

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-3-04

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL)
UNION LOCAL 503,)
OREGON PUBLIC EMPLOYEES UNION,)

Complainant,)

v.)

STATE OF OREGON,)
JUDICIAL DEPARTMENT,)

Respondent.)

FINDINGS AND ORDER
ON COMPLAINANT'S
PETITION FOR
REPRESENTATION COSTS

On March 18, 2005, this Board issued an Order that found Respondent in violation of ORS 243.672(1)(a). 20 PECBR 864. Complainant filed a petition for representation costs on April 5, 2005. Respondent filed objections to the petition on April 8, 2005. Pursuant to OAR 115-35-055, this Board makes the following findings:

1. Complainant filed a timely petition for representation costs. Respondent filed timely objections to the petition.
2. Complainant is the prevailing party.

Respondent asserts that Complainant prevailed on only part of its complaint and that we should reduce our award accordingly. We reject this argument and find Complainant to be the prevailing party on the entire complaint.

When a complaint contains more than one “separate charge,” a party is entitled to representation costs only as to those charges on which it prevailed. OAR 115-35-055(1)(b). Our rule establishes a two-part test for determining whether a charge is “separate.” First, it must be “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 second, the separate charges must concern “enforcement of rights independent of the other(s).” OAR 115-35-055(1)(b)(A). To be “separate,” a charge must meet both prongs of this test. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 526 (2003) (Rep. Cost Award).

This case concerns employees’ workplace discussions with one another about a union organizing campaign. We concluded that two separate employer directives unlawfully interfered with those discussions. Respondent’s objections focus on our resolution of the claim concerning the employer’s directive to refrain from going desk-to-desk to talk with other employees about union-related matters. Complainant asserted that the directive violated both prongs of ORS 243.672(1)(a)¹ because the employer routinely permitted employees to have discussions on work time about other nonwork-related and personal subjects. We found that the employer had no rule prohibiting systematic contact of fellow employees, and there was no allegation that such conversations would unduly interfere with work performance. We concluded that the employer’s conduct violated the “in the exercise” prong of subsection (1)(a), but not the “because” prong.

Respondent asserts that the award should be reduced because Complainant did not prevail on its “because” prong allegations. We disagree. Complainant merely pled alternative legal theories based on the same basic facts. Such charges are not “separate” under our rule because they arise from the same operative facts and could not have been pled and litigated without reliance on the allegations of the other. Under OAR 115-35-055, Complainant prevailed on the entire complaint for purposes of an award of representation costs.

¹ORS 243.672(1)(a) makes it an unfair labor practice for a public employer to “interfere with, restrain or coerce employees *in or because of*” the exercise of protected rights. The statute identifies two separate claims, a “because of” violation and an “in the exercise” violation. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 739 (2004).

3. Complainant petitions for an award of \$3,500, the maximum amount permitted under Board rules.² According to the affidavit of counsel, the reasonable value of her services is \$4,920. This is based on 41 hours at \$120 per hour.

4. The hearing on this matter took less than one day. A case takes an average of 45-50 hours per day of hearing. *Gibson-Boles v. Oregon AFSCME Council 75*, Case No. UP-46-01, 20 PECBR 982, 983 (2005) (Rep. Cost Order). The 41 hours claimed here is slightly less than average. Complainant values the services of counsel at \$120 per hour. This rate is reasonable. See *IBEW Local 48 v. School District 1J*, Case No. UP-69-03, 21 PECBR 13, 14 (2005) (finding an hourly rate of \$135 to be reasonable).

5. This dispute arose out of a union organizing campaign. We held that the employer issued two directives during the campaign that violated ORS 243.672(1)(a). We describe above the employer's unlawful directive to refrain from desk-to-desk contact with fellow employees regarding union-related matters. In addition, we concluded that a supervisor unlawfully told an employee that he could not talk about the union in the office. We ordered the employer to cease and desist from interfering with the right of employees to communicate with each other about union-related matters to the same extent it permits employees to discuss other nonwork-related or personal matters in the workplace.

Our normal practice is to award a prevailing party about one-third of its reasonable representation costs, not to exceed \$3,500. *E.g. IBEW, Local 48 v. School District 1J*, 21 PECBR at 15. We adjust the percentage up or down for policy reasons identified in our rules and cases. *Id.*

We generally adjust our award upward when an employer violates subsection (1)(a) because such conduct is directed at core rights protected by the Public Employee Collective Bargaining Act (PECBA). *Days Creek Association of Classified Employees v. Days Creek School District 15*, Case No. UP-93-94, 16 PECBR 289, 290 (1995) (Rep. Cost Order); *Oregon Public Employees Union v. Jefferson County*, Case No. UP-20-99 Unpublished Rep. Cost Order January 2000). We found that the employer violated subsection (1)(a) in two separate instances. We see no reason to depart from our practice of making a greater-than-average award in these circumstances.

²Complainant also asks us to order reimbursement of its \$250 filing fee. Such a request, like a request for a civil penalty, must be made in the complaint and is awarded or denied in the underlying decision. It is not properly raised in a petition for representation costs. *IBEW Local 48 v. School District 1J*, Case No. UP-69-03, 21 PECBR 13, 14 (2005).

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

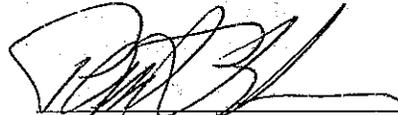
ORDER

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

SIGNED and ISSUED this 16th day of November 2005.

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Donna Sandoval Bennett, Chair



Paul B. Gamson, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Bennett has recused herself from this case.