

1  
2  
3 **IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY**  
4

5 JOSEPH BOVA,  
6 Plaintiff,

7 vs.

**CASE NUMBER: 08-1663-E7**

8 CITY OF MEDFORD, an incorporated  
9 Subdivision of the State of Oregon, and  
10 MICHAEL DYAL, City Manager of the City  
11 of Medford, as an Individual, and in his official  
12 capacity,

Defendants.

**OPINION AND ORDER ON MOTION  
FOR CONTEMPT**

13 This matter came before the court upon plaintiff's Motion For Finding of Contempt, and  
14 the court having conducted evidentiary hearings on August 17, 2010 and October 21, 2010, and  
15 having considered the evidence presented at said hearings, as well as the written memoranda  
16 provided by the parties, and having considered the argument of counsel, Stephen L. Brischetto  
17 and George P. Fisher on behalf of plaintiff's motion, and Robert E. Franz Jr. on behalf of  
18 defendant's opposition to the motion, and being otherwise fully advised in the premises, the  
19 court sets forth its Opinion and Order.

**OPINION**

20 To find a party in contempt, the court must find that a valid court order was in place, that  
21 the alleged contemnor had knowledge of the order, and that the alleged contemnor voluntarily  
22 failed to comply with the order. The court finds that it entered a valid order by way of a ruling  
23 on plaintiff's summary judgment motion on July 10, 2009, and the court further finds that it  
24 entered a valid Limited Judgment pursuant to said ruling on December 7, 2009. Based on the  
25 voluminous record in this case, the court further finds that the defendants in this case were aware  
26 of these rulings, and had actual knowledge of their content and import. The court then proceeds  
27 to examine the various allegations of defendants' voluntary noncompliance with the court's  
28 orders.

1           There is evidence supporting a finding, and the court does so find, that there are members  
2 of the class (plaintiffs in this class action proceeding), who have retired subsequent to the court's  
3 opinion order and the limited judgment, and that these retirees have not received a notice of their  
4 right to elect health benefit coverage, as retirees, pursuant to ORS 243.303, as explained in the  
5 prior court opinions and orders.

6           Plaintiff points out that the Written Plan submitted to the court by Defendants, pursuant  
7 to the Limited Judgment, was filed with the court two days after the court-imposed deadline for  
8 its submission. Given that approval (or denial) of the plan was shortly thereafter delayed by  
9 request for stay filed with this court, and the subsequent temporary stay that was granted by the  
10 Court of Appeals, and the fact that the court order establishing the need for a written plan  
11 required a subsequent implementation period after approval of the plan (which has yet to occur),  
12 the court cannot find by clear and convincing evidence that it's tardiness was a contemptuous  
13 act.

14           Plaintiff next alleges that the written plan was inadequate in several particulars. The court  
15 agrees with plaintiff that the plan failed to provide appropriate forms and procedures setting forth  
16 how retirees were to elect appropriate coverage under the statute. The plan also failed to address  
17 in any manner how class members who retired before a new policy was in place would thereafter  
18 be afforded the coverage required by the statute and this court's order. The plan also failed to set  
19 forth that city employees who are union members had agreed to any changes in their coverage, or  
20 how the City intended to secure their agreement. The plan further failed to set forth that city  
21 employees in the so-called management class had agreed to any changes in their coverage, or  
22 how the City intended to secure their agreement.

23           Plaintiff also alleges that the plan sets forth the defendants' intent to resist the court  
24 orders, by appealing them, and by seeking a stay of their effect pending such appeal. The  
25 defendants are certainly within their rights to appeal, although it is very questionable whether  
26 stating such intent has any place in a written plan intended to set forth how the courts order will  
27 be complied with. That portion of the plan was thus superfluous, not contemptuous.  
28

1 Plaintiff alleges that the plan was designed to generate negative publicity and employee  
2 opposition to these proceedings. That part of the language in the plan very likely had such an  
3 effect (as borne out by a subsequent petition circulated amongst some members of the  
4 management group), and it may well have been the defendants intention to plant seeds of fear  
5 amongst their employees, but the court cannot make a finding, by clear and convincing evidence,  
6 that it was so designed or intended.

7 Finally, plaintiff alleges that the plan is deficient because it states the City's intent to pass  
8 along any additional costs associated with compliance with the statute to its employees. Despite  
9 other rulings made by this court elsewhere, the addition of this language in the written plan is not  
10 an act of contempt, in light of the wording of ORS 243.303, and given the lack of a court ruling,  
11 at the time of the plan's submission, requiring the City to bear this cost.

12 Plaintiff also alleges that the defendants are in contempt because of the action of the City  
13 Council in authorizing up to \$20,000 to certain members of the class to retain independent  
14 counsel for representation in this litigation. While the lack of any evidence to the effect that the  
15 City Council received any advice from its city attorney on the possible effects of this action  
16 certainly raises questions and concerns of the court, the court cannot find by clear and  
17 convincing evidence that these acts were acts of contempt by the City, or any of its employees.

18 The bottom line is that the written plan submitted by the City did not comply with the  
19 courts prior order and judgment, as set forth above. The court finds that the City **knew** it had to  
20 get the approval and consent of union members and other city employees to properly implement  
21 its compliance with ORS 243.303. The court finds that the City **knew** it had to provide  
22 appropriate health benefit coverage to members of the class who retired in the interim. The court  
23 finds that the City **knew** that it would require proper forms and procedures in order to implement  
24 these changes. The court finds that the City **knew** that bringing the City into compliance with  
25 the statute would require a well thought out and thoroughly detailed plan. The written plan was,  
26 at best, a feeble attempt to respond to the court's directive. The City failed to do all these things  
27 within the time frame originally ordered by the court. It is now 15 months since the court's order  
28

1 and almost 11 months since the court signed the Limited Judgment and the city still has not  
2 complied.

3 The court finds that the defendants have resisted compliance with ORS 243.303 at every  
4 stage of these proceedings. The defendants have consistently blamed the class, class counsel and  
5 now even this court for the lack of a health benefit policy in place that would be in compliance  
6 with the statute. But ORS 243.303 places that obligation squarely upon the local governing  
7 body in question—The City of Medford, in this case. Whether the defendants agree with this  
8 court’s interpretation of the statute or not, they have been ordered to comply, they have failed to  
9 do so, they have dragged their feet in whatever efforts to comply that they have made, and they  
10 are thus in contempt of the court’s orders.

11 For remedy for this contempt, the court will order that the defendants comply completely  
12 with this court’s order as set forth in the separate Opinion and Order on Defendants Motion For  
13 Approval For Purchase Of Insurance, pursuant to ORS 33.105(1)(d). For these purposes, and for  
14 convenience sake, the language of that opinion is incorporated herein by reference. Also  
15 pursuant to ORS 33.105(1)(d), defendant Michael Dyal, as City Manager, shall execute and file  
16 with the court, within 10 days of the date of this order, a statement that he will take all actions  
17 necessary to bring the City into compliance with ORS 243.303(2) as addressed by the court in its  
18 other orders. Pursuant to ORS 33.105(1)(c), the court further orders that a fine of \$100 a day be  
19 imposed against the defendant City of Medford, commencing November 1, 2010. Said fine shall  
20 remain in effect until all employees of the City, and all members of the class who have already  
21 retired, are enrolled in a policy that complies in all respects with ORS 243.303. The total amount  
22 of the fine will be calculated by the court upon proof (or stipulation) that the court’s other orders  
23 have been complied with fully, and is to be paid by defendant City of Medford within 10 days of  
24 the court’s calculation. Plaintiff is also entitled to attorney fees and costs associated with this

25 ///

26 ///

27 ///

28 ///

1 motion, pursuant to ORS 33.105(1)(e).

2 **ORDER**

3  
4 Based upon the above and foregoing, and good cause appearing therefore, it is hereby

5 ORDERED that defendants are in contempt of court, and it is further;

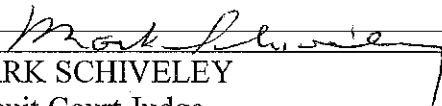
6 ORDERED that defendants are to comply in every respect with the court's order in  
7 defendants Motion For Approval For Purchase Of Insurance, and it is further;

8  
9 ORDERED that defendant Michael Dyal, , as City Manager, shall execute and file with  
10 the court, within 10 days of the date of this order, a statement that he will take all actions  
11 necessary to bring the City into compliance with ORS 243.303, as addressed by the court in its  
12 other orders, and it is further;

13 ORDERED that defendant City of Medford pay a fine of \$100 per day commencing  
14 November 1, 2010 until said defendant is in compliance with the courts orders, as set forth  
15 herein, and it is further;

16  
17 ORDERED that plaintiff is entitled to attorney fees and costs associated with this motion,  
18 to be paid by defendant City of Medford.

19 DATED this 25 day of October, 2010.

20  
21  
22   
23 MARK SCHIVELEY  
24 Circuit Court Judge

25 cc: Mr. Stephen L. Brischetto  
26 Mr. George P. Fisher  
27 Mr. Robert E. Franz, Jr.  
28 Ms. Lisa M. Umscheid