



Judgment which designated Respondent as the prevailing party on appeal. On February 25, 2002, Respondent filed a petition for attorney fees on appeal. On March 11, 2002, Complainant filed objections and a motion to strike the petition.

On remand, we reviewed the record without the document the Court of Appeals said we erroneously relied upon. Although the rationale was substantially different from that in our original Order, we reached the same conclusion. That is, we held that Respondent violated subsection (1)(g) when it refused to arbitrate a grievance. 19 PECBR 762.<sup>2</sup>

Respondent again sought review by the Court of Appeals. The Court denied Respondent's request to stay the Board's Order pending appeal, 184 Or App 97, 55 P3d 546 (2002), and on December 15, 2004, the Court affirmed this Board's Order on Remand, 196 Or App 586, 103 P3d 1138. On March 17, 2005, the Court issued an Appellate Judgment which designated Complainant as the prevailing party on appeal. On March 30, 2005, Complainant filed a "Petition for Attorney Fees And/Or Representation Costs." On April 4, 2005, Respondent filed objections to the petition.<sup>3</sup>

This is an unusual circumstance where there were two separate appeals and each party prevailed on one appeal. We will consider both parties' petitions for attorney fees in this Order. We will separately determine the appropriate award on each petition and then offset the awards.

Pursuant to OAR 115-035-0057, this Board makes the following findings:

#### RESPONDENT'S PETITION

1. Respondent filed a timely petition for attorney fees on appeal.<sup>4</sup> Complainant filed timely objections to the petition.

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<sup>2</sup>Neither party filed a timely petition for representation costs based on our Order on Remand.

<sup>3</sup>Complainant filed a reply to Respondent's objections. Our rules do not provide for a reply to objections, and Complainant did not seek our permission to file it. We find no extraordinary circumstances that would warrant a reply, and we will disregard it.

<sup>4</sup>OAR 115-035-0057(1) requires a party to file a petition for attorney fees "within 21 days of the date of the appellate judgment." Complainant filed this petition after the Court of Appeals issued its decision, but before it issued an appellate judgment. We will not dismiss a petition for attorney fees as premature so long as the opposing party suffers no prejudice and the other provisions of the rule are met. *Chenowith Education Association v. Chenowith School District 9*, Case No. UP-104-94, 17 PECBR 21 (1996) (Attorney Fees Order). On this record, we consider the filing timely.

Complainant asks us to strike the petition because it lacks the statement required by OAR 115-035-0055(2)(c) explaining how the amount sought would be consistent with the purposes and policies of the Public Employee Collective Bargaining Act (PECBA). The policy statement need not refer to a specific section of ORS 243.656 so long as it discusses how an award would further PECBA policies. *Mengucci v. Teamsters Local 223*, Case No. C-188-83 (Unpublished Rep. Cost Order, February 1985). We find Respondent's policy discussion minimally sufficient.

2. The March 19, 2002 Appellate Judgment names Complainant as the prevailing party.

3. Respondent requests an award of \$3,500, the maximum generally permitted by our rule. According to the affidavit of counsel, total attorney fees on appeal are \$11,149.30. This amount includes clerical costs and fees for computer research. Such out-of-pocket expenses are not properly part of an attorney fees award, and we will not consider them.

The remaining request is for 95.4 hours valued at \$10,611.50, broken down as follows: 74 hours of attorney time at \$120 and \$125 per hour; 20.8 hours of paralegal time at \$75 and \$85 per hour; and .6 hours of law clerk time at \$40 and \$45 per hour. Based on our review of the supporting documents that accompany the petition, it appears that 14.55 of the requested hours concern work in proceedings before this Board rather than on appeal. We will disregard these hours and adjust the request to 80.85 hours.

The hourly rate is reasonable. The hours, even after adjustment, are more than three times the average for appeals of this type. *See Portland Association of Teachers and Poole v. Multnomah School District No. 1*, Case No. UP-72-96 (Unpublished Attorney Fees Order, July 2001) (74.6 hours is about three times the number of hours claimed in similar appeals). We will consider this factor in our award.

4. The complaint alleged that Respondent refused to arbitrate several grievances. We found no refusal in two instances and dismissed those charges. We found that Respondent refused to arbitrate one grievance in violation of ORS 243.672(1)(g), and Respondent appealed our conclusion that it acted unlawfully. The Court of Appeals reversed our decision and remanded it to us for further consideration. It held that we improperly considered a document that was part of the official agency file but was not part of the evidentiary record. On remand, we again found that Respondent unlawfully refused to arbitrate a grievance, although the rationale was substantially different. Under these circumstances, we believe an average attorney fee award is appropriate.

Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards Respondent attorney fees in the amount of \$1,100.

### COMPLAINANT'S PETITION

1. Complainant filed a timely petition for attorney fees and Respondent filed timely objections.

Respondent asserts that the petition is untimely and should be dismissed because it was not filed within 21 days after the Court of Appeals issued its decision. Respondent misconstrues our rule. OAR 115-035-0057(1) requires a petition for attorney fees to be filed with the Board "within 21 days of the date of the appellate judgment." The decision is not the same as an appellate judgment. The court issues an appellate judgment when all appeals have been exhausted or the time lines for further appeals have expired. The court here issued a document marked "Appellate Judgment" which states that it is effective March 17, 2005. Complainant's petition was filed within 21 days of that date and is therefore timely.

2. The March 17, 2005 Appellate Judgment designated Complainant as the prevailing party.

3. Complainant requests \$3,500, the maximum attorney fee award generally permitted under our rules.

In deciding a petition for attorney fees, we consider only the time spent on services related to the appeal. Complainant also petitions for time spent in proceedings before this Board and for work performed in the underlying grievance arbitration. Such time is not properly part of a petition for attorney fees on appeal, and we will not consider it. In analyzing the documents submitted, we have identified 32.8 hours of legal services that are relevant to the appeal. The time was billed at \$130 and \$135 per hour.

The hourly rate is reasonable. The number of hours slightly exceeds the average for similar appeals, a factor we consider in making our award.

4. The complaint alleged that Respondent refused to arbitrate several grievances. We found no refusal in two instances and dismissed those charges. Neither party appealed this portion of the decision, and those charges were no longer at issue in any of the subsequent proceedings in this matter. We further concluded that Respondent refused to arbitrate one grievance in violation of ORS 243.672(1)(g), and it is this conclusion that

became the focus of all subsequent proceedings. Respondent appealed our conclusion that it acted unlawfully, and the Court of Appeals reversed our decision and remanded it to us for further consideration. It held that we improperly considered a document that was part of the official agency file but was not part of the evidentiary record. On remand, we again found that Respondent unlawfully refused to arbitrate a grievance, although the rationale was substantially different. Respondent again sought appellate review. The Court of Appeals affirmed our conclusion that Respondent refused to arbitrate in violation of ORS 243.672(1)(g). This appeal is the subject of Complainant's petition. We typically issue larger than average awards in refusal to arbitrate cases to effectuate the policies of the PECBA which favor arbitration of disputes. Under these circumstances, we believe a larger than average attorney fee award would be appropriate.

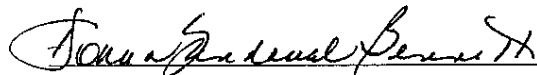
Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards Complainant attorney fees in the amount of \$1,600.

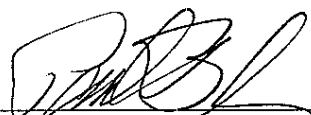
We offset the \$1,100 we awarded Respondent as the prevailing party on the first appeal. The result is an award of \$500 to Complainant.

ORDER

Respondent will remit \$500 to Complainant within 30 days of the date of this Order.

DATED this 7<sup>th</sup> day of December 2005.

  
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Donna Sandoval Bennett, Chair

  
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Paul B. Gamson, Board Member

  
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James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

