

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-22-05

(UNFAIR LABOR PRACTICE)

BLUE MOUNTAIN FACULTY)
ASSOCIATION/OREGON)
EDUCATION ASSOCIATION/NEA)
AND JOHN LAMIMAN,)

Complainant,)

v.)

BLUE MOUNTAIN)
COMMUNITY COLLEGE,)

Respondent.)

FINDINGS AND ORDER
ON COMPLAINANT'S PETITION
FOR REPRESENTATION COSTS

On February 26, 2007, this Board issued an Order which held that the College, during a single round of contract negotiations with the Association, committed nine separate unfair labor practices under ORS 243 672(1)(a), (b), (e), and (f) We dismissed three other charges against the College. 21 PECBR 673.

On March 19, 2007, both parties petitioned for representation costs. On April 9, 2007, each party objected to the petition of the other.

Pursuant to ORS 243 676(2)(d) and OAR 115-035-0055, this Board finds:

1. Each party filed a timely petition for representation costs, and each party filed timely objections to the petition of the other.

2. Both parties partially prevailed. In such circumstances, each party is entitled to representation costs for the portion of the case on which it prevailed. OAR 115-035-0055(1)(b).

Over the years, we have changed our method of calculating an award when both parties prevail. Until 1985, we made a separate award to each party and then set off the awards against each other. For example, in *Oregon School Employees Association, Chapter 39 v Silvertown Union High School District 7J*, Case No. C-11-82, 7 PECBR 6097 (1983) (Rep. Cost Order), we awarded \$1,550 on Respondent's petition and \$800 on Complainant's petition. We then offset the amounts and ordered a \$750 payment to Respondent.

In 1985, in the interest of simplifying the process and our orders, we adopted our current system where we determine the percentage of the case on which each party prevailed, and then subtract the percentages to determine a single prevailing party for purposes of awarding costs. *Springfield Education Association v Springfield School District*, Case No. C-144/161-83 (Rep. Cost Order, January 1985). In *Springfield*, for example, we determined that the employer prevailed on 65 percent of the case and the union prevailed on 35 percent. We concluded that the employer was a 30 percent prevailing party (65 percent minus 35 percent), and we based the remainder of the order on that conclusion.

We apply that analysis here. The first step is to determine the percentage of the case on which each party prevailed. The Association prevailed on nine claims and the College prevailed on three. Determining the percentage is not, however, solely a matter of dividing the number of claims on which a party prevailed by the total number of issues. We also look at the relative importance of each issue to the case and the amount of time devoted to the issues in hearing. For example, in *Mid-Valley Bargaining Council and Clausing-Lee v. Corvallis School District*, Case No. UP-69-95 (Rep. Cost Order, February 1997), the Board analyzed nine issues. The employer prevailed on six and the union prevailed on three. The Board determined, however, that even though the union prevailed on a smaller number of issues, those issues were more significant in the case and more time was devoted to them in the hearing. We concluded that the union prevailed on 75 percent of the case and the employer on 25 percent. We subtracted the percentages and found the union a 50 percent prevailing party.

Here, much of the hearing time was devoted to exploring the details of the entire course of negotiations. This information is not attributable to any single issue. It is pertinent, either directly or as important background material, to most of the issues in the case. We have carefully reviewed the record and conclude that the Association

prevailed on 75 percent of the case and the College prevailed on 25 percent. We offset the percentages and find the Association a 50 percent prevailing party. We will adjust the Association's request accordingly, and will address only the Association's petition for purposes of the award. *Lane Unified Bargaining Council v South Lane School District*, Case No. UP-36-98 (Rep. Cost Order, October 2002).

3. The Association seeks \$32,601.50 in representation costs. According to the affidavit of counsel, this amount is based on 239.6 hours of attorney time billed at various rates ranging from \$105 to \$135 per hour.

The College does not object to the reasonableness of the hourly rates or the number of hours claimed. The hourly rates are within the range we have found reasonable in recent representation cost awards. *E.g., Union-Baker ESD Association v. Union-Baker Educational Service District*, Case No. UP-2-05, 21 PECBR 808 (2007) (Rep. Cost Order) (hourly rate of \$135-\$140 is reasonable).

Cases take an average of 45-50 hours per day of hearing. *Gibson-Boles v. Oregon AFSCME Council 75*, Case No. UP-46-01, 20 PECBR 982 (2005) (Rep. Cost Order). The hearing here lasted for four days. The number of hours claimed by the Association is about 20 percent above the average. We note, however, that this case was unusually complex. Due to this complexity, we allowed the parties to file over-sized briefs and we conducted an exceptionally long oral argument. We also note from the affidavit submitted by the College's counsel that the College devoted an even greater number of attorney hours (304.25) to this case. The number of hours the College devoted is relevant to determining the reasonableness of the Association's request. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 526, 528 n. 5 (2003). We conclude that in these circumstances, the number of hours the Association devoted was reasonable.

4. The complaint alleged that the College committed an array of unfair labor practices during the course of contract negotiations with the Association. This Board concluded that the College violated ORS 243.672(1)(e) when it introduced several proposals in mediation concerning new issues, when it included several proposals in its final offer concerning new issues, and again when it implemented proposals concerning new issues; that it violated ORS 243.672(1)(f) when it submitted a late final offer and again when it submitted an amended final offer without the required cost summary; that it violated ORS 243.672(1)(e) when it implemented a final offer for which it failed to submit a cost summary; that it violated ORS 243.672(1)(e) when it included a permissive proposal in its final offer; that it violated ORS 243.672(1)(b) and (e) numerous times when it communicated directly with bargaining unit members about

bargaining issues and employment relations; and that it violated ORS 243.672(1)(a) when it directed faculty members to make a scripted statement to students about the Association's plans for a strike. We dismissed claims that the College made a premature request for mediation, that it misrepresented facts or its position in bargaining, and that it engaged in surface bargaining.

To remedy the violations, we ordered the College to cease and desist from violating the PECBA, to restore the *status quo* on working conditions to the extent requested by the Association, to make bargaining unit members whole for any losses they sustained because of the College's unlawful conduct, to return to bargaining at the mediation stage at the College's expense, and to sign and post a notice of its wrongdoing in a prominent place in each building where bargaining unit members work. In addition, we found the College's conduct to be egregious and ordered it to pay the Association a civil penalty of \$1,000.

The award of a civil penalty is especially pertinent to the Association's representation cost petition. Under Board rules, an award of representation costs 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).

In cases where we impose a civil penalty, we typically award the prevailing party all of its reasonable representation costs. *E.g. East County Bargaining Council 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); *Salem Education Association v. Salem-Keizer School District*, Case No. UP-132-93, 15 PECBR 519 (1994) (Rep. Cost Order) (reducing the number of hours requested to a reasonable amount and awarding \$5,250, all of the costs reasonably incurred) ¹ We will do so here

The College argues that we should limit our award here to the amount we awarded in earlier cases involving a civil penalty. Based on the cases cited above, that range is approximately \$3,400 to \$5,200. The College's argument misses the point. We award representation costs *reasonably incurred*. We calculate reasonable costs by multiplying the reasonable number of hours spent times the reasonable hourly rate.

¹In cases with a civil penalty, we infrequently award less than 100 percent of the reasonable costs incurred, usually for policy reasons which do not apply here. *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).

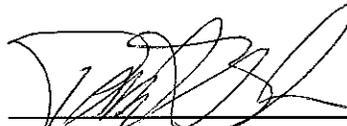
Based on these factors, what is reasonable in one case may not be reasonable in another. Some of the cited cases are more than 20 years old when the reasonable hourly rate was considerably lower than it is now. In addition, all of those cases involved one or two days of hearing. This case required four days of hearing. We have already determined that the Association's request for \$32,601.50 is reasonable and that the Association is a 50 percent prevailing party. We will make our award accordingly.

Having considered the purposes and policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable cost of services rendered, this Board awards the Association representation costs in the amount of \$16,300.75.

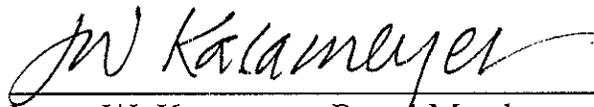
ORDER

The College will remit \$16,300.75 to the Association within 30 days of the date of this Order.

DATED this 30th day of May 2007.



Paul B. Gamson, Chair



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482