EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-01-10

(UNFAIR LABOR PRACTICE)

KEVIN ZEMMER and RONALD KIRK, Complainants,	)	
v.	)	FINDINGS AND ORDER ON RESPONDENT STATE OF OREGON'S PETITION FOR REPRESENTATION COSTS
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES and STATE OF OREGON, DEPARTMENT OF CORRECTIONS, Respondents.	)	

Kevin Zemmer and Ronald Kirk (Complainants) filed this unfair labor practice complaint against their union and their employer. They alleged that their employer, the State of Oregon, Department of Corrections (State), violated ORS 243.673(1)(g) when it reduced their seniority, contrary to the terms of the applicable collective bargaining agreement. They further alleged that their union, American Federation of State, County and Municipal Employees (AFSCME), violated ORS 243.672(2)(a) when it interpreted a settlement agreement to supercede the collective bargaining agreement, gave Complainants inaccurate information about their seniority which they relied on to their detriment, and refused to pursue a contract grievance to challenge their seniority reduction. On August 18, 2010,[1] this Board dismissed the complaint. 23 PECBR 886. On September 8, the State petitioned for representation costs. On September 14, Complainants objected to the petition.

[1]All dates are 2010 unless stated otherwise.

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

1. The State filed a timely petition for representation costs and Complainants filed timely objections to the petition.

2. The State is a prevailing party.

3. According to the affidavit of counsel, the State incurred $606.20 in representation costs. This consists of 4.2 hours of attorney time billed at $137 per hour, and .4 hours of paralegal time billed at $77 per hour.

This Board dismissed the complaint without a hearing. Complainants do not object to the hourly rate or the amount of time spent, and we find both to be reasonable. *See Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 510 (2010) (Rep. Cost Order) ($165-170 per hour is an average rate); *Sisney v. IBEW Local 659, and Eugene Water and Electric* Board, Case No. FR-2-10, 23 PECBR 853 (2010) (Rep. Cost Order) (5.7 hours was reasonable when a DFR complaint was dismissed without hearing).

4. This is a hybrid duty of fair representation case. *See Chan v. Clackamas Community College and Clackamas Community College Association of Classified Employees,* Case No. UP-13-05, 21 PECBR 563 (2006), *ruling on reconsideration,* 21 PECBR 597 (2007). Complainants asserted that the State reduced their seniority in violation of the collective bargaining agreement and that AFSCME failed to fairly represent them in challenging the seniority reduction. We dismissed portions of the complaint as untimely and the remaining portions for failure to state a claim for relief.

The Complainants argue that we should not award any representation costs because this Board erred in determining that portions of the complaint were untimely. A petition for representation costs is not the proper vehicle to reargue the merits of the underlying case. If Complainants believed our decision was wrong, they could have asked us to reconsider it, OAR 115-010-0100, or they could have appealed it to the Court of Appeals, ORS 183.482. They did neither. In a proceeding for representation costs, we assume the underlying Order is correct and we will not reconsider the merits.

An average award is approximately one-third of the prevailing party's reasonable representation costs, up to the $3,500 limit. OAR 115-035-0055(1)(a); *Benton County Deputy Sheriff's Association v. Benton County,* Case No. UP-24-06, 22 PECBR 46, 47 (2007) (Rep. Cost Order). We adjust that percentage up or down for policy reasons described in our rules and cases. In duty of fair representation cases such as this, where complainants rely on their personal resources to litigate the claim, we usually make a smaller-than-average award. OAR 115-035-0055(4)(a)(D); *Hadley, Hadley, Cordes,*

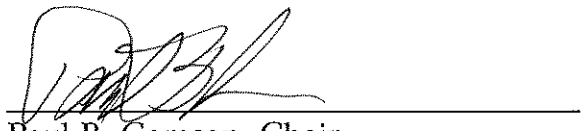
Burton, and McMenamy v. Multnomah County Deputy Sheriff's Association and Multnomah County, Case No. FR-1-08, 22 PECBR 627 (2008). We typically award approximately ten percent of the petitioner's reasonable representation costs. *Randolph v. International Alliance of Theatrical Stage Employees and Metropolitan Exposition and Recreation Commission*, Case Nos. UP-15/16-92, 15 PECBR 337 (1994). It serves the purposes and policies of the Public Employee Collective Bargaining Act (PECBA) to ensure that bargaining unit members have realistic access to this Board when they believe their union has failed to represent them fairly. It would discourage employees from seeking this Board's protection if we awarded costs that were unduly burdensome to an individual who does not have the collective resources of a union or a public employer.

After considering the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards the State representation costs in the amount of $60.

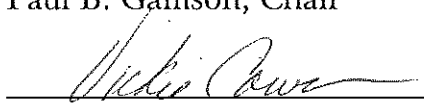
ORDER

Complainants will remit $60 to the State within 90 days of the date of this Order.

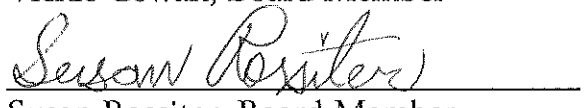
DATED this 16 day of December 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.