

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-32-07

(UNFAIR LABOR PRACTICE)

GRESHAM-BARLOW EDUCATION )	
ASSOCIATION/OEA/NEA, )	
)	
Complainant, )	FINDINGS AND ORDER ON
)	COMPLAINANT'S PETITION
v. )	FOR ATTORNEY FEES ON
)	APPEAL
GRESHAM-BARLOW SCHOOL )	
DISTRICT No. 10J, )	
)	
Respondent. )	
)	

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On June 4, 2009, this Board issued an Order which held that Gresham-Barlow School District (District) violated ORS 243.672(1)(a) when it involuntarily transferred two bargaining unit members to other schools. 23 PECBR 170. The Gresham-Barlow Education Association (Association) petitioned for reconsideration, and on June 30, 2009, we issued an Order which adhered to our original decision but made a slight modification to the remedy. 23 PECBR 219. The District appealed. The Court of Appeals affirmed our decision without an opinion. 241 Or App 352. The court issued its Appellate Judgment on May 12, 2011.

On May 24, 2011, the Association filed this petition for attorney fees on appeal. The District did not object or otherwise respond to the petition. *See* OAR 115-035-0057(1) and 115-035-0055(3) (an opposing party has 21 days to object to a petition for attorney fees on appeal).<sup>1</sup>

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<sup>1</sup>The Association also petitioned separately for representation costs for work performed before this Board. ORS 243.676(2)(d); OAR 115-035-0055. We address that petition in a separate Order issued on this date.

Pursuant to OAR 115-035-0057, this Board makes the following findings:

1. The Association filed a timely petition for attorney fees on appeal. The District did not object to the petition.
2. The Appellate Judgment names the Association as the prevailing party.
3. The Association incurred \$8,134 in attorney fees on appeal. According to the affidavit of counsel, this amount is based on 55.3 hours of attorney time billed at rates ranging from \$130 to \$150 per hour.

The requested hourly rate is 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). The number of hours devoted to this appeal is above the average. We reviewed the 18 attorney fees awards we issued since 1997. The petitioning parties spent an average of 35 hours on an appeal. We will consider these factors in determining the Association's reasonable attorney fees.

4. The District involuntarily transferred two teachers to positions in other schools. Both teachers were active in the Association and were outspoken in challenging a school improvement plan. The Association alleged the teachers were transferred because of their protected Association activities. We concluded the District had a mixed motive for the transfers, that is, it transferred the teachers for both lawful reasons and for unlawful ones (*i.e.*, their protected union activity). We determined that the unlawful considerations played a small role in the transfer and that the District would have transferred these teachers even if they had not engaged in protected activity. We therefore concluded the District did not violate the "because of" portion of ORS 243.672(1)(a).

We further concluded, however, that the District violated the "in the exercise" portion of subsection (1)(a). The transferred teachers, as well as other members of the bargaining unit, correctly perceived that the District considered protected union activities in its decision to transfer the teachers. The natural and probable effect of the District's actions would be to restrain employees from engaging in protected activities for fear of unwanted consequences. The District's appeal focused on our conclusion that it violated the "in the exercise" portion of subsection (1)(a). As noted, the Court of Appeals summarily rejected the appeal without an opinion.

5. When an employer violates subsection (1)(a), we typically make a larger than average award because the employer's conduct strikes at core PECBA rights. *See Lebanon Education Association v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 623, 625 (2008) (Rep. Cost Order). We will do so here.

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 attorney fees on appeal in the amount of \$2,500.

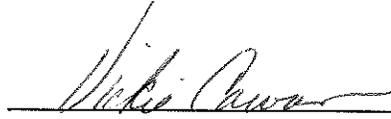
ORDER

The District will remit \$2,500 to the Association within 30 days of the date of this Order.

DATED this 3 day of August 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.