

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No UP-27-02

LINCOLN COUNTY)
EDUCATION ASSOCIATION,)
)
Complainant,)
)
v.)
)
LINCOLN COUNTY)
SCHOOL DISTRICT)
)
Respondent.)
_____)

FINDINGS AND ORDER ON
BOTH PARTIES' PETITIONS
FOR REPRESENTATION COSTS

This Board issued an Order on April 7, 2004.¹ Both parties filed petitions for representation costs on April 27. Respondent filed objections on April 27; Complainant filed objections on May 18. Pursuant to OAR 115-35-055, we make the following findings:

1. Both parties filed timely petitions for representation costs. Each filed timely objections to the other party's petition.
2. Complainant is a prevailing party. Respondent is not a prevailing party.

Representation costs are available to a party that prevails on an unfair labor practice complaint. ORS 243.676(2)(d) and (3)(b); OAR 115-35-055(1). Where this Board upholds one or more charges and dismisses one or more charges in a complaint,

¹All dates are 2004 unless stated otherwise

“each party may be regarded as a prevailing party” for purposes of representation costs where the charges in question meet a two-part test. “Separate charges * * * [1] are based on clearly distinct and independent operative facts; i.e. the charges could have been plead and litigated without material reliance on the allegations of the other(s), and * * *[2] concerned the enforcement of rights independent of the other(s).” OAR 115-35-055(1)(b)(A).

Each party in this case asserts that it is a prevailing party. Respondent does not dispute that Complainant is a prevailing party, but argues it prevailed on a portion of the complaint and is thus entitled to have the award offset. *See Lane Unified Bargaining Council [LUBC] v. McKenzie School District*, Case No. UP-14-85 (Rep. Cost Order, January 1986) (where both parties prevail, this Board will determine the percentage won by each and offset the percentages for purposes of the award). In the alternative, Respondent argues that the petitions for representation costs should be held in abeyance until the conclusion of arbitration proceedings ordered by this Board.

3. The complaint charged Respondent with violations of ORS 243.672(1)(g) by refusing to arbitrate grievances concerning retiree health insurance benefits and refusing to provide vested benefits to retirees as required by the parties' current and prior collective bargaining agreements. We found Respondent violated ORS 243.672(1)(g) by refusing to arbitrate the grievances. We denied Complainant's request that this Board decide the merits of the alleged contract violations under ORS 243.672(1)(g), and instead ordered the parties to arbitrate the grievances.

Complainant argued that this Board should decide the merits of the grievances because of Respondent's violation of ORS 243.672(1)(g) by refusing to arbitrate those grievances. The alleged contract violations could not have been pled or litigated without material reliance on the alleged refusal to arbitrate. We conclude that Respondent did not prevail on a “separate charge” and is not a prevailing party under OAR 115-35-055(1). We will dismiss Respondent's petition.

4. Respondent objects to Complainant's petition because (1) the case is novel and presents issues of first impression, and (2) Complainant has not prevailed on the “underlying facts.” It asserts that, to prevail in arbitration, Complainant will have to seek an award which exceeds the arbitrator's jurisdiction and public policy.

A case that is novel or presents issues of first impression does not preclude an award of representation costs; it merely warrants a smaller than average award so as

not to discourage litigation of such matters. *Eugene Police Employee Association v. City of Eugene*, Case No. UP-5-97, 18 PECBR 95 (Rep. Cost Order, June 1999); *OSEA v. Coos Bay School District*, Case No. C-159-84, 9 PECBR 8585 (Rep. Cost Order, March 1986). The policy favoring arbitration of contract disputes is of equal force regardless of the intrinsic merits of the underlying grievance. We therefore deny Respondent's request to hold Complainant's petition for representation costs in abeyance pending arbitration of the grievances.

5. Complainant requests an award of \$3,500, the maximum allowed under the rules in most cases. According to affidavit of counsel, Complainant was billed \$14,967 for 119.2 hours of service at rates ranging from \$125 to \$135 per hour.

6. This case involved one day of hearing, post-hearing briefs, and oral argument before this Board. The number of hours requested by Complainant is approximately twice the average number for one day of hearing, argument, and briefing, a factor we consider in making cost awards. The hourly rates are reasonable.

Some of the issues litigated in this case were matters of first impression. While this case was pending, a decision of this Board on remand from the Court of Appeals in a similar case² substantially altered the analysis of the central issue of the arbitrability of the retiree health insurance grievances. As discussed above, this Board typically makes smaller than average awards in matters of first impression. On the other hand, to further the policy of the Public Employee Collective Bargaining Act (PECBA) that favors the arbitration of contract disputes, we typically issue a substantial award where a party refuses to go to arbitration; *OPEU v. Linn County*, Case No. UP-19-87, 10 PECBR 190 (Rep. Cost Order, August 1987). On balance, an average award would be appropriate.

After adjusting for the number of hours claimed, the total costs amount to around \$7,500 for Complainant. Our usual practice is to award approximately one-third of the adjusted fees claimed in most cases. *Oregon Nurses Association v. Oregon Health Sciences University*, Case No. UP-3-02 (Rep. Cost Order, May 2002).

²*Portland Fire Fighters' Association v. City of Portland*, 18 PECBR 723 (1000), *rev'd and remanded* 181 Or App 85, 45 P3d 162, *rev den* 334 Or 491, 52 P3d 1056, *order on remand* 20 PECBR 48A (2002)

Having considered the appropriate amounts for services rendered, our awards in similar cases, and the policies and purposes of the PECBA, this Board awards Complainant representation costs in the amount of \$2,500.

ORDER

Respondent is ordered to remit \$2,500 to Complainant within 30 days of the date of this Order.

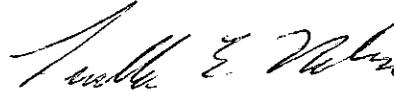
DATED this 19th day of June 2004

*

Paul B. Gamson, Chair



Rita E. Thomas, Board Member



Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson has recused himself from this case.