

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-34-08

(UNFAIR LABOR PRACTICE)

EUGENE CHARTER SCHOOL)	
PROFESSIONALS, AFT, AFL-CIO,)	
)	
Complainant,)	FINDINGS AND ORDER
)	ON RESPONDENT'S
v.)	PETITION FOR
)	REPRESENTATION COSTS
RIDGELINE MONTESSORI PUBLIC)	
CHARTER SCHOOL,)	
)	
Respondent.)	
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Eugene Charter School Professionals, AFT, AFL-CIO (Union) filed this unfair labor practice complaint which alleged that Ridgeline Montessori Public Charter School (School) violated ORS 243.673(1)(a) when it reprimanded a teacher and placed her on a plan of assistance. On September 15, 2009,¹ this Board issued an Order which dismissed the complaint. 23 PECBR 316. On September 21, the School petitioned for representation costs. On October 9, the Union objected to the petition.

Pursuant to ORS 243.676(3)(b) and OAR 115-035-0055, this Board finds:

1. The School filed a timely petition for representation costs and the Union filed timely objections to the petition.
2. The School is the prevailing party.

¹All dates are 2009 unless stated otherwise.

3. According to the affidavit of counsel, the School incurred \$14,707 in representation costs. This represents 54.7 hours billed as follows: 7.6 hours of attorney time billed at \$370 per hour; 46 hours of attorney time billed at \$260 per hour; 7 hours of attorney time billed at \$270 per hour; and .4 hours of paralegal time billed at \$115 per hour. The average rate for all attorney and paralegal time is \$268.87 per hour.

Under OAR 115-035-0055(1)(a), an award of representation costs may not exceed \$3,500 unless a civil penalty would be appropriate. The School asserts that the \$3,500 cap does not apply here because a civil penalty would be appropriate. We disagree. A request for a civil penalty must be included in a party's complaint or answer. OAR 115-035-0075(2). The School's answer did not request a civil penalty. As a result, the parties did not litigate the issue and we did not award a civil penalty in the underlying decision. *See Amalgamated Transit Union, Division 757(AFL-CIO) v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-64-03, 23 PECBR 250 (2009) (Rep. Cost Order) (a civil penalty is not properly requested or awarded in a petition for representation costs).² Accordingly, the \$3,500 cap applies to the School's request for representation costs.

The Union objects to the total number of hours expended. The hearing took one day. Cases typically take an average of 45-50 hours for each day of hearing. *Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853 (2007) (Rep. Cost Order). This case was not unusually complex. The School spent slightly more time than the average for a case of this length and complexity, a factor we will consider in determining the School's reasonable representation costs.

The Union also objects to the hourly rate. Based on our recent cases, the average hourly rate for cases before this Board is \$155 per hour. *See AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 23 PECBR 133 (Rep. Cost Order). The School seeks an hourly rate considerably higher than average, another factor we will consider in determining the School's reasonable representation costs.

The School seeks reimbursement for paralegal time. Paralegal time may be recovered as a representation cost if not duplicative. *Association of Oregon Corrections*

²Even if we reached the merits, a civil penalty is not warranted based on this record. The School asserts that a civil penalty would be appropriate because the complaint is frivolous. We disagree. Although we ultimately dismissed the complaint, it did not completely lack a basis in law or fact.

Employees v. State of Oregon, Department of Corrections, Case No. UP-1-08, 23 PECBR 130 (2009) (Rep. Cost Order). The School seeks only .4 hours of paralegal time, and nothing in the record indicates the time was spent duplicating work performed by the attorneys.

The Union asserts that the School somehow waived or negotiated away its right to seek representation costs. When a prevailing party makes an appropriate request, the statute requires this Board to award representation costs if any were incurred. *Gresham Tchrs. v. Gresham Gr. Sch.*, 52 Or App 881, 896, 630 P2d 1304 (1981). We will do so here.³

4. An average award is approximately one-third of a prevailing party's reasonable representation costs, up to the \$3,500 cap. *Benton County Deputy Sheriff's Association v. Benton County*, Case No. UP-24-06, 22 PECBR 46, 47 (2007) (Rep. Cost Order). We adjust that percentage up or down based on various policy considerations described in our rules and cases.

In this case, the School reprimanded a teacher and placed her on a plan of assistance. The Union asserted that the School took both actions in retaliation for the teacher's protected union activities, a violation of ORS 243.672(1)(a). We disagreed. We concluded that some of the teacher's asserted union activity was not protected because it was an individual protest that did not involve a union or other employees. We further concluded that although some of the teacher's other activities were protected, the School was unaware of them, so these activities could not have been the reason for the School's actions. We dismissed the complaint.

On these facts, neither party has identified a reason to depart from an average award.

After considering the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards the School representation costs in the amount of \$2,500.

³Even if we were to consider the merits, the Union's argument would fail. The Union recites and relies on facts not in the record. This Board may only consider evidence that is offered and made part of the record. ORS 183.450(2). There is no evidence in the record that the School waived or negotiated away its right to seek representation costs. We therefore reject the Union's assertion.

ORDER

The Union will remit \$2,500 to the School within 30 days of the date of this Order.

DATED this 30th day of December 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.