

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-043-13

(UNFAIR LABOR PRACTICE)

RICHARD BELL,)
)
 Complainant,)
)
 v.)
)
 TRI-COUNTY METROPOLITAN)
 TRANSPORTATION DISTRICT OF OREGON)
 and PENSION PLAN FOR BARGAINING)
 UNIT EMPLOYEES OF TRIMET,)
)
 Respondents.)

FINDINGS AND ORDER ON
RESPONDENTS' PETITIONS FOR
REPRESENTATION COSTS

Complainant Bell filed an unfair labor practice alleging that Respondents violated ORS 243.672(1)(g) and (2)(d) by denying him certain pension benefits upon his retirement. The matter had previously been filed in circuit court, where Respondents asserted that the Board had exclusive jurisdiction to resolve the matter. The circuit court held its proceeding in abeyance until this Board could hear the matter.

In orders issued January 29 and March 8, 2016, we dismissed Complainant's unfair labor practice complaint, determining that we lacked jurisdiction over the claim involving Respondent Pension Plan because it was not a public employer, labor organization or designated representative under ORS 243.672. We also dismissed the claim against Respondent TriMet because Complainant did not prove that TriMet breached the at-issue collective bargaining agreements with respect to the calculation of Complainant's pension benefits.

Both Respondents filed timely petitions for representation costs, and Complainant filed timely objections.¹

¹We withdrew earlier orders for representation costs and awaited resolution of the Pension Plan's petition for judicial review. That petition has been withdrawn, and the matter is now ready for the issuance of this order.

Pursuant to ORS 243.676(3) and OAR 115-035-0055, we find that:

1. The Respondents are the prevailing parties.
2. This case required four days of hearing. Additionally, the parties had to address an attorney-client privilege issue advanced to the Board before the issuance of the Administrative Law Judge's recommended order.
3. Respondent Pension Plan requests an award of \$5,000. The Pension Plan states that it incurred \$73,146.60 in representation costs, consisting of \$70,011 in attorney fees and \$3135.60 in costs.² The number of attorney hours spent was 298.30, with 212.70 hours billed at \$200 per hour. The remaining hours were billed at rates ranging from \$160 to \$340 per hour.
4. Respondent TriMet requests an award of \$5,000. TriMet states that it spent "at least" \$38,275.50 on this case, consisting of \$37,765 in attorney fees and \$510.50 in costs. The number of attorney hours spent was 215.8, billed at \$175 per hour.³
5. Respondents' hourly rates are higher than the average hourly rate used by this Board. *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).
6. The Respondents' claimed time is greater than what this Board considers an average amount of time. *See id.* (cases generally require an average of 45 to 50 hours per day of hearing).
7. We generally award a prevailing party a percentage of its reasonable representation costs, subject to the \$5,000 cap in OAR 115-035-0055(1)(a). Reasonable representation costs are costs that are calculated using the Board's criteria of hourly rate and number of hours.

Complainant's objections to an award of representation costs fall into three categories: (1) the Pension Plan and TriMet forced the filing of this complaint, and neither respondent succeeded on the central issue of the case; (2) awarding representation costs in this matter is not consistent with the purposes and policies of the Public Employee Collective Bargaining Act (PECBA) because public employees' rights will be chilled; and (3) Complainant is an individual who had to rely on his own personal resources to advance this case.

²Both Respondents included costs in their requests. "Photocopying, clerical, mileage, postage, and telephone costs are not awarded in representation cost awards." *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-069-11, 26 PECBR 412, 413 (2015) (Rep. Cost Order).

³TriMet used in-house counsel for a substantial number of hours, but also was billed by outside counsel for approximately 53 hours.

Although Respondents are the prevailing parties (*see* OAR 115-035-0055(1)(b)— “[p]revailing party is the party in whose favor a Board Order is issued”), Complainant has a meritorious argument that the only reason that he is before this Board is due to the jurisdictional arguments raised by Respondents in circuit court. Specifically, as noted above, Complainant availed himself of this forum at the direction of the circuit court because Respondents asserted that Complainant was *required* to litigate his pension benefits claim before this Board. To now order that Complainant must pay significant representation costs does not, in our opinion, advance “consistency with the policies and purposes of the PECBA.” OAR 115-035-0055(4)(a).

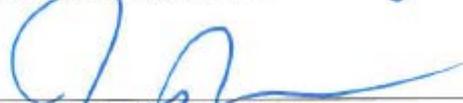
Consequently, considering all the facts of this matter, along with the narrow focus of this particular order, and the purposes and policies of the PECBA, we will award minimal representation costs to both respondents.

ORDER

Complainant is required to pay representation costs of \$100 to Respondent TriMet and \$100 to Respondent Pension Plan, within 90 days of the date of this order.

DATED July 15, 2016.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.