

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-16-06

(UNFAIR LABOR PRACTICE)

WY'EAST EDUCATION	)	
ASSOCIATION/EAST COUNTY	)	
BARGAINING COUNCIL/OREGON	)	
EDUCATION ASSOCIATION, <i>et al.</i> ,	)	
	)	
Complainant,	)	
	)	FINDINGS AND ORDER
v.	)	ON COMPLAINANT'S
	)	PETITION FOR
	)	REPRESENTATION COSTS
OREGON TRAIL SCHOOL	)	
DISTRICT No. 46,	)	
Respondent.	)	
	)	

On October 23, 2008, this Board issued an Order that held that the Oregon Trail School District No. 46 (District) committed numerous unfair labor practices in violation of ORS 243.672(1)(a). The unfair labor practices arose from a strike by the Wy'East Education Association, *et al.* (Association). 22 PECBR 668. We dismissed some of the allegations in the Association's complaint; one of the allegations we dismissed was the Association's claim that the District violated ORS 243.672(1)(a), (b), and (e) by deducting the cost of health insurance premiums from bargaining unit members' salaries when they returned to work after the strike.

On November 5, 2008, the District filed a petition for representation costs. On November 13, 2008, the Association filed a petition for representation costs.

The Association appealed our dismissal of its claims concerning the District's payment of health insurance premiums during the strike. On July 13, 2011, the Court of Appeals reversed our order and remanded it to us for further consideration. 244 Or App 194, 260 P3d 626 (2011).

On May 8, 2012, we issued an Order on Remand. 24 PECBR 786. We concluded that the District violated ORS 243.672(1)(a) and (e) when it did not pay the cost of employees' health insurance premiums in November 2005 and instead deducted the premium cost from employees' paychecks.

On May 29, 2012, the Association filed a supplemental petition for representation costs. On June 13, 2012, the District filed objections to the Association's supplemental petition.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. Each party filed a timely petition for representation costs.
2. Both parties partially prevailed. In such circumstances, each party is entitled to representation costs for the portion of the case on which it prevailed. OAR 115-035-0055(1)(b).

We must first determine to what extent each party prevailed. Under Board rules, a party prevails if it succeeds on a separate charge. A charge is considered separate if it (1) is "based on clearly distinct and independent facts; i.e. the charges could have been plead and litigated without material reliance on the allegations of the other(s);" and (2) concerns enforcement of rights that are independent of any other charges. OAR 115-035-0055(1)(b)(A). A charge is separate only if it meets both parts of this test. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 24 PECBR 726 (2012) (Rep Cost Order).

We begin by determining whether the charges at issue are separate. The Association prevailed on four claims that the District violated ORS 243.672(1)(a) by taking actions against striking teachers. The Association also prevailed on claims that the District violated ORS 243.672(1)(a) and (e) by deducting the cost of health insurance premiums from bargaining unit members' salaries when they returned to work after the strike.

We dismissed the claim that the District's actions in regard to insurance premiums violated ORS 243.672(1)(b). We also dismissed the claim that the District denied "other paid leave" to bargaining unit employees because of their exercise of protected rights in violation of ORS 243.672(1)(a).

The claims concerning the District's refusal to pay insurance premiums are not separate, since they arise from the same set of facts. The claim regarding the District's denial of paid leave is separate since it concerns facts that are "clearly distinct and independent" from those involving strike activity and insurance payments; in addition, it concerns rights that are independent of any other charges.

Next, we determine the percentage of the case on which each party prevailed. The Association prevailed on six claims, and the District prevailed on one. "Determining the percentage is not, however, solely a matter of dividing the number of claims on which a party prevailed by the total number of issues." *Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853 (Rep Cost Order). We also consider the relative importance of each issue in the case, and the amount of time devoted to the various issues. *Id.* Here, the vast majority of time in this case was devoted to litigating the issues regarding strike activity and insurance payments, and these were clearly the most significant issues in the case. After reviewing the record, we conclude that the Association prevailed

on 95 percent of the case and the District prevailed on 5 percent of the case. As is our practice, we subtract the percentages to determine a single prevailing party for purposes of awarding representation costs. *Id.* We find that the Association is a 90 percent prevailing party. We will adjust the Association's request accordingly, and will address only the Association's petition for purposes of the award.

3. The Association seeks a total \$31,102.94 in representation costs related to processing this unfair labor practice complaint prior to the appeal. According to the affidavit of counsel, this amount represents 238.50 hours of legal staff time (attorneys, a law clerk, and a paralegal) billed at hourly rates ranging from \$64 to \$145.

In addition, the Association seeks a total of \$6,693.07 in representation costs related to processing this case after the Court of Appeals remanded it to this Board. According to the affidavit of counsel, this amount represents a total of 43.7 hours of attorney and paralegal time billed at an average of \$145 per hour.

The claimed hourly rates are below the average. *See Josephine County* (Rep Cost Order) (average rate for representation costs is \$165-170 per hour).

This number of hours claimed is above average. This case involved three days of hearing. On remand, the parties stipulated to the facts and submitted written argument. Cases take an average of 45-50 hours per day of hearing. *Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853 (2007) (Rep Cost Order). The average time spent on a stipulated fact case of normal complexity is 16-25 hours. *Teamsters Local 670 v. City of Ontario*, Case No. UP-40-08, 23 PECBR 384 (2009) (Rep Cost Order). The case on remand was more complex than the average case. We will consider all these factors in determining the Association's reasonable representation costs.

4. As discussed above, the complaint alleged that the actions the District took against striking teachers violated ORS 243.672(1)(a), and that its deduction of insurance premium costs from the salaries of these teachers violated ORS 243.672(1)(a), (b), and (e). We dismissed a claim that the District denied "other paid leave" to teachers because of their exercise of protected rights in violation of subsection (1)(a).

To remedy these violations, we ordered the District to: cease and desist from violating the Public Employee Collective Bargaining Act (PECBA); to remove documents from the personnel files of certain teachers that addressed their conduct during the strike; to reimburse each bargaining unit member for the amount the District deducted from the bargaining unit member's November 2005 paycheck up to a \$720 cap, plus interest at 9 percent per annum; and to pay the Association a civil penalty of \$500. 22 PECBR 668.

Under Board rules, an award of representation costs may not exceed \$3,500. That limit does not apply when we find a civil penalty is appropriate. OAR 115-035-0055(1)(a). In cases where we

impose a civil penalty, we typically award the prevailing party all its reasonable representation costs. *Blue Mountain Community College* (Rep Cost Order); *Josephine County* (Rep Cost Order).

In its objections to the Association's Supplemental Petition for Representation Costs, the District asserts that an award of representation costs in excess of \$3,500 is not warranted. The District contends that the Association's appeal was unnecessary litigation because the argument the Association raised on appeal was one which should have been raised on a petition for reconsideration to this Board. In addition, the District notes that the Court of Appeals concluded that this Board (and the District) misunderstood that Association's arguments concerning payment of insurance payments and remanded the case for analysis of the Association's claims under a proper characterization of its position. Under these circumstances, the District asserts that it did not have an adequate opportunity at hearing to present evidence relevant to the Association's claim. Finally, the District argues that full representation costs should not be awarded because we imposed a civil penalty of \$500, half of the statutory maximum. ORS 243.676(4).

In civil penalty cases, we infrequently award less than 100 percent of the reasonable costs requested. In *Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, Case No. UP-32-01, 20 PECBR 650 (2004) (Rep Cost Award) we awarded less than the full amount because we imposed a \$500 civil penalty on the County and because the case involved issues of first impression. Here, one of the significant issues—the extent to which activity on a strike picket line is protected under the PECBA—was an issue of the first impression. In addition, we imposed a civil penalty of only \$500. We will reduce the award slightly for these reasons.

Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards the Association representation costs in the amount of \$23,100.

ORDER

The District will remit \$23,100 to the Association within 30 days of the date of this Order.

DATED this 21 day of September, 2012.



Susan Rossiter, Chair



Kathryn A. Logan, Board Member



Jason Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.