

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-17-06

(UNFAIR LABOR PRACTICE)

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| OREGON AFSCME COUNCIL 75, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | FINDINGS AND ORDER |
| |) | ON RESPONDENT'S |
| STATE OF OREGON, DEPARTMENT |) | PETITION FOR |
| OF CORRECTIONS, |) | REPRESENTATION COSTS |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

Oregon AFSCME Council 75 (AFSCME) filed this unfair labor practice complaint which alleged that the Department of Corrections (DOC) violated ORS 243.673(1)(e) when it unilaterally implemented a sick leave policy. On January 27, 2009,¹ this Board issued an Order which dismissed the complaint. 22 PECBR 958. AFSCME sought reconsideration. On April 10, this Board issued an Order on Reconsideration which adhered to the original Order, as clarified. 23 PECBR 83. On February 13, DOC petitioned for representation costs. On March 2, AFSCME objected to the petition. On April 16, following the Board's Order on Reconsideration, DOC amended its petition, and on April 21, AFSCME renewed its objections.

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

1. DOC filed a timely petition for representation costs and a timely amendment to the petition. AFSCME filed timely objections to the petition and the amended petition.

¹All dates are 2009 unless stated otherwise.

2. DOC is the prevailing party.

3. According to the affidavit of counsel, DOC incurred \$33,588.60 in representation costs.² This represents 275.3 hours billed at various hourly rates ranging from \$69 for paralegal services to \$126 for attorney services. The average hourly rate is \$122, which is reasonable. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 23 PECBR 133 (2009) (Rep. Cost Order) (an hourly rate of up to \$155 is reasonable); *AOCE v. Department of Corrections*, Case No. UP-1-08, 23 PECBR 130 (2009) (Rep. Cost Order) (paralegal time may be recovered as a representation cost if not duplicative).

AFSCME asserts that the number of hours devoted to the case is excessive. An average case takes approximately 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). This case required two days of hearing. DOC attorneys spent almost three times the normal number of hours for a case of this length. We will consider this in determining the amount of representation costs reasonably incurred.

AFSCME notes that five different attorneys billed time on this matter and asserts that some of the time appears duplicative. See *Molalla Union High School Education Association v. Molalla Union High School District*, Case No. C-109-84 (November 1984) (Rep. Cost Order) (representation costs can be awarded for multiple attorneys on a case so long as they do not duplicate work). We reviewed the billing records DOC submitted with its petition, and there appears to be some duplication of work. For example, two attorneys billed time for attending oral argument on September 30, 2008, although only one attorney participated in the argument. We will take this duplication into account in determining the amount of representation costs reasonably incurred.

AFSCME's attorney asserts that her firm billed about 105 hours on this matter. The time AFSCME devoted to the case is another factor we consider in assessing the reasonableness of DOC's request. *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853, 855 (2007) (Rep. Cost Order).

4. AFSCME's complaint alleged that DOC violated ORS 243.672(1)(e) when it unilaterally implemented changes to its sick leave policy without first

²The text of the amended petition contains a higher number. We rely instead on the number in the affidavit of counsel and the accompanying billing information.

bargaining to completion. We dismissed the complaint on grounds that the parties' collective bargaining agreement permitted the changes.

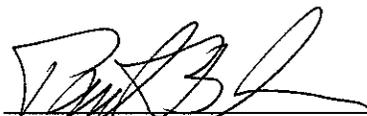
This Board typically makes an average award in a unilateral change case. *Northwest Education Association v. Northwest Regional Service District*, Case No. UP-23-06, 22 PECBR 482, 483 (2008) (Rep. Cost Order). An average award is approximately one-third of a prevailing party's reasonable representation costs, up to the \$3,500 cap. *Benton County Deputy Sheriff's Association v. Benton County*, Case No. UP-24-06, 22 PECBR 46, 47 (2007) (Rep. Cost Order); OAR 115-035-0055(1)(a). We adjust the percentage up or down based on various policy considerations identified in Board rules and cases. One such consideration is whether a case presented novel legal issues. We generally reduce the percentage to one-fourth of the reasonable costs so that parties will not be deterred from litigating novel 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). Here, the Board decision addressed novel and complex legal issues regarding the interplay between the unilateral change doctrine and the parties' collective bargaining agreement. In these circumstances, we will make a less-than-average award.

After considering the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards DOC representation costs in the amount of \$3,050.

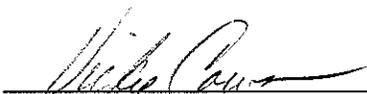
ORDER

AFSCME will remit \$3,050 to DOC within 30 days of the date of this Order.

DATED this 10th day of August 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.