

On September 18, 2014, Eric Sofich (Complainant) filed this complaint against the Salem Firefighters Local 314 (Union) and the Salem Fire Department/City of Salem (Department or City). The complaint, as amended on November 21, 2014, alleges that the Union 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 the City filed timely answers to the complaint.

The issue is:

Did the Union breach its duty of fair representation under ORS 243.672(2)(a) in investigating Complainant's discharge and in making the decision not to take his grievance to arbitration?

As discussed below, we conclude that the Union did not violate its duty of fair representation. Therefore, we will dismiss the complaint.

RULINGS

Bifurcation

In duty-of-fair-representation cases involving related claims that an employer violated ORS 243.672(1)(g), we bifurcate the claims in order to first address the allegations against the labor organization. If we find that the labor organization breached its duty of fair representation, we then determine whether the employer also violated the collective bargaining agreement. If we find no violation of the duty of fair representation, we dismiss the claims against the labor organization and the employer. *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); *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722, 6734 (1984).

Transcript Admissibility

On the third day of the hearing, Complainant moved to admit a transcript of the Step-2 grievance meeting concerning his dismissal from the City. Counsel for the Union and the City both objected, asserting that Complainant had recorded the meeting without the knowledge of the other participants, thereby violating ORS 165.540(1)(c). That statute declares that it is a Class A misdemeanor to

“[o]btain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained.”

Counsel for the Union and the City further argued that to use the transcript in the hearing would also violate ORS 165.540(1)(e), which makes it a Class A misdemeanor to “[u]se or attempt to use, or divulge to others, any conversation, telecommunication or radio communication obtained by any means prohibited by this section.” Under ORS 41.910(1),

“[e]vidence of the contents of any wire or oral communication intercepted * * * [i]n violation of ORS 165.540 shall not be admissible in any court of this state, except as evidence of unlawful interception * * *.”

Complainant did not assert that he informed the participants in the Step-2 grievance meeting that he was recording them. Rather, Complainant argued that the Step-2 grievance meeting falls under the category of “[p]ublic or semipublic meetings such as hearings before governmental or quasi-governmental bodies,” thereby creating an exemption to ORS 165.540(1)(c). *See* ORS 165.540(6)(a).

We do not agree that the Step-2 grievance meeting over Complainant’s discipline was a public or semipublic meeting under the statute. Grievance meetings are an opportunity for the parties to meet and attempt to resolve a dispute over the meaning and application of their collective bargaining agreement without resort to litigation. Members of the public do not normally attend these meetings, and participation is generally limited to those individuals that the labor organization and the employer deem necessary to resolve the dispute. Thus, we conclude that the Step-2 grievance meeting was not a “public or semipublic meeting,” such that Complainant was permitted to record the meeting without notice to others.

Complainant also argued that the hearing was not one before a “court of this state,” but rather an administrative hearing, and therefore ORS 41.910(1) should not apply. We do not agree that we should disregard the mandate of ORS 41.910(1) because our hearings process is administrative, rather than civil or criminal. Assuming for the sake of argument that this Board is not *required* to comply with the relevant provisions of ORS 41.910(1), we have the authority to exercise our discretion to do so when applying the evidentiary standards set forth in our rules.

The legislature has chosen to make it unlawful to secretly record in-person conversations. It further chose to prohibit any such unlawful recordings from being admitted in courts of this state. These separate but related statutes establish a strong public policy against admitting and considering unlawfully obtained conversations. The Oregon Supreme Court was faced with a similar situation when reviewing a disciplinary case against a lawyer where an illegal recording had been made that was potentially relevant to the issues in that case. The Court noted that the recording would be inadmissible in an “ordinary civil or criminal action,” and then rejected the use of the recordings in the disciplinary process:

“Without attempting to decide whether ORS 41.910 is binding upon this court when the court functions in the internal discipline of the Bar, we hold that it would not be desirable for the Bar to employ in its disciplinary operations illegal tape recordings, evidence secured unlawfully by wire-tapping, or other fruits of criminal eavesdropping. We recognize that the rules of evidence in disciplinary cases are more flexible than they are in criminal prosecutions. However, to permit the Bar to

use illegal tape recordings would be inconsistent with the public policy expressed by ORS 165.540.” *In re Langley*, 230 Or 319, 322-23, 370 P2d 228 (1962).

We hold that the same public policy considerations should apply to the cases before us. Accordingly, the ALJ properly excluded the transcript.

Unemployment Decision Admissibility

At the hearing, Complainant sought to admit a decision from the Office of Administrative Hearings regarding Complainant’s right to receive unemployment benefits. The ALJ denied the motion to admit in accordance with ORS 657.273(2), which states that unemployment decisions “[a]re not admissible as evidence in any other civil action or proceeding,” other than those determining eligibility for public assistance or supplemental nutrition assistance. However, the ALJ permitted Complainant to make an offer of proof, marked it as an exhibit, but did not admit it as evidence.

Complainant objected to the ALJ’s ruling, asserting that the Union had “opened the door” regarding the substance of the decision by virtue of testimony that the decision had been considered as part of the deliberative process regarding Complainant’s grievance. We disagree that the Union’s testimony at issue rendered the decision admissible. The language of ORS 657.273(2) is unambiguous. Accordingly, we find that the ALJ properly excluded the decision.

The remaining rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

The Parties and Background

1. The Department and the City are public employers within the meaning of ORS 243.650(20).

2. The Union is a labor organization within the meaning of ORS 243.650(13).

3. Complainant is a former Department employee and Union bargaining unit member who was terminated from his employment on March 25, 2014.

4. The Department has 11 stations in Salem. Currently, approximately nine are staffed. All stations have engines, which carry water, hoses, and medical equipment. Engines are identified by their respective station numbers. Stations #2 and #4 have ladder trucks, respectively referred to as Ladder #2 and Ladder #4. A ladder truck is a vehicle that carries specialized items such as aerial ladders, tools for car extraction, and tools for rope rescue.

5. Engines and ladder trucks are fully staffed at four personnel. The four personnel on a ladder truck include an Engineer (Driver), a Captain, a Charlie seat firefighter (directly behind the Captain) and a Delta seat firefighter (directly behind the Driver). A ladder truck is considered minimally staffed at three personnel. If a ladder truck is minimally staffed, it is sometimes referred

to as being “browned out.” Typically, that means that the Delta seat is empty. However, it may also mean that the Charlie seat is empty, because the Charlie and Delta seats share the same firefighting duties.

6. Department firefighters work 24-hour shifts designated as A Shift, B Shift, and C Shift. Official shift hours are 8:00 a.m. to 8:00 a.m. the following day. Frequently, however, the corresponding firefighter on the next shift (known as the relief) will arrive earlier than 8:00 a.m. Firefighters may leave when their relief arrives.

7. The on-duty Captain for an apparatus is responsible for coordinating on-duty staffing and assigning roles on the apparatuses. The Battalion Chief on duty for a given shift is the next rank above the Captain. Battalion Chiefs are responsible for overseeing the operations of four or five stations on their shift.

8. During the relevant times and events, Department positions were staffed as follows:

Fire Chief	Mike Niblock
Deputy Chief	Greg Hadley
Battalion Chiefs	Frank Stephenson – conducted disciplinary investigation Robin Chitwood – North Stations
Station 2 Captains	Kyle Amsberry – A Shift Engine Patrick Ward – A Shift Ladder Scott Miller – B Shift Ladder

9. The Union represents approximately 140 employees. Until recently, only Firefighters and Captains were members of the designated bargaining unit, whereas Battalion Chiefs and Deputy Chiefs were not. Sometime after the spring of 2014, the Battalion Chiefs became members of the bargaining unit.

10. During the relevant times and events, Union positions were staffed as follows, with the first three being considered the principal “E-board” members:

President	Trevor Elmer
Vice President	Gary West
Secretary/Treasurer	Matt Brozovich
Sergeant at Arms	Brian Turner
Trustee	Ian Fitzgerald
Trustee	Chuck Ettl
Trustee	Brandon Silence

11. The Union Vice President is typically tasked with managing member grievances and convening the Grievance Committee. The Grievance Committee makes recommendations to the E-board regarding whether to pursue a grievance, and the E-board ultimately makes the decision.

12. Article 13 of the Union’s bylaws titled “Duty of Fair Representation” states:

“The obligation on the Local is to represent all members of the bargaining unit equally. The Executive Board/Grievance Committee will investigate all complaints and grievances. The Executive Board will make a determination as to what steps will be taken, and the involvement of the Local, in all grievances. Should the Executive Board deem it necessary to place the issue before the membership for discussion at either a regular, or special meeting, the Executive Board will make a recommendation to the body as to what they believe is the best course of action. An aggrieved member may appear and appeal the recommendation at the Executive Board, and/or the Union meeting, scheduled to take up the matter. If the Executive Board makes the determination to take no action on a grievance the individual, or individuals, will have the right to continue on with their grievance independently.”

13. The Union and the City are parties to a collective bargaining agreement (Agreement) in effect from July 1, 2013 to June 30, 2016. Article 18 of the Agreement governs and outlines the grievance procedure. Step 1 requires the grievance to be delivered to the employee’s supervisor who is of a Chief Officer rank. According to the Agreement, to go to Step 2, the grievant is required to file it with the Deputy Chief of Operations. The Agreement states that to advance to Step 3, the grievant shall file it with the Fire Chief. For Step 4, which is arbitration, the Agreement states that the Union shall submit the issue to an arbitrator using one of four methods, which are subsequently listed.

14. The Union’s lead counsel is Henry Kaplan of Bennett Hartman Morris and Kaplan LLP. Nelson Hall is a partner in that firm who practices in workers’ compensation and labor law. Tom Doyle is also a partner in that firm who practices labor law.

Events on December 29 and 30, 2013

15. Complainant worked his normally assigned C Shift on December 28, 2013. Immediately thereafter, he worked a second 24-hour A Shift starting at 8:00 a.m., on December 29, 2013. Complainant worked the second shift because of a trade with another firefighter. It was Complainant’s last shift before he commenced a month of vacation leave.

16. When Complainant agreed to take the traded shift, he had forgotten that he had a dentist appointment at 8:00 a.m. on December 30 in West Linn, which is approximately 45 minutes away from Salem. After remembering the appointment, he contacted Firefighter Andy Lake, who indicated that he could arrive early to provide relief.

17. At approximately 8:30 p.m. on December 29, 2013, Lake called Station #2 and stated that he had hurt his shoulder and could not come into work. Complainant attempted to find someone who could relieve him early and allow him to attend his dentist appointment. At around 10:00 p.m., he explored the possibility of taking short-term leave. At that time, Complainant had a brief conversation with Captain Amsberry about Complainant’s efforts to obtain relief to leave early. At some point, Complainant contacted Firefighter Cole Clarke to see if he could provide early relief.

18. At approximately 4:00 a.m., the engine company responded to a medical call. While returning to the station, a coworker, Bell, confirmed that Complainant knew that Lake could not provide relief. During that conversation, Complainant told Bell that Clarke had texted him and had said that he also would not be able to provide early relief.

19. On the morning of December 30, 2013, before 8:00 a.m., the Department had scheduled Ladder #2 to be staffed by Captain Michael Patrick, Driver Brian Mitzel, Delta Firefighter Seth Ohlgren and Charlie Firefighter Matt Graham. Complainant was scheduled to occupy the Hoser position on Engine #2.

20. Complainant left the station at some time between 6:45 a.m. and 7:00 a.m. to attend his dental appointment.¹ Before leaving, Complainant moved Graham's equipment from Ladder #2 Charlie position to the Engine #2 Hoser position. Complainant texted Graham to notify him that he had done that and stated that Amsberry had given him permission. Graham verified that all of his equipment was on Engine #2.

21. At approximately 7:05 a.m., dispatch communicated a possible apartment fire. Engine #2 departed fully staffed. Firefighter Ohlgren began to board Ladder #2. Driver Mitzel said something to Ohlgren about Ladder #2 being a "3-man truck." Ohlgren interpreted this to mean that his relief had arrived, and that the truck would be minimally staffed at three personnel. Therefore, Ohlgren removed his gear from Delta seat.

22. Driver Mitzel and Captain Scott Miller boarded Ladder #2, but could not dispatch to the scene because both the Charlie and the Delta seat were empty due to the absence of Complainant, Graham, and Ohlgren. Around that time, a relief Driver was arriving, and he boarded Ladder #2. Ladder #2 then departed with the minimum staffing of three.

City Investigation and Pre-termination Events

23. On January 3, 2014, Complainant directed a tort claim notice to City Manager Linda Norris, City Attorney Dan Atchison, and Fire Chief Mike Niblock. The tort claim notice alleged an ongoing pattern of unfair, retaliatory and disparate treatment due to Complainant's physical disabilities, work related injuries, use of Family and Medical Leave Act leave, and requests for accommodations. Union President Trevor Elmer was copied as a recipient.

24. On January 4, 2014, Complainant left the country for a month-long vacation in Australia and New Zealand.

¹Complainant asserted through his entire disciplinary procedure that, immediately after the 4:00 a.m. medical call, Amsberry gave him permission to leave before 8:00 a.m. and without relief. Amsberry denied that any conversation took place. Although the existence of this conflict is significant as far as understanding the actions taken by the parties, we do not need to resolve it in order to determine whether the Union violated its duty of fair representation. Therefore, we decline to make any findings of fact to resolve the parties' factual disputes that bear on whether Complainant had permission to leave.

25. On January 5, 2014, Elmer forwarded Complainant's tort claim notice to the other principal E-board members. The following email exchange occurred between Elmer, Brozovich and Gary West:

Elmer: "Gentlemen, I received this from [Complainant] as he was getting ready to board an airplane to Australia I believe. First I have heard of it. Nelson is [Complainant's] private counsel.

Brozovich: "Ahhhh first I have heard of it...wow.

West: "Wow! I have a bad feeling for [Complainant]. Especially after what we talked about day before yesterday.

Elmer: "Ya well none of these guys will let anything go. Always taking the fight to them. Poking the bear if you will. Not our fight though.

West: "I'm with ya on all accounts. I just worry that he will be the next in a long line of people getting terrible advice from our one percenters.

Elmer: "Ya, I wish that people could just move on.

Brozovich: "Unfortunately [Complainant] hasn't ever moved past any event that has occurred at SFD."

26. Between January 7 and 10, 2014, the Department began investigating Complainant's early departure on December 30, 2013. The Department interviewed Battalion Chiefs Hoaglin and Chitwood, Captains Miller, Amsberry and Patrick, and Firefighters Mitzel, Clarke, Bell, Graham, Miller, Ohlgren, and George. Most of the interviews were recorded, but Chitwood's was not.

27. During Amsberry's January 7, 2014, interview, he stated that he did not give Complainant permission to leave. Amsberry stated that the extent of the conversation was as follows: "[Complainant] made some kind of comment about a four-person truck. I wasn't sure what he meant."

28. On or about January 7, 2014, the Union leadership learned of the City's investigation. Shortly thereafter, Elmer informed Deputy Chief Hadley that the Union would like to be involved in further interviews. Additionally, the principal E-board members engaged in an email discussion as to whether they should notify Complainant. Their conversation was as follows:

Elmer: "I decided not to let [Complainant] know about the investigation that is ensuing regarding him leaving the station without relief. He is on vacation, I will notify him as soon as he returns, hopefully before he hears it otherwise.

West: "I definitely understand that. Why ruin his vacation? Hopefully he doesn't get word from the grapevine..."

Elmer: "Ok, I confirmed with Hadley that this is most likely headed down the Maj Discipline road, outside of some circumstances that would excuse what he did. [Hadley] made it very clear that they do not have [Complainant's] side yet of course. I think I should let him know that there is an investigation going on. That is all I will tell him. I get the whole don't ruin his vacation thing but think of yourself, would you want to know or be blindsided by it? Please give me your two cents?"

Brozovich: “I say at least tell him something, i.e.: there is an investigation in progress regarding him. We should be upfront and forthright that something is occurring. My 2 cents....”

29. On January 8, 2014, Elmer sent an email to Complainant, stating:

“Just don’t want you to be blind-sided by this when you return. There is an on-going investigation surrounding the shift at station 2 when you left early. Just an FYI at this point. Please enjoy the rest of your vacation. We can talk when you return.”

Around this time, Trustee Fitzgerald also sent Complainant a text message requesting that he contact Fitzgerald.

30. On January 31, 2014, after Complainant returned, Elmer and Complainant spoke by phone. Elmer stated that he did not know a great deal about the investigation. This was the first of approximately 40 phone conversations that Complainant recorded between himself and E-board members and Union counsel, without the other participants’ knowledge.

31. On February 7, 2014, Battalion Chief Stephenson issued a Notice of Investigation to Complainant. The Investigation Notice stated that the Department was conducting an investigation about whether Complainant left early without permission or relief on December 30, 2013. The Investigation Notice contained an outline of the factual allegations, and explained that Complainant would be formally interviewed and would have the right to have union representation at that interview.

32. Around February 11-13, 2014, Elmer and Fitzgerald were in regular communication with Complainant. They both strongly advised that Complainant be honest and take full responsibility for leaving early without permission. Complainant expressed a desire to provide a written statement. Both Elmer and Fitzgerald strongly advised Complainant not to provide a written statement. However, Complainant provided Elmer, West, and Fitzgerald with a draft of the statement that he wanted to submit. Elmer and Fitzgerald provided him with some feedback indicating that they did not view the written statement as taking full responsibility. Complainant responded that he disagreed and ultimately submitted a written response, which Fitzgerald reviewed and provided input on.

33. On February 14, 2014, Stephenson notified Complainant that his investigatory interview would occur that day. Typically, the current Vice President attends investigatory interviews, but West was on leave and not available. Elmer had a previously scheduled conflict, but he told Complainant that he could break the commitment. However, Fitzgerald was available, had received training in representing grievants, and Complainant expressed comfort in having him as the representative. Accordingly, Fitzgerald served as his Union representative.

34. Complainant provided his written statement to Stephenson before his February 14, 2014, investigatory interview. During the interview, Stephenson repeatedly asked Complainant what Amsberry had said to give him the impression that he could leave early without relief. Complainant repeatedly responded that, given the length of time since the events, he could

not remember the exact words, but that Amsberry had said something about moving him from the engine to the ladder. Complainant also stated that he and Amsberry had had a conversation lasting 10-12 minutes. Stephenson kept pressing Complainant for Amsberry's specific words, and Fitzgerald requested a break. During the break, Fitzgerald encouraged Complainant to be as honest and specific as possible.

35. The Department re-interviewed Amsberry on February 15, 2014. Amsberry continued to assert that he did not give Complainant permission to leave early and that there was not a conversation of several minutes regarding Complainant's request to do so.

36. Around the time of Complainant's interview, Brozovich and Fitzgerald were in contact with Hadley about how Complainant could best address the situation. Hadley told Brozovich and Fitzgerald that if Complainant admitted to having been absent without permission, he would receive the discipline of having to take a couple of shifts off without pay. This was the historical discipline that had been received by employees who had been absent without permission. Complainant did not want to accept the Department's offer without receiving it in writing. The Department declined to provide the offer in writing.

37. After the investigatory interview, the E-board decided to have Union Lead Counsel Kaplan more involved in the situation. On February 16, 2014, Complainant made several requests of Elmer and Kaplan. First, he requested that they listen to the recording of his investigatory interview. Second, he requested that they investigate the situation where Ohlgren did not board Ladder #2 for the apartment fire call. Third, Complainant requested that he have a single representative moving forward. Fourth, Complainant requested that Elmer and Kaplan listen to Amsberry's interview and then contact Amsberry.

38. To satisfy Complainant's requests, Kaplan listened to the recordings, agreed to be Complainant's representative moving forward, and phoned Amsberry. In response to Complainant's requests, Elmer listened to the recordings, and contacted Ohlgren, Bell, and Mitzel for interviews regarding the Ohlgren situation. Finally, after consultation with the principal E-board officers, Elmer determined that Kaplan would serve as Complainant's representative moving forward, even though West and Brozovich opposed appointing counsel, because this had not been provided to Union members in similar situations in the past.

39. On February 18, 2014, Stephenson sent Hadley a memorandum containing his findings regarding the investigation of Complainant. After summarizing his findings, Stephenson concluded that "[i]t is my opinion based on numerous interviews that [Complainant] left work without proper relief or permission from his (or any) supervisor [] on December 30, 2013."

40. On February 25, 2014, Fire Chief Niblock issued a Notice of Pre-Disciplinary Hearing to Complainant. The notice contained a short statement of the allegations and provided a notice of a hearing to occur on March 7, 2014.

41. On March 1, 2014, Hadley sent Niblock an investigation summary. In that summary, Hadley provided the background, undisputed facts, disputed facts, and excerpts from the documentation and interviews. Hadley concluded:

“None of the findings in this case support [Complainant’s] explanation; in fact all evidence supports that Amsberry was unaware [Complainant] was leaving early, that Amsberry does not recall any conversation or even a single comment that would have led [Complainant] to believe he had been approved to leave early.”

42. The Department decided to conduct a due process or *Loudermill*² hearing. Although the Union does not typically provide grievants with counsel for *Loudermill* hearings, the E-board determined that Kaplan would represent Complainant. Kaplan was in communication with Complainant about the hearing in advance. Complainant wanted to submit a written statement. Kaplan, however, strongly advised against it. Ultimately, they agreed that Complainant would bring a written statement previously reviewed by Kaplan, and present it only if Kaplan indicated that he should do so.

43. The Department conducted the *Loudermill* hearing on March 12, 2014. In addition to Kaplan’s legal representation, Fitzgerald also attended as a non-attorney Union representative. Kaplan did not raise all of the issues that Complainant wanted him to raise. Further, at the end of the hearing, Complainant produced his written statement, even though Kaplan did not indicate that he should do so.

44. On March 19, 2014, Elmer told Complainant that he still thought that the City did not have a good case because Amsberry could not remember the conversation.

45. On March 25, 2014, Niblock issued Complainant a Letter of Determination and Disposition of Discipline. In that letter, Niblock informed Complainant that he was terminated from employment as of 5:00 p.m. on March 25, 2014. In that letter, Niblock wrote that:

“[Complainant’s] unauthorized absence contributed to the delayed response of an effective firefighting force arriving to the apartment fire the morning of December 30, 2013. In addition, it required an emergency response from an additional engine company to ensure an effective firefighting force was present at the apartment fire which further reduced the department’s available resources, limiting its ability to deliver emergency services to the public.”

46. Shortly thereafter, the Grievance Committee convened under the direction of West. After reviewing the City’s investigatory materials, including interview recordings, transcripts, correspondence and other documents, it voted to pursue a grievance against the Department to challenge Complainant’s termination.

47. On April 1, 2014, Kaplan and Elmer filed grievances on behalf of Complainant to challenge his termination from employment. The Union requested that Grievance Steps 1-3 be bypassed and the grievance submitted directly to arbitration.

²See *Cleveland Board of Education v. Loudermill*, 470 US 532 (1985).

48. Complainant was dissatisfied with the representation that he had received from Kaplan at the *Loudermill* hearing and requested new representation. The E-board initially sought to have Tom Doyle provide it. However, Complainant was not familiar or comfortable with Doyle. Nelson Hall had represented Complainant in previous workers' compensation cases, and Complainant requested Hall. The E-board, Kaplan and Hall agreed that Hall would represent him.

49. On April 21, 2014, Battalion Chief Chitwood denied both the grievance at Step 1 and the request to proceed directly to arbitration. After the grievance was denied, the Union advanced it to Step 2.

50. On April 22, 2014, a hearing was conducted on Complainant's unemployment claim. Sergeant-at-Arms Brian Turner testified on Complainant's behalf.

51. Complainant's Step-2 grievance meeting occurred on May 2, 2014. It was attended by Complainant, West, Hadley, Hall, and Department note taker Gina Cepeda. This was the first time that the Union had provided attorney representation to a grievant at Step 2.

52. On May 12, 2014, Hadley denied Complainant's grievance at Step 2. Hadley stated in the denial letter that, during the Step-2 meeting, Complainant provided new recollections of a conversation that he allegedly had with Amsberry, and specifically that Amsberry had told him that he could move over to Ladder #2.³

53. Like Hadley, West also considered Complainant's statements about his conversation with Amsberry to be more specific than they had been in the past. West perceived that Complainant's Step-2 statements clearly expressed that Amsberry had told him to move his gear to the ladder truck, rather than it being something that Complainant had extrapolated or misunderstood from more general statements. Because West perceived the Union's position on the grievance weakened, he decided that it would be beneficial to reconvene the Grievance Committee.

54. West convened the Grievance Committee to determine whether the Union should continue to pursue Complainant's grievance and proceed to arbitration. After meeting, the Grievance Committee again voted to recommend that the Union continue to support Complainant's grievance, despite West's opinion that Complainant's statements at the Step-2 meeting had weakened the Union's position.

55. On May 13, 2014, Hall advanced the grievance to Step 3. Complainant was represented by Hall at the Step-3 meeting held on May 21, 2014. Also present at the meeting were Niblock and West.

56. On May 21, 2014, David Hollander, the personal tort attorney for Complainant, sent a Notice of Tort Claim to the City asserting that Complainant's termination was in retaliation for asserting his rights under ORS Chapter 656.

³Cepeda's non-verbatim notes indicate that Complainant said Amsberry had said something like "Let's move you over."

57. On May 24, 2014, Trustee Brandon Silence wrote to Elmer, Turner, West, Fitzgerald, Brozovich, and Trustee Chuck Ettel, stating that he felt that Complainant was being untruthful and that he could not support the grievance morally or ethically. Silence also stated that by pursuing the grievance, it would appear as if the E-board had turned their back on another Union member (meaning Amsberry).

58. On May 27, 2014, Niblock denied the grievance at Step 3. Niblock stated that:

“Upon review of all previous testimony and facts, I find that [Complainant] abandoned his shift without permission or proper relief. I further find that [Complainant’s] explanations of his actions on December 30, 2013 are not credible and that he was dishonest throughout the investigation and again during the Step II grievance meeting.”

59. The E-board, in consultation with Kaplan, determined that it wanted a neutral third-party attorney review of the merits of the grievance. Ultimately, Kaplan and the E-board selected attorney Will Aitchison to complete one.

60. Elmer and West had the following exchange regarding the Grievance Committee and the anticipated report from Aitchison:

Elmer: “G, Was your last meeting of this committee in regard to Step III or for taking this item to Arbitration.

West: “I don’t remember. I think technically it was for step 3, I think that step three had already been filed (I didn’t know that though.) we just voted on moving forward, or not moving forward.

Elmer: “I wonder if their opinion would change given what I expect to get from [Kaplan]? What do you think?

West: “I have thought about that. We should talk about it. I could certainly call the grievance committee again if that is what we decide we want to do. Or I could send the letter from [Kaplan] to the grievance committee and ask them if that warrants having another meeting. Kind of puts the onus on them, so it doesn’t seem like I am just having the meeting to try to get them to vote the way that I want....

Elmer: “We can talk tomorrow about that. Did you speak with them about the DFR aspect? I think when we previously spoke you stated that you had not. If you did not, I would not until a vote is taken. But they do need to know that this is a possibility at some point. Not really of importance to them making the appropriate decision at this point.

West: “No I haven’t spoken to them about that at all. I want them to make their decisions based solely on the merit of the case.

Elmer: “Sweet, ‘A Few Good Men’ quote by Hollander. ‘I object!’ ‘I strenuously object!’ --Demi Moore. What a giant dickbag. I can see how our idiots would think he is a great guy.

West: “Right!?!?”

61. On May 29, 2014, Hollander submitted a Supplemental Notice of Tort Claim to the City. In that notice, Hollander asserted:

“We believe that [Complainant] was targeted and ultimately fired because he exercised his right to receive benefits under ORS Chapter 656. [Complainant] further believes that in retaliating against him, certain persons employed by the Salem Fire Department violated the City’s prohibition against dishonesty. These individuals include, but are not necessarily limited to, Captain [Amsberry] and Battalion Chief [Stephenson]. We believe this to be a continuation of the pattern of discrimination set forth in [Complainant’s] letter to you dated January 3, 2014.”

62. On June 2, 2014, Elmer sent an email to the general membership stating that Complainant’s grievance was between Step 3 and Step 4. He also explained that an independent third-party attorney would review the information and provide advice to the E-board.

63. The Union held a general membership meeting on June 3, 2014. At that meeting, members discussed Complainant’s grievance. Some members confronted Turner for having testified at Complainant’s unemployment hearing. They expressed frustration that, as an elected Union official, he testified on behalf of one Union member (Complainant) at the expense of another (Amsberry).

64. After receiving the report from Aitchison (Aitchison Report), Elmer and West decided not to reconvene the Grievance Committee. The Aitchison Report found merit to Complainant’s grievance.⁴ As the Grievance Committee had already voted to move forward, Elmer and West did not believe it would change the Grievance Committee’s recommendation.

65. Turner received permission from Union Secretary/Treasurer Brozovich to send an email to bargaining unit members regarding Complainant’s grievance through the Union’s official email account. On June 6, 2014, Turner sent an email to the general membership responding to members’ allegations that he should not have testified at Complainant’s unemployment hearing. He included links to files on an online server containing the audio recording of Complainant’s unemployment hearing. Subsequently, Elmer suspended Turner’s access to the official email account, because the email divulged privileged communications, did not reflect the Union’s official position and confused some members about the Union’s position.

66. On June 10, 2014, the E-board held a daylong meeting, reviewing all of the investigatory materials related to Complainant’s grievance. During that meeting, Silence noted that Article 13 of the Union’s bylaws provided members the right to pursue grievances independently if the E-board determined not to pursue them. Following the material review and discussion, the E-board voted to pursue the grievance.

⁴The Union asserts that the report contains privileged attorney-client communications and declined to provide the report. However, the testimony by various witnesses indicates that the report found the grievance to be meritorious.

67. Following the E-board's vote at 8:01 p.m., Elmer sent an email to the general membership stating that the Union would be advancing Complainant's grievance to arbitration. Elmer mentioned Article 13's provision allowing for an individual to proceed independently and commented:

"Allowing an individual to move a grievance forward on their own is problematic. It allows the individual to have their own attorney and the possibility to shape/control the grievance any way they and their attorney see fit. Potentially allowing for mistreatment of other union members acting as witnesses during the process."

68. On June 10, 2014, Hall provided notice to Niblock that the Union would be advancing the grievance to Step 4 (arbitration). On June 11, 2014, Hall requested a list of arbitrators and subsequently provided the City with formal notice that the grievance was advanced to Step 4. Hall provided a copy of this formal notice to Elmer and West via facsimile.

69. On June 11, 2014, Battalion Chiefs Chitwood and Hoaglin directed frustration at the E-board members, stating that they did not want the Union to pursue Complainant's grievance. They threatened to discontinue their Union membership and to instead "go fair-share."⁵ Elmer responded to Hoaglin, expressing agreement and a desire for the situation to end soon.

70. On June 12, 2014, Fitzgerald wrote to Elmer, stating:

"* * * I have concern[s] about continuing with [Complainant's] grievance. I have been thinking about the ramifications both ways if we continue or stop this process and I have to be honest, I don't feel like we should continue with the grievance. I have a hard time sleeping at night putting our 'stamp of approval' on the actions that we would be defending. I agree with Turner that we need to make a stand with our management when they treat people like crap, but this isn't the one to make the stand on in my opinion. We need to make this decision taking into account the labor body that we represent and we have been hearing loudly that they want it to stop dead now. I know there are inadequacies in management's statements and positions which are not accurate and false in some instances but that ultimately doesn't excuse [Complainant] and his actions. I would recommend that the Fire Chief amend his statement about why the other engine was added to the box and move forward with a termination of the grievance. * * *."

71. Due to the feedback by several members, the E-board determined to reconsider its decision to advance Complainant's grievance to arbitration. Elmer requested that the City extend the deadline to file its intention to move to the next step. Elmer also sent an email to the general membership stating that the Union's control of the grievance may not be in the best interest of the membership. He further announced that there would be a general membership meeting to discuss Complainant's grievance on June 16, 2014.

⁵See ORS 243.650(10).

72. Other Union members provided feedback to the E-board. Specifically, Greg Rains, Aaron Schoof, and Battalion Chief Reed Godfrey stated that they could not attend the meeting and did not offer an opinion regarding proceeding with the grievance. Jen Pratt, Mike Hoopes, and Jeff Zaluskey stated that the grievance should not proceed. Mark Philip and Captains Telfer and Berkson stated that the E-board should proceed with the grievance. Elmer responded to Pratt, stating that he agreed with her and hoped that the matter would be over soon.

73. Additionally, before the June 16 meeting, Complainant prepared a written statement and requested that Elmer read it to the membership.

74. Before the June 16 meeting, principal E-board members received legal advice from Kaplan indicating that Complainant had the right under the Union bylaws and the Agreement to proceed to arbitration independently, and that the Union would not be bound by the arbitrator's decision.

75. At the June 16, 2014, emergency membership meeting, eight members spoke, including Amsberry. Twenty members voted against the Union proceeding to arbitration. Five members voted in favor of proceeding, and six abstained. Elmer read Complainant's prepared written statement after the voting and the meeting then adjourned.

76. Following the membership meeting, the E-board met. The E-board reviewed the written correspondence from members who could not attend the meeting. The E-board members then voted to discontinue support for Complainant's grievance. Following the meeting, Elmer sent an email to the general membership informing them of the results of the vote.

77. On June 17, 2014, Hollander notified Kaplan that Complainant wished to pursue the grievance to arbitration independently. In turn, Kaplan notified the Department, asserting that it was Complainant's right to pursue arbitration independently under the Union's bylaws and the Agreement. The City responded on June 20, 2014, asserting that the Agreement's language does not permit grievants to proceed to arbitration independently.

78. Elmer and Niblock met on June 19, 2014, and part of their discussion involved Complainant's grievance. On June 20, 2014, Elmer sent Niblock the tort claim letter from Complainant's private attorney and copied Chitwood.

79. On June 24, 2014, Elmer sent a letter to the general membership stating that the Union would not be supporting Complainant's grievance. Elmer explained

“In our constitution and bylaws, [Complainant] and his private attorney have the ability to move forward with the grievance, without the Local. The [City's] position, I believe, is in opposition to this. At this point, that is for those two parties to discuss.”

80. Also on June 24, 2014, Turner wrote to Elmer, asserting that the Union should reconsider not pursuing Complainant's grievance given that the Department was claiming that he could not continue to arbitration independently. Elmer forwarded Turner's email to West and Brozovich. West responded:

"Uh no. As you guys know, this was much more than a financial decision. This was a decision to disassociate from this grievance. This was not a fucking financial decision. This was a reputation decision. We didn't want to stake our reputation on this fight...and still don't."

Brozovich responded to both Elmer and West, seconding West's sentiments.

81. On September 26, 2014, Complainant sent several Union members a copy of a recorded telephone conversation with Elmer when Elmer was supportive of the grievance. A member forwarded it to Brozovich, who then forwarded it to Elmer, asking "Have you heard this?" Elmer responded "I have heard it now. Remember that this is prior to step 2 and after the conversations related to [Complainant's] mental status." Elmer resigned shortly thereafter, because he no longer believed that he could serve as President, given that the recording contained disparaging statements that he had made about Department management.

CONCLUSIONS OF LAW

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

DISCUSSION

Legal Standards

We have long held that as a corollary to its statutory rights as the exclusive bargaining representative for a group of employees, a labor organization has the duty to fairly represent employees for whom it is the exclusive representative. *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, 422 (1993). Claims for alleged breaches of this duty of fair representation may be brought against the labor organization under ORS 243.672(2)(a), which prohibits a labor organization from interfering with, restraining, or coercing any employee exercising rights guaranteed by the Public Employee Collective Bargaining Act (PECBA).

In determining whether a labor organization fairly represented an employee when deciding not to take a grievance to arbitration, we give labor organizations broad discretion. Moreover, we give substantial deference to a labor organization's decision about whether to file or how far to pursue a grievance. *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98, 18 PECBR 79, 88 (1999). We extend this deference because "[i]f 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.

To ensure fair representation of all members, however, we have 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. A labor organization's decision is arbitrary if it lacks a rational basis. *Howard v. Western Oregon State College Federation of Teachers Local 2278, OFT and Western Oregon State College*, Case Nos. 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.* Finally, a labor organization's decision is in bad faith if it intentionally acts against a member's interest 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).

In order to determine if a labor organization has made an arbitrary, discriminatory, or bad-faith decision not to arbitrate a grievance, we focus on the labor organization's conduct and the process by which it made its decision, instead of the merits of the grievance. *Chan v. Clackamas Community College; Leach and Stubblefield; Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563, 575 (2006). Accordingly, as long as the labor organization acted reasonably, it may rationally decide not to pursue a grievance, even if it 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).

Analysis

As explained by Complainant at oral argument, the crux of his argument is that the Union breached its duty of fair representation when—on June 16, 2014—it reversed its initial decision to take Complainant's grievance to arbitration.⁶ Complainant maintains that this decision was both arbitrary and made in bad faith. To support this assertion, Complainant points to a number of statements and actions by Union officers and members. According to Complainant, that conduct proves that he was not well-liked by some Union members and officers, which resulted in an “orchestrated scheme” to thwart the grievance in order to protect more popular Union members (Chitwood and Amsberry) from possible charges of dishonesty.

In response, the Union asserts that it made the decision not to take Complainant's grievance to arbitration for several legitimate reasons, including: (1) member input that the grievance should be discontinued; (2) ongoing concerns about Complainant's credibility; (3) the Union being placed in the position of supporting one member over another; (4) concerns about the potential damage to the Union's reputation should it expend resources to protect an employee who had left work without permission; and (5) Union counsel's advice that Complainant could proceed independently with his grievance, without the outcome becoming binding on the Union.

⁶In his brief and memorandum in aid of oral argument, Complainant relied on testimony and evidence concerning events well before the June 16, 2014, decision not to take the grievance forward to arbitration. However, at oral argument, Complainant clarified that this evidence was offered to prove the Union's alleged improper motives for not taking his grievance to arbitration, and not as independent grounds for a duty-of-fair-representation claim.

Complainant concedes that, if the Union acted for these asserted reasons, then the Union did not violate its duty of fair representation. However, Complainant argues that these reasons were pretexts for the Union's unlawful motives. The difficulty with Complainant's argument is that the evidence does not establish that the Union's asserted reasons were pretextual. Specifically, there is sufficient evidence to establish that: (1) the Union did receive member input (*via* a vote) to discontinue the grievance; (2) the Union had concerns about Complainant's credibility; (3) the credibility issues placed the Union in the difficult position of supporting one member over another; (4) the Union was concerned about expending resources and risking its reputation by taking this grievance to arbitration; and (5) the Union received legal advice that Complainant could proceed independently with the grievance. We credit this evidence and conclude that Complainant did not satisfy his burden of proving that the Union's decision was instead arbitrary, discriminatory, or made in bad faith.

In rejecting Complainant's argument, we acknowledge that there is evidence of a few negative comments made by some Union officers regarding Complainant and other members who were aiding him. However, we do not find those comments sufficient to satisfy Complainant's burden of proof, particularly in light of the credible evidence establishing legitimate reasons for not taking the grievance to arbitration.

We also recognize that the Union changed its position on whether to take Complainant's grievance to arbitration. The record does not establish, however, that the Union's change of heart was arbitrary, discriminatory, or made in bad faith. Rather, the record establishes that the Union's view of the grievance changed over time as it received additional information and credibility concerns grew.⁷ After initially deciding to take Complainant's grievance to arbitration, the Union was presented with a membership vote indicating that the members did not want the Union to continue the grievance. Thus, the Union has demonstrated that it had legitimate, rational reasons for its change of position, and Complainant has not established that the change was arbitrary, discriminatory, or made in bad faith.

Complainant also asserts that the E-board failed to properly investigate the grievance early in the process. We accord discretion to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken. *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20 and Metropolitan Exposition Recreation Commission*, Case Nos. UP-15/16-92, 15 PECBR 85, 106 (1994), *AWOP*, 134 Or App 414, 894 P2d 1267 (1995). Here, we find that the Union conducted a reasonable good-faith investigation. Specifically, when Complainant requested that Elmer investigate the Ohlgren situation, Elmer did so. As far as additional investigation of Complainant's grievance, Elmer testified that he relied on the extensive investigatory materials of the City, which included recorded and transcribed interviews of Amsberry, Bell, Clarke, George, Graham, Hoaglin, Lake, Miller, Mitzel, Patrick, and Ohlgren. Additionally, Elmer reviewed and relied on the notes of Chitwood's interview.

⁷We disagree with Complainant's argument that the Union's credibility concerns were manufactured. Rather, as set forth above, we find that the record establishes that those concerns were real. That is not to say that the Union could not have made a different decision, in light of those credibility concerns—*i.e.*, to proceed with Complainant's grievance to arbitration. However, Complainant's burden is to establish that the Union's decision is outside a wide range of reasonableness, so as to be wholly irrational or arbitrary. On this record, Complainant has not satisfied that burden.

Moreover, in addition to investigating the grievance, the Union provided Complainant with extensive assistance. Specifically, the Union provided Complainant with an attorney (Kaplan) as early as the *Loudermill* hearing. Around this time, Complainant made several requests of Kaplan and Elmer, which they fulfilled. Then, when Complainant became dissatisfied with Kaplan's representation, the E-board allowed him to choose another attorney. These actions show extensive assistance to Complainant, and negate his claims of ill-will, animus, and hostility.

Complainant next argues that the Union failed in its duty of fair representation because it did not follow its own bylaws when processing his grievance. To begin, "a union's violation of its constitution or bylaws does not by itself constitute an unfair labor practice under the PECBA." *Block v. Amalgamated Transit Union, Division 757*, Case No. FR-001-15, 26 PECBR 486, 490 (2015). Rather, there must be other evidence to support a determination that the failure to follow the bylaws was arbitrary, discriminatory, or made in bad faith, and that the failure to follow the bylaws harmed Complainant. *Id.*; see also *Houchin v. Service Employees International Union, Local 49 and Centennial School District*, Case No. UP-37-92, 14 PECBR 395, 407 (1993) (no violation of the duty of fair representation) where no prejudice is shown from the union's actions). Here, Complainant alleges that the Union failed to investigate the grievance fully as required by Article 13, because it did not provide the Grievance Committee with the Aitchison Report. However, as explained above, the initial decision not to submit the Aitchison Report (which found merit in the grievance) to the Committee was made because, at that point, the grievance was proceeding. Complainant also argues that the E-board did not make a recommendation to the members as to how to vote, which is required by Article 13. The failure to make a recommendation in this case, however, amounts to, at most, a minor technical violation of that article; it alone does not establish arbitrary, bad-faith, or discriminatory conduct. Moreover, the record does not establish that the E-board's failure to make a recommendation prejudiced Complainant, a necessary element of his duty-of-fair-representation claim.

Finally, we address Complainant's allegation that the Union failed to honor its commitment to ensure that he had the right to carry the grievance to arbitration on his own. The Union took reasonable steps to ensure that Complainant had the opportunity to independently pursue the grievance to arbitration. The Union notified the City that Complainant intended to independently pursue the grievance, and informed the City of the Union's belief that he had the right to do so under the Agreement. When the City refused the request of Complainant's private attorney to proceed to arbitration, the Union's legal counsel suggested that Complainant's counsel file a complaint with this Board to compel arbitration of the grievance.

Rather than pursuing that option, Complainant instead believed that he could not independently take the grievance to arbitration. He further concluded that the Union knew that he could not take the grievance forward and had withdrawn its support in order to scuttle the grievance. This conclusion is not supported by the evidence. To the contrary, the evidence demonstrates that the Union believed, based on the advice of counsel, that Complainant had the right under both the bylaws and the Agreement to move forward without the Union's involvement. Complainant elected not to avail himself of that opportunity. Such circumstances do not establish that the Union failed to fairly represent Complainant.

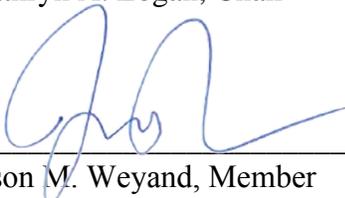
In sum, focusing on the Union's conduct and its decision-making process, we conclude that Complainant has not established that the Union's actions were arbitrary, discriminatory or made in bad faith. *Chan*, 21 PECBR at 575. Rather, the Union's actions were within the broad range of discretion that we afford unions to make decisions concerning the representation of employees. Consequently, Complainant has not established that the Union violated ORS 243.672(2)(a).

ORDER

The complaint is dismissed.

DATED February 26 2016.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.