

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-7-08

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY)
EMPLOYEES' ASSOCIATION,)
)
Complainant,)
)
v.)
)
CLACKAMAS COUNTY/)
CLACKAMAS COUNTY DISTRICT)
ATTORNEY,)
)
Respondent.)
_____)

FINDINGS AND ORDER ON
BOTH PARTIES' PETITIONS
FOR REPRESENTATION COSTS

Clackamas County Employees' Association (Association) filed this unfair labor practice complaint which alleged that Clackamas County/Clackamas County District Attorney (County) violated ORS 243.672(1)(a) when it threatened to remove an Association representative from a meeting. On April 15, 2009, this Board, with one member dissenting, dismissed the complaint. 23 PECBR 90. On May 5, 2009, the County petitioned for representation costs. On May 7, 2009, the Association objected to the petition.

The Association appealed our Order. We followed our usual practice and held the County's representation cost petition in abeyance until the appellate process was complete. OAR 115-035-0055(5). On May 25, 2011, the Court of Appeals concluded that the Board majority incorrectly interpreted ORS 243.672(1)(a). The court reversed the Order and remanded the case to the Board for further consideration. 243 Or App 34, 259 P3d 932 (2011).

On remand, this Board determined that the County violated subsection (1)(a) and ordered the County to cease and desist. 24 PECBR 518 (2011). On December 2, 2011, the Association petitioned for representation costs. On December 8, 2011, the County objected to the petition.

Pursuant to OAR 115-035-0055, this Board finds as follows:

COUNTY'S PETITION

1. The County filed a timely petition for representation costs and the Association filed timely objections to the petition.
2. The County is not the prevailing party.

Under ORS 243.676(2)(d) and (3)(b), only a "prevailing party" is entitled to representation costs. The prevailing party "is the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(b). Although we initially ruled in favor of the County, the court reversed that Order. For purposes of representation costs, we determine the prevailing party after all appeals of an Order have been exhausted or the time for further appeal of the Order has expired. Here, the time for further appeal of this Order has expired and the County did not ultimately prevail.

Because the County is not a prevailing party, we must dismiss its petition for representation costs. *See Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Department of Administrative Services, the Homecare Commission, and the Department of Human Services*, Case No. UP-60-02, 21 PECBR 555 (2006) (Rep. Cost Order)(dismissing the representation cost petition of a party that prevailed on a Board Order that was later reversed by the Court of Appeals); *Portland Fire Fighters' Association, Local 43 v. City of Portland*, Case No. UP-58-99 (Rep. Cost Order, October 2002) (same).

ASSOCIATION'S PETITION

1. The Association filed a timely petition for representation costs and the County filed timely objections to the petition.
2. The Association is the prevailing party.
3. The Association incurred \$4,275 in representation costs pursuing this complaint. According to the affidavit of counsel, this consists of 28.5 hours of attorney time billed at \$150 per hour.

The hearing on this matter took one day. The number of hours spent here is well below the average in similar cases. See *Blue Mountain Faculty Association/Oregon Education Association/NEA and Laniman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 853 (2007) (Rep. Cost Order) (cases typically take an average of 45-50 hours for each day of hearing). The hourly rate is similarly below average. See *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 510 (2010) (Rep. Cost Order) (the average rate for representation costs is \$165-170 per hour). We will consider these factors in determining the Association's reasonable representation costs.

4. This case arose out of a meeting between the County's District Attorney and an employee he proposed to discharge. Two Association officials attended the meeting to represent the employee. During the meeting, the District Attorney thought one of the Association representatives was "smirking" at him. In response, the District Attorney "threatened to remove [the] association representative from a protected meeting and threatened to never allow the representative to attend a meeting in the district attorney's office again." 243 Or App at 42. Such threats are objectively likely to chill employees from exercising their protected rights, a violation of ORS 243.671(1)(a). 243 Or App at 43.

5. An average award is approximately one-third of the prevailing party's reasonable representation costs, up to the \$3,500 limit. OAR 115-035-0055(1)(a); *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 for policy reasons described in our rules and cases.

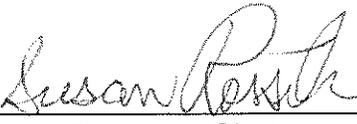
We generally adjust the award upward when an employer violates subsection (1)(a) because the employer's conduct strikes at core Public Employee Collective Bargaining Act (PECBA) rights. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-3-04, 21 PECBR 179 (2005) (Rep. Cost Order). Conversely, we generally 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 (2008) (Rep. Cost Order). The County asserts that this case presented novel issues. We agree. The County correctly points out that two members of this Board concluded that there was no violation, and it required a Court of Appeals decision to establish the proper interpretation of the statute. 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 the Association representation costs in the amount of \$1,425.

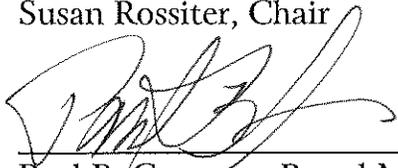
ORDER

1. The County's petition is dismissed.
2. The County will remit \$,1425 to the Association within 30 days of the date of this Order.

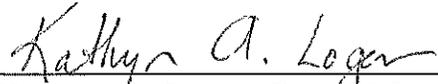
DATED this 24 day of April 2012.



Susan Rossiter, Chair



Paul B. Gamsón , Board Member



Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.