

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-25/35-04

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON)
CORRECTIONS EMPLOYEES,)

Complainant,)

v.)

STATE OF OREGON,)
DEPARTMENT OF CORRECTIONS,)

Respondent,)

Case No. UP-25-04;)
_____)

FINDINGS AND ORDER ON
RESPONDENTS' PETITION FOR
REPRESENTATION COSTS

OREGON STATE POLICE)
OFFICERS' ASSOCIATION,)

Complainant,)

v.)

STATE OF OREGON,)
DEPARTMENT OF STATE POLICE,)

Respondent,)

Case No. UP-35-04.)
_____)

On April 21, 2004, the Association of Oregon Corrections Employees (AOCE) filed an unfair labor practice complaint against the State of Oregon, Department of Corrections (DOC) (Case No. UP-25-04). On July 8, 2004, the Oregon

State Police Officers' Association (OSPOA) filed an unfair labor practice complaint against the State of Oregon, Department of State Police (OSP) (Case No. UP-35-04). Both complaints made the same allegations: that DOC and OSP violated ORS 243.672(1)(e) by submitting permissive subjects of bargaining to interest arbitration and implementing arbitrators' awards that included these permissive subjects; and by engaging in surface bargaining. We consolidated the cases for hearing and decision. By Order dated October 31, 2005, this Board dismissed the complaints. 21 PECBR 139 (2005).

On November 22, 2005, OSP and DOC petitioned for representation costs. On December 8, 2005, OSPOA and AOCE objected to the petition. We followed our usual practice and held the petition in abeyance until completion of the appeals process. OAR 115-035-0055(5). The Court of Appeals affirmed this Board's decision. 213 Or App 648, 164 P3d 291 (2007). The Supreme Court denied review. 343 Or 363, 169 P3d 1268 (2007). The appellate judgment was issued on December 17, 2007, and the appellate process is now complete.

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds:

1. DOC and OSP filed a timely petition for representation costs. AOCE and OSPOA filed timely objections to the Respondents' petition.
2. DOC and OSP are prevailing parties.
3. DOC and OSP each request an award of \$3,500 in representation costs. This represents the maximum amount we are permitted to award by law in each case. OAR 115-035-0055(1)(a). According to the affidavit of counsel, DOC incurred a total of \$14,650 in representation costs which included 147.8 hours of attorney time billed at \$98 per hour, and 2.4 hours of paralegal time billed at \$69 per hour. Also according to the affidavit of counsel, OSP incurred a total of \$22,679.20 in representation costs which included 229.3 hours of attorney time billed at \$98 per hour, and 8.6 hours of paralegal time billed at \$69 per hour.

We find DOC and OSP's hourly rates reasonable. *See Lebanon Education Association v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 623 (2008) (Rep. Cost Order) (hourly rate of up to \$145 for attorney time is reasonable). In addition, the use of a paralegal is an appropriate cost for reimbursement. *AOCE v. State of Oregon, Department of Corrections*, Case No. UP-16-05, 22 PECBR 51 (2007) (Rep. Cost Order).

We note that although these cases involve separate parties, they were consolidated for hearing. In addition, the prevailing parties were both represented by the same attorneys from the Oregon Department of Justice.

A case normally requires approximately 45-50 hours of attorney 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). These cases involved three days of hearing. DOC and OSP attorneys spent a total of 377.1 hours working on both cases. According to the affidavit of counsel, approximately 40 percent of this time was devoted to Case No. UP-25-04, and approximately 60 percent of this time was devoted to Case No. UP-35-04. In addition, DOC and OSP paralegals spent a total of 11 hours working on both cases. Approximately 20 percent of this time was spent on Case No. UP-25-04, and approximately 80 percent of this time was spent on Case No. UP-35-04. We will apportion our fee awards according to these percentages.

4. The complaints alleged that DOC and OSP violated their duty to bargain in good faith under ORS 243 672(1)(e) by offering harsh proposals and refusing to make significant concessions during negotiations for the parties' 2003-2005 collective bargaining agreements. OSPOA and AOCE also alleged that DOC and OSP violated subsection (1)(e) by submitting a last best offer to interest arbitration that included a permissive proposal for a wage freeze that remained in effect after the collective bargaining agreement expired. The labor organizations further alleged that DOC and OSP violated subsection (1)(e) when they implemented an interest arbitrator's award that included this last best offer.

We concluded that OSP and DOC did not engage in unlawful surface bargaining. We also found that DOC and OSP's proposals for salary freezes that remained in effect after the expiration of the contract were mandatory for negotiations. Accordingly, we concluded that DOC and OSP did not violate subsection (1)(e) by submitting last best offers to the interest arbitrators that included these proposals, and by implementing an arbitrators' awards that also included this proposal. We dismissed all allegations in the complaints.

In cases such as these that involve bad faith bargaining charges, we normally award approximately one-third of the prevailing party's reasonable representation costs, up to the \$3,500 limit. *IAFF, Local 2285 v. Douglas County Fire District #2*, Case No. UP-3-03, (May 2003) (Rep. Cost Order); *Redmond Police Officers' Association v. City of Redmond*, Case No. UP-62-02, (May 2003) (Rep. Cost Order). We note, however, that some of the issues in these cases were novel. When a case presents novel legal issues, we usually reduce the award to one-fourth of the prevailing party's reasonable costs so that we do not discourage parties from litigating this type of issue. *AOCE v. State of Oregon, Department of Corrections*, Case No. UP-33-06, 22 PECBR 456 (2008) (Rep. Cost Order). We will consider these factors in making our award of representation costs.

OSPOA and AOCE object to *any* award of representation costs. By law, we are required to award representation costs to a prevailing party if any were incurred,

however. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4*, 52 Or App 881, 896, 630 P2d 1304 (1981).

Having considered the purposes and policies of the Public Employee Collective Bargaining Act, our awards in prior cases, and the reasonable cost of services rendered, this Board awards DOC \$1,400 in Case No. UP-25-04 and OSP \$2,100 in Case No. UP-35-04.

ORDER

AOCE will remit \$1,400 to DOC within 30 days of the date of this Order. OSPOA will remit \$2,100 to OSP within 30 days of the date of this Order.

DATED this 28th day of August 2008.¹



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

¹Member Cowan was the Administrative Law Judge (ALJ) who conducted the hearing in this case, and Member Rossiter was the ALJ who wrote the Recommended Order. Normally, these Board Members would recuse themselves from this case, but to do so would make it impossible for a majority of this Board to issue a Representation Cost Order.

For this reason, we invoke the “rule of necessity.” Under this rule, a decision maker who is recused is nevertheless permitted to participate when a case could not be heard otherwise. *Oregon AFSCME Council 75, Local 3336 v. State of Oregon, Department of Environmental Quality*, Case No UP-47-06, 22 PECBR 18, *on recons*, 22 PECBR 54, 57 (2007). Members Cowan and Rossiter have participated in the consideration and decision regarding this petition for representation costs.