

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-32-07

(UNFAIR LABOR PRACTICE)

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

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 Court of Appeals affirmed our decision without an opinion. 241 Or App 352.

On June 25, 2009, the Association filed this petition for representation costs. The District did not object or otherwise respond to the petition. *See* OAR 115-035-0055(3) (an opposing party has 21 days to object to a petition for representation costs).¹

¹We followed our normal procedure and held this petition in abeyance until the appeal was complete. OAR 115-035-0055(5). The Court of Appeals issued its Appellate Judgment on May 12, 2011. The Association also petitioned separately for attorney fees on appeal. ORS 243.676(2)(e); OAR 115-035-0057. We address that petition in a separate Order issued on this date.

Pursuant to OAR 115-035-0055, this Board makes the following findings:

1. The Association filed a timely petition for representation costs. The District did not object to the petition.
2. The Association is the prevailing party.
3. The Association incurred \$22,730.50 in representation costs in pursuing this complaint. According to the affidavit of counsel, this consists of 161.05 hours of attorney time billed at \$140 and \$145 per hour.

The hearing took three days. The number of hours devoted to this case is slightly above the average in similar cases. *See Blue Mountain Faculty Association 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 somewhat below the 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. 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.

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 PECBA rights. *SEIU International Union Local 503, OPEU v. State of Oregon, Judicial Department*, Case No. UP-3-04, 21 PECBR 810 (2005). We conclude that the Association is entitled to larger-than-average award. We note, however, that even an average award would exceed the \$3,500 cap, so we will award the maximum amount permitted by Board rules.

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 \$3,500.

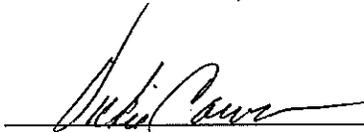
ORDER

The District will remit \$3,500 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.