

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-69-03

(UNFAIR LABOR PRACTICE)

IBEW, LOCAL 48 AND DISTRICT )  
COUNCIL OF TRADE UNIONS, )  
 )  
Complainants, )  
 )  
v. )  
SCHOOL DISTRICT NO. 1J, )  
MULTNOMAH COUNTY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINDINGS AND ORDER  
ON RESPONDENT'S  
PETITION FOR  
REPRESENTATION COSTS

On December 30, 2004, this Board issued an Order dismissing the complaint. 20 PECBR 802. Respondent filed a petition for representation costs on January 7, 2005. Complainants filed objections to the petition on January 27, 2005. Pursuant to OAR 115-35-055, this Board finds as follows:

1. Respondent is the prevailing party.
2. Respondent filed a timely petition for representation costs, and Complainants filed timely objections to the petition.
3. Respondent requests an award of \$12,714.83. This request includes \$123.75 for mileage reimbursement. We do not reimburse for mileage as part of representation costs. *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 860 (Rep. Cost Order, February 2005).

Respondent also seeks reimbursement of \$1127.33 for service fees, postage, photocopies, and long distance phone charges. These items are not recoverable as representation costs. *Coos County Board of Commissioners v. Coos County District Attorney*, Case No. UP-32-01, 20 PECBR 650 (Rep. Cost Order, June 2004).

Respondent requests reimbursement of its \$100 filing fee. Such a request must be made pursuant to OAR 115-35-075(3), and is awarded or denied in the underlying decision. It is not properly part of a representation cost petition. *Joseph Education Association v. Joseph School District No. 6*, Case No. UP-56-95, 16 PECBR 775, n. 1 (Rep. Cost Order, September 1996).

We reduce Respondent's request accordingly.

4. According to the affidavit of Respondent's counsel, the remaining request is for 96.8 hours of time valued at \$11,463.75. The time is broken down as follows: 58.45 hours of attorney time at \$135 and \$150 per hour; 28.75 hours of paralegal time at \$90 and \$95 per hour; 3.6 hours of law clerk time at \$50 per hour; and 6 hours of travel time at \$37.50 and \$67.50 per hour.

Law clerk and paralegal time can be recovered as a representation cost if it is not duplicative. *Lunak v. University of Oregon*, Case No. C-49-82 (Rep. Cost Order, January 1983). There is no evidence here of duplication. Complainants do not object to the hourly rates for law clerk and paralegal time.

Complainants object to the hourly rate Respondent requests for attorney time. The \$150 per hour rate exceeds the \$135 per hour rate which is the highest we have recently held reasonable. E.g., *Portland School District No. 1 v. Portland Association of Teachers*, Case Nos. UP-23/25-03, 20 PECBR 816 (Rep. Cost Order, January 2005); *Hillsboro Education Association v. Hillsboro School District*, Case No. UP-7-02, 20 PECBR 731 (Attorney Fees Order, July 2004); and *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-27-02, 20 PECBR 657 (Rep. Cost Order, June 2004). After we reduce the excessive rate to a reasonable one, the average rate for all time—including attorney, law clerk, paralegal, and travel—is \$114.30 per hour.

5. Complainants also object to the number of hours sought. This matter required a one-day hearing and post-hearing briefs. Neither party filed objections to the proposed order, and there was no oral argument to this Board. The 96.8 hours claimed by Respondent far exceeds the average in other similar cases. *AOCE v. State of Oregon, Department of Corrections*, Case No. UP-39-03, 20 PECBR 819 (Rep. Cost Order,

January 2005) involved slightly less than a one-day hearing, with no objections to the recommended order. We described the 37.4 hours sought in *State of Oregon, Department of Corrections* as higher than average. Here, with a full-day hearing and several novel issues, we believe that 40 hours is reasonable. The 96.8 hours claimed here is more than twice that amount. We will adjust the number of hours accordingly.

6. This dispute arose out of the District's decision to sell its radio station to a private sector entity. IBEW first asserted that the District violated ORS 243.672(1)(e) and (1)(f) by refusing to bargain over the impacts of the sale on bargaining unit members. We dismissed this portion of the complaint because IBEW waived its right to bargain by failing to make a timely demand to bargain.

IBEW also alleged that the District violated ORS 243.672(1)(a) and (1)(b) by telling employees not to discuss the sale, and by dealing directly with the employees rather than their exclusive representative. We determined that the claim regarding the directive not to discuss the sale was untimely. We further concluded that any direct dealing was by the private purchaser rather than the District. The Public Employee Collective Bargaining Act (PECBA) does not cover the private purchaser, so we concluded there was no violation of the Act.

The District asks this Board to award the entire amount it requests. The District argues that it will otherwise not be made whole for the expense of successfully litigating this matter. We reject this argument. Under OAR 115-35-055(1)(a), we award the full amount of representation costs only when the losing party has engaged in activities that would warrant a civil penalty under ORS 243.676(4). Such circumstance are not present here.

Our usual practice is to award the prevailing party roughly one-third of its reasonable representation costs, not to exceed \$3500 under OAR 115-35-055(1)(a). The percentage may be adjusted up or down for policy reasons identified in our rules and cases.

IBEW asserts that the novelty of the issues here justifies a downward adjustment. *See Eugene Police Employee Association v. City of Eugene*, Case No. UP-5-97, 18 PECBR 95 (Rep. Cost Order, June 1999) (Board issues less-than-average awards in cases of first impression so as not to deter parties from litigating such issues). We agree. This case involved some unusual and complex facts, and it involved some novel legal questions regarding agency and the interplay between public and private sector. On balance, a less-than-average award of 25 percent would be appropriate.

Having considered the appropriate amount for services rendered, our awards in similar cases, and the purposes and policies of the PECBA, this Board will award Respondent \$1150 in representation costs.

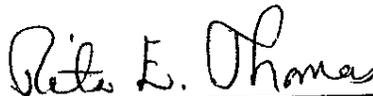
ORDER

Complainants shall remit \$1150 to Respondent within 30 days of this Order.

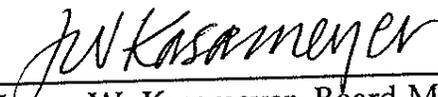
DATED this 15<sup>th</sup> day of August 2005.



Paul B. Gamson, Chair



Rita E. Thomas, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.