

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-003-15

(UNFAIR LABOR PRACTICE)

MICHELLE SCOTT,)	
)	
Complainant,)	
)	
v.)	
)	
SERVICE EMPLOYEES INTERNATIONAL)	FINDINGS AND ORDER ON
UNION, LOCAL 503, OREGON PUBLIC)	RESPONDENT UNION’S PETITION FOR
EMPLOYEES UNION,)	REPRESENTATION COSTS
)	
and)	
)	
STATE OF OREGON, OREGON YOUTH)	
AUTHORITY,)	
)	
Respondents.)	

On July 24, 2016, this Board issued an order holding that Respondent Service Employees International Union, Local 503, Oregon Public Employees Union (Union) did not violate ORS 243.672(2)(a), as alleged in the complaint. Because we dismissed the duty of fair representation charge against the Union, we also dismissed the companion ORS 243.672(1)(g) charge against Respondent State of Oregon, Oregon Youth Authority. The Union timely filed a petition for representation costs, and Complainant filed timely objections to that petition.

Pursuant to ORS 243.676(3)(b) and OAR 115-035-0055, this Board finds that:

1. The Union is a prevailing party.
2. This case required one day of hearing. However, at the hearing, Complainant was not allowed to call witnesses or offer exhibits because she failed to comply with the Administrative Law Judge’s (ALJ) pre-hearing instructions on providing Respondents with her witness list, exhibit list and copies of her exhibits. Further, Complainant failed to provide the ALJ with copies of her witness and exhibit lists in a timely manner. As a result, no testimony was received, but several Union exhibits and two joint exhibits were entered into the record. The parties also submitted post-hearing briefs.

3. The Union requests an award of \$5,000, the maximum amount awarded by this Board unless a civil penalty is also ordered. OAR 115-035-0055(1)(a). The Union's request is based on costs of \$7,507.50, which reflect 45.5 hours of attorney time billed at a rate of \$165 per hour.

4. The Union's hourly rate charged is consistent with the average hourly rate used by this Board in awarding representation costs. 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 used for representation costs is between \$165 and \$170 per hour).

5. The number of hours claimed by the Union is also within the average for a one day hearing. In awarding representation costs, this Board generally uses an average of 45 to 50 hours per day of hearing. *Id.*

6. Complainant objects to any award of costs to the Union, or in the alternative, requests a "drastically" reduced award. In support of this position, counsel for Complainant asserts that the Union's defense of this matter was not "challenging" because Complainant was unable to call witnesses or offer evidence. Counsel for Complainant further avers that the Union should not receive representation costs because the ALJ allowed the "hearing" to proceed even after making this evidentiary ruling.

These arguments are not well taken. Complainant was obligated to comply with the ALJ's pre-hearing instructions. But Complainant—through her counsel's admitted error—failed to fulfill this obligation, resulting in the ALJ's decision to preclude Complainant from calling witnesses or offering exhibits. When that ruling was made at the hearing, Complainant could have moved to withdraw the complaint, terminating the case without further expenditure of time and money by Respondents. Yet Complainant made no such efforts. To the contrary, Complainant's counsel continued to argue the case, submitting a detailed post-hearing brief on the merits of the case based on the documents admitted into the record with the consent of the parties. Notably, in that brief, Complainant's counsel did not object to the ALJ's ruling or argue that the ALJ should have dismissed the case at the hearing, rather than allowing Complainant the opportunity to argue the merits of the case. Finally, Complainant's counsel did not file objections to the ALJ's procedural ruling or to any aspect of the recommended order.

7. Complainant relied on her own funds to pursue this case. In duty of fair representation matters such as this, we typically limit any award to ten percent of what we deem to be reasonable representation costs. See, e.g., *Horn v. Salem Police Employees' Union and City of Salem and Salem Police Department*, Case No. FR-002-13, 26 PECBR 348, 349 (2014) (Rep. Cost Order). We issue smaller awards in these cases because the Public Employee Collective Bargaining Act (PECBA) contemplates a number of circumstances under which individuals must rely on personal resources in order to seek protection of their PECBA rights, and it would unduly chill pursuit of those rights to assess the usual costs against such complainants. *Reinwald v. Employment Department*, Case No. UP-81-93, 16 PECBR 14, 16 n 4 (1995) (Rep. Cost Order). We will take this into consideration in determining an award that is consistent with the purposes and policies of the PECBA. See OAR 115-035-0055(4)(a).

8. Under the circumstances of this case, having considered both parties' submissions, our awards in similar cases, and the purposes and policies of the PECBA, we award the Union representation costs of \$750.

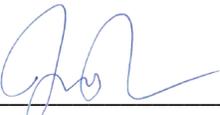
ORDER

Complainant will pay the Union \$750 within 90 days of the date of this Order.

DATED October 14, 2016.



Adam L. Rhynard, Chair



Jason M. Weyand, Member

This Order may be appealed pursuant to ORS 183.482.