

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-01-12

(UNFAIR LABOR PRACTICE)

THOMAS SLAYTER,)	
)	
Complainant,)	
)	
v.)	
)	
SERVICE EMPLOYEES INTERNATIONAL)	RULINGS,
UNION LOCAL 503,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
and)	AND ORDER
)	
STATE OF OREGON, DEPARTMENT OF)	
FISH AND WILDLIFE,)	
)	
Respondent.)	
_____)	

A hearing was held before Administrative Law Judge (ALJ) Peter A. Rader on September 19, 2012, in Salem, Oregon. The record closed on October 12, 2012, upon receipt of the parties' post-hearing briefs. Neither party objected to the ALJ's Recommended Order issued on March 20, 2013.

Michael W. Franell, Attorney at Law, Medford, Oregon, represented Complainant.

Christy Te, Staff Attorney, Service Employees International Union Local 503, Salem, Oregon, represented Respondent Service Employees International Union Local 503.

Gary M. Cordy, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent State of Oregon, Department of Fish and Wildlife.

On January 3, 2012, complainant Thomas Slayter filed this unfair labor practice complaint, which was amended on April 12, 2012. The Amended Complaint alleged that Service Employees International Union Local 503 (SEIU or Union) breached its duty of fair representation to Slayter by failing to file a grievance on his behalf in violation of ORS 243.672(2)(a), and that the State of Oregon, Department of Fish and Wildlife (Department) disciplined him without just cause in violation of ORS 243.672(1)(g). The respondents filed timely answers.

Slayter can maintain an action against the Department for a violation of the collective bargaining agreement only after proving that SEIU breached its duty to fairly represent him. *Dennis v. SEIU Local 503, OPEU and State of Oregon, Oregon State Hospital*, Case No. UP-26-05, 21 PECBR 578, 591 (2007). Accordingly, the claims were bifurcated to address the allegations against the Union first. *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722 (1984).

The issue presented is:

Did SEIU violate ORS 243.672(2)(a) by breaching its duty of fair representation to Slayter in connection with discipline imposed by the Department on or about June 1, 2011?

For the reasons stated below, we conclude that the Union did not breach its duty of fair representation under ORS 243.672(2)(a). Accordingly, we will dismiss the complaints against both respondents.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Department, a public employer, is charged with the protection and enhancement of fish and wildlife and their habitats in Oregon. As part of its mission, it operates more than thirty fish hatcheries around the state.
2. SEIU is a labor organization and the designated representative of a bargaining unit of employees who work for the Department at various facilities around the state.
3. Slayter, a member of the SEIU bargaining unit, has worked for the Department in various seasonal or permanent positions since 1975. From 1987 on, he worked at the Cole Rivers Fish Hatchery, where he was a Fish Hatchery Technician II.

The Parties' Agreement

4. SEIU and the Department, through the Department of Administrative Services (DAS), have been parties to a series of collective bargaining agreements, including contracts effective July 1, 2009 through June 30, 2011, and July 1, 2011 through June 30, 2013. Both agreements (collectively known as the Agreement) have identical language regarding grievances and discipline.

5. The Agreement contains a four-step grievance process that culminates in binding arbitration. At Step 1, either the Union or the employee may file a grievance, but only the Union can advance a grievance beyond Step 1. After Step 1, the Union has sole discretion to determine whether a grievance should be pursued to Steps 2 through 4.

6. Article 20 of the Agreement provides that the principles of progressive discipline shall be used when appropriate. The levels of discipline that may be imposed include written reprimand, denial of annual performance pay, demotion, suspension without pay, and dismissal.

7. Article 21 of the Agreement sets out the grievance process:

“GRIEVANCE AND ARBITRATION PROCEDURE

“Section 1. Grievances are defined as acts, omissions, applications, or interpretations alleged to be violations of the terms or conditions of this Agreement.

“* * * * *

“Section 5. Grievances shall be processed as follows:

“* * * * *

“Step 1. The grievant(s), with or without Union representation, shall, within thirty (30) calendar days, file the grievance except as otherwise noted to his/her management/executive service supervisor.

“* * * * *

“Step 2. When the response at Step 1 does not resolve the grievance, the grievance must be filed by the Union within fifteen (15) calendar days after the Step 1 response is due or received.”

Department Policies

8. The Department has a Code of Conduct, which Slayter signed in 2004, that sets out certain expectations of behavior. Section II of HR Policy 410_02 provides in relevant part:

“In addition to an employee’s specific job duties, it is important to understand what is expected of every employee in terms of personal and professional work behavior. Employee’s conduct which does not comply with this policy may result in disciplinary action, up to and including dismissal. Off-duty conduct which does not comply with this policy may result in disciplinary action when such conduct has a nexus with the Department.

“* * * * *

“1. Professionalism

“Employees are to model professional behavior. This includes honesty, integrity, and caring. * * * * *

“The importance of employees presenting a professional image to the public is critical to our effectiveness and the success of the Department. * * * * *

“2. Laws, Rules, and Policies

“Adherence to federal and state laws, rules, regulations and policies is important. Violations that adversely affect [the Department], its credibility or its image, cannot be overlooked. New employees or current employees must report to their supervisor any convictions (including pleas of no contest), traffic/driving violation which could affect driving privileges and/or violate [the Department’s] acceptable driving records guidelines, or pending legal issues for violations of laws no later than five calendar days after the event. * * *

“You must promptly report to your immediate supervisor any illegal acts or violations of department rules, policies, or regulations that occur in the workplace.

“3. Attendance/Backup

“* * * * *

“Do not use while at work, nor come to work under the influence of drugs or alcohol that might affect your judgment, behavior or the safety of yourself and others. [The Department] has zero tolerance for drugs or alcohol in the workplace.”

9. The Department also has a Drug and Alcohol Free Workplace policy, which provides for zero tolerance for alcohol use during work hours or in the workplace. HR policy 450_02 provides:

“III. POLICY

“A. To promote employee safety, health and efficiency, the department prohibits during work hours or in the work place any activity involving alcohol, illegal drugs, and prescription and/or non-prescription drugs that

impair performance. Such activities include, but are not limited to the use, sale, transport, possession, transfer and consumption of alcohol and/or illegal drugs; use and abuse of alcohol, prescription and/or nonprescription drugs that impair performance.

- “B. Operation of state-owned, leased or privately owned vehicle in an official capacity while under the influence of alcohol, other intoxicants or depressants is prohibited.
- “C. Upon determining or having reasonable suspicion, under subsection III, C, of this policy, that an employee has not complied with this policy, the Human Resources Administrator, in conjunction with the appropriate deputy director, shall take appropriate personnel action with regard to the employee, which may include:
 - “1. Transfer,
 - “2. Granting of leave with or without pay,
 - “3. Discipline up to and including dismissal, and/or
 - “4. Requiring satisfactory participation by the employee in an approved drug abuse assistance or rehabilitation program.”

10. On April 26, 2010, Cole Rivers Hatchery Manager Devan Garlock sent an e-mail to all hatchery staff entitled “Sick Leave Use and On Call Duties.” The e-mail addressed an employee’s mental and physical ability to perform work, and states

“I would like to remind everyone that while you are on call you are required to maintain yourself physically and mentally ready to respond to any situation that may present itself. This means if you would not drink alcoholic beverages before coming to work at 7:30 then you should not do it while on call.”

11. The operation of fish hatcheries requires personnel to be available 24 hours per day, seven days per week to respond to mechanical equipment breakdowns and water system maintenance emergencies. If the incubators fail, the fish may die, resulting in a significant financial loss to the Department.

12. To ensure that adequate personnel are available, the Department’s technicians may live in rental housing on hatchery property and work rotating shifts. Approximately three or four times per month, a technician may be on-call for six hours after his or her regular shift ends. Technicians are paid one hour of regular salary for every six hours of on-call status.

13. Slayter’s last performance evaluation, in June 2009, indicates that he received an overall rating of “successful.” Slayter operates machinery and mechanical equipment as part of his job. In 2010, he was counseled by Garlock about drinking beer while operating hatchery equipment.

Facts Giving Rise to Slayter's June 1 Discipline

14. On March 13, 2011, Slayter was scheduled for fish feed duty from 7:30 a.m. to 4:00 p.m., and following his shift, was scheduled for on-call hatchery duty beginning at 4:30 p.m.¹ He did not take a lunch break, so he actually ended his shift at 3:00 p.m. that day. Slayter went home after his shift and consumed a beer, which was his regular habit.

15. At approximately 3:25 p.m., the first in a series of hatchery alarms went off to which Slayter and other employees responded. At approximately 4:30 p.m., Slayter was observed in the hatchery office by four coworkers holding what was described as a can of Busch beer in a Coolie beverage holder.

16. During this same time frame, Slayter had a telephone conversation about the alarms with his supervisor, David Pease, during which Slayter told Pease he was drinking a beer while talking to him.

17. Slayter's drinking at the hatchery office while working on-call was reported to Department management, and the Department conducted an investigation. On March 28, an investigatory interview was held with hatchery manager Garlock, HR analyst Brenda Frank, Slayter, and his Union representative. Slayter was asked about the events of March 13, especially his consumption of alcohol on hatchery grounds. The Department summarized several key questions and Slayter's response in the disciplinary notice that was ultimately issued to Slayter. The relevant portion of the notice stated as follows:

- "a. Had a beer with you when you reported to the hatchery office for the alarm? You said, 'I could have';
- "b. Consumed any of the beer while on hatchery grounds? You said 'probably';
- "c. Had consumed beer on the hatchery grounds before or if this is something you might normally do? You said, 'yes';
- "d. Had made the comment to Mr. Pease that you were working on a beer while talking to him? You said, 'I could have'."

18. Also on March 28, Slayter had a conversation with Pease in which Slayter stated the next day was his birthday and he planned to get "hammered." Slayter was scheduled for on-call duty the next day, but when Pease offered to find someone to cover for him, Slayter declined, stating that he just hoped there would be no alarms.²

¹Unless noted otherwise, all remaining dates occurred in 2011.

²Slayter later argued that his comment was "facetious" or made in fun, but his refusal to accept Pease's offer to find a replacement for him, and his further statement to Pease that he hoped no alarms would go off, lead us to agree with the Department's findings that he said it and that it was neither facetious nor made in jest.

19. On May 16, a second investigatory meeting was held with Pease and HR analyst Alida McNew, during which Slayter acknowledged drinking a beer after his shift but denied drinking while at the hatchery office.³ They discussed a previous incident in which he and a relative toured the hatchery in a motorized cart while drinking beer, which led to Slayter being advised not to operate hatchery equipment while drinking.

20. On June 1, the Department issued Slayter a one-step pay reduction for three months. The notice of discipline listed the Department's Code of Conduct and the Drug and Alcohol Free Workplace policies as grounds for the discipline. It also cited Garlock's April 2010 e-mail to hatchery employees reminding employees that if they were on call, drinking alcohol was prohibited. The notice of discipline also cited Slayter's conversation with Pease on March 28 in which Slayter stated that he planned to get "hammered" the next day, even though he was scheduled for on-call duty.

21. The notice of discipline listed a number of essential duties in Slayter's position description that could be impaired by alcohol consumption, including being available to respond to water systems maintenance emergencies; possessing decision-making skills when confronted with an emergency while working alone; and being mindful that safety of self or others, and safety and life support systems for fish, may be at risk without appropriate action or decision. The notice concluded by stating that the agency had lost confidence in his judgment and professionalism and that future misconduct would result in further disciplinary action, up to and including dismissal from state service.

22. Slayter's written response to the notice of discipline stated that after drinking a beer following his shift on March 13, he switched to Pepsi. He pointed to inconsistencies in the witnesses' statements regarding the color, size, and brand of beer they saw and alleged that at least one of them was also drinking. He took issue with the finding that he might have been impaired because he was congratulated by his manager for his work that day. He attributed the complaint about his drinking beer to a disgruntled employee whom Slayter had criticized 12 days earlier for being lazy.

23. Slayter decided to file a grievance over the discipline and was put in touch with Union Steward Joe Sheahan, who worked for the Department for over 20 years and is familiar with hatchery operations. At the time, the parties' Agreement had expired and Sheahan, who works in Salem, was preoccupied with contract negotiations. He was uncertain if the grievance procedures remained intact due to the expired contract. He asked Slayter to send him any written materials.

24. On June 28, the Department granted an extension to July 8 to file the grievance.

³Slayter stated he was drinking Pepsi, not beer, at the hatchery office, and did not know how anyone could identify what he was drinking because the can was in a Coolie. When asked why he did not volunteer this information at the March 28 interview, Slayter replied that he was perturbed by the questioning and did not offer more information than was specifically asked. We do not find this explanation credible, and we agree with the Department's findings on this issue.

25. Sheahan reviewed the materials Slayter provided, as well as a transcript of the March 28 investigatory meeting. Based on Slayter's evasive answers to questions about his drinking on March 13, and his failure to deny that he was drinking a beer while talking on the telephone to his supervisor, Sheahan determined that the chances of reversing the Department's discipline were slim. He discussed the case with at least one other steward and decided not to go forward with the grievance.

26. The Union typically takes grievances to arbitration if there is some likelihood of winning. An arbitration screening panel, made up of stewards, decides which cases are arbitrated. If a steward does not think the employee will prevail at arbitration, the case is not brought to the grievance review panel for approval. Although an employee may file their own grievance at Step 1, after that, the steward typically determines whether to pursue it.

27. When Slayter telephoned Sheahan to ask the status of his grievance, Sheahan initially gave an equivocal answer, in part because he believed Slayter to be confrontational. Slayter was left with the impression that it would be filed. In three subsequent telephone conversations with Slayter, Sheahan either assured Slayter that he was working on the grievance, or told him that the grievance had been filed. The grievance, however, had not been filed, and no grievance was ever filed.

28. In August, Slayter learned that the grievance had not been filed.

Events Giving Rise to Slayter's Dismissal

29. On September 8, while on authorized leave, Slayter was pulled over in the hatchery's parking lot and subsequently charged with Driving Under the Influence of Intoxicants (DUII). Under HR Policy 450_17, Slayter was required to inform the Department of his arrest within five days, but did not do so.

30. On September 28, Slayter pled guilty to the DUII charge and entered a diversion program. On October 18, his DUII conviction was published in the local newspaper. On October 20, he participated in a hearing before the Office of Administrative Hearings to determine whether his license should be suspended.

31. On October 28, for the first time, Slayter provided copies of the citation and other relevant documents to his supervisor, which was six weeks after his arrest. On November 7, he learned that his driver's license was suspended for 90 days, from October 30, 2011 to January 28, 2012.

31. On November 8, Slayter was issued a notice of pre-dismissal and was dismissed from state service effective November 25. The decision was based on his DUII arrest in September, his failure to inform his employer of the arrest for six weeks, his inability to perform his job as a result of his license suspension, and that it was his second alcohol-related incident in less than a year. The notice pointed out the admonition in the June 1 notice of discipline that stated future misconduct will result in further discipline, up to and including dismissal from state service.

32. Slayter filed a grievance on his own behalf at Step 1. He asked for a steward other than Sheahan, but the Union, after reviewing the circumstances and documents related to the dismissal decision, decided not to advance the grievance to Step 2. The Union informed him of its reasons for not doing so, which included Slayter's second alcohol-related discipline in the past year, and his evasive and less than truthful answers to the evidence presented by the Department.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this complaint.
2. The Union did not breach its duty of fair representation in violation of ORS 243.672(2)(a).

DISCUSSION

Slayter alleges that the Union violated its duty of fair representation under ORS 243.672(2)(a) by failing to file a grievance on his behalf as a result of the discipline imposed on June 1, 2011. He argues that the Union arbitrarily decided not to file a grievance, and did not disclose its failure to file until after the deadline had passed. He further contends that if he had prevailed in that grievance, he would not likely have been dismissed from state service as a result of his September DUII arrest.

The Union argues that, after reviewing the evidence and following its regular evaluation process, it made a rational decision not to file a grievance. Slayter's admission that he drank beer after his shift on March 13, his evasive answers to questions about his drinking, and his statement to his supervisor about drinking a beer while they were talking on the telephone, led the Union to conclude that the chances of reversing the Department's decision were slim. It contends that its failure to disclose the results of the evaluation is irrelevant because even if a grievance had been filed, the Union would not have advanced the grievance to the next step.

Legal Standards

Under ORS 243.672(2)(a), it is an unfair labor practice for a labor organization to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782." Under the statute, a labor organization is required to fairly represent all employees in a bargaining unit for which it is the exclusive representative. *Putvinskis v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 894 (2000). A union may breach its duty of fair representation by refusing to file a grievance if its refusal to process or pursue a grievance is "arbitrary, discriminatory or in bad faith." *Coan and Goar v. City of Portland, Bureau of Parks and LIUNA Municipal Employees Local 483*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342, 351 (1987), *AWOP*, 93 Or App 780, 764 P2d 625 (1988), citing *Vaca v. Sipes*, 386 US 171, 190, 87 S Ct. 903, 17 L Ed 2d 842 (1967). However, in reviewing duty of fair representation claims, this Board recognizes that labor organizations have substantial discretion in deciding whether to arbitrate or even file a grievance. *Conger v. Jackson County and OPEU*, Case No. UP-22-98, 18 PECBR 79, 88 (1999). A union abuses its discretion, and its conduct may be actionably arbitrary, when its decision lacks a rational basis or its processing of a

grievance is so perfunctory that a reasoned decision is not made. *Ralphs v. OPEU, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409, 422 (1993).

Slayter does not allege that the Union discriminated against him, and did not argue in his closing brief that the Union acted in bad faith. Our focus, therefore, is on determining whether the Union's conduct was actionably arbitrary. This Board has discussed when a union's decision not to take a grievance forward is actionably arbitrary, explaining that

“[a] union's good-faith decision not to pursue a potentially meritorious grievance, even if mistaken, is not a breach of its duty of fair representation. *Chan*, 21 PECBR at 576 (citing cases) [*Chan v. Clackamas Community College and Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563 (2006), *recons den*, 21 PECBR 597 (2007)]. In addition, ‘[t]he duty of fair representation does not require a union to represent a bargaining unit member in the same manner as an attorney represents a client.’ [*Putvinskas*, 18 PECBR at 898]. This discretion extends to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken. *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20, and Metropolitan Exposition Recreation Commission*, Case Nos. UP-15/16-92, 15 PECBR 85, 106 (1994), *AWOP*, 134 Or App 414, 894 P2d 1267 (1995).

“* * * * *

“Generally, we do not substitute our judgment for that of a union that rationally decided not to process a grievance. Instead, we determine whether a union conducted a proper investigation and used a rational method of decision-making in reaching its conclusion. *Putvinskas*, 18 PECBR at 895.” *Dennis v. SEIU Local 503, OPEU and State of Oregon, Oregon State Hospital*, Case No. UP-26-05, 21 PECBR 578, 592-93 (2007).

The Union's Decision Not to File a Grievance

The Union's determination that Slayter's grievance lacked merit was not arbitrary. After reviewing the evidence provided, including a transcript of the March 28 interview in which Slayter gave evasive answers about his alcohol consumption on March 13, Sheahan determined that the likelihood of reversing the Department's decision was slim. An extension to file the grievance was granted in order for Sheahan to review the materials, and although he discussed it with at least one other steward, his opinion did not change.

The Department's Code of Conduct and its policies regarding zero tolerance for alcohol in the workplace were circulated and signed by Slayter in 2004. In 2010, hatchery manager Garlock sent an e-mail to all employees reminding them of that policy and informing them that employees who were in “on-call status” were considered the same as employees reporting for regular duty, and that consuming alcohol before either type of shift was prohibited. Slayter's statement to Pease on March 13 that Slayter was drinking a beer while he was speaking to Pease on the telephone at the hatchery, and Slayter's statement to Pease on March 28 that Slayter planned to get “hammered”

on his birthday the following day, even though he was scheduled for on-call duty, were additional reasons for Sheahan's decision. Slayter's allegation that other employees were drinking on March 13 was not substantiated, but even if it was, under the Department's policy of zero tolerance for alcohol in the workplace, his conduct would not be excused. Similarly, Slayter's allegation that the source of the complaint about his drinking came from a coworker whom he had recently accused of being lazy, and who was retaliating against him, does not excuse his violation of Department policies.

Slayter did not provide evidence that the Union failed to follow its internal practices for evaluating the grievance and provided no evidence that the Union had any reason to change its decision. This Board's role is not to decide whether a grievance has merit, only whether the Union undertook a good-faith evaluation of the grievance before deciding not to take it forward under the contractual dispute resolution procedures. *Chan*, 21 PECBR at 575. The Union's decision was within the broad range of discretion permitted by law and there was a rational basis for its determination that Slayter was unlikely to prevail in his grievance. Based on the foregoing, we conclude that the Union did not act arbitrarily when it decided to forego filing a grievance on Slayter's behalf.

The Union's Failure to Notify Slayter of Its Decision

Slayter also argues that the Union violated its duty of fair representation by failing to inform him of its decision not to file a grievance on his behalf regarding the June incident. Slayter reasons that his rights have been prejudiced because he could have filed a grievance on his own behalf at Step 1 if he had been told the Union was unwilling to do so. Even if he had filed a grievance, however, the parties' Agreement allows only the Union to determine whether to advance it to the next step. Slayter offered no evidence to suggest that the Union would change its mind about filing or advancing a grievance on his behalf. To the contrary, the record establishes that, following an evaluative process, the Union made a rational decision to not file such a grievance.

In addition, even if Slayter had been informed by the Union of its decision not to file a grievance regarding the June incident, and even if he had prevailed in his own grievance arising from the June 1 discipline, the Department would have dismissed him from state service for his subsequent misconduct in September and October. In that regard, the dismissal notice dated November 23, 2011, listed a number of reasons for the Department's decision, including his DUII arrest while on hatchery property, his failure to disclose his arrest for six weeks to his employer, his inability to perform the essential functions of his job for 90 days as a result of his driver's license suspension, and his violation of multiple Department policies. Thus, the dismissal notice focused primarily on Slayter's September and October misconduct, rather than his June misconduct, on which this complaint is based. Consequently, we do not find serious prejudice to Slayter's employment rights as a result of the Union's failure to notify him of its decision not to file a grievance regarding the June incident.

For these reasons, we conclude that the Union did not breach its duty of fair representation to Slayter, and we will dismiss the claim under ORS 243.672(2)(a).

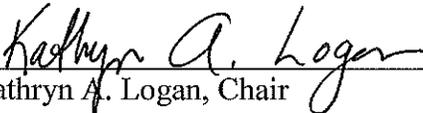
ORS 243.672(1)(g) Claim Against the Department

Where no violation against a labor organization is found in a duty of fair representation case, the claim against the public employer will automatically be dismissed. *Mengucci*, 8 PECBR at 6734; *Tancredi*, 20 PECBR at 975, 977. Therefore, we will dismiss the claim against the Department.

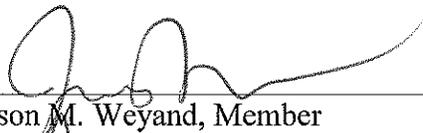
ORDER

The complaint is dismissed.

DATED this 10 day of May 2013.



Kathryn A. Logan, Chair



Jason M. Weyand, Member



Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.