

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-36-02

(UNFAIR LABOR PRACTICE)

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|------------------------|---|
| BENTON COUNTY DEPUTY |) |
| SHERIFF'S ASSOCIATION, |) |
| |) |
| Complainant |) |
| |) |
| v. |) |
| |) |
| BENTON COUNTY |) |
| SHERIFF'S DEPARTMENT |) |
| |) |
| Respondent |) |
| |) |
| |) |
| |) |

FINDINGS AND ORDER
ON RESPONDENT'S
PETITION FOR
REPRESENTATION COSTS

On March 19, 2004, this Board issued an Order dismissing the complaint. 20 PECBR 551.¹ Respondent filed a petition for representation costs on March 29, 2004. Complainant filed objections to the petition on April 16, 2004. Pursuant to OAR 115-35-055, this Board makes the following findings:

1. Respondent filed a timely petition for representation costs.² Complainant filed timely objections to the petition.

¹The Court of Appeals affirmed our decision, 198 Or App 533, 109 P3d 803, and the Supreme Court denied review, 338 Or 583, 114 P3d 505 (2005). The Court of Appeals issued an Appellate Judgment on July 14, 2005 that named Respondent as the prevailing party. Respondent did not file a petition for attorney fees for work performed on appeal. See OAR 115-35-057 (a petition for attorney fees on appeal must be filed within 21 days of the date of the appellate judgment).

²Documents accompanying Respondent's petition indicate that counsel billed Respondent for photocopying, faxes, postage, long-distance phone calls and other similar charges. It is unclear whether Respondent seeks reimbursement for these costs. Such charges are not properly part of a representation cost award, *Coos County Board of Commissioners v. Coos County District Attorney*, Case No. UP-32-01, 20 PECBR 650 (2004) (Rep. Cost Order), and we will not consider them in making our award.

2. Respondent is the prevailing party.

3. Respondent requests an award of \$3,500 which is the maximum amount permitted under Board rules. Respondent asserts it incurred legal costs of \$39,788 in defending against the complaint. According to the affidavit of counsel, this represents 222.3 hours billed at various rates ranging from \$100 to \$225 per hour. The average rate is \$179 per hour.

The number of hours far exceeds the average. This case involved a one-day hearing, post-hearing briefs, objections, a memorandum in aid of oral argument, and oral argument to this Board. The average number of hours spent in similar cases is 45-50. *Gibson-Boles v Oregon AFSCME Council 75*, Case No. UP-46-01, 20 PECBR 982 (2005) (Rep. Cost Order). Respondent seeks more than four times the average, a factor we consider in our award. Respondent notes that it spent time preparing for a claim that Complainant dropped on the day of the hearing. We will take that into consideration in making our award.

The claimed hourly rate exceeds the \$135 per hour rate which is the highest we have found reasonable in our recent awards. See *IBEW, Local 48 v. School District No. 1J*, Case No. UP-69-03, 21 PECBR 13 (2005) (Rep. Cost Order) (noting the \$135 per hour maximum); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-39-03, 20 PECBR 819 (2005) (Rep. Costs Order) (\$175 per hour exceeds the average). We will consider this factor in making our award.

4. This case involved Respondent's so-called "zipper clause" proposal which purported to waive Complainant's right to bargain over changes in terms and conditions of employment during the life of the contract. According to Complainant, the proposal was unlawful, and therefore a prohibited subject for bargaining, because (1) it was in conflict with Complainant's statutory right to mid-contract bargaining under ORS 243.698, and (2) at the interest arbitration stage of negotiations, it was an invalid waiver of bargaining rights because the waiver was not voluntary. We rejected both arguments. We held that a zipper clause proposal was mandatory for bargaining, and its mandatory status did not change when the parties went to interest arbitration.

In a typical case, we award a prevailing party approximately one-third of its reasonable representation costs, up to the \$3,500 cap established in OAR 115-35-055(1)(a). We adjust the percentage up or down for policy reasons identified in our rules and cases. We make a downward adjustment for novel issues. *Eugene Police Employees Association v. City of Eugene*, Case No. UP-5-97, 18 PECBR 95 (1999) (Rep. Cost Order) (novel issues require a less-than-average award so that parties are not deterred from litigating such issues).

Our decision here noted that the complaint raised novel issues that we had not previously addressed. Accordingly, we conclude that an appropriate award is approximately 25 percent of Respondent's reasonable representation costs.

Having considered the purposes and policies of the Public Employee Collective Bargaining Act (PECBA), our awards in prior cases, and the reasonable cost of services rendered, this Board awards Respondent representation costs in the amount of \$1,850.

ORDER

Complainant will remit \$1,850 to Respondent within 30 days of the date of this Order.

SIGNED and ISSUED this 16th day of November 2005.



Donna Sandoval Bennett, Chair



Paul B. Gamson, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

