

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-65-99

(UNFAIR LABOR PRACTICE)

ARLINGTON EDUCATION)	
ASSOCIATION,)	
)	
Complainant,)	
)	
v.)	FINDINGS AND ORDER
)	ON BOTH PARTIES'
ARLINGTON SCHOOL DISTRICT NO. 3,)	PETITIONS FOR
)	REPRESENTATION COSTS
Respondent.)	
)	
)	
)	

On November 21, 2000, this Board, with one member dissenting, issued an Order finding that Respondent violated ORS 243.672(1)(g) when it refused to arbitrate a grievance. The Board found no refusal to arbitrate two other grievances and accordingly dismissed the complaint as to those charges. 18 PECBR 901. On December 8, 2000, we denied Respondent's petition for reconsideration. Both parties seek representation costs. Complainant filed its petition for representation costs on December 11, 2000, and Respondent filed objections to the petition on December 15, 2000. Respondent filed its petition for representation costs on December 12, 2000, and Complainant filed objections to the petition on December 19, 2000.

Although both petitions arise from our November 21, 2000 Order, we recite the subsequent history of the case to provide a more complete picture of the issues and their importance. Respondent appealed that portion of the Board's order which found it in violation of subsection (1)(g). We followed our usual practice under OAR 115-035-0055(5) and held the representation cost petitions in abeyance until the appellate process was complete. The Court of Appeals reversed our Order and remanded the matter for further consideration. 177 Or App 658, 34 P3d 1197. It held that the Board erred when it considered

the contents of a document that was in the Board's official file but was not made part of the evidentiary record. On February 5, 2002, the Supreme Court denied review. 333 Or 399, 42 P3d 1243. The Court issued its Appellate Judgment on March 19, 2002.¹

On remand, we reviewed the record without the document the Court of Appeals said we erroneously relied upon. Although our rationale was substantially different from that in our original Order, we reached the same conclusion. That is, we held that Respondent violated subsection (1)(g) when it refused to arbitrate a grievance. 19 PECBR 762.

Respondent again sought review by the Court of Appeals. On December 15, 2004, the Court affirmed this Board's Order on Remand, 196 Or App 586, 103 P3d 1138. The Court issued an Appellate Judgment on March 17, 2005.²

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

1. Complainant filed a timely petition for representation costs and Respondent filed timely objections to the petition. Respondent filed a timely petition for representation costs and Complainant filed timely objections.³

2. Because each party succeeded on at least one separate charge, both parties are considered "prevailing" for purposes of representation costs.

Only a "prevailing party" in an unfair labor practice case is entitled to representation costs. ORS 243.676(2) and (3); OAR 115-035-0055(1). Both parties assert that they prevailed. Respondent observes that the Order concerns three separate grievances. It concedes that Complainant prevailed on one claim but asserts that it prevailed on the two claims we dismissed.

¹Respondent separately petitioned for attorney fees on appeal based on this court decision. We address that petition in a separate order.

²On March 30, 2005, Complainant filed a "Petition for Attorney Fees and/or Representation Costs." Based on our review of the supporting documents filed with the petition, it includes approximately one hour of time for attorney services on the remand portion of the case. We do not consider this time in our award of representation costs because it was not filed within 21 days of the Board's Order on Remand. OAR 115-035-0055(2). We address the request for attorney fees on appeal in a separate order.

³Despite the long and complicated procedural history, the only petitions we address here are those seeking representation costs based on the original Order we issued on November 21, 2000. A companion order addresses both parties' petitions for attorney fees based on the two appeals.

Complainant asserts that it prevailed on the entire complaint. It argues that the “central, overriding issue” in the case was not Respondent’s *refusal* to arbitrate, but instead was its *obligation* to arbitrate.⁴ According to Complainant, it successfully established Respondent’s obligation to arbitrate which “provides it precious rights to exercise in the District prospectively.”

Complainant’s position is belied by its complaint. It alleges in four separate counts⁵ that Respondent violated ORS 243.672(1)(g) by “refusing to arbitrate” a grievance and by “refusing to process [three other grievances] to binding arbitration.” It sought a civil penalty because of Respondent’s “refusal to process the grievances to arbitration,” and the prayer for relief sought a declaration that Respondent acted unlawfully “by refusing to process the various grievances to arbitration.” We found a refusal to arbitrate on one count, and Complainant did not object, seek reconsideration, or appeal that finding. In these circumstances, Complainant cannot now deny that it alleged and pursued a theory that Respondent refused to arbitrate several grievances. Respondent, not Complainant, prevailed on the two claims we dismissed.

Under our rules, if one or more “separate charges” in a complaint are upheld and one or more such charges are dismissed, each party may be considered “prevailing” for purposes of representation costs. 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 115-035-0055(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).

We conclude that each of the three counts alleging a refusal to arbitrate constitutes a “separate charge.” Each involves independent operative facts and concerns the enforcement of different provisions of the collective bargaining agreement. We held that Respondent unlawfully refused to arbitrate one of the grievances. Complainant prevailed on that charge. We dismissed the remaining two allegations. Respondent prevailed on those

⁴Complainant apparently attempts to separate the two elements of a refusal to arbitrate: (1) an obligation to arbitrate and (2) a refusal to comply with that obligation. Complainant seems to argue that it proved the obligation element, thereby making it a prevailing party even on the two claims we dismissed. The elements cannot be separated. Without proof of both, there is no unfair labor practice, and Complainant cannot be a prevailing party on those claims.

⁵Complainant eventually dropped one of the counts so that only three proceeded to decision by this Board.

charges. Each party partially prevailed for purposes of representation costs.

When each party partially prevails, the Board reviews the record to determine the percentage of the case won by each party, and it then offsets the percentages. *East County Bargaining Council v. Centennial School District No. 28JT*, Case No. C-185-82, 8 PECBR 8359 (1986) (Rep. Cost Order).

Coos Bay Education Association v. Coos Bay School District No. 9, Case No. UP-67-96, 17 PECBR 643 (1998) (Rep. Cost Order) illustrates how we apply this formula. There, we found that the employer prevailed on 60 percent of the case and the union prevailed on 40 percent. We offset the percentages and found the employer to be a 20 percent prevailing party. Because only the employer ended with a positive percentage after the offset, we considered only its petition in calculating the award. We adjusted the employer's request to consider only 20 percent of the amount it sought. *See also, Hood River County Law Enforcement Association v. Hood River County*, Case No. UP-29-97 (Unpublished Rep. Cost Order, January 1999) (applying the formula).

In determining the percentages on which each party prevailed, we consider the number of issues involved, the relative significance of the issues, and the amount of time reasonably devoted to each issue. *Mid-Valley Bargaining Council and Clausing-Lee v. Corvallis School District*, Case No. UP-69-95 (Unpublished Rep. Cost Order, February 1997). Upon review of the record and application of these factors, we conclude that Respondent prevailed on 67 percent of the case and Complainant prevailed on 33 percent. We offset these percentages and find Respondent a 34 percent prevailing party. We will reduce Respondent's request accordingly.

3. Respondent asserts that it incurred \$13,717.52 in representation costs. That amount includes expenses for mileage, meals and lodging, filing and service fees, and photocopying charges. Such expenses are not properly part of a representation cost award, *Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney*, Case No. UP-32-01, 20 PECBR 650 (2004) (Rep. Cost Order), and we will not consider them in making our award. The petition also seeks reimbursement for clerical expenses. Representation costs do not include clerical expenses, *Milton-Freewater Police Association v. City of Milton-Freewater*, Case No. UP-37-97 (Unpublished Rep. Cost Order, March 1998), and we will not consider them in making our award.

The remaining request is for 127.05 hours valued at \$13,345.50. According to the affidavit of counsel, this represents 87.15 hours of attorney time billed at \$120 per hour; 32.9 hours of paralegal time billed at \$75 per hour; and 7 hours of travel time billed at \$60 per hour.

This portion of the case involved a one-day hearing, post-hearing briefs, objections and oral argument before this Board. The hourly rate is reasonable. The number of hours far exceeds the average in similar cases. We note that Respondent spent more than twice the number of hours Complainant spent on this portion of the case, a factor we will consider in fashioning our award.

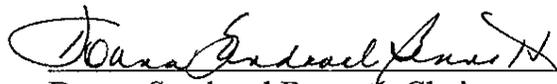
4. The complaint alleged that Respondent refused to arbitrate three grievances. The Board, with one member dissenting, concluded that Respondent unlawfully refused to arbitrate one of the grievances. It found that the facts did not establish a refusal to arbitrate the other two grievances, and we dismissed those allegations. We found that the complaint was not frivolous or filed in bad faith, and we accordingly denied Respondent's request for a civil penalty and filing fee. We also note that after two appeals, the result in the case remained the same. Under the circumstances, an average award is appropriate.

Having considered the purposes and policies of the Public Employee Collective Bargaining Act (PECBA), our awards in prior cases, and the reasonable cost of services rendered, this Board awards Respondent representation costs in the amount of \$500

ORDER

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

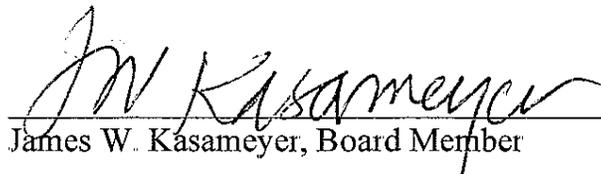
DATED this 7th day of December 2005.



Donna Sandoval Bennett, Chair



Paul B. Gamson, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

