

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-32-01

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| COOS COUNTY BOARD OF |) | |
| COMMISSIONERS AND |) | |
| AFSCME LOCAL 2936, |) | |
| |) | |
| Complainants, |) | |
| |) | FINDINGS AND ORDER ON |
| v. |) | COMPLAINANTS' PETITIONS |
| |) | FOR REPRESENTATION COSTS |
| COOS COUNTY DISTRICT ATTORNEY |) | |
| AND STATE OF OREGON, |) | |
| |) | |
| Respondents. |) | |
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This Board issued an Order on December 12, 2002, and a Ruling on Petition for Reconsideration on February 7, 2003. Both Complainants filed petitions for representation costs on January 2, 2003. Respondent State of Oregon filed objections on January 23, 2003. Pursuant to OAR 115-35-055, this Board makes the following findings:

1. Complainants are the prevailing parties.
2. Complainants' representation cost petitions were timely filed. Respondent's objections were timely filed.
3. Complainant Coos County Board of Commissioners ("Complainant County") requests an award of \$36,925.76. That total is based on 220.60 hours of

service valued at \$170, \$150, \$130, \$100, and \$85 per hour,¹ plus \$2,079.01 in costs.² Complainant AFSCME Local 2936 ("Complainant Union") requests an award of \$12,334. That total is based on 97.7 hours of service valued at \$75, \$90, and \$130 per hour.³

4. This case involved one day of hearing, post-hearing briefs, and oral argument before this Board. The number of hours requested by Complainant County is more than four times the average number for one day of hearing, argument, and briefing. The billing records submitted by Complainant County include time spent on claims that could be heard only in other forums, *e.g.*, workers' compensation claims and claims before the Bureau of Labor and Industries. Some of those entries mingle activities related to proceedings before this Board with activities related to proceedings in other forums. This Board allows costs only for "services directly connected with prosecuting" the complaint. OAR 115-5-055(1)(c)(B). While we cannot be certain of the number of hours spent on such other matters, it appears the total approximates 20 of the 220.60 hours requested. After exclusion of those hours, the number of hours requested by Complainant County still remains approximately four times the average number of hours requested for a one-day hearing. This is a factor we consider in making cost awards. The hourly range includes some rates considerably higher than the average rate, a factor we also consider in making cost awards.

Complainant County contends the extra hours are justified because of the egregiousness of Respondents' egregious conduct; its own possible exposure to liability had it not acted; its right to seek common law indemnity from Respondents; Respondents' persistence in unlawful conduct despite being advised of controlling legal precedent; the impact of its legal fees on this small community; and the flagrant nature of the violations. It argues this Board should recognize the true costs of legal representation and permit prevailing parties to receive the full measure of expenses incurred in cases where this Board finds a civil penalty appropriate. It argues that doing this will discourage violations of the law and provide an incentive to resolve cases short of litigation. Finally, it argues Respondent State of Oregon has a duty under ORS

¹The detailed billing records submitted with Complainant County's request do not summarize the number of hours billed at each of these hourly rates.

²Photocopying, clerical, mileage, postage, and telephone costs are not included in representation cost awards. *AFSCME Local 2746 v. Clatsop County*, Case No. UP-59-95, 16 PECBR 664 (Rep. Cost Order, June 1996); *OSEA Ch. 7 v. Salem School Dist.*, Case No. C-271-83 (Rep. Cost Order, November 1984).

³The breakdown is 107.5 hours at \$130 per hour, 4.8 at \$90 per hour, and 4.0 at \$75 per hour.

30.285 to defend and indemnify Respondent Coos County District Attorney, and therefore will be liable for those costs.

The number of hours requested by Complainant Union is about twice the average number of hours requested for a one-day hearing. The hourly rates are reasonable.

Complainant Union argues that an award of full representation costs would discourage egregious or repetitive violations. It further argues that Respondents refused Complainants' reasonable efforts to keep the costs of litigation down, by refusing to agree to a stipulation of facts and denying factual allegations at the heart of the case, requiring massive efforts to adduce facts Respondents could not controvert. It asserts that litigating only the legal defenses would have required half the effort and costs. It further argues Respondents should be liable for a greater share of costs because some defenses were questionable or arguably frivolous. It further argues that Respondents' "scattershot" approach to their legal defense required more legal research and writing, and that Respondents should bear the expense required by their "extensive (and perhaps unnecessary) arguments."

Respondent State of Oregon ("Respondent State") objects to both Complainants' petitions for representation costs. It argues this case presented multiple issues of first impression. It asserts Respondent Coos County District Attorney ("Respondent DA") has no source of funds to pay representation costs other than his own personal resources. In this regard, it notes that the only funding from the State of Oregon is for Respondent DA's salary and benefits. It asserts that the doctrine of "respondent supervisor" [*sic*] is inapplicable in that this Board did not find Respondent DA was the agent of the State of Oregon "for purposes of PECBA obligations *vis a vis* a county employee."⁴ It asserts that cases cited by Complainant Union in support of its request for an award in excess of \$3,500 "involved awards that were less than the \$3,500 cap on representation fees."⁵ It argues that it could have petitioned for reconsideration

⁴Respondent State does not explain its representation of Respondent DA if the person holding that office is not an agent of the State, nor did it argue why Respondent DA would not be held harmless under ORS 30.285. The State is a Respondent on this record.

⁵Contrary to this assertion, in the first such case, *ECBC v. David Douglas School Dist.*, Case No. UP-84-86, 9 PECBR 9438 (Rep. Cost Order, April 1987), we awarded \$4,333 in representation costs, the full amount requested. More recently, in *Salem Education Association v. Salem-Keizer School District 24J*, Case No. UP-132-93, 15 PECBR 519 (Rep. Cost Order, December 1994), we awarded less than the full amount requested because the number of hours

(continued. .)

of the civil penalty but did not because it could not afford to continue litigation.⁶ It argues Complainant County should not recover through representation costs an amount it failed to recover in damages

5 Respondents were charged with violations of ORS 243.672(1)(a) and (1)(g). We concluded that Respondent DA was bound as a joint employer with Complainant County to the collective bargaining agreement between Complainants. We further found that Respondent DA failed to abide by Complainant County's decision resolving a grievance under that collective bargaining agreement, and that his failure to do so was contrary to the terms of the contract and thus violated ORS 243.672(1)(g). We also found that, by repudiating the contractual grievance procedure, he interfered with and restrained employees in their use of the grievance procedure in violation of ORS 243.672(1)(a). Because of Respondent DA's flagrant disregard of the contract, flagrant violation of ORS 243.672(1)(a), and the impact of the violation on the ongoing employment rights of an employee, we ordered the posting of a notice. We also granted both Complainants' requests for a civil penalty.

Several of the issues litigated in this case were matters of first impression. This Board typically makes smaller than average awards in matters of first impression, so as to avoid discouraging 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). On the other hand, we typically issue larger than average awards in cases alleging a violation of ORS 243.672(1)(a) because such violations strike at core Public Employee Collective Bargaining Act (PECBA) rights. *Vilches & Central Education Association v. Central School District*, Case No. UP-74-95 (Rep. Cost Order, October 1998). We also typically issue larger than average awards where we have found the violations were flagrant. *Lincoln County Deputy Sheriff's Association v. Lincoln County*, Case No. UP-31-02 (Rep. Cost Order, October 2002). To further the policy of the PECBA which favors the arbitration of contract disputes, we also 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); or refuses to comply with an arbitration award; *Hanna and Portland Association of Teachers v. Portland School District*, Case No. UP-64-99 (Rep. Cost Order, July 2002). A refusal to comply with a grievance resolution reached short

⁵(...continued)

claimed was somewhat greater than average, but nonetheless awarded \$5,250 in representation costs. In both cases, as here, the \$3,500 limit did not apply because a civil penalty had been awarded. OAR 15-35-055(1)(a).

⁶Respondent State nonetheless re-argues the civil penalty issue in its opposition. That argument is improper and will not be considered.

of arbitration raises similar policy issues favoring the voluntary resolution of contract disputes. On balance, an award somewhat larger than average is appropriate here. Further, in view of the fact that we ordered a civil penalty, an award in excess of the usual \$3,500 limit is also appropriate.

After adjusting for the number of hours claimed and, in the case of Complainant County, the hourly fees, the total fees amount to around \$8,500 for Complainant County and \$7,000 for Complainant Union. 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). However, in view of our conclusion that a higher than average award is warranted, and the fact that we ordered a civil penalty, we will award half the total fees to each Complainant.

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 County representation costs in the amount of \$4,250 and awards Complainant Union representation costs in the amount of \$3,500.

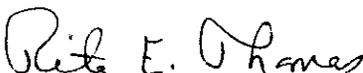
ORDER

Respondents are ordered to remit \$4,250 to Complainant County and \$3,500 to Complainant Union within 30 days of the date of this Order.

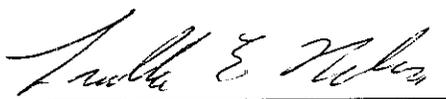
DATED this 14th day of June 2004.

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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.