

on August 6, 2010.¹ The Board continued to hold the petition for representation costs in abeyance while this Board and the parties resolved numerous compliance and enforcement issues. AFSCME submitted two supplemental requests for representation costs related to the compliance and enforcement issues. The County did not object to the supplemental requests. On February 8, 2012, the parties notified this Board that all remaining issues have been resolved.

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. AFSCME subsequently filed two supplemental petitions for representation costs to which the County did not object.
2. AFSCME is the prevailing party.

Only a “prevailing party” is entitled to representation costs. ORS 243.676(2)(d). The County asserts that AFSCME only partially prevailed and therefore is entitled to only a portion of its representation costs. *See Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 623 (2008) (Rep. Cost Order) (the Board will reduce the award of representation costs to reflect the percentage of the case on which the petitioning party prevailed); *Enterprise Education Association v. Enterprise School District No. 21*, Case No. UP-16-04, 21 PECBR 413, 414 (2006) (Rep. Cost Order) (same).

We must determine the extent to which AFSCME is the “prevailing party.” Under Board rules, a party prevails if it succeeds on a “separate charge.” A charge is considered separate if it (1) is “based on clearly distinct and 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 enforcement of rights that are independent of any other charges. OAR 115-035-0055(1)(b). To be considered separate, a charge must meet both parts of this test. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 526 (2003) (Rep. Cost Order).

We conclude that none of the charges in AFSCME’s complaint were “separate” for purposes of representation costs. All of the charges arose out of the same core of operative facts concerning the County’s decision to contract out bargaining unit work in response to AFSCME’s lawful strike. We determined that the County’s conduct violated ORS 243.672(1)(a) in two ways. First, it retaliated against bargaining unit members because they exercised their PECBA right to strike, and second, it chilled employees in the exercise of their protected rights. We further concluded that the

¹AFSCME petitioned separately for attorney fees on appeal. ORS 243.676(2)(e); OAR 115-035-0057. We address that petition in a separate Order issued on this date.

County's contracting out interfered with AFSCME's ability to perform its statutory duties as the exclusive bargaining representative, a violation of ORS 243.672(1)(b). AFSCME fully prevailed on these charges.

AFSCME also raised two other charges which this Board chose not to decide. First, it alleged that the County's contracting out violated ORS 243.672(1)(c) because it discouraged membership in AFSCME. We declined to decide the issue because it would add nothing to the remedy even if we found this additional violation. This charge merely presented an alternative legal theory based on the same core facts as the other charges. Separate legal theories based on the same core facts do not constitute a separate charge for purposes of representation costs. *City of Vale*, 20 PECBR at 527.

AFSCME further alleged that County officials violated the PECBA by making several threatening statements to bargaining unit members about the strike. The Board again determined that finding the violation would add nothing to the remedy, so we declined to decide it. We noted, however, that we considered these threats as important evidence of the County's unlawful motive for contracting out bargaining unit jobs in violation of subsection (1)(a). 22 PECBR at 99. The facts concerning these threats are thus not separate and independent from the core facts of the other charges, so they do not constitute "separate charges" for purposes of representation costs. As a result, AFSCME is the prevailing party on the entire case. There are no separate charges on which it did not prevail.

3. AFSCME requests an award of \$25,894 in representation costs. According to the affidavit of counsel, this represents 170.7 hours billed at various rates between \$75 and \$165 per hour. The request further breaks down as follows: \$18,089.50 for 123.4 hours in the original petition; \$3,811.50 for 23.1 hours in the first supplemental petition; and \$3,993 for 24.2 hours in the second supplemental petition.²

The County objects that the claimed hourly rate is excessive. We disagree. The average rate for representation costs is \$165-170 per hour. *See Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 510, 511 (2010) (Rep. Cost Order). AFSCME's requested rates are at or below the average.

²AFSCME's first supplemental request involves time spent on briefs and related tasks concerning its motion to compel enforcement, the County's motion to stay the Board's Order pending appeal, and the County's request for reconsideration of the Board's Supplemental Order. The second supplemental request involves time spent to prepare evidentiary materials, affidavits, and briefs regarding compliance issues. These various motions and requests resulted in the six additional Board orders listed latter in the text.

The County also asserts that AFSCME devoted excessive hours to the case. It correctly notes that cases typically take an average of 45-50 hours for each day of hearing. See *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853 (2007) (Rep. Cost Order). The contested case hearing here lasted for three days. AFSCME spent about 20 hours more than average for a typical three-day hearing. This case, however, was anything but typical. A typical case involves a complaint, an investigation, an answer, a hearing, post-hearing briefs, objections to a recommended order, briefs-in-aid of oral argument, and oral argument. Here, in addition to the typical requirements, there were an extraordinary number of collateral proceedings on motions that required additional briefing. In addition to the underlying Order on the merits, this Board issued a Ruling on Motion to Stay (22 PECBR 292); an Order Modifying Conditions of Stay (22 PECBR 414); a Ruling on Motion to Amend Stay (22 PECBR 643); a Supplemental Order (22 PECBR 651); a Ruling on Respondent's Motion for Reconsideration (22 PECBR 904); and a Compliance Order (24 PECBR 397).

We recognize that some cases are complex and require more time than usual. For example, in *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 636 (2008) (Rep. Cost Order), the complainant filed a motion asking the Board to reconsider its initial Order, and the Board conducted an oral argument on the motion. We observed that these procedures are not part of a typical case, and we concluded they justified approximately 28 hours more than the average. Similarly, in *Blue Mountain Community College*, 21 PECBR 853 (2007) (Rep. Cost Order), the issues were exceedingly numerous and complex. The Board permitted the parties to file over-sized briefs and conducted an exceptionally long oral argument. As a measure of the case's complexity, the Board's final Order was 115 pages. In these circumstances, we held it was reasonable to request a number of hours about 20 percent above the average.

The same principle applies here. These proceedings were lengthy and complex. They involved a three-day hearing, numerous post-hearing motions, and several compliance and enforcement issues. In these circumstances, we conclude that AFSCME devoted a reasonable number of hours to the case.

4. As described above, we held that the County violated ORS 243.672(1)(a) and (b) when it contracted out the work of more than 100 bargaining unit members in retaliation for their participation in a lawful strike. We concluded that the County's conduct struck at the very heart of the core rights protected by the PECBA, and we imposed a \$1,000 civil penalty against the County, the maximum penalty permitted by law.

The civil penalty award is pertinent to AFSCME's representation cost petition. Under Board rules, representation cost awards generally may not exceed \$3,500. That limit, however, does not apply when, as here, a civil penalty is appropriate. OAR 115-035-0055(1)(a).

When we impose a civil penalty, we typically award the prevailing party all of its reasonable representation costs. *E.g., East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9438 (1987) (Rep. Cost Order) (awarding \$4,333, the full amount requested); *Rogue Community College Classified Employees Association, Chapter 152 v. Rogue Community College*, Case No. C-54-84, 9 PECBR 8830 (1986) (Rep. Cost Order) (awarding \$3,412.50, the full amount requested); *Blue Mountain Community College Association*, 21 PECBR at 857 (union reasonably incurred \$32,601.50 in representation costs and prevailed on 50 percent of the case; Board awarded \$16,300.75, the full amount of representation costs incurred in the portion of the case on which it prevailed).

Infrequently in civil penalty cases, however, we award less than 100 percent of the reasonable costs incurred, usually for policy reasons. *See Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, Case No. UP-32-01, 20 PECBR 650 (2004) (Rep. Cost Order) (Board awarded a \$500 civil penalty—half the statutory maximum—and decided issues of first impression). *See also Salem Education Association v. Salem-Keizer School District, 24J*, Case No. UP-132-93, 15 PECBR 519 (1994) (Rep. Cost Order) (Board awarded less than the full amount requested because the number of hours claimed was greater than average). Here, several factors warrant a modest reduction. The numerous compliance issues involved in calculating back pay and benefits for more than 100 employees were both factually and legally complex. Following the Court of Appeals decision, the County made a sincere effort to comply. In addition, there were several issues of first impression in the compliance phase.³

³The County argues that we should not award representation costs because our decision was wrong on the facts and the law. We disagree for two reasons. First, “[a] petition for representation costs is not the proper vehicle to reargue the merits of the underlying case.” *Zimmer and Kirk v. American Federation of State, County and Municipal Employees, and State of Oregon, Department of Corrections*, Case No. FR-01-10, 24 PECBR 52, 53 (2010) (Rep. Cost Order). For purposes of representation costs, we assume the underlying order is correct. Second, the Court of Appeals affirmed this Board's Order, so the County's claims of error have already been rejected by a higher court.

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 \$23,500.

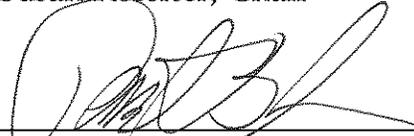
ORDER

The County will remit \$23,500 to AFSCME within 30 days of the date of this Order.

DATED this 21 day of March 2012.



Susan Rossiter, Chair



Paul B. Gamson, Board Member



Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.