

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-64-03

(UNFAIR LABOR PRACTICE)

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| AMALGAMATED TRANSIT UNION, |) | |
| DIVISION 757 (AFL-CIO), |) | |
| |) | |
| Complainant, |) | |
| |) | FINDINGS AND ORDER |
| v. |) | ON COMPLAINANT'S |
| |) | PETITION FOR |
| TRI-COUNTY METROPOLITAN |) | REPRESENTATION COSTS |
| TRANSPORTATION DISTRICT |) | |
| OF OREGON, |) | |
| |) | |
| Respondent. |) | |
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On June 28, 2006, this Board issued an Order which held that Respondent, Tri-County Transportation District of Oregon (Tri-Met), violated ORS 243.672(1)(g) when it refused to comply with an arbitration award. 21 PECBR 443. The Court of Appeals affirmed. 222 Or App 293, 195 P3d 389, *adhered to on reconsid.*, 224 Or App 173, 197 P3d 60 (2008). On July 21, 2006, Complainant, Amalgamated Transit Union, Division 757 (ATU), filed this petition for representation costs. On August 8, 2006, Tri-Met filed objections to the petition.¹

Pursuant to OAR 115-035-0055, this Board makes the following findings:

¹We followed our normal procedure and held the petition in abeyance until the appeal was complete. OAR 115-035-0055(5) The Court of Appeals issued its Appellate Judgment May 14, 2009 Neither party petitioned for attorney fees on appeal. ORS 243.676(2)(e); OAR 115-035-0057.

1. ATU filed a timely petition for representation costs. Tri-Met filed timely objections to the petition.

2. ATU is the prevailing party.

3. According to the affidavit of ATU's counsel, ATU incurred more than \$30,000 in representation costs in pursuing this matter. Counsel billed at hourly rates ranging from \$145 to \$185. ATU requests an award of \$30,000 in representation costs and a \$1,000 civil penalty.

Under OAR 115-035-0055(1)(a), an award of representation costs may not exceed \$3,500 unless a civil penalty would be appropriate. A civil penalty is not appropriate here for at least two reasons. First, a request for a civil penalty must be included in a party's complaint. OAR 115-035-0075(2). As we noted in our Order, both parties withdrew their requests for a civil penalty. 21 PECBR at 444. Second, a civil penalty is awarded or denied in the underlying decision. It is not properly requested or awarded in a proceeding for representation costs. *Service Employees International Union Local 503 v. State of Oregon, Judicial Department*, Case No. UP-3-04, 21 PECBR 179, 181 n 2 (2005) (Rep. Cost Order). Accordingly, we deny ATU's request for a civil penalty and we apply the \$3,500 cap to its request for representation costs.

The parties submitted this matter on a fact stipulation in lieu of an evidentiary hearing. The average time spent on a stipulated fact case of normal complexity is 16-25 hours. *Benton County Deputy Sheriff's Association v. Benton County*, Case No. UP-24-06, 22 PECBR 46 (2007) (Rep. Cost Order); *AFSCME Local 189 v. City of Portland*, Case No. UP-1-05, 21 PECBR 527 (2006) (Rep. Cost Order). The legal issues in these cases were exceedingly complex, a factor the Board will consider in determining ATU's reasonable representation costs.

Some of the hourly rates claimed are higher than average. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 23 PECBR 133, 134 (2009) (Rep. Cost Order) (an hourly rate of up to \$155 is reasonable). We will also take this factor into account in determining the reasonable amount of representation costs incurred.

4. This dispute arose when Tri-Met fired a bus driver because she allegedly failed a drug test. ATU filed a grievance challenging the termination, and the parties submitted the dispute to an arbitrator. The arbitrator upheld the grievance and reinstated the driver to her former position. Tri-Met agreed to return the grievant to a

job, but it refused to restore her to a bus driver position unless she first submitted to an evaluation by a substance abuse professional. According to Tri-Met, federal law requires such an evaluation before reinstatement to a safety-sensitive bus driver position. The parties submitted this issue to the arbitrator, and the arbitrator concluded the grievant was not required to undergo the evaluation. Tri-Met nevertheless refused to return the grievant to a bus driver position. ATU filed this unfair labor practice complaint to enforce the arbitrator's award. This Board enforced the award and the Court of Appeals affirmed.

Tri-Met asserts that we should refuse to award any representation costs because it acted in good faith. We disagree. The statute requires this Board to award representation costs if any were incurred. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4*, 52 Or App 881, 896, 630 P2d 1304 (1981).

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. We reduce the percentage in cases that present novel legal issues so that parties are not deterred from litigating novel issues. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-5-06, 22 PECBR 479, 480 (2008) (Rep. Cost Order). This case presented novel legal issues concerning the proper interpretation of federal statutes and regulations. Conversely, we increase the normal percentage in cases involving a refusal to comply with an arbitrator's award because the Public Employee Collective Bargaining Act (PECBA) favors the resolution of contract disputes through arbitration. *Washington County Police Officers' Association v. Washington County*, Case No. UP-76-99 (September 2003) (Rep. Cost Order).

We balance these competing policies and conclude that an average award of representation costs is appropriate.

After considering the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards ATU representation costs in the amount of \$1,550.

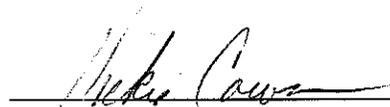
ORDER

Tri-Met will remit \$1,550 to ATU within 30 days of the date of this Order.

DATED this 10th day of August 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.