

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-7-07

(UNFAIR LABOR PRACTICE)

AFSCME LOCAL 189,	)	
	)	
Complainant,	)	
	)	FINDINGS AND ORDER
	)	ON COMPLAINANT'S
v.	)	PETITION FOR
	)	REPRESENTATION COSTS
CITY OF PORTLAND,	)	
	)	
Respondent.	)	
	)	

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On October 23, 2008, this Board issued an Order which held that the City of Portland (City) committed various violations of ORS 243.672(1)(a) and (b). 22 PECBR 752. On January 5, 2009, we issued an Order on Reconsideration which clarified the remedy. 22 PECBR 908. On November 13, 2008, AFSCME Local 189 (AFSCME) petitioned for representation costs. On December 4, 2008, the City objected to the petition.

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

1. AFSCME filed a timely petition for representation costs and the City filed timely objections to the petition.
2. AFSCME is the prevailing party.

The City asserts it prevailed in part.<sup>1</sup> We disagree. Some brief background will put the City's argument in perspective. One issue before the Board was whether the City

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<sup>1</sup>The City provided scant argument to support its position. It apparently intends to argue as follows: a party is entitled to recover representation costs on only that portion of the case on which it prevails; AFSCME did not prevail on all of its legal theories, so it is not entitled to all of the representation costs it requests.

could lawfully threaten to discipline a union representative unless she revealed the contents of her conversations with a bargaining unit member. In pursuit of this claim, AFSCME argued, among other legal theories, that this Board should adopt a full evidentiary privilege for communications between union representatives and bargaining unit members. We held that it was not necessary to reach this question because we could decide the issue using our existing legal standards under subsection (1)(a). We decided that the City acted unlawfully.

The City now asserts that it partially prevailed because we did not adopt the evidentiary privilege urged by AFSCME. This argument misconstrues Board rules that govern representation costs. Under OAR 115-035-0055(1)(b), a prevailing party is one that prevails on a “separate charge.” A charge is considered separate if it (1) is “based on clearly distinct and independent operative facts; i.e. the charges could have been plead and litigated without material reliance on the allegations of the other(s),” and (2) concerns the enforcement of rights that are independent of any other charges. *Id.*; *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 526 (2003) (Rep. Cost Order).

Applying these standards, the City did not prevail. At most, we rejected AFSCME’s alternative legal theory. AFSCME prevailed on the same facts and enforced the same right, albeit under a slightly different legal theory. AFSCME is the prevailing party.

3. AFSCME asks us to award representation costs of \$3,500, the maximum generally permitted by Board rules. 115-035-0055(1)(a). According to the affidavit of counsel, AFSCME incurred attorney fees of \$28,077.50. This represents 178.7 hours of attorney time billed at an hourly rate of either \$155 or \$165, plus \$85 per hour for travel time. The average hourly rate is \$157.12.

The City does not object to the requested hourly rate. We find that a rate of up to \$155 per hour is reasonable.

The hearing lasted for three days and part of a fourth. Cases typically take an average of 45-50 hours of attorney time for each day of hearing. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 623, 625 (2008) (Rep. Cost Order). The hours expended here are within that range.<sup>2</sup>

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<sup>2</sup>The City notes that AFSCME spent a fraction of an hour reviewing a press release, a task which, according to the City, does not qualify as a representation cost. We will take this into account in determining the reasonable number of hours devoted to this case. The City also asserts—mistakenly—that AFSCME seeks reimbursement for its filing fee. AFSCME’s petition does not seek such reimbursement, and we do not consider it. *See Joseph Education Association v. Joseph School District No. 6*, Case No. UP-56-95, 16 PECBR 775, n. 1 (1996) (Rep. Cost Order) (filing fees are not reimbursed as a representation cost).

4. This Board concluded that the City violated ORS 243.672(1)(a) in two separate incidents involving Angela Oswald. Oswald is both a City employee and an AFSCME official. In the first incident, a number of employees approached Oswald about a rumor that a retiring supervisor had already chosen her successor without following the process specified in the collective bargaining agreement for filling the vacancy. Oswald, acting in her capacity as an AFSCME official, sent an e-mail to several City supervisors asking about the rumor and reminding the City of its contractual obligation to interview qualified bargaining unit members for promotions. The City then charged Oswald with violating City policies based on her e-mail, investigated the charges, and gave her a letter of expectations. We concluded that the City's actions were unlawful because they interfered with the protected right to contact the employer about concerns and disputes that arise in the workplace.

The second incident arose after a bargaining unit member spoke with Oswald about concerns in the workplace. The City then threatened Oswald with discipline unless she told the City what she discussed with the bargaining unit member. We concluded that employees engage in protected activity when they speak to a union official about workplace issues. We further concluded that employees would be chilled in exercising this right if union officials could be forced to reveal the contents of these conversations. Accordingly, we held that the City violated ORS 243.672(1)(a) when it threatened Oswald with discipline unless she revealed the contents of her conversation with a bargaining unit member.

We also concluded that the City violated ORS 243.672(1)(b) when it placed Oswald on administrative leave and denied her access to City facilities. Without such access, Oswald was unable to act as a union representative for employees in meetings with management. We concluded that the City thus interfered with AFSCME in performing its duties as the exclusive bargaining representative.

An average award is approximately one-third of a prevailing party's reasonable representation costs. *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 based on a variety of policy considerations described in our rules and cases. We typically make a larger-than-average award when, as here, an employer violates subsection (1)(a), because the employer's conduct strikes at the heart of rights protected by the Public Employee Collective Bargaining Act (PECBA). *Grants Pass Association of Classified Employees/OEA/NEA and Bullington v. Grants Pass School District No. 7*, Case No. UP-5-07, 23 PECBR 87 (2009) (Rep. Cost Order). Conversely, when a case involves novel legal issues, we typically make a smaller-than-average award so that parties will not be deterred from litigating novel legal issues. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-5-06, 22 PECBR 479, 480 (2008) (Rep. Cost Order). This case presented a novel issue. The Board had not previously decided whether an employer can compel a union representative to reveal the contents of a conversation with a bargaining unit member.

Here, we balance these competing policies and conclude that an average award of representation costs is appropriate. An average award here would far exceed the \$3,500 cap, so we will award the maximum amount permitted by 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 AFSCME representation costs in the amount of \$3,500.

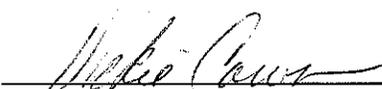
ORDER

The City shall pay \$3,500 to AFSCME within 30 days of the date of this Order.

DATED this 14<sup>th</sup> day of May 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.