

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-4-06

(UNFAIR LABOR PRACTICE)

LEBANON EDUCATION)	
ASSOCIATION/OEA,)	
)	
Complainant,)	
)	FINDINGS AND ORDER ON
v.)	COMPLAINANT'S PETITION
)	FOR REPRESENTATION COSTS
LEBANON COMMUNITY)	
SCHOOL DISTRICT,)	
)	
Respondent.)	
_____)	

On March 25, 2008, this Board issued an Order in which we concluded that the Lebanon Community School District (District) violated ORS 243.672(1)(a), (b), and (e). We dismissed one other charge against the District and rejected the Lebanon Education Association's (Association) request for a civil penalty. 22 PECBR 323.

On April 9, 2008, the Association petitioned for representation costs. On April 14, 2008, the District objected to the petition.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. The Association filed a timely petition for representation costs. The District filed timely objections to the Association's petition.
2. Both parties partially prevailed. Only the Association petitioned for representation costs. In such circumstances, we adjust the request to reflect only the

percentage on which the petitioning party prevailed. *Ashland Police Association v. City of Ashland*, Case No. UP-50-05, 21 PECBR 551, 552 (2006) (Rep. Cost Order); *Enterprise Education Association v. Enterprise School District No. 21*, Case No. UP-16-04, 21 PECBR 413, 414 (2006) (Rep. Cost Order).¹ To determine the percentage of a case on which a party prevailed, we consider the total number of separate issues involved, the number of issues on which the petitioner prevailed, the relative importance or significance of each issue, and the amount of time reasonably devoted to each issue. *See Arlington Education Association v. Arlington School District No. 3*, Case No. UP-65-99, 21 PECBR 192, 195 (2005) (Rep. Cost Order).

Here, we concluded that the District violated ORS 243.672(1)(a) and (b) when it disciplined bargaining unit member and Association officer Kim Fandiño for making direct contact with a school board member. We also held that the District policies which prohibited such contact, even by an employee conducting Association business, violated ORS 243.672(1)(a) on their face. We chose not to decide whether Fandiño's discipline also violated ORS 243.672(1)(c). We further concluded that the District violated ORS 243.672(1)(e) both by unilaterally changing its practice in regard to charging the Association for information it requested and by delaying and refusing to respond to the Association's request for information related to the disciplinary action imposed upon Fandiño. We dismissed a separate charge that a District administrator's discussion with bargaining unit member Debra McIntyre about an e-mail she sent to a District school board member violated ORS 243.672(1)(a).

The Association thus prevailed on five charges and the District prevailed on one.² Based on our review of the record, we conclude that all of the issues had

¹The District was also entitled to petition for representation costs for the portion of the case on which it prevailed. OAR 115-035-0055(1)(b). Had it done so, our analysis would be different. *See Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853, 854-55 (2007) (Rep. Costs Order) (describing the analysis this Board uses when both parties partially prevail and both petition for representation costs).

²As noted, we opted not to decide the Association's claim that the District violated ORS 243.672(1)(c) when it disciplined Fandiño. This does not constitute a separate charge because it arose from the same operative facts as the claims we addressed under subsections (1)(a) and (b). *See* OAR 115-035-0055(1)(b)(A) (separate charges are those that "are based on clearly distinct and independent operative facts") It is thus part of the series of claims on which the Association prevailed.

roughly equal significance, and that an approximately equal amount of time was devoted to each issue. We conclude that the Association prevailed on 83 percent of the case, and we will adjust the Association's request accordingly.

3. The Association requests an award of \$3,500, the maximum amount permitted under our rules. According to the affidavit of counsel, the Association incurred a total of \$14,939 in representation costs for 111.8 hours of attorney time billed at various rates between \$70 and \$145 per hour. We find the hourly rates of \$145 or less to be reasonable.

The hearing lasted four days, and the issues were both numerous and complex. Cases normally take an average of 45-50 hours of attorney time for each day of hearing, and perhaps longer if the issues are especially complex. *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853, 855 (2007) (Rep. Cost Order). The total number of hours spent on this case is well below the average for cases of similar length and complexity.

4. We concluded that the District violated ORS 243.672(1)(a), (b), and (e). 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 the percentage up or down for policy reasons described in our rules and cases. We generally adjust the award upward when an employer violates subsection (1)(a) because the employer's conduct strikes at core Public Employee Collective Bargaining Act (PECBA) rights. *State Employees International Union Local 503, OPEU v. State of Oregon, Judicial Department*, Case No. UP-3-04, 21 PECBR 179 (2005) (Rep. Cost Order). We generally make an average award in cases involving either a unilateral change or a refusal to provide information under subsection (1)(e). *Northwest Education Association v. Northwest Regional Education Service District*, Case No. UP-23-06, 22 PECBR 482 (2008) (Rep. Cost Order) (average award in unilateral change cases); *Benton County Deputy Sheriff's Association v. Benton County*, 22 PECBR 46 (average award in refusal to supply information cases). We generally adjust the award downward in cases that present a novel issue so that parties will not be deterred from litigating novel issues. *State Employees International Union Local 503, OPEU v. State of Oregon, Judicial Department*, Case Nos. UP-52/62-03, 21 PECBR 810 (2007) (Rep. Cost Order). The District's defense that the Association waived its right to bargain over the cost of producing information presented this Board with a novel legal issue.

Balancing all of these factors, we conclude that an average award is appropriate.³ Here, an average award would exceed the \$3,500 cap, so we will award the maximum permitted under Board rules.

Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards the Association representation costs in the amount of \$3,500.

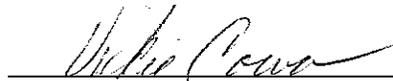
ORDER

The District will remit \$3,500 to the Association within 30 days of the date of this Order.

DATED this 17th day of August 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member

*Susan Rossiter, Board Member

*Board Member Rossiter is recused from this matter.

This Order may be appealed pursuant to ORS 183.482.

³The District correctly notes that this Board's final Order varied from the ALJ's Recommended Order. The difference was slight. In these circumstances, we see no significance in these differences for purposes of determining the appropriate amount of representation costs.