

**BEFORE THE HEARING EXAMINER FOR THE CITY OF SEATTLE
UNDER DELEGATION FROM CIVIL SERVICE COMMISSION
FOR THE CITY OF SEATTLE**

THERESA G. RAMOS)	CSC and Hearing
)	Examiner File:
Appellant)	CSC 04-03-010
v.)	
)	ORDER ON MOTION
DEPARTMENT OF PLANNING)	FOR AWARD OF
AND DEVELOPMENT)	BACK PAY, AND
Respondent)	DISPOSING OF APPEAL

Background

The Appellant, Theresa Ramos, was notified that she would be demoted or terminated from her Building Plans Examiner entry position with the Department of Planning and Development because she was not making satisfactory progress in her probationary period. The Appellant took a personal (FMLA) leave for illness and treatment, although she ultimately accepted the demotion. The unpaid leave continued for several extended periods of time, with the Appellant returning to work at times on a reduced schedule agreed to by the Department.

Ms. Ramos appealed her demotion to the Civil Service Commission (Commission). On November 16, 2006, the Commission issued a Memorandum Decision denying the Department's motion to dismiss the appeal. The Commission determined that the Appellant was not a probationary employee at the time she received notice of the demotion, and thus the Commission had jurisdiction over the appeal. Pursuant to Seattle Municipal Code 4.04.250 L.7, the Commission delegated the appeal to the City of Seattle Hearing Examiner for hearing and decision.

On March 29, 2006, the Department offered the Appellant immediate reinstatement to the position of Building Plans Examiner (BPE) at the entry level and, upon successful completion of the entry level program, promotion to a journey level position with the same effective date that would have applied had there been no interruption in her service as a BPE. (Exhibit 6 to Appellant's "Motion and Memorandum Re: Awarding Back Pay") The offer also provided that the Appellant was not required to accept reinstatement and could remain in her current position if desired. The Department acknowledged the Commission's decision on the Appellant's status and that the Department would have followed different procedures had they considered the Appellant a non-probationary employee.

The Department's offer also stated: "Regardless of whether you accept this offer you will be paid any difference between the amount you have been paid from August 23,

2004 to the date you make a decision on this offer of reinstatement ... and what you would have earned in the BPE Entry position.”

In an email message in late March of 2006, counsel for the Department responded to a question from Appellant’s counsel and clarified that the Department would pay the Appellant back pay for all hours that she had actually worked, as well as vacation, sick leave and holiday time, but not for her unpaid FMLA leave time. In early April, the Appellant’s counsel sent an email message to the Department’s counsel stating that the Appellant accepted the “offer to be reinstated to and complete the BPE entry position”. (Exhibits A and B to Declaration of Counsel in Opposition to Appellant’s Motion Re Awarding Back Pay”)

The parties agree that the Department has removed from the Appellant’s employment history any record of the Department’s determination that she had failed to make satisfactory progress in the BPE entry position, and agreed that it will draw no adverse inference from the fact that the records show a voluntary reduction. The Appellant returned to the BPE program on May 24, 2006.

The parties have been unable to agree on the method for calculating back pay, and the Appellant filed a Motion and Memorandum Re: Awarding Back Pay (Appellant’s Motion) seeking an order “awarding the full CSC ‘backpay’ remedy”. Responsive and reply memoranda were filed, and the hearing on Appellant’s Motion was held on June 22, 2006, before the Hearing Examiner (Examiner). The Appellant was represented by Michael A. Jacobson, attorney-at-law; and the Department was represented by Daniel M. Berger, Assistant City Attorney.

The Department initially contends that in light of its unconditional offer of reinstatement and back pay, and Appellant’s acceptance of reinstatement, this appeal is moot. With respect to calculating back pay, the Department contends that back pay includes all paid time, including hours actually worked, vacation, sick leave and holiday time. (Respondent’s Opposition to Appellant’s Motion RE: Awarding Back Pay (Respondent’s Opposition) at p.4; Exhibit 9 to Appellant’s Motion. The Department has stipulated that there will be no offset to this pay. The Appellant does not agree that the appeal is moot. She agrees that the Department owes her back pay and benefits for all time worked, but contends that the Department must also pay for her unpaid FMLA leave, reimburse her for insurance premiums that were self-paid during part of the unpaid leave (COBRA), and pay her “prejudgment interest” since March 15, 2005 on all amounts owed.

Issues

1. Does the Commission have jurisdiction to order back pay for unpaid FMLA leave time and reimbursement for employee-paid insurance premiums during part of the leave?
2. If the Commission has jurisdiction to order payment for unpaid FMLA leave time and reimbursement of employee-paid insurance premiums, is there sufficient evidence in the record to support such an award in this case?

3. Does the Commission have jurisdiction to award "prejudgment interest" on whatever amount is due the Appellant?
4. Are the remaining issues in this appeal moot?

Applicable Law

By Charter, the Commission may hold hearings to receive relevant evidence and "issue such remedial orders as it deems appropriate." City of Seattle Charter, Article XVI, §6. SMC 4.04.250 L.5 provides that the Commission has authority to

3. ... hear appeals involving the administration of the personnel system
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5. ... issue such remedial orders as it deems appropriate; provided, that no remedial order may supervene the exclusive authority of the City Council as it relates to the financial transactions of the City. The Commission shall have the power to reinstate employees. It may introduce legislation for lost wages and benefits, and may make recommendations to the Mayor and City Council;¹

"An employee may take unpaid Family and Medical Leave for . . . the employee's own serious health condition that makes the employee unable to perform the functions of his or her job." Personnel Rule 7.1.3 B.4

Analysis

The Appellant asserts that under the Charter, the Commission has remedial authority to restore back pay and benefits for unpaid FMLA leave time, that SMC 4.04.250 L.5 requires that the Council take affirmative steps to define specific areas or items that relate "to the financial transactions of the City" and cannot be affected by the Commission's remedial orders, and that the Council has not defined back pay and benefits for unpaid leave as something that affects the financial transactions of the City.

All parts of a legislative act must be considered together and if possible, harmonized to give effect to each of them. *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). SMC 4.04.250 L.5 applies this basic rule of statutory construction to the Charter. The Code section clarifies that the Commission's Charter authority to issue remedial orders must be read together and with the Council's Charter authority over the City's finances so as to give effect to both. This Code section is self executing; there is nothing to suggest that it requires further Council action to be effective. The appropriate

¹ The Department states that in practice, "the City's departments do not contest the Commission's orders for back pay that is directly attributable to the disputed employment action that is the subject of the appeal. This is a reflection of the fact that as a matter of basic fairness, the departments accept responsibility for the direct consequences of their decisions without needlessly burdening the Council and Mayor to correct the results of decisions that the Commission has held to be erroneous. It also reflects the inference [that] it is the intent of the Council and Mayor that the City accept this responsibility." Respondent's Opposition at p.6.

question is not whether the Council has “exerted its Charter authority to bar back pay awards,” Appellant Ramos’ Reply re: Awarding Back Pay (Appellant’s Reply) at p. 6, but whether the Commission’s award of back pay for unpaid leave time would supervene the Council’s authority over the City’s financial transactions. An award of “lost wages and benefits,” does require a City financial transaction. Further, SMC 4.04.250 L.5 provides that the Commission may introduce legislation and make recommendations to the Mayor and Council on an award of lost wages and benefits. An award of back pay and benefits for unpaid FMLA leave time would be no different, and would encroach upon the Council’s Charter authority over the “financial transactions of the City”.

Appellant states that “[s]ound social policies of statutory interpretation support” the award she seeks, and characterizes SMC 4.04.250 L.5 as a remedial statute that must be liberally construed. (Appellant Ramos’ Reply Re: Awarding Back Pay, at p.6.) Remedial statutes “afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries.” *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976). Appellant is correct that remedial legislation is liberally construed, *see Olesen v. State* 78 Wn.App. 910, 913, 899 P.2d 837, (1995), but she offered no evidence to support the characterization of SMC 4.04.250 as remedial. It plainly does not add to the Charter’s broad grant of remedial authority to the Commission.

The Appellant also asserts that the Commission has historically used its remedial authority to award back pay and benefits for unpaid leave time, citing *In re Cousins*, CSC 00-01-017; *In re Gregorio*, CSC 98-01-012; and *In re Lundquist*, CSC 00-04-013 (Order re Back Wage). Where an administrative agency exercises quasi-judicial functions, substantial weight is given to the agency’s interpretation of governing statutes and legislative intent. *Nationscapital Mortg. Corp. v. Department. of Financial Institutions*, WL 1680952, at 6 (Wn.App., 2006). However, the Appellant has cited, and the Examiner has found, no Commission decision construing the Commission’s authority to issue remedial orders as including authority to award back pay and benefits for unpaid leave time *that was not imposed by the City decision being appealed*.

The decision in *In re Gregorio*, CSC 98-01-012 (Findings of Fact, Conclusions of Law and Decision) recommended that pay and benefits be restored for days the appellant did not work during the suspension that was the subject of the appeal before the Commission. In *In re Cousins*, CSC 00-01-017, (Memorandum Opinion and Order), the Commission ordered six months back pay less income earned following the appellant’s termination that was the subject of the appeal. *In re Lundquist*, CSC 00-04-013 (Order Re Back Wage) was a wage inequity appeal, and a hearing officer awarded back pay and benefits for hours the appellant had worked performing certain duties. On review, the Commission vacated the order because it determined that it had no authority under the Charter or Code to adjudicate such claims. *In re Lundquist*, CSC 00-04-013 (Memorandum Opinion and Order) at 9. Because the Commission believed that the Personnel Rules should provide for back pay in cases like *Lundquist*, the Commission stated in the order that it intended to pursue the process established in SMC 4.04.250 L.5,

to recommend to the City Council that legislation be adopted providing back pay for the appellant in that case.

In summary, the Charter and the Code do not authorize the Commission to award back pay and benefits for unpaid FMLA leave time, or reimbursement for insurance premiums paid by the employee during the leave. Therefore, the Examiner concludes that the Commission lacks jurisdiction grant the relief the Appellant seeks.

Even if the Commission had authority to award back pay and benefits for unpaid FMLA leave, there is not sufficient evidence in the record to support such an award in this case. Unlike financial losses directly attributable to a City disciplinary decision, such as compensation lost during a suspension or termination, losses attributable to an unpaid leave that is allegedly taken because of a disciplinary decision are consequential damages. These are normally adjudicated as part of a civil action in court, and require proof of proximate cause (cause in fact plus legal causation), which would be developed by the parties through extensive examination and cross examination of the Appellant and her medical providers. The record in this case does not include that evidence, and thus would not provide the basis for an award of indirect, or consequential, damages.

The Commission also lacks jurisdiction to award "prejudgment interest" on back pay the Appellant will receive from the Department. The authority for courts to award prejudgment interest in certain cases is found in state statute, RCW 4.56.110, and requires that there be a judgment on which to base the interest. The Commission does not issue judgments, and is not covered by the statute on prejudgment interest. The Appellant contends, however, that she is simply claiming the right to the "use value," or "purchasing power" of the money she will receive as back pay, and that the Commission has the authority to award this element of damages under its authority to "'reinstate' lost status".

This loss of interest is present in every case where the Commission overturns a disciplinary suspension or termination and awards back pay. Although it may be desirable social policy to compensate successful appellants for the time value of their back pay and benefits, that does not provide a sufficient basis for the Commission to do so. "The power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied therein." *Conway v. Department of Social and Health Services*, 131 Wn.App. 406, 419, 120 P.3d 130 (2005), quoting *McGuire v. State*, 58 Wn.App. 195, 198, 791 P.2d 929 (1990). The Appellant points to nothing in the Charter or Code that *expressly* grants or *necessarily* implies Commission authority to award interest to appellants. And again, the Commission's prior actions are instructive. Since this loss exists in every case where the Commission awards back pay, it is likely that the Commission would have exercised the authority to award interest in at least some of those cases if it interpreted the law as allowing it. However, the Appellant has cited no case in which the Commission has awarded "prejudgment interest." The Examiner concludes that the Commission lacks authority to make such an award.

As an alternative basis for her entire claim, the Appellant points to the Department's offer. She asserts that the Mayor and Council approved the Department Director's appointment; that the Council approved the Director's budget which "undoubtedly included" funds to cover unpredictable occurrences, such as litigation; and thus, that the Director was acting within her authority when she stated in the offer that the Appellant would be paid any difference between the amount she was paid between August 23, 2004 and her reinstatement, and "what [she] would have earned in the BPE entry position." Appellant argues that the Director's commitment was not limited to damages directly caused by the demotion, such as payment of back pay and benefits for hours actually worked, but included the consequential damages and interest she seeks in this appeal. Thus, the Appellant asks the Commission to both interpret the phrase, "what you would have earned" in the Department's unconditional offer of repayment and enforce the offer. However, the Appellant has cited no authority for the Commission to interpret the meaning of such an offer, and the Examiner has found none. The Appellant's request that the Commission enforce the offer as she interprets it is simply another way of asking the Commission to award back pay for unpaid FMLA leave time, and employee-paid insurance premiums, together with interest on the amount awarded. As discussed above, the Commission lacks jurisdiction to so.

The Department has reinstated the Appellant in accordance with Exhibit 6 to Appellant's Motion, and has clarified that its offer to pay her "any difference between the amount she was paid between August 23, 2004 and her reinstatement, and what she would have earned in the BPE entry position, includes pay and benefits for all hours she actually worked, with no offset for the higher wage earned as a Land Use Planner II. In light of this decision on the Appellant's Motion, if the Department pays the Appellant in accordance with its offer, this appeal will be moot. However, because of the form of the Department's offer, it required no acceptance by the Appellant. To avoid questions of enforceability, the terms of the offer should be incorporated into the Commission's decision on the appeal.

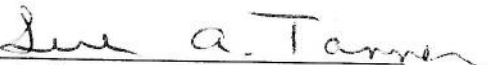
Decision

The Appellant's motion seeking an award of back pay for unpaid FMLA leave time, reimbursement for self-paid insurance premiums, and interest on the entire amount paid by the Department of Planning and Development in this matter is **DENIED**.

Having reinstated the Appellant in the BPE entry position, the Department is **ORDERED** to pay the Appellant the difference between the amount she was paid between August 23, 2004 and her reinstatement, and what she would have earned in the BPE entry position. The amount paid shall include back pay and benefits for all hours the Appellant worked during the specified time period, with no offset for the higher wage she earned during that time as a Land Use Planner II.

The remaining issues in this appeal have become moot and are therefore **DISMISSED**.

Entered this 3rd day of July, 2006.


Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner is subject to review by the Civil Service Commission. To be timely, the petition for review must be filed with the Civil Service Commission no later than ten (10) days following the date of issuance of this decision, as provided in Section VII of the Civil Service Commission Rules.

