

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

NEBRASKA ASSOCIATION OF)
PUBLIC EMPLOYEES LOCAL 61 of)
the AMERICAN FEDERATION OF)
STATE, COUNTY, AND MUNICIPAL)
EMPLOYEES,)

Petitioner,)

v.)

STATE OF NEBRASKA,)

Respondent.)

Case No. 1561

ORDER FOR ATTORNEY FEES

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

JAN 08 2025

CLERK

On July 11, 2024, the Commission entered its Findings of Fact and Order in this matter which dismissed the Petition and further found that Petitioner filed the case in bad faith. Specifically, it was found that the “totality of the record before the Commission demonstrates that Petitioner engaged in a pattern of willful flagrant, aggravated, persistent, and pervasive prohibited misconduct by pursuing this action in bad faith.” The Commission further found that Respondent is entitled to attorney fees. The Commission ordered that such reimbursement shall include costs, expenses, and fees that were incurred by Respondent in the investigation, preparation, presentation, and conduct of this proceeding, including reasonable counsel fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs.

Pursuant to that Order, on July 25, 2024, Respondent submitted its request for such attorney fees, costs, and expenses in the amount of \$113,296.63 (Affidavit in Support of Costs, Expenses, and Fees (Including Confidential Attachment)). Petitioner responded on August 9, 2024, with its Affidavit of Abby Osborn and Affidavit of Justin Hubly. Also on August 9, 2024, Petitioner appealed the Findings of Fact and Order. On October 18, 2024, the Commission received the Nebraska Supreme Court Mandate advising that its judgement has been summarily dismissed.

The Commission considers filings regarding attorney fees as a CIR Rule 20 Motion, and as such may make its ruling without further hearing. *Employees United Labor Union v. Douglas County* (17 CIR 229 (2011)); *County of Hall v. United Food and Commercial Workers District Local 22*, 15 CIR 167 (2006). As stated in the Findings of Fact and Order, these filings are received as evidence solely for the purpose of determining an appropriate remedy.

JURISDICTION

The Commission has jurisdiction to adjudicate alleged violations of the Act by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. When the Commission finds that a party has violated the Industrial Relations Act, Neb. Rev. Stat. §§ 48-819.01 and 48-825(2) grant the commission authority to issue such orders as it may find necessary to provide adequate remedies to the parties to effectuate the public policy enunciated in Neb. Rev. Stat. § 48-802. *Int'l Union of Operating Engineers Loc. 571 v. City of Plattsmouth*, 265 Neb. 817 (2003); *Omaha Police Union Loc. 101, IUPA, AFL-CIO v. City of Omaha*, 274 Neb. 70, 88 (2007); *County of Hall v. United Food and Commercial Workers District Local 22*, 15 CIR 167 (2006); *County of Hall v. United Food and Commercial Workers District Local 22*, 15 CIR 197 (2006). The Commission's authority to order the payment of attorney fees pursuant to CIR Rule 42 has been previously addressed by the Nebraska Supreme Court. *Omaha Police Union Loc. 101, IUPA, AFL-CIO v. City of Omaha*, 274 Neb. 70, 88, (2007).

Furthermore, Neb. Rev. Stat. § 48-823 states the "Act and all grants of power, authority, and jurisdiction made in such act to the Commission shall be liberally construed to effectuate the public policy enunciated in §48-802. All incidental powers necessary to carry into effect the Industrial Relations Act are hereby granted to and conferred upon the Commission."

The State Employees Collective Bargaining Act shall be deemed controlling for state employees and state employers covered by such act and is supplementary to

the Industrial Relations Act except when otherwise specifically provided or when inconsistent with the Industrial Relations Act, in which case the State Employees Collective Bargaining Act shall prevail.

The State of Nebraska, its employees, employee organizations, and exclusive collective-bargaining agents shall have all the rights and responsibilities afforded employers, employees, employee organizations, and exclusive collective-bargaining agents pursuant to the Industrial Relations Act to the extent that such act is not inconsistent with the State Employees Collective Bargaining Act.

Neb. Rev. Stat. § 81-1732.

Except as modified by the Commission or the other provisions of the Industrial Relations Act, proceedings before the Commission shall conform to the code of civil procedure applicable to the district courts of the state pursuant to Neb. Rev. Stat. § 48-812. Neb. Rev. Stat. § 25-824 provides that allegations which are frivolous or made in bad faith shall subject the party or attorney pleading the same to the payment of expenses including attorney's fees.

“As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.”

Eicher v. Mid Am. Fin. Inv. Corp., 270 Neb. 370, 381–82, (2005), (internal citations omitted).

In the Affidavit of Abby Osborn, Petitioner argues that CIR Rule 42(B)(2) should only be used to award attorney fees to a Petitioner. The plain language of the rule states the intent of the rule is to make the *injured party* whole in prohibited practice proceedings. See also CIR Rule 42(B)(6). Petitioner’s assertions that CIR Rule 42 has not been previously used as a basis for awarding attorney fees to a Respondent may be true; however, that does not impute lack of authority. Rather, except for a non-related, contemporaneous case (*General Drivers and Helpers Union Local 554 v. Duet*, CIR Case 1549), the Commission has not previously had the opportunity

to hear a case where the record so clearly showed bad faith on the part of a Petitioner in the filing of a Petition itself. One could reasonably speculate that Petitioner's misunderstanding of the Commission's remedial authority weighed into its decision to file the Petition, as the Commission had never awarded fees against a Petitioner at that time. "The Petitioner, having full knowledge of the undisputed facts and applicable law, could not have reasonably or in good faith believed they would prevail by bringing this case before the Commission. Rather it appears to be a misuse of the Commission's status quo protections..." As such, even absent CIR Rule 42, the Respondent is entitled to attorney fees under Neb. Rev. Stat. § 25-824.

DISCUSSION

Pursuant to the Findings of Fact and Order, Respondent submitted an Affidavit and invoices for December 2023, January 2024, February 2024, March 2024, April 2024 and May 2024 showing the billing details, hours expended, and total fees incurred by Respondent for this matter. (Affidavit in Support of Costs, Expenses, and Fees and Exhibit A). Neb. Rev. Stat. § 25-1244. The Nebraska Supreme Court held in *Nicholas Family* that the submission of affidavits was an acceptable way to introduce evidence in a motion for attorney fees. *TransCanada Keystone Pipeline, LP v. Nicholas Fam. Ltd. P'ship*, 299 Neb. 276, 284, 908 N.W.2d 60, 66 (2018). The Court also found that evidence presented by the landowners was insufficient to support the award of attorney fees where no written fee agreement or *invoice for legal services* was offered as evidence in support of the motions for attorney fees and costs. Nor did the landowners, in their affidavits, aver any specific amount owed by them to counsel. *TransCanada Keystone Pipeline, LP v. Tanderup*, 305 Neb. 493, 498 (2020) (emphasis added).

As to the amount of attorney fees incurred by the Respondent, the Commission finds the Respondent's Affidavit Exhibit A invoices to be sufficient proof as to the fees actually charged to

and owed by the Respondent. The Commission further finds that time entry detail contained in each invoice to be sufficient for purposes of determining reasonableness of hours expended on this matter, with specific exceptions discussed below. The record indicates Respondent's counsel were diligent and effective in presenting Respondent's case, and they obtained a favorable result for the Respondent. However, our analysis must go further.

The Nebraska Supreme Court has stated that the time and labor devoted by attorneys to the case and the customary charges for such services are two of the factors to be considered in arriving at a fee award under Nebraska case law. Other factors may be considered which may form the basis of a court-ordered attorney fee under existing Nebraska law, which include the nature of the litigation, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, and the character and standing of the attorney. *Eicher v. Mid Am. Fin. Inv. Corp.*, 270 Neb. 370, 383–84, (2005). The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Hensley v. Eckerhart*, 461 U.S. 424(1983). The determination of what is a reasonable attorneys' fee is a matter peculiarly within the court's discretion. *Marshall v. Anderson Excavating & Wrecking Co.*, 8 F.4th 700, 712 (8th Cir. 2021). “Although there is no one methodology for calculating an award of fees, it is important ‘for the district court to provide a concise but clear explanation of its reasons for the fee award.’” *Jet Midwest Int'l Co. v. Jet Midwest Grp., LLC*, 93 F.4th 408, 421 (8th Cir. 2024) (quoting *Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 966 (8th Cir. 2012), in turn quoting *Hensley*, 461 U.S. at 437). See, e.g. *Benson v. City of Lincoln*, 2024 WL 2155139, (D. Neb. May 13, 2024).

One method used by the court is the “lodestar method,” which begins by determining the number of hours reasonably expended at a reasonable hourly rate, then making other adjustments

if appropriate in the circumstances of the case.

The starting point in determining attorney fees is the lodestar, which is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rates. As a general rule, a reasonable hourly rate is the prevailing market rate, that is, the ordinary rate for similar work in the community where the case has been litigated. The court has great latitude to determine a reasonable hourly rate because it is intimately familiar with its local bar.

Jet Midwest Int'l Co. v. Jet Midwest Grp., LLC, 93 F.4th 408, 420 (8th Cir. 2024) (internal quotations and citations omitted).

Respondent submitted only the affidavit of its counsel in support of the reasonableness of the hourly rates charged for each of its attorneys and paralegal. While the hourly rate charged for the work of Paralegal Barbara Levos may be fair and reasonable, and the usual and customary rate charged in this community and surrounding area for services performed by paralegals with similar skill and experience, the Respondent provided insufficient evidence of this. Accordingly, the paralegal entries have been excluded from the Commission's calculations. Further, Respondent provides insufficient evidence as to the reasonableness of the different rates charged by each of its attorneys. However, the Commission has recently found in a similar case that a reasonable hourly rate for attorneys to be up to \$250 an hour. The Commission finds that a reasonable hourly rate to be applied for work performed by Mark A. Fahleson and Tara L. Paulson is \$250 per hour. The Commission finds that a reasonable hourly rate to be applied to the entries for work performed by Sam D. Colwell and Adam J. Kost is \$215 per hour.

The Respondent's submission includes several entries related to a District Court contempt action between January 3, 2024 and February 5, 2024. Of those entries attributable to both this case and the District Court contempt action, there is insufficient detail in each entry to distinguish the time to be allotted to work on this case specifically. These entries have been excluded from the Commission's calculations.

After applying the reasonable hourly rate modification and the specific exclusions stated above, the Commission finds that Respondent's request is otherwise fair and reasonable for the amount of work performed, taking into consideration the skill and experience of the attorneys in presenting the case, the nature of the case and issues involved, and the result obtained for the purpose of making the Respondent whole and not as a sanction against the Petitioner.

IT IS THEREFORE ORDERED that Petitioner shall pay Respondent the amount of \$42,234.63 for attorney fees and costs in this matter.

All panel members join in the entry of this Order.

Entered January 8, 2025.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

/s/ Gregory M. Neuhaus

Gregory M. Neuhaus, Hearing Commissioner