

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-023-14

<p>DISTRICT COUNCIL OF TRADE UNIONS; AFSCME LOCAL 189; LABORERS’ INTERNATIONAL UNION, LOCAL 483; IBEW LOCAL 48; MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 24; AUTO MECHANICS, DISTRICT LODGE 24; OPERATING ENGINEERS, LOCAL 701; PLUMBERS, LOCAL 290; AND PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 5,</p> <p style="text-align: right;">Complainants,</p> <p style="text-align: center;">v.</p> <p>CITY OF PORTLAND,</p> <p style="text-align: right;">Respondent.</p>		<p>FINDINGS AND ORDER ON COMPLAINANT’S PETITION FOR REPRESENTATION COSTS</p>
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On November 25, 2015, this Board issued an order holding that the City of Portland (City) violated ORS 243.672(1)(e) when it refused to bargain with the District Council of Trade Unions (DCTU) regarding the City’s installation of GPS devices on City vehicles. *See* 26 PECBR 525 (2015). The order dismissed, however, DCTU’s charge that the City violated ORS 243.672(1)(g) by purportedly not complying with the terms of the parties’ ground-rules agreement. DCTU timely filed a petition for representation costs, and the City timely filed objections to that petition.¹ Pursuant to ORS 243.676(2)(d), (3)(b), and OAR 115-035-0055, this Board finds that:

1. This case required three days of hearing.
2. Both DCTU and the City are prevailing parties.

Only a “prevailing party” in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1). In situations “[w]here one charge (or more) in a complaint is upheld while one charge (or more) in a complaint is dismissed, each party may be

¹The City did not file a petition for representation costs.

regarded as a prevailing party and may file a petition for representation costs for the portion of the case upon which it prevailed, provided that” the separate charges: (1) “are based on clearly distinct and independent operative facts; i.e. the charges could have been plead[ed] and litigated without material reliance on the allegations of the other(s)”; and (2) concern “the enforcement of rights independent of the other(s).” 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 720, 721 (2012) (Rep. Cost Order).

Here, DCTU prevailed on its (1)(e) charge, but the City prevailed on DCTU’s (1)(g) charge. We conclude that the (1)(e) and (1)(g) charges are separate, within the meaning of OAR 115-035-0055(1)(b)(A).² Specifically, the (1)(e) charge concerned the City’s refusal to bargain the mandatory impacts of the installation of GPS devices on City vehicles. That charge could have been pleaded and litigated without material reliance on the allegations of the (1)(g) charge, which concerned an alleged violation of the parties’ ground-rules agreement for successor bargaining. Likewise, the (1)(e) charge concerned the enforcement of rights under the obligation to bargain in good faith, which is independent of the rights enforced under (1)(g)—*i.e.*, the requirement that a party comply with a written agreement with respect to employment relations. Because both parts of our test under OAR 115-035-0055(1)(b)(A) are satisfied, we conclude that both DCTU and the City are prevailing parties.

Next, we determine the percentage of the case on which each party prevailed. DCTU prevailed on one charge, and the City prevailed on one charge. However, “determining the percentage is not * * * 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 Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853, 854 (2007) (Rep. Cost Order). Rather, we also consider the relative importance and complexity of each issue, as well as the amount of time devoted to each issue. *Id.* Here, the crux of the case concerned whether DCTU had standing to bring the (1)(e) claim and whether DCTU proved the alleged (1)(e) violation. In the overall context of the litigation and our final order, the (1)(g) claim represented a very minor issue. Consequently, we conclude that DCTU prevailed on 90 percent of the case, and that the City prevailed on 10 percent of the case. Our practice is to subtract those percentages to determine a single prevailing party. *Id.* Accordingly, we conclude that DCTU is an “80-percent” prevailing party and we will adjust our award accordingly.

3. DCTU’s petition and affidavit reflect an award request of \$17,256.50 in representation costs, based on 102.10 hours of attorney time billed at \$165 per hour and 41 hours of attorney time billed at \$175 per hour.³ DCTU’s hourly rate of \$165 per hour is consistent with

²We decline the City’s request to fragment the (1)(e) charge into multiple charges based on the different legal theories advanced under that charge. Such a conclusion would be inconsistent with OAR 115-035-0055(1)(b)(A), particularly that rule’s requirement that a separate charge concern the enforcement of independent rights.

³DCTU’s petition requests an award of \$17,291.50, but that amount is the result of a mathematical error in the affidavit. The time spent and hourly rate asserted in the affidavit equal \$17,256.50 in representation costs.

the average hourly rate that this Board uses for representation costs, and the rate of \$175 per hour is slightly above that average hourly rate. *See Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129, 130 (2014) (Rep. Cost Order) (the average rate for representation costs is between \$165 and \$170 per hour). We will adjust our award accordingly.

4. DCTU's claimed time (102.1 hours) is less than what this Board considers an average amount of time for a three-day hearing. *See id.* (cases generally require an average of 45 to 50 hours per day of hearing).

5. An award of representation costs is not to exceed \$5,000, unless a civil penalty has been awarded. OAR 115-035-0055(1)(a). Here, we awarded a civil penalty, which means that the cap in OAR 115-035-0055(1)(a) does not apply. In civil-penalty cases, we typically award full representation costs, subject to any adjustments (discussed above). *See Blue Mountain Community College*, 21 PECBR at 856. We see no compelling reason to depart from that practice in this case.

6. Having considered the purposes and policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable cost of the services rendered, this Board awards DCTU representation costs in the amount of \$13,641.

ORDER

The City will remit \$13,641 to DCTU within 30 days of this Order.

DATED this 5 day of February 2016.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.