with her co-workers.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL retract the work rule prohibiting you from participating in union-related discussions in the workplace.

WE WILL honor your request to have union representation in an investigatory interview and allow your union representative to assist you.

WE WILL remove the unlawful discipline from Basim's personnel file and pay her the wages and benefits she lost from the 5-day unpaid suspension we issued to her, plus interest.

WE WILL make Basim whole for the income she lost, plus interest, because we withdrew our endorsement for her to teach at CJTC ~~and WE WILL request that the CJTC rehire Basim.~~

WE WILL pay Basim and Penman for the overtime wages they lost as a result of being placed on administrative leave, plus interest.

WE WILL remove the unlawful discipline from Penman's personnel file and reinstate Penman to the CAD team.

WE WILL NOT change a work rule relating to a mandatory subject of bargaining without first notifying your union and providing it an opportunity to bargain.

WE WILL NOT tell you that you cannot discuss your discipline with your co-workers.

WE WILL NOT interfere with your ability to communicate with your union officers or interfere with your union officers' ability to contact you.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

**AN OFFICIAL NOTICE FOR POSTING AND READING
WILL BE PROVIDED BY THE COMPLIANCE OFFICER.**

The full decision is published on PERC's website, www.perc.wa.gov.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

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RECORD OF SERVICE - ISSUED 07/31/2012

The attached document identified as: **DECISION 11149-B - PECB** has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS
COMMISSION

BY: S/ ROBBIE DUFFIELD

CASE NUMBER: 23032-U-10-05868 FILED: 02/10/2010 FILED BY: PARTY 2
DISPUTE: ER MULTIPLE ULP
BAR UNIT: DISPATCHERS
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