EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-002-13

(UNFAIR LABOR PRACTICE)

JOE HORN, Complainant, v. SALEM POLICE EMPLOYEES' UNION, and CITY OF SALEM AND SALEM POLICE DEPARTMENT, Respondents.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Sean J. Riddell, Attorney at Law, Portland, Oregon, represented Complainant.

Jaime B. Goldberg, Attorney at Law, Makler, Lemoine, & Goldberg, PC, Portland, Oregon, represented Respondent Salem Police Employees' Union.

Jeffrey P. Chicoine, Attorney at Law, Miller Nash, LLP, Portland, Oregon, represented Respondents City of Salem and Salem Police Department.

On August 29, 2014, Administrative Law Judge Larry L. Witherell issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. *See* OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. The final order

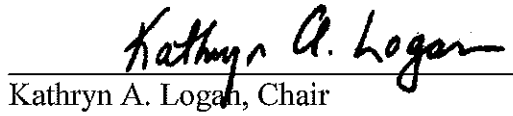
is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

ORDER

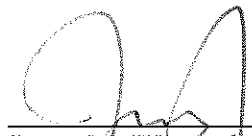
1. The Board adopts the recommended order as the final order in this matter.

2. The complaints against the Salem Police Employees' Union and the City of Salem/Salem Police Department are dismissed.

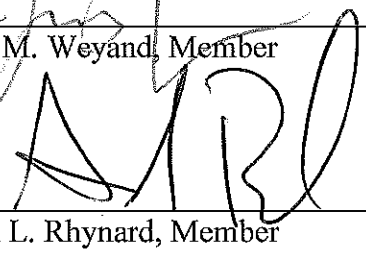
Dated this 24 day of September, 2014



Kathryn A. Logan, Chair



Jason M. Weyand, Member



Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-002-13

(UNFAIR LABOR PRACTICE)

JOE HORN, Complainant, v. SALEM POLICE EMPLOYEES' UNION, and CITY OF SALEM AND SALEM POLICE DEPARTMENT, Respondents.	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

A hearing was held before Administrative Law Judge (ALJ) Larry L. Witherell on April 28-29, 2014, in Salem, Oregon. The record closed on June 2, 2014, with the receipt of the parties' post-hearing briefs.

Sean J. Riddell, Attorney at Law, Portland, Oregon, represented Complainant.

Jaime B. Goldberg, Attorney at Law, Makler, Lemoine, & Goldberg, PC, Portland, Oregon, represented Respondent Union.

Jeffrey P. Chicoine, Attorney at Law, Miller Nash, LLP, Portland, Oregon, represented Respondents City of Salem and Salem Police Department.

On August 19, 2013, Joe Horn (Horn or Complainant), filed this unfair labor practice complaint against Salem Police Employees' Union (Union), and the City of Salem and Salem Police Department (collectively City or Department). The complaint, as amended on April 1, 2014, alleges that the Association breached its duty of fair representation in violation of ORS 243.672(2)(a) and that the City breached the collective bargaining agreement in violation of ORS 243.672(1)(g). The Union and City filed timely answers to the complaint.

The issue presented for hearing was:

Did the Salem Police Employees' Union (SPEU) conduct toward and treatment of Joe Horn, relative to his termination by the City, violate SPEU's duty of fair representation and ORS 243.672(2)(a)?

For the reasons set forth below, we conclude that the Union did not violate ORS 243.672(2)(a) as alleged. We further dismiss the complaint against the City.

RULINGS

The ALJ bifurcated the case. In duty of fair representation cases, we bifurcate the claims in order to address the allegations against the labor organization first. *Slayter v. Service Employees International Union Local 503, and State of Oregon, Department of Fish and Wildlife*, Case No. FR-01-12, 25 PECBR 494, 495 (2013); *Gibson-Boles v. Oregon AFSCME Council 75, and State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-46-01, 20 PECBR 483, 487 (2003), *AWOP*, 195 Or App 185, 99 P3d 1238 (2004), *rev den*, 338 Or 16, 107 P3d 26 (2005); *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722, 6734 (1984).

The other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The City is a public employer as defined by ORS 243.650(20). The Union is a labor organization as defined by ORS 243.650(13).

2. The Union is the exclusive bargaining representative for a unit of all employees in the City's police department, including police officers, corporals, police laboratory technicians, community service officers, custody officers and special investigators. The City and Union are parties to a collective bargaining agreement, which, at the time of the hearing, was effective from July 1, 2011 to June 30, 2014.

3. During the relevant times and events, or where otherwise specified, the following individuals held the following positions with the Union:

Richard Beal	Member of Executive Board
Jacob Burke	Secretary and Member of Executive Board
Mark Makler	Attorney for the Union
Tom Rousseau	Member of Executive Board
Jeff Staples	President and Member of Executive Board
Dustin Wann	Member of Executive Board

4. Officer Beal has been a police officer for 26 years, including 13 years with the City, and has been on the Union executive board (E-Board) for 6 years. Officer Burke has been a police officer with the City for 16 years, and has been on the executive board for a little over 2 years. Officer Rousseau has been a police officer for the City for 26 years and has been a member of the executive board for 7 years. Detective Staples has been a police officer for 31 years, including 27 years with the City. He was the Union secretary from 1999 to July 2007, when he became the Union president. Detective Wann has been a police officer with the City for about 10 years and has been on the executive board for about 2 years.

5. During the relevant times and events, or where otherwise specified, the following individuals held the following positions with the City:

James Anglemier	Lieutenant
Ben Bales	Sergeant, Internal Affairs Unit
Jeff Barratt	Sergeant
Steve Bellshaw	Deputy Chief of Police
James Ferraris	Deputy Chief of Police, Investigations Division
Aaron (Pat) Garrett	Sergeant, Internal Affairs Unit
Mark Keagle	Lieutenant, Special Operations Section
Skip Miller	Lieutenant, Internal Affairs
James Mooney	External Investigator for the City
Gerald Moore	Chief of Police

6. Joe Horn worked for the City as a police officer from November 2008 until March 27, 2013. During that time he was also a member of the Union. (First Amended Complaint, ¶3 and ¶4; Union Answer ¶1 and ¶2.)

Internal Affairs Investigation (August 14, 2012): The Photo and Phone Incident

7. In July 2012, Sgt. Barratt learned that Officer Horn possessed on his cell phone a photo showing a partially nude, female City employee, and that Horn had shown it to another police officer. As a result, Barratt met with Lt. Keagle, Special Operations, and Deputy Chief Ferraris, Investigations Division, to recount the details.

8. On July 20, 2012, Deputy Chief Ferraris directed that Sgt. Garrett conduct an internal affairs (IA) investigation into the allegations.

9. On August 13, 2012, Garrett informed Horn of the complaint (in which Horn was alleged to have shown the photo to another Salem police department employee), and scheduled an IA interview with Horn for August 14. Garrett informed Horn that the complaint, if substantiated, may constitute violations of Policy 2.01, Personal Conduct, Section III (Conducting Unbecoming an Officer); Rules of Conduct, Part II (General Conduct and Responsibilities), Section A (General Conduct); and the City Policy of Nondiscrimination and Harassment. (Exh. R-3 at 133.)

10. Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer) states: "Since the conduct of an officer, on or off duty, may reflect directly upon the department, an officer must at all times conduct himself in a manner which does not bring discredit to himself, the department, or the City." (Exh. R-3 at 144.)

11. The Rules of Conduct, Part II (General Conduct and Responsibilities), Section A (General Conduct), states that "[m]embers, on and off duty, shall be governed by the ordinary and reasonable rules of good conduct and behavior, and shall not act in such a manner as to bring reproach or discredit upon the department or the City of Salem." (Exh. R-3 at 149.)

12. The pertinent sections of the City's Policy of Nondiscrimination or Harassment states:

> "The City of Salem is committed to providing all employees with a work environment free of discrimination or harassment of any kind. The purpose of this policy statement is to reaffirm our commitment to equal employment opportunity and to provide a harassment free work environment for all employees. Employees include all part-time exempt, seasonal, career status employees, and volunteers working for the City and Housing Authority.
>
> "* * * * *
>
> "Harassment or discriminatory conduct, of any kind, whether physical or verbal, committed by supervisors or non-supervisory personnel or agents of the City, is prohibited in the workplace. Prevention of discriminatory activities must be practiced at all times, especially by supervisors. Supervisors and managers have additional responsibility to listen to harassment and/or discrimination complaints and to take corrective actions where appropriate. In those cases where discrimination can be established, disciplinary action up to and including termination may be taken by the City." (Exh. R-3 at 135.)

13. Garrett interviewed Horn on August 14, 2012. Union President Staples was also present to represent Horn at the investigatory interview. During the interview, Horn stated that he received the topless photo 11 months earlier, in the summer of 2011. He also stated that he showed or electronically forwarded the photo to Detective Lance Diede within a couple of days after receiving the picture. Garratt asked Horn, "are you still in possession of it?" (Exh. R-3 at 172.) Horn answered, "[n]o, I'm not. * * * It was on my other phone and it's in the bottom of the Deschutes River. Um, about last September, or last August [2011]. Uh, I only had it for like a week and then went rafting. * * * And it disappeared." (*Id.*)

Garrett asked Horn if he had a social relationship with the City employee shown in the photo. Staples objected to that line of questioning, asserting that the issue was not within the IA

notice, also referred to as a *Weingarten* notice, to Horn, and therefore, not an appropriate line of inquiry.[1] Garrett discontinued that line of inquiry.

14. During the investigation of Horn, Garrett and IA Sgt. Ben Bales also interviewed Diede. During the interview, Diede stated that Horn forwarded the photo to his cell phone in April or May 2012. Bales asked Diede, "could it have been last summer," meaning 2011? Diede answered, "[n]o. I didn't know Joe [Horn] last summer. I didn't really know Joe until I became, uh, his partner and when I joined the [Drug Activity Response Team] Unit in January [2012]." (Exh. R-3 at 176.)

15. On September 20, 2012, Garrett submitted a report on his investigation of Horn to Deputy Chief Ferraris. In the report, Garrett concluded that Horn violated the City's sexual harassment policy by forwarding the photo to another police officer; and that Horn engaged in conduct unbecoming an officer in violation of the City's personal conduct policy by forwarding the photo to another police officer.

In his report, Garrett also stated that "there is substantial evidence to support an investigation into untruthfulness on the part of Officer Horn during his interview with me." (Exh. R-3 at 118.) During the interview, it was established that in the summer of 2011 the female co-worker asked Horn if he still had the photo. Garrett concluded that Horn, when asked by the female co-worker, untruthfully represented that he did not. Garrett also concluded that Horn untruthfully represented to Garrett that he did not have the photo anymore because he claimed to have lost the cell phone in the Deschutes River in August or September 2011, even though Diede stated he received the photo from Horn in April or May 2012. Diede was certain about the time frame because he did not know Horn until January 2012, and Horn would not have had Diede's cell phone number in August or September 2011.

16. Garrett initiated a formal complaint against Horn for lying during an official investigation, and assigned the case to Bales for investigation.

Internal Affairs Investigation (September 17, 2012): Untruthfulness

17. On September 7, 2012, Bales informed Horn that a complaint had been filed against him for "[u]ntruthfulness during an official interview." (Exh. R-3 at 23.) On September 14, Bales gave Horn the formal *Weingarten* notice of the complaint against him and scheduled the IA interview for September 17. This notice alleged that Horn had been "untruthful during an official interview with Sgt. Garrett." (Exh. R-8.) The alleged conduct could be in violation of the Rules of Conduct, Part III (Professional Conduct), Section L (Truthfulness); and Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer).

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[1]The *Weingarten* notice refers to the City's notice to an employee that he/she is subject to an investigatory interview that could result in discipline, and therefore the employee may have union representation at the interview. It refers to *NLRB v. J. Weingarten*, 420 US 251, 95 S Ct 959 (1975), in which the court concluded that an employee is entitled to union representation at an investigatory interview if the employee has a reasonable belief that the interview could result in disciplinary action.

18. The City's Rules of Conduct cover police department employees. The Rules of Conduct, Part III (Professional Conduct), Section L (Truthfulness) require that all police officers "shall be truthful in their spoken and written word at all times as it relates to their professional and official conduct and duties. This applies also to official reports and court testimony which shall be factual, complete, and accurate in all details." (Exh. C-40 at 8.)[2]

19. Between September 14 and 17, Staples met with Horn and gave him some documents related to his prior interview with Garrett so that Horn could review them and prepare for his interview with Bales. During this meeting, Horn brought up the phone issue and said he may have been mistaken about the timeline, about when he lost his phone and which phone actually had the picture on it. Staples explained that at the upcoming IA interview, Bales would begin by asking Horn if he has anything he would like to tell Bales, anything he would like to add or explain before they begin the questioning. Staples advised Horn to explain to Bales that he had several phones and that he was confused about the timeline of when he lost the phone and which phone had the picture.

20. On September 17, Bales met with Horn for the IA investigation into the allegation of untruthfulness. Staples and Union Secretary Burke were present to represent Horn.

21. As Staples expected, Bales began the interview by asking Horn, "[d]o you have anything you want to say before we start asking questions." (Exh. R-3 at 25.) Instead of following the instructions that Staples had given him a day or two earlier, Horn merely answered, "[n]o sir." (*Id.*)

After a series of questions, Horn acknowledged that in his first interview he told Garrett that he had lost the cell phone that had the picture of the female employee on it a year earlier, in August 2011, on a rafting trip. He also acknowledged that he did not know Diede until Diede joined the drug activity response team (DART), in January 2012. Bales asked how Horn could send Diede the photo when the phone was on the bottom of the Deschutes River. Horn responded, "[w]ell, that's where my error was in the timeframe, 'cause when I answered the question, I said initially that I didn't know when I had, when I sent the picture and I said nine months to a year ago, and then I started processing it out loud saying it had to be on my old phone, the one that I lost in the bottom of the Deschutes." (*Id.* at 27.)

Bales then reviewed the transcript of the first interview with Horn. Bales pointed to several instances where Horn was unsure or could not recall with any certainty. He then pointed out that Horn, however, was very specific and certain about the photo and phone. Bales noted where, in the first interview, that Horn stated with certainty that he sent Diede the photo within a couple of days after receiving it. Bales stated to Horn, "there's nothing in there that says I don't know, I don't recall." (*Id.*)

Bales again noted that when Garrett asked Horn when he last had the picture, Horn said with certainty that it is on the bottom of the Deschutes River. Bales said that was not true. Horn responded,

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[2]For Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer), see Findings of Fact 10.

> "[w]ell, I know that I did lose the phone and I went to Verizon and I got a printout of the phones that I had used, or that I had got over the last year. * * * And I had lost that phone, or I lost a phone, the, the, uh, a Droid Incredible, on 7/31. Got a new phone, then got that one, which was another Droid Incredible, through the warranty deal, and then I actually, that one went into the river at, down at the Willamette and I ended up putting rice in it to try and fix that one. So as far as what phone that picture was on, I don't know. Uh, as, I, I mean, yes I had the picture, yes I showed it. As far as the, the timeframe, I don't know. I, I really, I don't know." (*Id.* at 28.)

Horn acknowledged that after his interview with Garrett he realized he could not have sent Diede the photo until after January 2012. Bales then asked Horn, "[s]o what effort did you make to contact Sergeant Garrett to clarify your statement?" Horn answered, "I didn't make any effort sir." (*Id.* at 29.) When asked why not, Horn claimed not to know whether it would be appropriate. Horn did not dispute Bales when he stated, "[y]ou knew your statement wasn't truthful and accurate at the time that you were in, you were being interviewed by Sergeant Garrett, you realized that your statement wasn't true and accurate, but you made no effort to clarify that statement with Sergeant Garrett." (*Id.*)

Horn originally said the female employee asked if he still had the photo, and he said he did not, that he had lost it the summer of 2011. Bales stated that Horn lied to the female employee when he told her he no longer had the photo. Horn, however, claimed that he did not lie to her or to Garrett in the first interview, but that he merely made an error about the time frame. Horn acknowledged that his statement that the phone with the photo is at the bottom of the Deschutes River is not a true statement. Horn also acknowledged that he became aware it was not a truthful statement and that he made no effort to correct the untruthfulness during the month after the first interview with Garrett.

At one point during the interview, Bales tried to pin Horn down about why Horn could and could not remember certain facts. Bales asked if Horn texted such an amount that he would not be able to remember if he sent the picture or merely showed the picture to another officer. When Horn conceded he texted a lot, Bales asked how many per month. Horn said 11,000 per month. Bales attempted to inquire whether his excessive texting was happening on duty time or personal time. Staples objected to that line of inquiry since it was beyond the formal IA notice. Bales terminated that line of inquiry.

22. On October 2, 2012, Bales submitted a report on his investigation to Chief Moore via the chain of command. In his report, Bales concluded that Horn violated the Rules of Conduct, Part III (Professional Conduct), Section L (Truthfulness); and Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer).

<u>Internal Affairs Investigation (September 17, 2012): Personal Use of Evidence Tape</u>

23. On July 25, 2012, Detective Kistner reported to Internal Affairs that he believed Horn had used police evidence tape at his personal residence. Kistner visited a house that had been

rented by Horn from August 2010 to July 2012, and that was owned by another police officer. While visiting the house, Kistner observed that police evidence tape had been put on the walls.

24. On September 13, 2012, Garrett gave Horn a written *Weingarten* notice of a complaint concerning the alleged personal use of evidence tape. Garrett advised that the complaint, if sustained, could constitute violations of Policy 2.01, Personal Conduct, Section V (Integrity), and Section III (Conduct Unbecoming an Officer); and Rules of Conduct, Part II (General Conduct and Responsibilities; Section C (Obey the Law).

25. Policy 2.01, Personal Conduct, Section V (Integrity), states:

> "The public demands that the integrity of its law enforcement officers be above reproach, and the dishonesty of a single officer may impair public confidence and cast suspicion upon the entire department. Succumbing to even minor temptation can be the genesis of a malignancy which may ultimately destroy an individual's effectiveness and may contribute to the corruption of countless others. An officer must scrupulously avoid any conduct which might compromise the integrity of himself, his fellow officers, or the department." (Exh. R-3 at 91-92.)[3]

26. The Rules of Conduct, Part II, General Conduct and Responsibilities, Section C (Obey the Law), provides that "[m]embers of this department shall not violate any of the laws, statutes, or ordinances of federal, state, or local governments." (*Id.* at 79.)

27. Garrett interviewed Horn on September 17, 2012. Staples and Burke were also in attendance to represent Horn. During the interview, Horn stated that he had placed the police evidence tape on the walls of the house he was renting, and that he obtained the tape, which was property of the City, from his duty bag. He explained that he put the tape up as part of decorations for his daughter's birthday-Halloween party.

28. Later on September 17, 2012, after the IA interview, Horn asked Staples if he could get a copy of the transcript of his interview. After checking, Staples explained that IA will not release a transcript until they are ready for the next meeting.

<u>Some Pre-Disciplinary Actions</u>

29. Later on September 17, 2012, after Horn's second IA interview with Garrett, Chief Moore assigned Horn to paid administrative leave. Horn was required to surrender his police department identification card(s), badge, department-owned firearms, department taser, department keys, and all entry keys and devices. Horn was prohibited from entering any secure portion of a police facility or performing any police-related duties, including testifying in court proceedings, without prior written authorization from a supervisor, the police chief or his designee.

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[3]For Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer), see Findings of Fact 10.

30. On October 9, 2012, Garrett submitted his report to Deputy Chief Ferraris, in which he concluded that Horn violated Policy 2.10, Personal Conduct, Section III (Conduct Unbecoming an Officer), and Section V (Integrity); and the Rules of Conduct, Part II (General Conduct and Responsibilities), Section C (Obey the Law). On October 18, Ferraris asked Bales to determine when Horn actually rented the house in question. Bales checked into it and confirmed that Horn rented the house from August 2010 until July 2012.

31. On October 26, 2012, Chief Moore informally advised Staples that the City was prepared to provide Horn with a pre-disciplinary hearing, and that the City was proposing to terminate Horn. On October 29, the City gave Horn formal notice for his pretermination or pre-disciplinary meeting. The meeting was scheduled for November 15.

32. During this same time period, in late October or early November 2012, Staples discussed a possible resignation with both Horn and the chief. Staples wanted to negotiate Horn's resignation, which might not result in the loss of certification by the Department of Public Safety and Standards Training (DPSST). This way, Horn might be able to secure employment as a police officer with another jurisdiction. However, the chief would not agree to check "resignation" on the personnel action report that is submitted to the DPSST when a law enforcement officer leaves employment. Instead, he proposed to categorize it as a "resignation during investigation." Horn would not agree to resign under this situation since this would most likely result in the revocation of his licensure by DPSST.

33. During this same time period, Staples had discussions with Union attorney Makler. Staples informed Makler about the IA investigations and the interviews conducted with Horn. Staples advised Makler about the allegations; what the IA investigators are asking about; the focus of the IA investigations; and where the process seemed to be heading. Given their understanding of the allegations and their experience with IA investigations, Staples and Makler concluded that the investigators had reached or would reach the conclusion that Horn has been untruthful.

34. In early November 2012, Staples asked Makler to meet with Horn. On November 12, Staples and Makler met with Horn at Starbucks at the Wilsonville Fred Meyer. At the request of Staples, Makler discussed the situation with Horn, and explored likely scenarios, the likely outcome, and options should a conclusion of untruthfulness be sustained at the end of the investigation. Makler explained that there are significant ramifications to a police officer's licensure and certification if an officer is found to be untruthful. The DPSST most likely would proceed to revoke the officer's license and certification. This would make it virtually impossible to regain a license and employment as a police officer in another jurisdiction. Makler then explored options with Horn, including the option of resigning or negotiating a separation agreement with the City, which could leave Horn with the possibility of preserving his licensure and finding employment in law enforcement elsewhere; or he could just go forward with the investigation and see what happens.

35. During the Wilsonville meeting, Horn disclosed to Staples and Makler that he had had conversations with FF, an employee in the City's human resources department, about Horn's IA investigations. Horn revealed that he had a detailed memorandum containing four pages of

notes of what purported to be several communications with FF.[4] Staples asked for and received a copy of the memorandum and permission to discuss it with, and provide it to, the City.

Horn-FF Communications and Further Inquiries

36. After having been told about Horn's communications with FF, the next day, on November 13, Staples wrote to Chief Moore. Staples expressed concern that the City may have been interfering in an IA investigation of Horn. Staples wrote:

> "Officer Horn was placed on administrative leave on September 17, 2012 while he was being investigated by the City of Salem for offenses that could lead to his termination. * * * Officer Horn * * * advised me he has been in contact with [FF] from the Human Resources department during this investigation.
>
> "Officer Horn told me he had several conversation[s] with [FF] during the time he was out of state and when he returned, [FF] told him 'the City could not fire him.' According to Officer Horn[,] [FF] advised him the City would make some type of a separation agreement with Officer Horn if he came in and resigned providing him with pay and benefits for an undisclosed amount of time. According to Officer Horn, [FF] talked to him on September 11, 2012, and for over an hour * * * during the time of September 19 to 25. Officer Horn was under the impression that [FF] had the ability to change the course of the investigation by providing input as Human Resources often does on personnel matters. Officer Horn felt [FF] had information the Union did not and provided this to Officer Horn making him feel this could 'all go away' if Officer Horn came in and resigned on his own.
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> "Officer Horn said he met with [FF] at [W]est Salem Starbucks after sending an email to [FF] on September 11, 2012. [FF] called Officer Horn telling him not to communicate by email since 'they can be tracked.' [FF] told Officer Horn he is a target now. He told Officer Horn that the Police Department 'does rogue stuff and no one knows of the investigations going on.' [FF] told Officer Horn several times the Police Department could not fire him because the sexual harassment policy 'sucks' and said he would make sure Officer Horn['']s DPSST certification does not get affected. The last thing [FF] told Officer Horn was 'not to burn me by telling anyone we are talking.'
>
> "As you know if this is true, this information undermines the ability of the Union to provide Officer Horn with a fair defense and protecting his employment rights and options. This also violates article two, recognition in our current CBA, along with article three and six. Given this new information, I request the Loudermill

[4]At the request and agreement of the parties, and approval of the ALJ, the individual is identified only as FF.

[pretermination] hearing[5] scheduled for November 15, 2012 be delayed until the City can provide me with all reports generated by [FF].

"This letter is a PECBA information request with information being requested that is relevant to mitigation on behalf of Officer Horn and exculpatory information that may benefit the Salem Police Employees Union and Officer Horn in his Loudermill meeting. [FF]'s contact with Officer Horn has opened mitigating issues that have impacted the sanctity of the investigation by talking with Officer Horn while he was placed on administrative leave in [FF]'s official capacity. Not only do I request reports generated by [FF]'s contact with Officer Horn, but all notes, emails, and files that are stored in the Human Resources department regarding Joseph Horn." (Exh. R-14 at 1-2.)

37. Horn had a pre-disciplinary hearing scheduled for November 15, and Staples wanted it postponed. Staples wanted to determine if the City held any information that might have come from Horn's communications with FF, and that might be advantageous to Horn's case or provide some mitigating circumstances that the Union could use in Horn's defense. The chief agreed to postpone the pre-disciplinary hearing pending an investigation into FF's communications with Horn. The postponement also gave Staples additional time to attempt to negotiate a resignation in lieu of termination with the chief. Staples asked Horn for his phone records regarding his telephone calls with FF.

38. As a result of Staples's letter to City and his request for information, the City discovered for the first time that FF may have had communications with Horn. As a result, the City hired James Mooney, an outside human resources consultant, to inquire into Horn's allegations and the extent to which communications may have occurred between Horn and FF.

Horn and FF had at least seven conversations between September 11 and 25, 2012. According to the notes, Horn advised FF of the allegations he was facing. In his notes, Horn claims that FF assured him it was not a big deal and that he should trust FF because his role is to help employees such as Horn. On September 11, 2012, Horn wrote in his notes that FF assured Horn:

"I wasn't going to get fired and [FF] instructed for me to relax. He said it wasn't sexual harassment because the city[']s policy 'sucked' in that because it was very broad. He said I was ok and the worst that would happen is prob[ably] a day off but he was going to fight to prevent that even. He said if a day off happened then take it and move on. He told me several times to relax I wasn't going to get fired. * * * He said could the [police department] fire me, yes they could, but he wouldn't allow that to happen because that's what he does, he protects the employees[']s rights." (Exh. R-13 at 2.)

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[5]A *Loudermill* hearing is a reference to *Cleveland Board of Education v. Loudermill*, 470 US 532, 105 S Ct 1487 (1985), in which the Court held that certain non-probationary, public employees have a property interest in their employment, and under the due process clause are entitled to some kind of hearing before they can be terminated. The hearing would give the employee formal notice of the charges against them and an opportunity to present a response.

On September 15, according to Horn's notes, FF purportedly told Horn not to worry about the untruthfulness allegation.

> "[It was] no big deal, I just made a mistake on the time frame and to 'not sweat it.' He said it['']s not like I lied about not showing [the picture]. He said for me to just explain that I made an error in the time frame and if they showed me in black and white when it was sent, agree. * * * He again said it['']s fine and to relax, it was just a time frame issue because I had no intent." (*Id.*)

39. Investigator Mooney found that Horn unilaterally e-mailed FF on September 11, 2012, over his employment concerns. They then met face-to-face once and had several telephone conversations over the next two weeks. Horn claimed that FF assured him that the substance of the charges was not serious enough to warrant termination, and he encouraged Horn not to resign. FF denied to Mooney that he made any of the alleged statements or representations to Horn.

Investigator Mooney did not find that there was any tampering by the City in Horn's case as the result of Horn's communications with FF. Horn had unilaterally contacted FF. While the Union was concerned that FF might have access to information that the Union did not, Mooney concluded that all of FF's information came from Horn. FF did not engage in any misconduct but he was just not very experienced, particularly in a union environment, and probably should have been more forceful in advising Horn to contact the Union. FF did not provide Horn with any negative comment about the Union or the police command.

After the initial inquiry, the City requested that Mooney re-interview FF. The City wanted Mooney to ask FF specifically about the purported statements Horn claimed FF made to him. After re-interviewing FF, Mooney again concluded that Horn attributed to FF opinions and conclusions that Horn actually held and that he communicated to FF.

40. After the City's investigation of the FF-Horn communications, the Union requested a copy of the investigation results. On December 18, 2012, the Union's attorney made a written request for a copy of the FF investigation and any future information or documents that constitute the FF investigation. He argued that the information from the FF investigation, as it related to FF's communications with Horn, might include exculpatory material or material that contained mitigating circumstances. The City provided the investigatory materials to Makler subject to a non-disclosure agreement.

41. In late February 2013, Staples asked Makler for his legal opinion on the FF matter, based on Makler's review of the FF investigatory materials. On February 28, Makler advised Staples that the investigation revealed that FF violated several City rules and policies, but he did not believe that any of the investigatory materials were exculpatory for Horn, or mitigated Horn's conduct. As a result, Makler advised Staples that he still believed that the City had a factual basis to dismiss Horn. Since untruthfulness is one of the City's conclusion, it was anticipated that the City would inform the DPSST, which would then proceed to revoke Horn's certifications.

42. The Union was twice able to delay the pre-disciplinary or pretermination hearing that was originally scheduled for November 15, 2012. By delaying the matter, the Union was able to have Horn remain on the payroll with his benefits; and the Union and Horn were given additional time to pursue an exit strategy. Horn was still considering resignation and was actively applying for positions with other jurisdictions.

Termination of Officer Horn

43. With the conclusion of the FF matter, on about March 4, 2013, the City notified Horn and Staples that it intended to move forward with the pre-disciplinary hearing. Staples met with Horn before the hearing, and informed him that the Union attorney's found nothing beneficial to Horn from the results of the Mooney-FF investigation.

44. On March 11, 2013, Deputy Chief Ferraris met with Horn. Barratt, Garrett, Bales, and Lt. Miller were also in attendance. Staples was present, representing Horn. The purpose of the meeting was to provide Horn with an opportunity to furnish any information, explanation, mitigating circumstances, or other evidence for Ferraris's review and consideration that might bear on the allegations and the contemplated disciplinary action.

In the meeting, Horn took full responsibility for sending an inappropriate photo to a fellow officer. However, he claimed that he did not lie during the investigation concerning the loss of the cell phone, but rather that he made a mistake with reference to the time frame of events. He stated that he believed he lost his phone in August 2011. When he determined he had the time frame wrong, he spoke with Staples who, Horn claimed, said it was probably a clarification issue and that Horn should clarify it during his interview (with Bales). Horn stated that he did not think he had the option to just come in to internal affairs and re-explain the time frame and his confusion. Horn said he had six cell phones and averaged over 6,000 text messages per month. Horn stressed that he took responsibility for his other conduct.

Ferraris pointed out that between the interview with Garrett on August 14, 2012, and the interview with Bales on September 17, 2012, Horn did nothing to mitigate the situation, or to make anybody aware of the error that Horn discovered about the timeline. Ferraris noted that at the beginning of the second interview, Bales asked if Horn had any information he wished to provide. At that point, Horn told Ferraris that he did not feel comfortable going to Bales and explaining himself; and, further, he did not know he could do that, or that that was an option. However, Ferraris pointed out that when Horn acknowledged that when he received notice of the untruthfulness investigation, he discussed the matter with Staples and suggested it could be about the time frame. Yet, Ferraris pointed out, Horn neither went to see Bales, nor volunteered anything at the interview with Bales. Again, Horn tried to describe the problem as an error and not untruthfulness or a lie.

At one point during the meeting, Staples requested a break. Staples was concerned with the way the conversation between Ferraris and Horn was going. He believed Horn was going down a path that was not consistent with his previous statements. Staples wanted to interrupt that development and take a break so he could consult with Horn.

45. On March 27, 2013, Ferraris terminated Horn. In his letter to Horn, Ferraris concluded that "[b]y forwarding the photograph of one employee to another employee, your actions showed a lack of good judgment. Based on your actions, you disregarded the potential for rumors or embarrassment to the [female employee]. Therefore, you violated Salem Human Resource[s] Rules and Salem Police Department Policies." (Exh. R-3 at 2.)

Ferraris concluded that Horn violated the City Human Resources Rules, Section 18, subsections 18.01, 18.02, and 18.03; Department Policy 2.01 Personal Conduct, Section III (Conduct Unbecoming an Officer); and Directive 11; Rules of Conduct, Part II (General Conduct and Responsibilities), Section A (General Conduct).

Ferraris also found that Horn took City property without permission and used it for personal purposes in violation of Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer); Section V (Integrity); Directive 11; and Rules of Conduct, Part II, Section C (Obey the Law).

Lastly, Ferraris found that Horn made untruthful statements in his IA interview in violation of Policy 2.01, Personal Conduct, Section III (Conduct Unbecoming an Officer); Directive 11; and Rules of Conduct, Part III, Section L (Truthfulness). Ferraris took special note of Horn's statements made during the pre-disciplinary meeting on March 11.

> "With regard to the untruthful statement, you indicated that you made a mistake or an error in recounting the loss of a cell phone that contained a partially nude photograph of the female [employee]. You stated that you did not intend to lie. You stated once you realized you had made a mistake or error in your statement (regarding the loss of that phone) you did not disclose this realization to any official of the Salem Police Department prior to the second interview with Sgt. Bales. However, you indicated that you disclosed that information to your union representative, Detective Staples.
>
> "I did not find your explanation regarding the statements to Sergeant Garrett to be credible. I find that the other witness statements were credible. I further find that you provided inconsistent explanations to Sgt. Garrett, Sgt. Bales and to me. You made these statements at different times, making no effort to correct these 'errors' or 'mistakes.' I am particularly troubled by this fact in that that you did not come forward or advise any city official during the four week period between internal affairs interviews with the information about the 'error in timeframe' that you said you discovered, even though you had ample time and opportunity to do so.
>
> "The three primary areas of policy that you violated involve untruthfulness, sexual or workplace harassment, and conversion of department property to your personal use. Your actions as described, not only as recounted in each of three internal affairs investigations, but by your own account are disturbing and concerning to me. Integrity and truthfulness are the cornerstones of the police profession. How we treat and interact with our fellow employees is critical to achieving the mission and the effective operation of our organization. Because of the responsibility and power

the government has conferred on us, we are appropriately held to a higher standard by our community. Your actions indicate that you do not recognize or appreciate the impact of your behavior. Finally, by providing inconsistent and conflicting statements during your various interviews with the department, you were not credible or truthful." (Exh. R-3 at 5-6.)

Grievance Procedure

46. The grievance procedure, which is set out in Article 31 of the 2011-2014 collective bargaining agreement, provides as follows:

> "A. A grievance for the purpose of this Contract is defined as a dispute regarding the meaning or interpretation of a particular clause of this Contract or regarding an alleged violation of this Contract. A grievant is an employee or the Union filing a grievance on behalf of a group of employees similarly affected or on behalf of the Union's interests under this Contract. If the Union is a grievant, it shall be represented by an officer of the Union." (Exh. Jt-2 at 33.)

At Step I, an aggrieved employee or the Union may file a grievance with the employee's immediate supervisor with 15 days from the disputed event. If unresolved, at Step II, the grievance may be submitted to division commander within 20 days. Again, if unresolved, at Step III, the grievance may be submitted to the chief of police within 20 days. Step IV provides for arbitration.

Union By-Laws

47. The executive board consists of five individuals: the president, treasurer, secretary, and two at-large elected members.

48. Article VI (B)(4)(b) of the by-laws states that all "grievance duties shall be the responsibility of the Executive Board acting as the Grievance Committee." (Exh. C-4 at 9.) However, practice suggests that not all grievances go to the grievance committee. Article VI (B)(1), which concerns officers and duties, states that the "[p]resident shall be responsible for writing grievances." (*Id.* at 7.) Since at least 1999, when Staples became a member of the Union executive board, the president generally has been responsible for writing grievances. The president has the flexibility to carry a grievance forward unilaterally, or to work with an aggrieved employee whether the grievance goes forward, or even mitigate the grievance somewhere along the grievance process.

49. The grievance committee is explained in the Union by-laws at Article IX, Section B.

> "1. The Grievance Committee shall be the Executive Board chaired by the President. A grievance shall be defined as any dispute between labor and management cognizable under the [collective bargaining agreement].

"2. The Grievance Committee will determine by vote, the validity of the grievance after due investigation. If the Grievance Committee finds the alleged grievance is valid, it will determine to which level, if any, the Grievance Committee will seek resolution with the City through the procedures set forth in the [collective bargaining agreement].

"3. If an aggrieved member disagrees with the Grievance Committee's decision to not further the grievance steps, he may 1) appeal to the Grievance Committee and eventually through arbitration through the steps in Article Seven, Conflict Resolution,[6] or 2) appeal to the membership as set forth at a Special or Regular Meeting called by the aggrieved as set forth in these By-Laws, or 3) both.

"4. The UNION will endeavor to ensure that there is an appropriate amount of money available to assist in the legal defense of any member disciplined or dismissed for reasons believed to be unjust, and any other grievance found by the membership at large to be warranted." (*Id.* at 16.)

50. The Union believes nothing in the by-laws requires every grievance go to the grievance committee. The president can take a grievance to the grievance committee. An aggrieved employee also can take a grievance to the grievance committee. Since 2007, when Staples became president, the Union has only taken one grievance to arbitration. That case involved a change in hours for the department bicycle unit. Staples took the grievance to the grievance committee for its consideration and action, and the committee then voted to take the case to arbitration.

51. The by-laws contain a provision on conflict resolution, Article XII, which provides as follows:

"If, in the course of UNION business, a conflict arises between the UNION and a member based on internal UNION actions such as the refusal to process a grievance, the member may resolve this conflict through the following procedure:

"**STEP ONE**: The aggrieved member will discuss the grievance with a UNION representative. In this discussion, the aggrieved member will present, in writing, the issue giving rise to the grievance and all supporting facts and documentation, if any. The UNION representative shall bring the conflict to the attention of the E-Board no later than fourteen (14) calendar days after the discussion with the aggrieved member took place. The E-board will respond to the conflict within seven (7) calendar days.

[6]The reference to the conflict resolution section of the by-laws mistakenly refers to Article VII when it should be identified as Article XII.

"**STEP TWO**: If the aggrieved member is unsatisfied with the response of the E-Board they can request a meeting with the E-Board to explain their position. The E-Board will set a meeting within thirty (30) calendar days of the member's request. The E-board will respond to the member within seven (7) calendar days of this meeting.

"**STEP THREE**: If the aggrieved member continues to disagree with the conclusion of the E-Board, they may submit the issue of whether the UNION violated its duty of fair representation to arbitration. Arbitration costs will be the responsibility of the aggrieved member and must be paid in advance. However, if the UNION is at fault, the parties will equally split the arbitration costs with the UNION reimbursing the member for one-half (1/2) the cost. The decision of the arbitrator will be final and binding on both parties.

"Nothing in this article prevents the conflicted member from seeking resolution of the conflict through a vote of the membership as defined in the Special Meetings provisions of these By-Laws. The E-Board will take such steps as are necessary to preserve the conflicted member's rights to proceed to arbitration should his appeal to the UNION by successful or unsuccessful." (*Id.* at 17-18; bold in original.)

52. Article VII (B)(1) of the Union by-laws, provides that special meetings may be called by the president, a majority vote of the executive board, or "[b]y a member for the express purpose of appeal to a decision by the Grievance Committee regarding any grievance filed by said member." (*Id.* at 14.)

53. The Union believes that, in the last sentence under Step Three, "The E-Board will take such steps as are necessary to preserve the conflicted member's rights to proceed to arbitration should his appeal to the Union be successful or unsuccessful," arbitration refers to an employee's dispute with the Union and not arbitration of his grievance with the City. (Testimony: Staples.)

Officer Horn's Grievance

54. Between March 27 and April 1, 2013, Staples notified the Union executive board that Horn had been terminated for untruthfulness, sexual or workplace harassment, and conversion of department property for personal use. Staples asked the executive board to read the case materials. The 190 pages of documents concerned all three investigations (sexual harassment, untruthfulness, and use of department property), and were in a three-ring binder available for the executive board members to read. In a memorandum dated April 1, 2013, which Staples left with the binder, he informed the members that "[o]ur Attorney has weighed in on this with his legal advice. His feeling is there is nothing the Union can do to help Joe." (Exh. C-17.) However, Staples

stressed, "[t]his is our Union and we do have the final say regarding grievances and arbitration." (*Id.*) Each member of the executive committee is a veteran officer with investigation experience and knows how to read the materials.[7]

Staples asked the available board members (Burke, Rousseau, and Wann) to read the file and the termination statement to determine if there is a truthfulness issue and then to vote whether the Union should go to arbitration in order to fight to keep Horn's job. (Executive board member Beal was on injury leave and did not participate in the April review and decision.) The three executive board members and Staples signed under "No we do not go to arbitration" and no executive board member signed under "Yes we go to arbitration." (*Id.*) A copy of the April 1 memorandum, with the signatures, was given to Horn by Staples.

The executive board members concluded that Horn had not been truthful and that his explanation of the events and circumstances was not credible. The board members concluded that the allegations had been proven by the investigations and that termination was the expected penalty for a finding of untruthfulness.[8]

55. At the time of their decision on April 1, 2013, the executive board members were not aware of any dispute or controversy between or involving Officer EM and Horn.[9] None of the board members were personal friends with either EM or Horn. They only had professional, work relationships with both officers. No executive board member held any ill-will toward Horn or held any special favor for EM.

56. On April 2, 2013, Staples informed Horn that the executive board members had read the investigatory materials, along with the opinion of the Union attorney and a copy of Article IX (B) (Grievance Committee) of the Union by-laws. Staples explained that "[t]he four out of the five members available voted unanimously to not file a grievance on your behalf per Article 31 of

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[7]Since Staples joined the executive board in 1999, Horn's case is only the second time that the Union has dealt with a termination. The first time was in 2006. For consideration of the Horn case, Staples followed the same procedure used in the other termination case. In the 2006 case, an officer was found to be untruthful in both his verbal statements and his police reports. In that case, the Union president made the investigatory and other materials available to the executive board members and, after reading and considering the materials, the executive board, acting as grievance committee, was asked to vote on whether the Union should grieve the officer's termination. The executive board voted against pursuing a grievance. The officer appealed to and appeared before the executive board. He provided a significant amount of additional materials to the executive board and there were a good deal of questions and answers at the meeting. However, the executive board again voted not to grieve his termination.

[8]The three parties agree that a charge of dishonesty or untruthfulness generally ends an officer's career. As a result, no participant in Horn's case indicated any surprise over the severity of the discipline. As Officer Burke aptly stated, it was a "death sentence for a police officer's career" to have their "integrity or honesty questioned. You cannot do the job anymore. That is about as simple as you can put it. * * * When you are being questioned formally about something, and you are untruthful about it, then you can't be believed anymore. So that is something that's kind of a death sentence for our career." (Testimony: Burke.)

[9]The purported difficulty between Office EM and Horn is set out below in Findings of Fact 83-91.

our contract." (Exh. C-18.) Staples concluded, "[i]f you feel you want to address the E-Board I will make arrangements for that." (*Id.*)

57. On April 8, 2013, Horn filed a Step I grievance with the City, asserting that it violated Article 37, the disciplinary provision of the collective bargaining agreement. The grievance stated:

> "I was terminated without just cause violating article 37. My conduct relating to the untruthfulness allegation as a Salem police officer did not rise to the level of untruthfulness. I was not untruthful during an official investigation while employed as a Salem Police Officer. The second violation of Conduct Unbecoming of an [O]fficer did not meet the standard for conduct unbecoming of an officer. I did not engage in conduct unbecoming of an officer while employed as a Salem Police Officer. If my actions are/were found to be conduct unbecoming of a Police Officer then it did not rise to the level of discharge. I am considering retaining legal council [*sic*] if this matter doesn't come to a mutual resolution." (Exh. C-19.)

58. Article 37 of the collective bargaining agreement, which concerns discipline, appeals and the representation rights of disciplined employees, provides, in pertinent part, as follows:

> "A. The parties agree that discipline may be imposed only for just cause and establishes [*sic*] a right to appeal from discipline. The intent of this Article is to establish a contractual discipline procedure, and specify differences between the procedures.
>
> "* * * * *
>
> "C. Forms of discipline are limited to: oral reprimand, written reprimand, suspension, demotion, pay reduction not to exceed thirty calendar (30) days, or discharge.
>
> Serious violations, as determined by the City, may be dealt with by any of the above measures on the first offense or subsequent offenses.
>
> "* * * * *
>
> "E. **Appeal of Discipline**
>
> "1. Imposition of discipline on an employee is appealed through this Contract's grievance procedure under Article 31.
>
> "F. **Disciplinary Interview – Right to Representation**
>
> "1. An employee has the right to have a representative of the Union at an [i]nterview or meeting with the City when the employee has a reasonable belief that the interview or meeting is part of an

> investigation which may result in a disciplinary action. No right to representation exists for interviews, meetings, or conversations involving unit members regarding work instructions, training, constructive correction of work techniques or methods, and work planning. Work performance appraisal sessions are exempt from the right to representation unless, prior to the beginning of the meeting, the City informs the employee that the performance appraisal may result in disciplinary action being taken by the City against the employee." (Exh. Jt-2 at 41-42.)

59. The practice between the Union and the City is that grievances are controlled by the specific provision asserted at the Step I level of a grievance. Accordingly, the Union cannot add at Step II or Step III a new or additional provision of the collective bargaining agreement that it believes has been violated. Based on the parties' practice, such a grievance would be denied by the City.

60. On April 16, 2013, the deputy chief responded to Horn's grievance. He stated that "[f]acts and circumstances rising to the level of just cause for your employment to be terminated do exist and are set forth in your discharge letter dated March 27, 2013. * * * Therefore, your grievance is denied at Step I." (Exh. C-20.)

61. On April 26, 2013, Horn pursued the grievance to Step II. Again, Horn claimed his termination violated article 37. The Step II grievance stated:

> "Contract articles violated: Discipline – article 37 untruthfulness and Conduct [U]nbecoming of an [O]fficer[.]
>
> "Statement of facts giving rise to the grievance: I was terminated without just cause violating article 37. My conduct relating to the untruthfulness allegation as a Salem police officer did not rise to the level of untruthfulness. I was not untruthful during an official investigation while employed as a Salem Police Officer.
>
> "A mistake in time frame regarding when a picture was shown or lost does not constitute a lie at the reasonable standard.
>
> "The second violation of Conduct Unbecoming of an [O]fficer did not meet the standard for conduct unbecoming of an officer. I did not engage in conduct unbecoming of an officer while employed as a Salem Police Officer. If my actions are/were found to be conduct unbecoming of a Police Officer then it did not rise to the level of discharge.
>
> "Equal discipline to that of past practice is a standard that all employees should be entitled to. My discipline of termination is not the equal discipline of previous employees." (Exh. C-21.)

62. On May 2, 2013, Chief Moore responded by denying Horn's Step II grievance. He stated that the facts and circumstances, as set forth in the March 27 termination letter, rose to the level of just cause for termination.

63. On May 1, 2013, Horn's attorney wrote to Union attorney Makler appealing the decision of the executive board, acting as grievance committee, not to grieve Horn's termination. He declared that Horn "requests the opportunity to be heard and appeal the Executive Board's decision not to grieve his termination. If there is not [an] appeal process and the Executive Board's decision is final please let me know at your earliest possible convenience." (Exh. C-24.)

64. On May 2, 2013, Staples informed the executive board that Horn wanted to appeal the decision of the grievance committee to the executive board. Staples set May 13 as the date for the meeting with Horn.

65. Although Staples informed Horn about an appeal to the executive board, the Union believes that Horn ceased to be a member of the Union on March 27, 2013, the day he was terminated, and only members can invoke any benefits or rights under the by-laws. (Testimony: Staples and Makler.) However, the Union did nothing to prevent Horn from filing the Step I, II, or III grievances. The Union was willing to allow Horn to file the grievances in the hope that the City would voluntarily change its position. Since Horn took it upon himself to file grievances to try to keep his job, Staples did not want to get in his way.

66. On May 3, 2013, Staples wrote Horn to remind him of certain timelines.

> "Joe, per SPEU Attorney Makler I am reminding you of your step three time line which I have copied for you. [S]ubmit this to the Chief requesting to meet. Also I have been advised through correspondence from your Attorney you would like to appeal to the E-Board per article 12 in the SPEU bylaws. I have scheduled this meeting with the E-Board for May 13, 2013 at 1500 in the Salem Police Department, conference room H." (Exh. C-23.)

67. On May 7, 2013, Horn's attorney wrote the chief and deputy chief asserting that Horn was terminated without just cause because it was based on a faulty and incomplete investigation; the investigators failed to document facts and witness statements; the investigators failed to document personal biases; Horn was subject to disparate treatment; the policies and general orders were vague and overly broad; there was a disparate application of policies and general orders; and the punishment was overly severe.

He also asserted that grievance rights under the collective bargaining agreement belong to the individual member unless the Union chooses to grieve the matter on behalf of the membership. Since the Union has chosen not to grieve the matter, he claimed that Horn can assert his rights under the collective bargaining agreement.

Lastly, Horn's attorney requested a meeting with the chief as Step III of the grievance procedure, pointing out that "[i]n this situation the Union does not represent Mr. Horn's interests.

I do. I respectfully request that this meeting take place with Mr. Horn and I. To that end * * * I am prepared to meet the first week in June." (Exh. C-26 at 2.)

68. On May 7, 2013, Horn's attorney also wrote to the Union acknowledging that Horn must appeal the executive board's decision by May 13. However, Horn's attorney objected to that particular date since he was to be out of state on military duty. He requested the Union reschedule the meeting for the first week of June so that he could be present and properly represent Horn's interests.

Horn's attorney also sought to have the Union join with Horn's grievance for several reasons. With respect to the conduct unbecoming allegation, he claimed:

> "Sergeant Garrett makes several factual errors in his report that[,] if left unchallenged[,] lower the standard of investigations for fellow members of the SPEU. I am prepared to point out several inaccuracies in Sergeant Garrett's report. For your reference I ask you to make note that Sergeant Garrett bases two of his conclusions on the 'negative' reaction of the civilian witness. Sergeant Garrett never interviewed the civilian witness, has no personal knowledge [that] the civilian witness had a negative reaction[,] and only assumes from a third party that the civilian witness had a negative reaction to Officer Horn's acts. This fact alone sets a dangerous precedent for SPEU members. If unchallenged[,] SPEU members can be found in violation of a policy or general order based upon assumptions, hearsay[,] and an incomplete investigation. Not grieving this matter will endanger every member of the SPEU. Once again, I am prepared to show numerous errors and assumptions made in this investigation that endanger all members." (Exh. C-27 at 1.)

With respect to the allegation of Horn's untruthfulness, he asserted the following:

> "As you are aware a finding of untruthfulness is not only a firing offense, but also a mandatory revocation of an officer's certification from the [DPSST]. There are numerous errors with this investigation. More errors than I can accurately list in this letter, but I am prepared to identify in front of a[n] arbitrator or jury. What is most troubling for your membership and should not be allowed to go unchallenged is that Officer Horn is being accused of untruthfulness when he was told at the time of his statement that he only needed to answer to the best of his recollection. During Officer Horn's original interview he was told by Sergeant Pat Garrett to answer the questions to the best of his recollection in the beginning of the interview and specifically when he was asked questions that management is now claiming he lied about. Management cannot have it both ways. They cannot tell an employee to answer to the best of their recollection and then accuse the employee of lying when his recollection is not the best. Allowing this assertion and others in the investigation to go unchallenged sets a dangerous precedent for other members of the SPEU. This is only one example of the dangerous precedents in this investigation that threaten your members. I am prepared to point out numerous others at arbitration and in front of a jury." (*Id.* at 1-2.)

69. On May 13, 2013, Horn appeared before the executive board to appeal the decision not to pursue his grievance. Including introductions, the meeting lasted only two or three minutes. Horn spoke for just a minute or two. He stated that he did not lie, that the Union is setting a bad precedent by not grieving the matter, and he asked that the executive board reconsider its decision. He did not present any new information or anything that led the executive board to change its decision. Beal, who did not participate in the April 3 decision, was present and asked a couple of clarifying questions.

There was no extended discussion among the executive board members after Horn departed. The members were generally disappointed because Horn had not provided any mitigating information or circumstances which the Union could use in a grievance. Staples asked the executive board for their position on Horn's grievance. The executive board members continued to believe that Horn had not been truthful and that his explanation of the events and circumstances was not credible. Staples did not tell them or instruct them how to vote. Before the meeting with Horn, Beal read the investigatory files concerning the charges against Horn. Based on his review and consideration of the file, Beal also concluded that Horn had been untruthful during the internal affairs investigation.

70. After the verbal vote of the executive board members, Staples prepared a memorandum dated May 16, 2013, which was signed by Staples and the four other executive board members. Staples sent the memorandum to Horn in which he stated:

> "As a result of your request to the SPEU E-Board and in compliance with the SPEU by-laws, on 05/13/2013 the SPEU E-Board met with you. This meeting took place in a private location at the Salem Police Department. In compliance with the bylaws, this was your opportunity to explain your position to the SPEU E-Board as to why the SPEU's decision to not arbitrate your just cause termination was in error and should be reversed. At this meeting you failed to provide any new information to the SPEU E-Board and/or you chose not to talk about your belief and position that a grievance should be filed, why a grievance should be field and/or what basis there was to file a grievance on your behalf.
>
> "Without any new information being provided to the SPEU E-Board either from you or your Attorney the E-Board unanimously confirmed its prior position and decision that the SPEU would not file a grievance contesting your just cause termination." (Exh. C-25.)

71. At the time of the decision on May 16, the executive board members were not aware of any dispute between Officer EM and Horn. No board member was a personal friend with either EM or Horn. They only had a professional, work relationship with both officers. The executive board members did not hold any animosity toward Horn or any favor for EM. The letter was signed by Union President Staples and the four members of the Union's executive board.

72. Horn and his attorney met with Chief Moore on June 7, 2013, as Step III of the grievance procedure. After the meeting, the chief reviewed Horn's file. He then wrote Horn's attorney:

"I considered the statements you made during our meeting regarding why Mr. Horn believes that the conclusions of Deputy Chief Ferraris were in error and that the level of discipline imposed was inappropriate.

"After fully evaluating the matter, I believe that both the conclusions were accurate and the level of discipline was appropriate. In the May 7, 2013, Step III Grievance, you do not specifically allege which Articles of the Salem Police Employees' Union and City's Collective Bargaining Agreement (CBA) have been violated. Therefore, you have not sufficiently preserved any arguments associated with the discipline imposed on Mr. Horn. Further, I note that Article 42 of the CBA relates to the duration of the current agreement and is in no way relevant to Mr. Horn's matter. In any event, the grievance at [S]tep III is denied." (Exh. C-28.)

73. Some time in June 2013, Union attorney Makler learned that Horn's attorney made a request with the Employment Relations Board (ERB) for grievance arbitration. On June 21, 2013, Makler wrote Horn's attorney:

"Please take note that you have not been authorized to act on behalf of the SPEU, you do not represent the SPEU, and SPEU has not authorized the filing of a request for grievance arbitration, on behalf of the SPEU related to Joe Horn. As such, I would request that you make it clear to the City and the ERB that your filing for arbitration with ERB, on behalf of Joe Horn, is an individual action by Joe Horn. At this point given the filing that you submitted and that I reviewed I believe that you have created a[n] inappropriate perception that you are representing the SPEU and that you are acting on behalf of the SPEU – which is not the case.

"I have copied City Attorney Natasha Zimmerman on this email so that she is aware of the SPEU position." (Exh. R-33 at 1.)

74. On June 27, 2013, the City's outside labor counsel wrote Horn's attorney:

"It is the City's position that an individual has no right to take a case to arbitration under the City's collective bargaining agreement with the Union. Article 31 of the agreement clearly anticipates that the union must be party to an arbitration and does not authorize individuals to pursue arbitration individually. Because it is now clear that Mr. Horn is attempting to pursue this grievance individually, and not on behalf of the union, Mr. Horn's grievance has not been properly taken to arbitration. That said, the City has no obligation to arbitrate Mr. Horn's grievance and refuses to do so.

"This position is supported by the plain language of Article 31 of the collective bargaining agreement, the Union's position as expressed by Mr. Makler's email and the U.S. Supreme Court case in *Vaca v. Sipes*. * * * *Vaca* holds that an individual lacks the right to bring a grievance to arbitration. The Court reasoned that such a rule weeds out unmeritorious claims before the most costly stage of the grievance process (i.e. arbitration) and helps unions retain control of the

enforcement and regulation of the parties' agreement as the sole representative of the bargaining unit. * * * 'When the union refuses to proceed to arbitration, an individual employee may obtain judicial review of his breach of contract claim only if he can demonstrate that the union wrongly refused to process his grievance.'" (Exh. R-34 at 1-2; citations omitted.)

75. On June 30, 2013, Horn wrote Staples and informed him that the City refuses to acknowledge any individual right to pursue a grievance under the collective bargaining agreement. Horn asked Staples if there was any other method to appeal the executive board's decision not to grieve his termination or whether he had exhausted all his appeal options.

76. On July 1, 2013, Makler wrote to Horn's attorney, providing him with a set of the SPEU bylaws. He added:

"If you or your client believe that there is an action, pursuant to the SPEU bylaws, that you want to pursue then please address this claim in conformance with the SPEU bylaws.

"As you know, the SPEU position is and remains that the termination of your client was done for/with just cause, and the SPEU E-Board/Grievance Committee, after due diligence and investigation of the entire matter and allegations, confirmed this same SPEU position after your client appealed the E-Board decision to not support to arbitrate your client's termination." (Exh. C-31.)

77. On July 12, 2013, Horn's attorney asked Makler:

"1. If my client elects to arbitrate the Grievance Board's decision, how do we go about choosing an arbitrator? The bylaws are silent on that matter.

"2. Article XII of the bylaws states, in part, that the Union will take such steps that are necessary to preserve the members['] rights to proceed to arbitration should his appeal be successful or unsuccessful. What steps has the e-board taken or, is the e-board willing to take to preserve Mr. Horn's rights to proceed to arbitration?" (Exh. C-32 at 1.)

78. On July 15, 2013, Horn's attorney wrote to Makler "that Mr. Horn wishes to exercise his Salem Police Employees' Union's By-Laws Step Three appeal rights and request a Special meeting of the Salem Police Employees' Union and, if necessary, a third party arbitrator[.]" (Exh. C-33 at 1.) Horn's attorney cited Article IX (B)(3) on the grievance committee and stated:

"If an aggrieved member disagrees with the Grievance Committee's decision to not further the grievance steps, he may 1) appeal to the Grievance Committee and eventually through arbitration through the steps in Article Seven, Conflict Resolution, or 2) appeal to the membership as set forth at a Special o[r] Regular Meeting called by the aggrieved as set forth in these By-Laws, or 3) both." (*Id.*)

Horn's attorney then asserted that Horn

> "wishes to address a Special Meeting of the union membership. * * * Please accept this letter as Mr. Horn's request for a Special Meeting in writing. Mr. Horn also requests that I be afforded the opportunity to address the membership and outline his arguments. * * * Mr. Horn also wishes to arbitrate the E-Board's decision in the event his appeal to the membership at large is unsuccessful. * * * Article XII states, 'STEP THREE: If the aggrieved member continues to disagree with the conclusion of the E-Board, they may submit the issue of whether the UNION violated its duty of fair representation to arbitration.' As I mentioned in an earlier e-mail, the By-Laws are silent on how the parties are to choose an arbitrator. Please let me know, after the Special Meeting, how you would like to choose an arbitrator and we will begin the process.
>
> "Finally, ARTICLE XII states, '[t]he E-Board will take such steps as are necessary to preserve the conflicted member's rights to proceed to arbitration should his appeal to the UNION be successful or unsuccessful.' I am sure you and the E-Board have taken whatever steps that are necessary to preserve Mr. Horn's right to arbitrate his dismissal with the City of Salem, with or without the Union's assistance. To put my client at ease, I respectfully request that you inform us what steps the E-Board has taken or is willing to take to preserve Mr. Horn's rights under the By-Laws." (*Id.* at 1-2.)

79. On July 29, 2013, Horn wrote to Staples that he wanted to exercise his rights under the by-laws and request a special meeting of the Union membership and, if necessary, arbitration of his dispute with the Union executive board.

80. On July 31, 2013, Horn's attorney wrote to Makler and reiterated his request originally made in his July 15 letter.

81. On August, 8, 2013, Horn's attorney wrote to Makler for the fourth time and repeated the requests contained in his July 15 letter.

82. The Union and Makler did not respond to any of these communications from Horn and his attorney.

Officer EM, Officer Horn, and the DART

83. The Complainant suggests that the Union's decision not to pursue his grievance was influenced by Horn's contentious relationship with Officer EM.[10]

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[10]At the request and agreement of the parties, and approval of the ALJ, the individual is referred to only as EM.

84. EM worked on the DART since about 2004. The DART was formed to investigate suspected drug activity, particularly alleged drug house complaints. Responding to hot-line calls, members of the DART would "knock and talk," meaning the officers would knock at the house and talk to the residents where there had been reports of suspected drug activity, explain the nature of the complaint, and, while doing so, effectively investigate the situation.

85. Horn was assigned to the DART in May 2009, and EM was assigned to act as his partner and to train Horn. In July 2009, EM began to have concerns about the manner in which Horn was conducting DART investigations; that Horn was not properly giving *Miranda* warnings; that Horn gained consent to search a premises through improper or coercive methods. EM discussed the situation with Horn, who disputed EM's contentions. EM then took the matter to his supervisor, and asked permission to speak with the district attorney because he did not want to be in a situation where he and Horn were giving conflicting statements or testimony. The supervisor refused to give him permission, but rather instructed EM to go through the chain of command within the department. The supervisor spoke with Horn about the situation and Horn denied the conduct.

86. In September 2009, EM again had concerns about Horn's investigatory conduct, particularly over an incident involving a marijuana arrest, probable cause, and identity theft. EM again expressed his concerns to his supervisor, Sgt. Engel. EM next discussed it with Lt. Anglemier and stated that he did not want to partner with Horn. He asked to ride with another officer. His requests were declined. EM then met with Deputy Chief Bellshaw and finally with Chief Moore.

87. On October 6, 2009, Engel and Anglemier informed EM that they were concerned for EM's reputation, and there were rumors no other officer wanted to partner with him. Officers had heard that EM had spoken with the chief about the situation in the DART. It was suggested that an officer left the DART because of EM.

88. EM went on vacation the later part of October 2009. Upon returning to work, EM was taken by Anglemier to a meeting with Bellshaw. EM was informed of accusations by the district attorney's office regarding his investigations, and EM was directed to cease conducting any investigation. Anglemier and Engel would speak to the district attorney's office to determine if a formal investigation was warranted.

89. On November 6, 2009, during a meeting with Bellshaw, EM stated that he believed Horn had gone outside the chain of command, in violation of department policy, and made accusations about EM to the district attorney's office. Bellshaw believed that Horn may have done so. At about this time, EM filed an internal affairs complaint against Horn. At the same time, Bellshaw informed EM that he was under an unofficial investigation, and he would send EM's supervisors to interview individuals.

90. EM protested the unofficial investigation and requested that an official investigation be conducted. That way, it would be conducted by officers other than his supervisor, in whom he did not have faith of impartiality; witnesses would have to provide sworn testimony to the investigators; his exoneration would be publicly known to the other officers; and there would be no basis for other officers to believe his supervisors had whitewashed him, and in effect

themselves as well. At some time after this meeting, EM did seek Staples's assistance in obtaining an official investigation.

On November 18, 2009, EM met with Bellshaw, who informed him that there had been no basis to the allegations made against him, and that the formal investigation had been concluded. However, Bellshaw removed EM from the DART and reassigned him to the patrol division.

91. EM had no conversations with any representative of the Union concerning Horn's termination or grievance. EM only has a professional relationship with members of the Union's executive board. He is not personal friends with any of the executive board members.

CONCLUSION OF LAW

1. This Board has jurisdiction over the parties.

2. The Respondent Union did not violate ORS 243.672(2)(a) in its treatment and conduct toward the Complainant's termination of employment by the City.

DISCUSSION

Legal Standards for Duty of Fair Representation Cases

The Complainant alleges that the Respondent Union violated ORS 243.672(2)(a) by refusing to process his grievance through arbitration, and that this was "an unintentional act or omission that amounted to a violation of its duty to fairly represent the Complainant." (Complainant's post-hearing brief at 13.)

Complainant relies on *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409, 424 (1993). There, we followed *Robesky v. Quantas Empire Airways Limited*, 573 F2d 1082, 1089-90 (9th Cir 1978), and held that unintentional acts or omissions by union officers may be actionably arbitrary if (1) the act or omission reflects a reckless disregard for the rights of the individual employee; (2) the act or omission seriously prejudices the injured employee; and (3) the policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case. *Ralphs*, 14 PECBR at 423-24.

The Union's conduct in the instant case was neither unintentional nor an act of omission. It was made with full intent and deliberateness. The complainant misconstrues the application of the *Ralphs* test. That case did not concern the union's judgment about pursuing or not pursuing a grievance, but rather concerned "the failure of a union to correctly perform 'ministerial' or 'procedural' acts[;]" the union representative failed to "timely file the grievance in the appropriate place," a species of negligence that amounted to a violation of the union's duty of fair representation. (*Id.* at 422-23.) In *Ralphs*, this Board continued to hold that "'ordinary negligence' in performance is not sufficient to create liability on the part of the union," but we adopted a

standard to find "that a union should not be totally immune to liability for its non-performance or misperformance of a non-discretionary duty." (*Id.* at 423.)

Therefore, in the instant case, the Complainant is really presenting us with a traditional duty of fair representation case: that the Union's decision not to grieve or arbitrate the Complainant's termination was arbitrary, discriminatory, or made in bad faith.

ORS 243.672(2)(a) prohibits a labor organization from interfering with, restraining, or coercing any employee in or because of the exercise of rights guaranteed by the Public Employee Collective Bargaining Act (PECBA). Out of this provision, this Board has historically extrapolated an affirmative duty that applies to a labor organization's relationship with its members. We have long held that "[a]s a corollary to its statutory rights, a labor organization has the duty to fairly represent bargaining unit employes; and an employe is given the right to be free from unfair or invidious treatment by his exclusive bargaining representative in matters affecting his employment." *Powell v. Monmouth Police Officers Association,* Case No. C-95-76, 3 PECBR 2038, 2041, *rev'd and rem'd other grounds,* 33 Or App 93, 575 P2d 175 (1978). A labor organization has the duty to fairly represent all employees for whom it is the exclusive representative. *Chan v. Clackamas Community College and Clackamas Community College Association of Classified Employees, OEA/NEA,* Case No. UP-13-05, 21 PECBR 563, 574 (2006), *recons,* 21 PECBR 597 (2007); *Putvinskas 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).

An employee, however, does not have an absolute right to have a grievance taken to arbitration. *Vaca v. Sipes,* 386 US 171, 191, 87 S Ct 903 (1967); *Chan,* 21 PECBR at 575;

Labor organizations are afforded broad discretion for their decisions concerning the representation of employees and, specifically as it relates to the instant case, the Union's "decisions about whether to file or how far to pursue a grievance is entitled to substantial deference." *Conger v. Jackson County and Oregon Public Employees Union,* Case No. UP-22-98, 18 PECBR 79, 88 (1999); *see Bjornsen v. Jackson County Sheriffs' Officers Association, Affiliated with Teamsters Local 223 and Jackson County,* Case Nos. C-130/131/132/133/134/135-83, 8 PECBR 6783, 6795 (1985) (absent evidence of bad faith, dishonesty, or hostility, a union should be granted a "wide range of reasonableness" in making judgments about employee grievances).

Since a significant purpose of the PECBA is to insure public employees the right to form, join, and participate in the activities of a labor organization of their own choosing, this purpose would be frustrated unless a labor organization is

> "free to act in what it perceives to be the best interests of its members, without undue fear of lawsuits from individual members. * * * If a union's decisions are constantly attacked by disgruntled members, the organization's collective power is weakened and the employees' interest in having a strong and effective organization to represent them is defeated." *Ralphs,* 14 PECBR at 422 (citation omitted).

We have nevertheless concluded that a labor organization can violate its duty of fair representation if that labor organization's decision not to pursue a grievance is arbitrary, discriminatory, or made in bad faith. *Chan*, 21 PECBR at 574; *Putvinskas*, 18 PECBR at 894. We have explained these standards as follows:

> "A union's decision is 'arbitrary' if it lacks a rational basis. *Howard v. Western Oregon State College Federation of Teachers*, Case No. UP-80/93-90, 13 PECBR 328, 354 (1991). Its decision is 'discriminatory' if there is 'substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.' *Id.* * * * A union's decision is in 'bad faith' if it intentionally acts against a member's interest, and does so for an improper reason. *Stein v. Oregon State Police Officers' Association and Oregon State Department of State Police*, Case No. UP-41-92, 14 PECBR 73, 80 (1992)." *Chan*, 21 PECBR at 574-75.

For instance, this Board has stated that "[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." *Wright v Local 2277, Portland Community College Federation of Faculty and Academic Professionals, AFT, AFL-CIO, and Portland Community College,* Case No. FR-004-11, 25 PECBR 910, 932, *recons*, 25 PECBR 951 (2014) (*citing Ralphs,* 14 PECBR at 422).

We extend to labor organizations "substantial discretion in deciding whether to arbitrate, or even to file, a grievance." *Grisham-Tittle v. American Federation of State, County and Municipal Employees, Local 1246-3, and State of Oregon, Department of Administration Services*, Case No. FR-03-10, 24 PECBR 228, 238 (2011). Given such deference, "[t]his Board generally does not substitute its judgment for that of a union that rationally decided not to process a grievance. Instead, this Board primarily determines whether the union conducted a proper investigation and used a rational method of decision-making in reaching its conclusion." *Putvinskas*, 18 PECBR at 895 (footnotes omitted).

We even apply this discretion "to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken." *Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP-31-04, 20 PECBR 967, 974 (2005) (*citing 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). We have held that "[w]hat is important is the process by which the [union] determined not to pursue the grievance, not whether the grievance was filed." *Tancredi*, 20 PECBR at 976.

We accept that "a union has a wide range of reasonableness in deciding how to exercise its discretion," and, "[t]herefore, without violating its duty of fair representation, a union may rationally decide not to pursue a grievance that the union would likely win in arbitration." *Martin v. Ashland School District #5, Morris, OSEA; Fields, Helman Elementary*, Case No. UP-30-01, 20 PECBR 164, 177 (2003); *see Putvinskas*, 18 PECBR at 895; *Chan*, 21 PECBR 575. The union is not required to represent a member in the same manner as an attorney represents a client. *Tancredi*, 20 PECBR at 974; *Putvinskas*, 18 PECBR at 898. A "union's failure to take witness

statements or to allow the union member to rebut aspects of the union's investigation does not breach the duty of fair representation." *Tancredi*, 20 PECBR at 974; *Putvinskas*, 20 PECBR at 898. It is also permissible for a union to consider the cost of arbitration in deciding whether to arbitrate a grievance. *Tancredi*, 20 PECBR at 974; *Strickland v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC*, Case No. UP-134-90, 13 PECBR 113, 123-34 (1991). A union has the discretion to withdraw a grievance when it believes that there is insufficient evidence to support the claim. *Tancredi*, 20 PECBR at 974.

We, therefore, focus not on the merits of the grievance but on the conduct of the labor organization. *Chan*, 21 PECBR at 575. In order "[f]or a union's actions to fall outside this wide range of reasonableness, they must be wholly irrational or arbitrary." *Tancredi*, 20 PECBR at 974 (internal quotes omitted); *quoting Baltus v. Multnomah County School District No. 1J and Portland Association of Teachers*, Case Nos. UP-51/52-94, 15 PECBR 764, 778 (1995). It follows that the Complainant must establish that the Union "had a hostile motive, acted dishonestly, or made its decision not to pursue the grievance without any basis." *Morgan-Tran v. AFSCME Local 88 and Multnomah County*, Case No. UP-67-03, 20 PECBR 948, 959 (2005) (*quoting Conger*, 18 PECBR at 88; *citing Coan and Goar v. City of Portland, Bureau of Parks, and Laborers' International Union of North America, Municipal Employees Local 483*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342, 351 (1987), *recons*, 10 PECBR 438, *AWOP*, 93 Or App 780, 764 P2d 625 (1988)).

The Case

In the instant case, the City conducted three internal affairs investigations into the Complainant's conduct, and held a pre-disciplinary interview with the Complainant. As a result, the City concluded that the Complainant had improperly forwarded a photo of a topless female co-worker to another employee in violation of City rules and policies; that the Complainant improperly converted City property for personal use in violation of City rules and policies; and that the Complainant had been untruthful during an official internal affairs investigation. The City concluded that the conduct was serious enough that on March 27, 2013, the City terminated the Complainant.[11]

The Union president fully and fairly represented the Complainant during the disciplinary process. At the investigatory interviews with the Complainant, the Union president prevented the investigators from expanding their inquiry beyond the allegations contained in the formal notice. The Union president also fully and fairly represented the Complainant when knowledge of the Complainant's communications with FF surfaced and caused the City formally to inquire into the

[11]The City points out the significant difficulty for a police officer and a police department, when an officer has been found to have been untruthful. Under *Brady v. Maryland*, 373 US 83, 83 S Ct 1194 (1963), the Supreme Court established an obligation on prosecutors to reveal exculpatory material to defendant. This developed to include evidence reflecting upon the credibility of prosecution witnesses, including police officers. *Giglio v. United States*, 405 US 150, 92 S Ct 763 (1972). This situation makes it impossible for a police officer, who has been found to be untruthful, to perform his duties as a police officer, where those duties include investigation of crimes and assistance in the prosecution of alleged criminals by giving sworn testimony. As all the parties and witnesses concede, for a police officer to be found to be untruthful in an official investigation is a career-ending event.

matter. The Union president arranged to have the Complainant meet with the Union attorney in order to receive the attorney's assessment of the potential disciplinary action and its consequences. The Union president also attempted to negotiate a resignation agreement between the City and the Complainant that might have allowed the Complainant to retain his license.

On April 1, 2013, the Union president provided the three available executive board members with a copy of the Complainant's 190-page termination file. It included the three internal affairs investigations, with transcripts of all the interviews, and the relevant City policies and regulations. On April 3, after considering the file, the president and the three executive board members, acting as the grievance committee, decided not to pursue a grievance on behalf of the Complainant.

As veteran police officers with an average of 22 years of police service and considerable investigation experience, the members of the executive board, after having read the internal affairs investigations and reports, concluded that the Complainant had been untruthful in an official investigation. Naturally, the concurrent, although unstated, conclusion is that an arbitrator would sustain the City's termination of the Complainant. Therefore, the executive board members voted not to grieve the Complainant's dismissal. Their decision was recorded and Horn was advised of the decision. The record contains no suggestion that executive board members made their decision based on anything other than their conclusion that he had been untruthful during an official investigation. There is no evidence to suggest that it was based on an improper reason.

The Complainant appealed the decision under the by-laws and on May 13, 2013, he personally appeared before the full executive board to ask that they reverse the decision not to grieve his dismissal. During his two-to-three minute appearance, the Complainant merely stated that he did not lie and that the Union is setting a bad precedent by not grieving his termination. He gave no additional or new facts which could have persuaded the executive board to reverse the earlier decision. As a result, the executive board sustained the decision not to grieve his termination. Their decision was recorded and the Complainant was subsequently advised of the decision.

Allegation No. 1

Initially, we must examine the Union's actions toward the Complainant. The complaint alleges that the executive board's decision not to grieve Complainant's termination was "arbitrary and based on bad faith" because (a) the April 3 vote by the Union officials was not documented in writing; (b) the Union president advised the Complainant that if he resigned during the internal investigation rather than being terminated it would be easier for him to maintain his law enforcement certification with the DPSST; (c) some of the executive board members did not read the investigations associated with the Complainant's termination; (d) the executive board members were not informed that Complainant reported to the Union president that he made an error during his first IA interview and the Union president instructed him to report the error at a later date; (e) the Union president did not provide the executive board members with a written summary or opinion regarding the validity of the Complainant's termination or grievance; (f) the Union attorney did not provide the executive board with a written summary or opinion regarding the validity of Complainant's termination or grievance; and (g) the Union did not use any

documented objective criteria when determining whether to grieve a member's termination. (First Amended Complaint, ¶17(a)-(g).)[12]

The Complainant has not provided any legal authority that would persuade this Board to conclude that the above allegations are a cause of action under a duty of fair representation complaint. Further, the focus of Complainant's post-hearing brief leads us to conclude that he has abandoned the above-enumerated allegations. Nevertheless, we presently are not prepared to hold that the conducted alleged above, either individually or collectively, would constitute a violation of a union's duty of fair representation.

We do not find that that union's decision not to grieve or arbitrate the Complainant's termination to be arbitrary. So long as there is a rational basis for the union's decision not to arbitrate, or even to file a grievance over the Complainant's termination, we will accord the union substantial discretion in making that decision. *Grisham-Tittle*, 21 PECBR at 238; *Conger*, 18 PECBR at 88. The union can demonstrate that its decision is rational by its investigation of the employee's complaint. We will accord discretion "to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken." *Randolph*, 15 PECBR at 106. After considering the City's investigation, it was not unreasonable for the Union to have concluded that the Complainant had been untruthful during an official investigation, and that the City most likely would prevail on that issue at arbitration. Where the union, as here, conducted a good-faith investigation prior to making its decision, "[t]his Board generally does not substitute its judgment for that of a union that rationally decided not to process a grievance." *Putvinskas*, 18 PECBR at 895. A union may rationally decide not to pursue a grievance that the union would likely win in arbitration without violating its duty of fair representation. *Balch v. Oregon Public Employees Union,* UP-6-96, 16 PECBR 478, 480 (1996) (union deliberately closed the grievance because it believed there was insufficient evidence to support it); *Martin*, 20 PECBR at 177 (union official reasonably concluded the complainant admitted actions for which he was disciplined); *Chan*, 21 PECBR at 576 (based on investigation, union concluded it would not prevail at arbitration; also union had no obligation to proceed further when employee resigned).

Accordingly, the Union's decision was not arbitrary or arbitrarily made, and we will dismiss these allegations.

Allegation No. 2

The complaint also alleges that the executive board's decision not to grieve Horn's termination was "arbitrary and based on bad faith" because "[o]ne or more of the members based their decision not to grieve Horn's termination based upon his participation in the 2009 unofficial investigation of [EM]." (First Amended Complaint, ¶17(h).) In the opening statement, Complainant described the allegation this way: The Union's decision not to grieve the

[12]The votes were documented in writing. The executive board members credibly testified that they each read the investigation reports on Horn's termination. There is no evidence to suggest that the executive board members were not informed that Horn reported that he had made an error during his first IA interview.

Complainant's termination was retaliatory for his participation in the investigation of Officer EM in 2009.

In essence, the Complainant alleges that the members of the executive board voted not to grieve the Complainant's termination because they held him in disfavor as a result of the enmity that existed between Horn and Officer EM, when the two served together on the DART back in 2009. The Complainant's suggestion is that the Union officials were friends with EM and held a grudge against Horn, who might have been responsible for EM's removal from the DART. Factually, it is clear that Horn and EM did not get along personally or professionally. Yet, the executive board members did not know of that troubled relationship until well after the dates they made their decision not to grieve the termination. There also is no evidence that the Union officials had any particular friendship toward EM or hostility toward the Complainant, and there is no evidence even to imply that the Union officers voted the way they did because of any friendship with EM or hostility toward the Complainant.

To prevail on this allegation, the Complainant must prove discrimination or bad faith. He may do so by establishing that the Union had a hostile motive or acted dishonestly. *Morgan-Tran*, 20 PECBR at 959 (*citing Conger*, 18 PECBR at 87-88; *Coan and Goar*, 10 PECBR at 351). In the alternative, to establish proscribed discriminatory conduct, the Complainant must demonstrate that the Union's decision was "intentional, severe, and unrelated to legitimate union objectives." *Chan*, 21 PECBR at 575; (*citing Howard*, 13 PECBR at 354). To prove a bad faith allegation, the Complainant must establish that the Union's decision was against the Complainant's interests and was done "for an improper reason." *Chan*, 21 PECBR 575. The record does not reveal any evidence that would lead this Board to conclude that the Union's decision was made for an improper reason. *Putvinskas*, 18 PECBR at 898 (refusal to grieve based on complainant's work conduct, not on the union official's personal relationship with the complainant). The Complainant has not established any of the requisite elements.

Accordingly, we will dismiss this allegation in the complaint.

Allegation Nos. 3 and 4

The complaint alleges that the Union's decision not to grieve the Complainant's termination to arbitration was "arbitrary and based on bad faith" because the collective bargaining agreement "specifically affords an individual member the right to grieve and arbitrate discipline and that right does not exclusively belong to the Executive Board at Step 4/Arbitration phase of the grievance procedure." (First Amended Complaint, ¶17(i).) In his opening statement, the Complainant presents the allegation in this fashion: the Union has an obligation to grieve the Complainant's termination because he is the grievant as defined by collective bargaining agreement, and, as the grievant, he gets to decide how far the grievance goes, including whether it goes to arbitration. Of course, the Union and City dispute that interpretation of the collective bargaining agreement.

Notwithstanding the Complainant's assertion that he has some variety of superior status under the collective bargaining agreement's grievance provision, even the Complainant appears to concede that his grievance nevertheless requires action by the Union (or otherwise why would

we be where we are now). Therefore, this concession brings the case back to the traditional duty of fair representation analysis.

In order to prevail, the Complainant must establish that the Union's action, decision, or even perhaps its divergent interpretation of the grievance provision was arbitrary, discriminatory, or made in bad faith. It does not benefit the Complainant to argue that the Union has failed to interpret its own collective bargaining agreement consistent with the Complainant's interpretation. We do not need to debate or analyze the various interpretations of the contractual grievance procedure. *Coan and Goar*, 10 PECBR at 439-440 (the union official permissibly decided not to grieve based on his understanding of the collective bargaining agreement and a reasonably thorough knowledge of the facts); *Morgan-Tran*, 20 PECBR at 960 (we need not decide whether the union's interpretation of contract is correct, and will not substitute our judgment for that of the union's).

It follows from a long line of Board decisions that we will permit a union to be mistaken in its understanding of the complainant's purported grievance so long as it makes its decision in good faith or not with a malicious purpose. *Wright*, 25 PECBR at 932; *Chan*, 21 PECBR at 575; *Tancredi*, 20 PECBR at 974; *Ekstrom and Bedortha v. Oregon School Employees Association*, Case No. UP-54-93, 14 PECBR 565, 567 (1993). Even the Supreme Court accepts that "the grievance processes cannot be expected to be error-free." *Hines v. Anchor Motor Freight*, 424 US 554, 571, 96 S Ct 1048 (1976)

Lastly, the complaint alleges that the Union violated its duty of fair representation by failing to follow its by-laws. (First Amended Complaint, ¶39-¶54.) The Complainant asserts that under the by-laws, he had a right to appeal to the full union membership and even to take his dispute with the Union to arbitration. However, this Board has held that "absent some persuasive evidence of arbitrary or bad faith conduct by the union," we do not have authority to enforce compliance with a labor organization's internal by-laws. *Witherell v. Marion County Law Enforcement Association*, Case No. UP-42-94, 15 PECBR 729, 742 (1995) (*citing Powell*, 3 PECBR 2038).

Accordingly, we treat this allegation as we have addressed the contractual contention set out above, and this brings the case back to the traditional duty of fair representation analysis and burden. In order to prevail, the Complainant must establish that the Union's action, decision, or application of the by-laws was arbitrary, discriminatory or made in bad faith. We have found no basis on which to conclude that the Union has followed or not followed its by-laws in an arbitrary or discriminatory manner or in bad faith. The Complainant failed to demonstrate that the Union acted dishonestly in deciding not to pursue the grievance; that the decision was based on any hostility toward the Complainant; or that the Union lacked a reasonable basis for its decision.

In *Slayter*, we stated that "[t]his 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." 25 PECBR at 504. We dismissed that complaint where, similar to the instant case, the union reviewed the employer's investigation, including transcripts, and found that the employee had given "evasive answers about his alcohol consumption," and the employer had a policy of "zero tolerance for alcohol in

the workplace." *Id.* at 503. As a result, the union "determined that the likelihood of reversing the [employer's] decision was slim;" and further there was "no evidence that the Union had any reason to change its decision." *Id.* at 503-04.

The fact that the Complainant is "not satisfied with the outcome does not establish that the Association acted without a rational basis or in bad faith." *Chan*, 21 PECBR at 576 (*citing Leah Moore v. Mount Hood Community College Classified Employees Association and Mount Hood Community College*, Case No. UP-39-99, 18 PECBR 279, 284 (1999); *Martin*, 20 PECBR at 177 (failure to speak to complainant's witness not a sufficient claim); *Putvinskas*, 18 PECBR at 897 (complainant's dissatisfaction with extent of union's investigation is not basis for a claim).

Accordingly, we will dismiss these allegations.

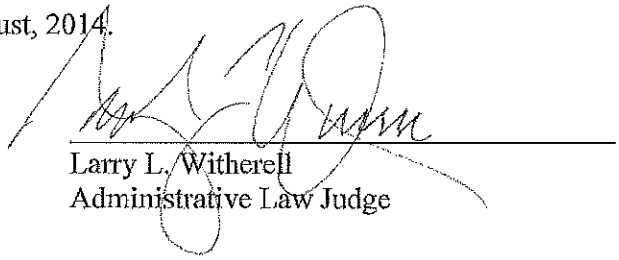
The City's Alleged Violation of ORS 243.672(1)(g)

Where no violation is found against the labor organization in a duty of fair representation case, the complaint against the public employer will automatically be dismissed. *Seehawer v. American Federation of State, County and Municipal Employees, Council 75, and State of Oregon, Department of Corrections*, Case No. FR-02-11, 25 PECBR 47, 53-54 (2012); *Mengucci*, 8 PECBR at 6734.

ORDER

The complaint against the Respondent Union and Respondent City are dismissed.

SIGNED AND ISSUED this 19th day of August, 2014.



Larry L. Witherell
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115 035-0050; 115-045-0040; and 115-070-0055.)