

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-003-15

(UNFAIR LABOR PRACTICE)

MICHELLE SCOTT,)	
)	
Complainant,)	
)	
v.)	
)	
SERVICE EMPLOYEES INTERNATIONAL)	RULINGS,
UNION LOCAL 503, OREGON PUBLIC)	FINDINGS OF FACT,
EMPLOYEES UNION,)	CONCLUSIONS OF LAW,
)	AND ORDER
and)	
)	
STATE OF OREGON, OREGON YOUTH)	
AUTHORITY,)	
)	
Respondents.)	

Peter W. McSwain, Attorney at Law, Andrews Ersoff, & Zantello, Lincoln City, Oregon, represented Complainant.

Shirin Khosravi, Staff Attorney, Service Employees International Union Local 503, Oregon Public Employees Union (Union) represented Respondent Union.

Sylvia M. Van Dyke, Assistant Attorney General, Department of Justice, Salem, Oregon, represented Respondent Oregon Youth Authority.

On June 28, 2016, Administrative Law Judge B. Carlton Grew 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). No objections were filed.

When the parties do not object 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 unreserved and waived. *International Brotherhood of Electrical Workers, Local*

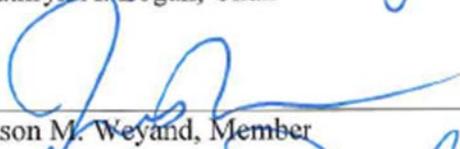
Union No. 659 v. Eugene Water & Electric Board, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. The final order is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential 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).

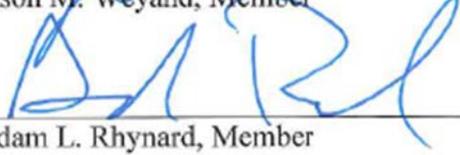
ORDER

1. The Board adopts the recommended order as the final order in this matter.
2. The complaint is dismissed.

DATED July 25, 2016.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

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 SERVICE EMPLOYEES INTERNATIONAL)
 UNION LOCAL 503, OREGON PUBLIC)
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)
 STATE OF OREGON, OREGON YOUTH)
 AUTHORITY,)
)
 Respondents.)

RECOMMENDED RULINGS,
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND PROPOSED ORDER

A hearing was held before Administrative Law Judge, B. Carlton Grew (ALJ) on March 3, 2016, in Salem, Oregon. The record closed on March 25, 2016, following receipt of the parties' post-hearing briefs.

Peter W. McSwain, Attorney at Law, Andrews, Ersoff, & Zantello, Lincoln City, Oregon, represented Complainant.

Shirin Khosravi, Staff Attorney, Service Employees International Union Local 503, Oregon Public Employees Union, Salem, Oregon, represented Respondent SEIU.

Sylvia M. Van Dyke, Assistant Attorney General, Labor and Employment Section, Salem, Oregon, represented Respondent Oregon Youth Authority.

On October 12, 2015, Complainant filed this Complaint alleging that the Service Employees International Union Local 503, Oregon Public Employees Union, (SEIU or Union) had violated its duty of fair representation to her under ORS 243.672(2)(a) in connection with her

separation from employment with the State of Oregon, Oregon Youth Authority (OYA).¹ She also alleged that she had been wrongfully terminated by OYA in violation of ORS 243.672(1)(g).² The Union and OYA each filed a timely answer, including affirmative defenses that this action was barred by a separation agreement signed by Complainant.

The issues are:

1. Does Complainant's separation agreement require dismissal of her claims?
2. Did the Union violate its duty of fair representation under ORS 243.672(2)(a) with respect to Complainant's separation?³

We conclude that Complainant did not establish that the Union violated its duty of fair representation, precluding her claims against OYA and requiring dismissal of her Complaint.

RULINGS

Bifurcation

Prior to hearing, the ALJ properly bifurcated the case to hear the Complainant's case against the Union first. 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 under ORS 243.672(2)(a). 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. *Slyter 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); *Eric Sofich v. Salem Professional Firefighters Local 314, and Salem Fire Department/City of Salem*, Case No. FR-003-14, 26 PECBR 720 (2016).

¹The Complaint does not cite ORS 243.672(2)(a), but the ALJ correctly concluded that the Complaint, as a whole, asserted a claim under that section, and Respondents did not object to listing such a claim as an issue for hearing.

²Complainant also alleged violations of various provisions of the Oregon and federal Constitutions. Complainant does not address these issues in her post-hearing brief and we do not consider them.

³The ALJ modified the issue statement pursuant to the objections of the parties at the start of the hearing.

Failure to submit exhibit/witness lists

In a prehearing order dated February 10, 2016, the ALJ stated:

“Pursuant to OAR 115-010-0068(2)⁴, you are directed to do the following:

“1. Prior to the hearing, review the explanation of Administrative Procedures Act rights that is attached to the notice of hearing;

“* * * * *

“3. Prior to the hearing, in accordance with the enclosed Instructions Regarding Exhibits, arrange and mark exhibits, *prepare an exhibit list, and consult with each other to avoid duplication of exhibits* (this should occur before the official exchange of exhibits, which is scheduled for seven days prior to the hearing);

“4. Prior to the hearing, redact portions of any exhibits that include a person’s name in combination with any of the following: social security number; driver’s license or state identification card number; passport number or other United States issued identification number; or financial account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to a consumer’s financial account. ORS 646A.600 *et seq.*;

⁴115-010-0068 provides in part:

Prehearing Procedures

115-010-0068 (1) The Board or its agent may convene prehearing conferences with the parties’ representatives for the purpose of:

- (a) Scheduling hearing dates, witnesses for hearing and further prehearing conferences;
- (b) Disposing of pending motions;
- (c) Formulating and simplifying issues;
- (d) Discussing settlement of any or all of the issues;
- (e) Avoiding submission of unnecessary or cumulative exhibits or other evidence;
- (f) Stipulating to facts;
- (g) Discussing the need for any special hearing procedures; or
- (h) Discussing any other matters that may assist in the disposition of the matter.

(2) At the discretion of the Board or its agent, the prehearing conference may be held by telephone or in person and may be recorded.

(3) Each party shall provide an exhibit list, witness list and exhibits to the other parties. These documents must be received no later than seven days before the scheduled hearing, unless the Board Agent directs otherwise.

(4) A party that fails to comply with prehearing requirements set forth in the rule or ordered by the Board or its agent shall be denied the right to offer such evidence or make argument regarding such matter at the hearing unless good cause is shown.

(5) The Board or its agent may rule prior to hearing on one or more of the claims or defenses, or a portion of any claim or defense, asserted in a complaint or answer. The Board agent may defer issuing a proposed order on any such prehearing ruling until after a hearing is held and a proposed order is issued on remaining claims or defenses.

“5. *Prior to the hearing, between yourselves, identify witnesses, arrange a schedule for witnesses to appear at hearing, and discuss any motion to exclude witnesses;*

“* * * * *

“8. By seven days prior to the hearing date, mail or deliver to the other parties a list of the witnesses who will testify in your case-in-chief and provide a copy to me (*witnesses called at hearing whose names were not included on the calling party’s witness list will be permitted to testify only upon a showing of good cause under OAR 115 010 0068(4)*);

“9. By seven days prior to the hearing date, mail or deliver to the other parties all exhibits and an exhibit list regarding your case-in-chief (*exhibits offered at hearing that were not mailed or delivered seven days before the hearing will be received only upon a showing of good cause under OAR 115 010 0068(4)*); During the seven days prior to the hearing, review the other party’s exhibits and be prepared to state which exhibits you do not object to at the hearing;

“* * * * *

“A party’s failure to comply with these directives may result in sanctions such as the dismissal of a complaint or a recommendation that any eventual representation cost order be increased or decreased and a request for reimbursement of filing fees not be granted. OAR 115-010-0068(4).” (Boldface omitted, italics added.)

The ALJ held a prehearing conference just prior to the start of the hearing in order to deal with evidentiary and witness issues. The Complainant presented certain exhibits⁵ and stated that she would offer testimony of certain witnesses. Respondents objected on the grounds that neither the proposed exhibits, nor the names of the witnesses, were mailed or otherwise provided to Respondents and ERB seven days prior to hearing as required by the ALJ’s prehearing order. Complainant did not show good cause for the late submission of exhibits and the names of witnesses.

The purposes of the requirement that the parties exchange exhibits and the names of witnesses before hearing are in part to alert parties to the evidence to be submitted, permit parties to prepare a response to evidence, eliminate duplication, help ensure the redaction of personal information in documentary evidence, and allow evidentiary issues to be addressed before or at the start of the hearing, in order to streamline the hearing. The requirement to exchange exhibits and witness lists is clearly set out in the ALJ’s prehearing order and OAR 115.010.068(3). The Complainant’s proposed exhibits and witness list were presented just prior to the hearing, too late to comply with the ALJ’s prehearing order. The ALJ properly denied admission of the late exhibits

⁵The parties submitted two joint exhibits, which were received into evidence without objection.

and properly denied Complainant's request to call witnesses on her witness list.⁶ *District Council Of Trade Unions; AFSCME Local 189; Laborers' International Union, Local 483; IBEW Local 48; Machinists And Aerospace Workers, District Lodge 24; Auto Mechanics, District Lodge 24; Operating Engineers, Local 701; Plumbers, Local 290; And Painters And Allied Trades, District Council 5 v. City Of Portland*, Case No. UP-023-14, 26 PECBR 525 (2015).

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

FINDINGS OF FACT⁷

The Parties

1. At the time of the events at issue, Complainant was a public employee within the meaning of ORS 243.650(19). OYA is a public employer as defined by ORS 243.650(20). SEIU is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of OYA employees, including Complainant.

2. At the time Complainant separated from her employment with OYA, a collective bargaining agreement between OYA and SEIU was in effect. The agreement included a multi-step dispute resolution process that began with a grievance and ended with binding arbitration.

3. Complainant began working for OYA in July 2014. During the time relevant to this Complaint, she was employed as a classified Office Specialist II in OYA's Camp Tillamook Youth Transitional Facility for juvenile male offenders.

4. In early March, 2015, OYA officials investigated Complainant for her conduct regarding an instance of unprofessional verbal conduct during work on March 5, 2015.⁸ A Union steward assisted Complainant during the investigation process.

5. On March 12, Complainant, OYA officials, and the SEIU steward participated in an investigatory teleconference about the incident. Complainant denied engaging in the conduct at issue. Later that evening, Complainant called the supervisor at home and stated that she might have engaged in the verbal conduct similar to that alleged, but that it did not take place in front of juveniles as alleged.

⁶Complainant does not challenge this ruling of the ALJ in her post-hearing brief.

⁷The Union's exhibits were admitted through consent of the parties at the prehearing conference; the Union presented no testimony. OYA did not present any exhibits or testimony except for the joint exhibits. Accordingly, these findings of fact are based on the Complaint, Answers, and Joint and Union exhibits.

⁸The allegations, if confirmed, were of a nature likely to negatively affect Complainant's prospects for future employment if disclosed to prospective employers. The record does not reveal whether such disclosure was customary or likely.

6. On March 25, Complainant allegedly committed two additional acts of unprofessional verbal conduct, this time in off-duty conversations prompted by OYA's investigation of Complainant's March actions. Complainant's conduct involved an OYA former client, and an OYA co-worker. The intent was reported to OYA by a law enforcement officer who was a participant in one conversation, and by another witness to the other conversation.

7. On Friday, April 10, 2015, Complainant, OYA officials, and the SEIU steward participated in an investigatory teleconference about the second, off-duty incidents.

8. Also on April 10, Complainant sent a text to the steward stating that she was "most likely going to resign Monday. I really stand no chance against a cop." (Exh. U-6, p. 6.). On April 17, 2015, Complainant met with the SEIU steward and OYA officials, and signed a separation agreement. The steward also signed the document on behalf of SEIU. On May 5, 2015, an OYA official signed the document.

9. The April 17, 2015 separation agreement provided in part:

"SETTLEMENT AGREEMENT

"This Is a Settlement Agreement and Release of all Claims, [and the parties] *** agree as follows:

"* * * * *

"1. Resignation in lieu of Dismissal: *OYA hereby accepts a notice of resignation (Notice of Separation attached) from Ms. Scott in lieu of dismissal from state service. Ms. Scott will not apply for employment, rehire, or re-employment/reinstatement with the Agency. If she does so, Ms. Scott understands that she has breached this Agreement and that the Agency has the right to terminate her without recourse.*

"2. Closure of Issues: *Ms. Scott, or the union acting on his⁹] behalf, agrees not to appeal, grieve, or otherwise challenge the Resignation in lieu of Dismissal listed above. Ms. Scott, in return for the benefits of this settlement, does hereby release the Oregon Youth Authority, and the State of Oregon, their officers and agents, in their personal and individual as well as their official capacities, from all claims, demands, causes of suit or action, liabilities, now existing or after developing, that in any way are connected with or arise out of the Ms. Scott's employment with the Oregon Youth Authority.*

"3. References: When contacted by prospective employers other than other State agencies, unless Ms. Scott provides such prospective employer with a signed release for full disclosure, *OYA agrees to provide only a neutral reference which*

⁹The settlement agreement, in most instances, refers to Complainant by the wrong gender pronoun "he." There is no evidence or argument that this error was of consequence to the parties, and Complainant does not refer to this in her Complaint or post-hearing brief.

will consist of dates of employment, Job classification, working title, job duties and salary upon separation. For other State agencies, or for prospective employers with whom Ms. Scott signed a release for full disclosure, OYA will be candid and provide factual information regarding Ms. Scott's employment record.

“* * * * *

“6. Good Faith Settlement: This Agreement constitutes the good faith resolution of all claims or potential claims Ms. Scott may have against the State or OYA and is not and shall not in any way be construed as an admission of any wrongful or discriminatory act of omission against Ms. Scott, or that OYA’s Investigative activities regarding Ms. Scott were in any way wrongful, unlawful, or contrary to the terms of the parties' collective bargaining agreement.

“* * * * *

“10. Unemployment Benefits: *OYA shall respond to a request for information by the Oregon Employment Department by disclosing that Ms. Scott agreed to resign her employment in lieu of OYA initiating disciplinary proceedings that may result in termination of employment; and that OYA may provide a copy of this resignation agreement, along with any other information requested by the Oregon Employment Department. If Ms. Scott provides inaccurate information to the Oregon Employment Department, OYA may be requested to provide accurate information.*

“11. Voluntary Agreement: *By signing this agreement, Ms. Scott acknowledges that he has carefully read and fully understands all provisions and effects of this Agreement; that he is voluntarily entering Into this Agreement free of coercion and duress; and that neither the State of Oregon, OYA, nor any of their agents have made representations or promises concerning the terms or effects of this agreement other than those expressly set forth herein. Ms. Scott acknowledges that he has been fully and fairly represented by his union and that he freely and voluntarily accepts this settlement with full knowledge and understanding of its content and meaning.*” (Exh. J-2, p.1-2.) (Boldface omitted, italics added.)

CONCLUSIONS OF LAW

Complainant brings this action under ORS 243.672(2)(a) and (1)(g), asserting that the Union breached its duty of fair representation to her, and that OYA violated the collective bargaining agreement, in connection with her separation from employment. As is our practice, the ALJ bifurcated the hearing to hear the claims against the Union first. In her Complaint, Complainant alleged that the Union violated its duty of fair representation to her by failing to adequately investigate her case and inducing her to sign an invalid separation agreement.

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

2. The April 17, 2015 settlement agreement signed by Complainant does not bar her claim against the Union.

In her Complaint, Complainant asserted that the settlement agreement lacked consideration and resulted from fraud.¹⁰ Complainant cites the Union's participation in the agreement as part of the alleged violation of its duty of fair representation. As a defense, the Union and OYA assert that, as a threshold matter, the separation agreement bars her from proceeding with this action. We agree that, if respondents are correct, the complaint should be dismissed, and so we turn to the interpretation and validity of the settlement agreement.¹¹

Contract interpretation standards

This Board recently summarized its approach to contract interpretation in *Medford Education Association v. Medford School District 549C*, UP-047-13, 26 PECBR 143 (2014). Our goal when interpreting contracts is to discern the parties' intent. To determine that intent, we apply the three-part analysis described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We first examine the text of the disputed contract language in the context of the document as a whole, and if the provision is clear, the analysis ends. Unambiguous contracts must be enforced according to their terms. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, (2001), *rev den*, 334 Or 491 (2002). Contract language is ambiguous if it can be given more than one plausible interpretation. 181 Or App at 91. If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent. Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *Yogman*, 325 Or at 364.

The settlement agreement provides, in part:

"Ms. Scott, or the union acting on his behalf, agrees not to appeal, grieve, or otherwise challenge the Resignation in lieu of Dismissal listed above. Ms. Scott, in return for the benefits of this settlement, does hereby release the Oregon Youth Authority, and the State of Oregon, their officers and agents, in their personal and individual as well as their official capacities, from all claims, demands, causes of suit or action, liabilities, now existing or after developing, that in any way are

¹⁰In her post-hearing brief, Complainant reviews the extant details of OYA's investigation, and steps taken by the SEIU steward, and critiques their actions. She does not, however, offer any specific argument regarding whether the settlement agreement was fraudulent, and we do not consider that issue. Complainant does, however, refer to an apparent lack of consideration for the agreement, and therefore we address that issue.

¹¹We are concerned here only with the effect of the agreement on the action against the Union; this Board does not consider claims against an employer under ORS 243.672(1)(g) prior to consideration of the claims against a union under ORS 243.672(2)(a). See *Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP-31-04, 20 PECBR 967, 975, n 2 (2005).

connected with or arise out of the Ms. Scott's employment with the Oregon Youth Authority.” (Finding of Fact 9.)

“Ms. Scott acknowledges that he has been fully and fairly represented by his union and that he freely and voluntarily accepts this settlement with full knowledge and understanding of its content and meaning.” (Finding of Fact 9.)

We first consider whether the relevant portions of the Settlement Agreement are ambiguous, that is, whether the language is susceptible to more than one plausible interpretation when considering the context of the agreement as a whole, including the circumstances in which it was made. *Portland Police Assoc. City of Portland*, 248 Or App 109-116-17, 273 P3d 192 (2012); *Tualatin Employees’ Association v. City of Tualatin*, Case No. UC-012-12, 25 PECBR 565, 572 (2013). We conclude that the relevant language is not ambiguous. Respondents’ interpretation of the separation agreement is consistent with the intent of the parties embodied in the writing.

When we interpret agreements, we give words their plain and customary meaning. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-05-06, 22 PECBR 224, 232 (2008). The agreement states that Complainant “agrees not to appeal, grieve, or otherwise challenge the Resignation in lieu of Dismissal listed above.” It also states that Complainant “does hereby release [OYA], and the State of Oregon, their officers and agents, in their personal and individual as well as their official capacities, from all claims, demands, causes of suit or action, liabilities, now existing or after developing, that in any way are connected with or arise out of the Ms. Scott's employment with [OYA].” While this language provides an expansive definition of the claims released, it does not include any claims against the Union. As to the Union’s claims, the agreement states, “Ms. Scott acknowledges that he has been fully and fairly represented by his union and that he freely and voluntarily accepts this settlement with full knowledge and understanding of its content and meaning.” Finding of Fact 9. While the statement may be relevant to the legal claim against the Union, it is not a release of that claim. We conclude that the relevant language of the agreement is unambiguous and does not release an ORS 243.672(2)(a) claim against the Union.

Lack of consideration

Assuming, but not deciding, that participating in obtaining a separation agreement which lacked consideration could support a claim for breach of the duty of fair consideration, we review the separation agreement.¹² Consideration is defined as “an act other than a promise, or as a return promise, bargained for and given in exchange for the promise.” *Schafer, et al v. Fraser, et ux*, 206 Or 446, 466, 290 P2d 190 (1955), citing First Restatement of the Law, Contracts, § 75; *see also Oregon Home Builders v. Crowley*, 87 Or 517, 527, 170 Pac 718, (1918).

¹²The standards for evaluating a claim of breach of the duty of fair representation appear in the following section.

The benefits to Complainant identified in the separation agreement were as follows:

- An end to OYA's investigation, without its proceeding to a potential finding of serious misconduct;
- Complainant's resignation instead of termination for misconduct;
- Neutral references upon inquiry by future non-State employers, instead of disclosing that Complainant resigned instead of being terminated after an investigation of inappropriate and unprofessional conduct;
- OYA's agreement to provide limited information to the Employment Department regarding any claim for unemployment compensation benefits, so long as Complainant's reported information is not inaccurate.

Complainant argues that these items were not, in fact, benefits to Complainant, that therefore there was no consideration for the agreement, and that Complainant would have been better off simply resigning without signing the agreement. We disagree. A reasonable person could conclude that the settlement agreement was preferable to having a diligent prospective employer informed of Complainant's actions, and that this information would have a significant effect on Complainant's prospects of future employment. The agreement also increased Complainant's chances of obtaining unemployment compensation benefits. We conclude that these items constituted adequate consideration for the agreement.

Complainant argues that the agreement's conditions that she not apply for future employment with OYA or the State are unreasonable on their face. Again, we disagree. Complainant's risk was that she would be terminated for the stated reasons, or that if she resigned, the allegations would have no additional protection from disclosure. A reasonable person could conclude that the termination or resignation without conditions would prevent her from obtaining employment with OYA again, and that her prospects for State employment would be limited. In other words, Complainant's agreement to forbear seeking future OYA employment simply acknowledged the reality she faced in any event.

We conclude that the settlement agreement is supported by consideration, and therefore reject Complainant's argument that the Union failed in its duty of fair representation because the separation agreement lacked consideration.

3. The Union did not violate its duty of fair representation under ORS 243.672(2)(a) with respect to Complainant's separation.

Legal Standard Under ORS 243.672(2)(a)

It is an unfair labor practice under ORS 243.672(2)(a) for a labor organization to interfere with, restrain or coerce an employee in or because of the exercise of any right guaranteed under the Public Employee Collective Bargaining Act (PECBA). The complainant bears the burden of proof. OAR 115-035-0042(6).

This Board has recognized that ORS 243.672(2)(a) requires a union to fairly represent all employees for whom it is the exclusive representative. *Chan v. Leach and Stubblefield, Clackamas Community College; McKeever and Brown, Clackamas Community College Association of Classified Employees/OEA/NEA*, Case No. UP-13-05, 21 PECBR 563, 574 (2006).

A union's conduct may breach its duty of fair representation when its refusal to process or pursue a grievance is arbitrary, discriminatory, or in bad faith. *Chan*, 21 PECBR at 574. A decision is discriminatory if there is substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. *Id.* at 575. A union'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). A union's decision is in bad faith if it intentionally acts against a member's interest, and does so for an improper reason. *Chan*, 21 PECBR at 575.

This Board accords a union substantial discretion in deciding whether to arbitrate, or even file, a grievance. *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98, 18 PECBR 79, 88 (1999). A union abuses its discretion, and its conduct may be actionably arbitrary, when its decision lacks a rational basis or its processing of a grievance is so perfunctory that a reasoned decision is not made. *Ralphs v. 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). An employee does not have an absolute right to have a union take a grievance to arbitration. *Chan*, 21 PECBR at 575, citing *Vaca v. Sipes*, 386 US 171, 191 (1967). A union's rational and good faith decision not to pursue a meritorious grievance, even if mistaken, does not violate its duty of fair representation. *Tancredi*, 20 PECBR at 974. "What is important is the process by which the [union] determined not to pursue the grievance, not whether the grievance was filed." *Id.* at 976.

This Board has described a union's duty of fair representation by explaining:

"[a] union's good-faith decision not to pursue a potentially meritorious grievance, even if mistaken, is not a breach of its duty of fair representation. *Chan*, 21 PECBR at 576 (citing cases) * * *. In addition, '[t]he duty of fair representation does not require a union to represent a bargaining unit member in the same manner as an attorney represents a client.' [*Putvinskas 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, 898 (2000).] This discretion extends to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken. *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20 and Metropolitan Exposition Recreation Commission*, Case Nos. UP-15/16-92, 15 PECBR 85, 106 (1994), *AWOP*, 134 Or App 414, 894 P2d 1267 (1995)." *Slyter v. Service Employees International Union Local 503 and State of Oregon, Department of Fish and Wildlife*, Case No. FR-01-12, 25 PECBR 494, 503 (2013).

We review the limited record in this case to determine whether Complainant met her burden to show that the Union failed in its duty of fair representation. Complainant argues that the Union failed in its duty of fair consideration because the settlement left Complainant worse off than had she simply resigned. Complainant also argues that the Union failed to ensure that her separation agreement had consideration, which we have already addressed. She also argues that the Union failed in its duty because the Union steward failed to properly investigate the matter, including failing to locate and interview hypothetical witnesses.

The separation agreement states, “Ms. Scott acknowledges that he has been fully and fairly represented by his union and that he freely and voluntarily accepts this settlement with full knowledge and understanding of its content and meaning.” Finding of Fact 9. The evidence in the record does not contradict this arguable admission by Complainant.

Complainant’s various arguments about the Union steward’s representation, on this record, fail to show conduct that was arbitrary, discriminatory, or in bad faith. For example, Complainant appears to argue that the Union failed to obtain a specific statement of charges against Complainant required under the collective bargaining agreement. Complainant resigned, however, before the disciplinary process was completed, and, at the time of her resignation, she had not been formally charged with any misconduct. She was, however, made aware during the investigatory meetings and elsewhere of the accusations of misconduct against her, and those specific allegations, including the ones made by law enforcement personnel, were the specific reason she stated she was considering resignation.

Complainant also generally attacks the agreement by arguing that the conduct at issue did not warrant termination, implying that Complainant’s signature on the agreement was obtained through mischaracterization of the likelihood of Complainant’s termination. On this record, however, we conclude that Complainant’s alleged conduct was such that a reasonable employer, under all the circumstances, could have chosen to terminate her. Complainant’s own conduct supports this conclusion – when she learned that a law enforcement official had reported some of her conduct, she told the Union steward that she was considering resignation.

Complainant argues that the Union violated its duty of fair representation through inaction by the steward, specifically failing to object to the employer’s directive that Complainant not have personal contact with witnesses to the first incident, did not object or intervene during the investigative interview regarding the second incident, did not seek other witnesses to the second incident at the restaurant (other restaurant patrons), and did not obtain the name of the two individuals who reported the second incident to OYA. Complainant failed to meet her burden to establish that this alleged inaction took place.

The record is insufficient to satisfy Complainant’s burden of proof to establish that the Union failed to comply with its duty of fair representation. Further, whatever the Union did, or did not do, the evidence shows that Complainant’s employment ended because Complainant chose to end her employment through a separation agreement. That separation agreement reflected Complainant’s concerns regarding the credibility of witnesses against her, and also addressed Complainant’s prospects of future employment and possible eligibility for unemployment compensation benefits. We will dismiss the claims against the Union.

Violation of ORS 243.672(1)(g)

Where, as here, no violation against the union is found, the claims against the employer are automatically dismissed. *Tancredi*, 20 PECBR at 977. Therefore, we will also dismiss the claims against the OYA, and dismiss the Complaint in its entirety.

PROPOSED ORDER

The Complaint is dismissed.

ISSUED June 28, 2016.



B. Carlton Grew
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.)