

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-1-08

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON	)	
CORRECTIONS EMPLOYEES,	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER
	)	ON RESPONDENT'S
STATE OF OREGON, DEPARTMENT	)	PETITION FOR
OF CORRECTIONS,	)	REPRESENTATION COSTS
	)	
Respondent.	)	
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The Association of Oregon Corrections Employees (AOCE) filed this unfair labor practice complaint which alleged that the Department of Corrections (DOC) violated ORS 243.672(1)(e) when it unilaterally changed the work schedule of two bargaining unit members. On November 18, 2008, this Board issued an Order which dismissed the complaint. 22 PECBR 850. On November 26, 2008, DOC petitioned for representation costs. On December 5, 2008, AOCE objected to the petition.

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

1. DOC filed a timely petition for representation costs and AOCE filed timely objections to the petition.
2. DOC is the prevailing party.
3. According to the affidavit of counsel, DOC incurred representation costs of \$14,337. This represents 112 hours of attorney time billed at \$126 per hour, and 1.7

hours of paralegal time billed at \$74 per hour.<sup>1</sup> We must first determine whether DOC seeks a reasonable hourly rate for a reasonable number of hours.

We find the hourly rate reasonable. *Lebanon Education Association v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 623 (2008) (Rep. Cost Order) (attorney time billed at \$145 per hour is reasonable). In fashioning our award, we will consider the time spent by a paralegal. See *AOCE v. Department of Corrections*, Case No. UP-16-05, 22 PECBR 51 (2007) (Rep. Cost Order) (paralegal time can be recovered as a representation cost if it is not duplicative).

AOCE asserts that the number of hours claimed is excessive. This case required one full day of hearing. An average case requires approximately 45-50 hours of time for each day of hearing. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-5-06, 22 PECBR 479 (2008) (Rep. Cost Order). DOC's request is more than double the average.

DOC asserts that it reasonably spent hours beyond the norm because the case was complex. DOC argues that in addition to typical case management, it needed to: determine the parties' past practice under the contract language; review the transcript; file a pre-hearing motion to make the complaint more definite and certain; conduct legal research regarding a recently decided case; perform substantial extra legal research and writing in an unsuccessful attempt to convince this Board to change settled law; and respond to AOCE's extensive objections to the Recommended Order.

We recognize that some cases are complex and require more time than usual. For example, in *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 636 (2008) (Rep. Cost Order), the complainant filed a motion asking the Board to reconsider its initial Order, and the Board conducted an oral argument on the motion. We observed that these procedures are not part of a typical case, and we concluded they justified about 28 hours more than the average. Similarly, in *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853 (2007), the issues were exceedingly numerous and complex. The Board permitted the parties to file oversized briefs and conducted an exceptionally long oral argument. As a measure of the case's complexity, the Board's final Order was 115 pages. In these circumstances, we held it was reasonable to request a number of hours about 20 percent above the average.

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<sup>1</sup>DOC also seeks reimbursement for photocopy charges and filing fees. Photocopy charges cannot be recovered as a representation cost. *IBEW, Local 48 and District Council of Trade Unions v. School District No. 1J, Multnomah County*, Case No. UP-69-03, 21 PECBR 13 (2005) (Rep. Cost Order). Similarly, a request for reimbursement of filing fees is not properly part of a petition for representation costs. *Id.* Such a request must be made in the complaint, OAR 155-035-0075(3), and reimbursement is awarded or denied in the underlying order. *Joseph Education Association v. Joseph School District No. 6*, Case No. UP-56-95, 16 PECBR 775, n. 1 (1996) (Rep. Cost Order).

Here, there were no unusual procedures, the case was not exceedingly complex, and the issues were not numerous. The alleged special circumstances DOC recites are all part of a typical case. They do not justify the amount of attorney time claimed by DOC – more than twice the average number of hours in a typical case. We will consider this factor in determining DOC’s reasonable representation costs.

4. The complaint alleged that DOC violated ORS 243.672(1)(e) when it unilaterally changed the work hours for two bargaining unit members. We concluded that the parties’ collective bargaining agreement specifically permitted the disputed change, and we dismissed the complaint.

An average award is approximately one-third of the prevailing party’s reasonable representation costs, up to the \$3,500 limit. *Lebanon Education Association v. Lebanon Community School District*, 22 PECBR at 625. We adjust the percentage up or down for policy reasons described in our rules and cases. We generally make an average award in a unilateral change case. *Northwest Education Association v. Northwest Regional Service District*, Case No. UP-23-06, 22 PECBR 482 (2008) (Rep. Cost Order). We will do so here.

Having considered the purposes and policies of the PECBA, our awards in prior cases, and the reasonable cost of services rendered, this Board awards Respondent representation costs in the amount of \$2,000.

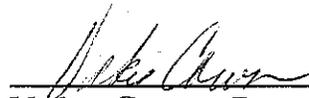
ORDER

Complainant will remit \$2,000 to Respondent within 30 days of the date of this Order.

DATED this 7<sup>TH</sup> day of May 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.