

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-14-02

TEAMSTERS LOCAL 670,)	
)	
Complainant,)	
)	
v.)	FINDINGS AND ORDER ON BOTH
)	PARTIES' PETITIONS FOR
CITY OF VALE,)	REPRESENTATION COSTS
)	
Respondent.)	
_____)	

This Board issued an Order on May 23.¹ 20 PECBR 337. Both parties asked us to reconsider portions of the decision. We issued an Order on Reconsideration on August 8, 20 PECBR 388. Each party now petitions for an award of representation costs. Both parties filed their petitions on June 19; each filed objections to the other party's petition on July 10. Pursuant to Board Rule 115-35-055, we make the following findings:

1. Both the Respondent and the Complainant filed timely petitions for representation costs. Each filed timely objections to the other party's petition.
2. The Complainant is a prevailing party. The Respondent is not a prevailing party.

Representation costs are available to a party that prevails on an unfair labor practice complaint. ORS 243.676(2)(d) and (3)(b); Board Rule 115-35-055(1). Both parties can be considered "prevailing" for purposes of representation costs when this Board finds in favor of each on a "separate charge." This Board has established a two-part test to define "separate charge." A "separate charge" is one "[1] 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] the separate charges concerned the enforcement of rights independent of the other(s)." Board Rule 115-35-055(1)(b)(A). To be considered "separate," a charge must meet both prongs of this test.

¹All dates are 2003 unless stated otherwise.

The Complainant asserts that it alone is the prevailing party. The Respondent does not dispute that the Complainant is a prevailing party. The Respondent asserts, however, that it also prevailed on a portion of the complaint and is thus entitled to an offsetting award of representation costs. See *Lane Unified Bargaining Council [LUBC] v. McKenzie School District*, Case No. UP-14-85 (Rep. Cost Order, January 1986) (where both parties prevail, this Board will determine the percentage won by each and offset the percentages for purposes of the award). We conclude that Complainant alone is the prevailing party.

This dispute arose out of Respondent's closure of its police department. We dismissed allegations under ORS 243.672(1)(a), (b) and (c) that the Respondent closed the department in retaliation for protected activity; we dismissed an allegation under ORS 243.672(1)(e) that Respondent failed to bargain over its decision to close the department; and we concluded that Respondent violated ORS 243.672(1)(e) and (f) by closing the department without first bargaining to completion over the impacts of the closure.

In *OSPOA v. Dept. of State Police and DAS*, Case No. UP-30-00, 18 PECBR 940 (Rep. Cost Order, November 2000), the complaint alleged, among other things, that the employer engaged in direct dealing with bargaining unit members in violation of ORS 243.672(1)(a), (b) and (e). In the underlying case, we separately discussed each theory. Despite these separate theories, our Order on representation costs described it as a single "discrete charge[]"²

The different theories here similarly constitute a discrete charge. They are not "separate" charges within the meaning of this Board's rule. The operative facts in each charge include the Respondent's closure of its police department and the events that led up to the closure. The complaint presented several legal theories to challenge the closure. Although each theory has some facts unique to it, all of them share a core group of operative factual allegations regarding the closure. They could not have been pled or litigated without material reliance on those core allegations. They therefore do not meet the first prong of the test in Board Rule 115-35-055(b)(A). Under the plain language of this Board's rule, the charges were not

²We did find that this single "discrete charge[]" was a "separate charge" from the other charge in that case, which was that the employer had refused to implement an interest arbitration award. That charge could have been pled and litigated separately. The same is true of the other cases cited by the dissent. Thus, *Coos Bay Education Association v. Coos Bay School District*, 17 PECBR 643, 644 (1998), involved separate charges of (1) threats to place a teacher on a plan of assistance if she prevailed in her grievance, and (2) unilateral change in status quo concerning tuition reimbursement. *LUBC* involved separate charges of (1) refusing to reduce an agreed-upon grievance settlement to writing and signing it, and (2) refusing to arbitrate that grievance. While the first turned on factual questions of offer and acceptance of a proposed grievance settlement, the latter turned on the arbitrability of a grievance in light of a then-recent grievance moratorium enacted by the legislature.

“separate.”³

We conclude that Respondent did not prevail on a “separate charge” and is therefore not a prevailing party under Board rules. We will therefore dismiss Respondent’s petition.

3. The Complainant petitions for an award of \$3,500, the maximum permitted under Board rules. According to the affidavit of counsel, the Complainant was billed \$26,452.50 for 217 hours of legal services at rates ranging from \$105 to \$130 per hour.

4. The hearing was conducted on four separate days, although in actual effect, there were closer to three days of hearing.⁴ The Complainant submitted a post-hearing brief, written objections to the recommended order, oral argument to this Board, and a memorandum-in-aid of oral argument. The number of hours spent exceeds the average claimed for hearings of this length; a factor we will consider in determining the amount of the award.⁵ The hourly rate claimed is reasonable.

5. As noted, this case arose from Respondent’s closure of its police department. This Board held that Respondent violated ORS 243.672(1)(e) and (f) by implementing the closure prior to the completion of bargaining over the impacts of the closure. We also found that Respondent did not act out of an improper motive in the closure. We typically make an average award in unilateral change cases.⁶ Even after we adjust the number

³The fact that some of the legal theories in this case “concerned the enforcement of rights independent of the other(s)” does not change the result required by this Board’s rule. The existence of separate legal theories is likely to imply separate legal rights. Finding a charge to be “separate” based solely on a party’s decision to plead in the alternative would render the first prong of this Board’s rule meaningless.

⁴Illness of the Administrative Law Judge required rescheduling after the second day of hearing.

⁵Although the number of attorney hours spent on behalf of the Complainant exceeds the average, we note from the affidavit submitted by Respondent’s counsel that Respondent devoted an even greater amount of attorney time (239.55 hours) to this matter. We will consider this fact in determining whether the number of hours the Complainant devoted to this matter was reasonable.

⁶*OSPOA v. Dept. of State Police*, Case No. UP-24-00 (Rep. Cost Order, February 2002); *FOPPO v. Washington County*, Case No. UP-70-99 (Rep. Cost Order, October 2001); *AOCE v. Department of Corrections*, Case No. UP-22-00 (Rep. Cost Order, January 2001).

of hours, an average award⁷ would exceed the \$3,500 maximum permitted by Board rules. We will award the maximum amount.⁸

Having considered the appropriate charges for services rendered, prior awards in similar cases, and the purposes and policies of the Public Employee Collective Bargaining Act (PECBA), this Board will award Complainant \$3,500 in representation costs.

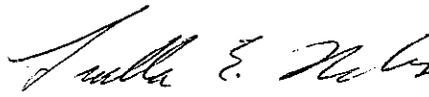
ORDER

1. The Respondent's petition for representation costs is dismissed.
2. The Respondent shall remit \$3,500 to Complainant within 30 days of the date of this Order.

DATED this 18th day of December 2003.



Paul B. Gamson, Board Member



Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

Board Chair Thomas Dissenting:

When a complainant does not prevail on all charges, this Board has considered both parties to be prevailing parties and eligible for representation costs under ORS 243.676(3)(b). See *Coos Bay Education Association v. Coos Bay School District*, 17 PECBR 643, 644

⁷An average, or insubstantial, award is approximately one-third of the representation costs reasonably incurred. *Oregon Association of Justice Attorneys v. Department of Justice*, Case No. UP-58-95 (Rep. Cost Order, April 1997); *Olney Education Association v. Olney School District 11*, Case No. UP-37-95 (Rep. Cost Order, March 1997); *Klamath Falls Association of Classified Employees v. Klamath Union/Mazama High School District No. 2*, Case No. UP-9-95 (Rep. Cost Order, February 1997).

⁸The City's belated offer to bargain does not mitigate its liability for representation costs. That offer did not include all of the elements required for good faith bargaining on the impact of its decision. In particular, the City did not offer to restore the status quo ante while bargaining was pending. Lack of that element eviscerated the Association's bargaining rights

(1998), where we wrote: "When both parties are considered prevailing parties, this Board reviews the record to determine the percentage of the case won by each party and then offsets the percentages for purposes of making a cost award." See also *OSPOA v. OSP/DAS*, Case No. UP-30-00, 18 PECBR 940 (2000), in which the union filed a complaint containing several charges involving an interest arbitration award, was successful on one charge, and three charges were dismissed; and, *LUBC v. South Lane School District*, 18 PECBR 1(1999), *aff'd* 169 Or App 280, 9 P3d 130 (2000), *reversed* 334 Or 157, 47 P3d 4 (2002), *order on remand* 19 PECBR 936 (2002), in which the union alleged that the district refused to sign a grievance settlement or, in the alternative, refused to arbitrate the grievance, in violation of ORS 243.672(1)(h) and (g). There the union was successful on what this Board considered to be the more significant (1)(g) charge. Concluding that the two charges concerned distinct rights that could have been pled and litigated separately, we found the complainant to be a 60 percent and the respondent a 40 percent prevailing party. We awarded the complainant 20 percent in our offset review.

This case involved two major elements. The larger part of this hearing involved whether the City was required to bargain the decision to close the police department; the City prevailed on that issue. The second element involved whether the City refused to bargain the impact of the change in working conditions caused by the closure; the Union prevailed on that charge.

OAR 115-35-055(1)(b)(A) states: "Separate charges in a complaint are [those allegations that are] 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 the separate charges concerned the enforcement of rights independent of the other(s)." . . ."

The Union's allegation is not that the City closed its police department.¹ The complaint consists of several distinct rights and allegations: a retaliation charge, alleging a violation of ORS 243.672(1)(a); a discrimination charge alleging the City intended to discourage membership in the union, in violation of ORS 243.672(1)(c); an interference with the administration of the Union charge alleging a violation of ORS 243.672(1)(b); a refusal to bargain a mid-term charge, in violation of ORS 243.672(1)(f) and ORS 243.698; and a refusal to bargain over the decision to close the police department, and alleged dilatory tactics in bargaining over the impact of closing the department, in violation of ORS 243.672(1)(e).

The Union filed distinct and independent charges against the City and prevailed on only two of those charges. The predominant charge in this complaint was that the City failed to negotiate over its decision to close the police department. We dismissed that charge, along

¹In this regard, the majority seems to confuse the application of this Board rule as if separate charges must arise out of a different fact situation. "Arise out of" is not a phrase used in our rule's definition of a separate charge. The rule states that a separate charge exists when each charge is based on "clearly distinct and independent operative facts."

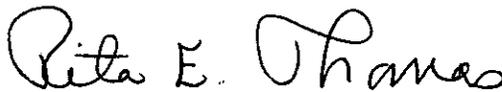
with the discrimination, retaliation, interference, and refusal to bargain mid-term change charges

A full award of \$3,500, in a case where a party prevailed on only two of six charges, is excessive and significantly more than this Board has ordered in similar cases. As a matter of policy, this Board should not order representation costs higher than average because the City actually offered to bargain the impact of the closure well before the ALJ issued her recommended order and well before this Board issued its final Order. When the City offered to bargain, the Union refused to participate in the bargaining process.

However, this case did involve four days of hearing and the majority decided that the City's failure to bargain the impact of closing the police department was an egregious violation of the PECBA. Therefore, we should award to the Union slightly higher costs than average for that charge.

There were six charges here and four of them were dismissed. If the claims were equally weighted, the City prevailed on two-thirds of the charges and the Union prevailed on one-third of the charges. However, the Union should be awarded slightly higher costs because of the nature of the PECBA violation. The representation costs award to the Union should represent 50 percent of the complaint, or \$1,750. The City is a prevailing party in 50 percent of the case and should also be awarded representation costs in the amount of \$1,750. The representation costs awarded here offset the other, and no amount is due from either party

I respectfully dissent.



Rita E. Thomas, Board Chair