

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-002-09

(UNFAIR LABOR PRACTICE)

ROBERT T. GRIFFIN,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
SERVICE EMPLOYEES	)	CONCLUSIONS OF LAW,
INTERNATIONAL UNION LOCAL 503,	)	AND ORDER
OREGON PUBLIC EMPLOYEES	)	
UNION and STATE OF OREGON,	)	
EMPLOYMENT DEPARTMENT,	)	
	)	
Respondents.	)	
_____	)	

None of the parties objected to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on October 6, 2010, after a hearing held on October 15 and October 22, 2009, in Salem, Oregon. The record closed on December 14, 2009, with the submission of the parties' post-hearing briefs.

Robert T. Griffin, Forest Grove, Oregon, represented himself.

Marc Stefan, Attorney at Law, SEIU Local 503, OPEU, Salem, Oregon, represented Respondent SEIU.

Donna Sandoval Bennett, Senior Assistant Attorney General, Department of Justice, Labor and Employment Section, Salem, Oregon, represented Respondent Department.

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On April 16, 2009,<sup>1</sup> Robert T. Griffin (Griffin) filed this Complaint alleging that he was wrongfully discharged by the State of Oregon, Employment Department (Department) in violation of ORS 243.672(1)(g) and that Service Employees International Union Local 503, Oregon Public Employees Union (SEIU or Union) violated its duty of fair representation in representing him in violation of ORS 243.672(2)(a). Respondents filed timely answers on September 10 and 18, 2009.

The issue is:

Did the Union's investigation of Griffin's discharge, its representation of Griffin in this matter, and its refusal to pursue Griffin's discharge grievance to arbitration violate ORS 243.672(2)(a)?<sup>2</sup>

### RULINGS

In addition to the named respondents, Griffin also alleged claims against the International SEIU. Those claims were properly dismissed by the ALJ on June 12, 2009. Griffin does not contest that ruling in his post-hearing brief.

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

### FINDINGS OF FACT

1. The Department is a public employer under ORS 243.650(20). SEIU is a labor organization within the meaning of ORS 243.650(13) and the exclusive representative of a bargaining unit of Department employees which included Griffin.
2. The provisions of the SEIU-Department collective bargaining agreement do not permit grievances based on disability discrimination to proceed to arbitration.
3. The Department administers Oregon's unemployment compensation tax and benefit program.
4. Griffin was hired by the Department in March 2005 as an Employer Tax Auditor. His position was reclassified to Compliance Specialist 2 in February 2006, a

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<sup>1</sup>On February 19, 2009, Griffin filed a Complaint against Respondents (Case FR-001-09). Griffin withdrew that Complaint and the case was closed on March 26, 2009.

<sup>2</sup>In our Conclusions of Law, we hold that SEIU did not violate its duty to fairly represent Griffin, and dismiss his claim against SEIU. As explained in our Conclusions of Law, we also dismiss Griffin's claim against the Department.

status he retained until his termination. Compliance Specialist 2 is a classified, hourly position not exempt from overtime compensation. Griffin's work hours were 8:00 a.m. to 5:00 p.m., with a 20 minute break in the morning and afternoon, and a 30-minute lunch break.

5. The purpose of Griffin's position was to "ensure employer compliance with Federal and State Unemployment Insurance Tax law." Griffin's specific duties were to:

- Select, plan and conduct independent compliance audits;
- Provide technical consultation;
- Collect delinquent payroll reports;
- Recover taxes by taking appropriate enforcement actions;
- Conduct investigations to resolve blocked claims for Unemployment Insurance benefits involving disputed or unreported wages and subjectivity issues.
- Conduct status investigations and make determinations regarding business and worker subjectivity to Employment Department Law;
- Represent the UI [Unemployment Insurance] Tax Section in contested cases arising from administrative decisions; and,
- Handle legal proceedings by conducting pre-hearing conferences, introducing probative evidence, cross examining witnesses and writing memoranda or briefs."

Compliance Specialist 2s work independently with employers, and perform that work both in the office and in the field. When in the office, Griffin worked in a cubicle alongside other Department employees.

6. Griffin, who lives in Forest Grove, worked in the Department's Hillsboro office. His supervisor at the time of the events at issue was UI Regional Tax Manager Dave Jones, who worked in the Department's Salem office.

7. Griffin is a veteran of the Vietnam War, and suffers from Post-Traumatic Stress Disorder (PTSD) from his military service in that war. He also has other significant health issues, including some problems affecting one leg.

8. At some time prior to his employment at the Department, Griffin was a representative for 12 years for the United Food and Commercial Workers Union in Arizona. He also held an office in that union for four years.

9. On April 30, 2008,<sup>3</sup> a co-worker temporarily assigned to Griffin's office, Jane Doe,<sup>4</sup> told Griffin's supervisor Jones that Griffin was: (1) making extensive personal phone calls during work time; (2) not conducting employer tax audits appropriately; (3) staying away from his office for extended and unexplained periods of time; and (4) having inappropriate phone conversations that included sexual content. On May 1, 2008, Doe reported overhearing a conversation between Griffin and another Department employee "that was so inappropriately sexual in nature that [Doe] felt sexually harassed."

10. On May 5, the Department informed Griffin that it was investigating the charge that he engaged in workplace harassment. He was ordered not to discuss the matter with anyone besides Department managers or his Union representative.

11. After Griffin was notified of the investigation and potential discipline, he sought SEIU representation for the meeting, and was represented by Kay Schneider, SEIU's Chief Steward for Department employees. Schneider had been a steward at the Department for approximately ten years. As Chief Steward for the SEIU Department employees, Schneider works on or is at least notified of grievances filed against the Department all over the state. Schneider also sits on SEIU's arbitration panel, which helps determine which grievances the Union should take to arbitration. Schneider works for the Department as an Employment Adjudicator, collecting testimony regarding claimants' eligibility for unemployment compensation benefits.

12. SEIU generally handles discharge matters by having workplace stewards represent employees at the preliminary stages, including attending investigatory meetings. The stewards often consult with an SEIU staff member called an Internal Organizer. If the matter moves to the predissmissal stage, the Internal Organizer becomes directly involved.

13. On May 7, Department manager Jones and Senior Human Resources Analyst Jerry Cox interviewed Griffin on the subjects of Griffin's telephone calls, threats against managers, and violations of his instructions not to discuss the investigation. Chief Steward Schneider communicated with Griffin prior to the investigatory meeting and represented Griffin at the meeting. Prior to the meeting, Griffin told Schneider that he kept a rubber band around his wrist for PTSD-related stress reduction, and therefore Schneider "remained vigilant" during the meeting to see if he began snapping it.

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<sup>3</sup>All events occurred in 2008 unless otherwise stated.

<sup>4</sup>A pseudonym.

14. The Department summarized<sup>5</sup> Griffin's responses to the allegations during the May 7 meeting in part, as follows:

"When questioned, you indicated that you did not make morning personal phone calls. You said that sometimes you call co-workers S.C. or [Alice Black],<sup>6</sup> but the calls are not personal in nature. You said you use your morning preparing for audits; looking for blocked claims; reviewing pending items, etc. You added that sometimes there are interoffice discussions on varied topics.

"You were asked if you had a phone conversation of a sexual nature with someone in the workplace. You said you had not. You also denied saying on the phone to [Black], 'I'm going to have to take Dave down too, as well as Dennis.' You admitted violating the verbal directive given to you by Mr. Jones to not discuss the investigation. You disclosed that you talked with co-worker S.C. You felt this was acceptable because you viewed her as your mentor and you were in shock and needed her input. Mr. Jones asked if she was a union representative and you said she was not."

15. At one point during the May 7 meeting, Schneider noticed that Griffin appeared to have tears in his eyes and began a controlled breathing exercise. Griffin did not snap his rubber band and did not ask for a break in the meeting, so Schneider did not ask for one. Neither Schneider nor Jones believed that Griffin was breaking down or otherwise having mental or emotional difficulties which impaired his responses.

16. Griffin subsequently characterized his behavior at the May 7 meeting as, and apparently believed that he had, an emotional breakdown in which he cried. Griffin subsequently contended, and apparently believes, that he was in an emotional state in which he could not formulate appropriate responses to the questions he was asked. Griffin did not, however, identify any answers he ultimately gave as incorrect because of his PTSD reaction.

17. At the end of the May 7 interview, Department officials informed Griffin that he was reassigned to the Department's Salem office pending the conclusion of the investigation, where he would work in the same office as Department manager Jones. Griffin was very unhappy about this transfer. He believed the longer commute would affect his health, and believed the transfer demonstrated that the accusations against him were a pretext, since he had been accused of threatening Jones.

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<sup>5</sup>Griffin did not dispute the accuracy of this summary.

<sup>6</sup>A pseudonym.

18. On May 19, Schneider contacted Jones to find out how long the Department would take to make a decision, and to tell Jones that the drive and longer days of work resulting from Griffin's transfer were a hardship for him.

19. On May 20, Griffin informed the Department that he would be on medical leave for the rest of the month.

20. On May 21, Griffin asked Schneider to get a copy of the Department incident report on his "emotional break down" at the May 7 meeting. Schneider made a request for the report but thought it was from a different meeting than the one she attended.

21. On June 2, Griffin e-mailed Schneider a lengthy grievance alleging that the Department had violated its policies against "Discrimination and Harassment Free Workplace" and "Retaliation." The grievance did not allege violations of the collective bargaining agreement.

22. On June 4, the Department held an additional investigatory meeting with Griffin. Department manager Jones and Senior Human Resources Analyst Jo Anne Nathan attended the meeting. Schneider communicated with Griffin prior to the investigatory meeting, and represented him at this meeting.

23. The Department summarized<sup>7</sup> portions of the June 4 meeting, including Griffin's responses, as follows:

"During the meeting you were asked about your work schedule, scheduled audits and attendance of meetings. There was concern that you were charging for time worked that was inconsistent with the work duties scheduled on your GroupWise calendar such as audits, in-person visits, and meetings.

"You were asked about a scheduled audit on Friday, May 2, 2008 with [employer DB].<sup>8</sup> You indicated that you were out for more than a half day doing the audit. However, the employer said you were at the worksite for less than one hour. You explained that you couldn't remember the details, but that you could have stopped along the way to check on other accounts you monitored. You said you did not enter supporting notes (scratch pad

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<sup>7</sup>Griffin did not dispute the accuracy of this summary.

<sup>8</sup>These initials, and all other initials or letters used in place of a name, are pseudonyms.

entries)<sup>[9]</sup> on these other accounts unless you were going to reopen the account.

“\* \* \* \* \*

“You explained that you were an ad hoc member of Washington County Disability, Aging, & Veterans Services Advisory Council (DAVS) and Aging & Veteran Services Advisory Council (AVSAC) Your attendance schedule was reviewed with you to clarify that your absences to serve on the councils were covered by vacation leave, personal leave or a flexed schedule. \* \* \*

“Your January 1, 2008 through present calendar was reviewed with you. You were asked about listed ‘site visits’ (employer worksites visited for audit and delinquency purposes). Specifically, your scratch pad entries were compared with your scheduled site visits and you were questioned about those that did not have any indication that a site visit took place. You explained that sometimes site visits are scheduled, but something else comes up and you end up not going. You added that if it was on your travel voucher, then you did go; if it was not, then you didn't go. You said that you would have written on the appointment notated in GroupWise if you had moved the site visit to another day.

“When asked about case documentation (scratch pad entries) you admitted that you were not making appropriate and accurate entries. You said that you sent employers letters (delinquency) to provide information by a specific date and that if you had received reports, the employer would not have to come in. When asked if you always documented these situations, you said not always. You said that you created an ‘assistance letter’<sup>[10]</sup> - something you used when you were trying to gather an

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<sup>9</sup>The term “scratch pad” is misleading. It is, in fact, an entry in the Department’s database regarding a particular employer.

<sup>10</sup>The “assistance letter” was a form letter created by Griffin. It stated, in part,

“I have left messages for a return call which none have been returned. You leave no choice but the following: You are requested to be present and prepared for the following: [stating date and location] SUBJECT: To assist you in compliance for U I Tax reporting for the above stated business, records for the year 2005 to

(... Continued)

employer's records. You were asked if you made supporting scratch pad entries for these situations; you said not always. You reported that you did not make scratch pad entries until you felt you had all of the information you needed. You conceded that handling audits in this manner did not follow established procedures.

"When asked about appropriate use of electronic equipment you explained that you were familiar with the agency's expectations. You indicated some personal use of the internet during work time. When provided with a list of the sites you accessed you admitted that you looked at news sites during work hours. When questioned about the 'Kenai River Run,' you denied knowing anything about it. But when pushed, you admitted that it was a game you played as a stress reliever. You said you thought it would be okay to play games on the internet while at work because you were experiencing depression.

"You were questioned about multiple communications sent via [the Department's] EdWeb internet system that connected with AOL.com, a private e-mail service. Multiple names were listed that did not appear to be work related. While you could not initially identify these contacts (J. L., M. B., J. H., C. L., D. L., D. L. and J. C.), after additional questioning and being shown where you had sent the messages during your scheduled work time, you identified the contacts as DAVS related. You could not explain how using work time in this manner was acceptable. You were given a copy

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(Continued...)

present will be needed. To include all cancelled checks, check register, payroll records, W-2s, W-3, 1099s,, 1096, IRS Income Tax Returns, etc.

"As a *responsible* business person in the State of Oregon, I am sure you realize how important providing required information timely can be.

"Thank you, in advance for your immediate attention to this matter, I look forward to seeing you on the above date and time with the requested documents!" (Italics, boldface, and underlining in original).

The Department contended that these letters were inappropriate and not authorized by its rules. Griffin contended that the letters had been authorized in a conversation with a manager whose identity he had forgotten, and by language in his job description. Griffin never identified any portion of the Department rules or manual that authorized these letters.

of your internet usage and related notes so that you could provide follow up input on non-work related entries.<sup>11</sup>

“You were then asked about multiple businesses that you had apparently issued audit letters to without following up and conducting audits. [The letter goes on to list eight businesses. The first business listed was Pacific Cab.] \* \* \*

“After much interaction it became apparent that you were issuing audit letters and then canceling the audit if you received the records you needed. You agreed that other auditors would not know if an audit was or was not taking place unless they reviewed your files because you had not put any documentation into EPAS (Payroll Audit System) or the scratch pad. You also agreed that you didn’t send anything to the employers in writing indicating that the matter is concluded; you only told them verbally. You provided no answer when it was pointed out to you that threatening to conduct an audit (by giving a letter) and not following through with it, could open the Department up to a risk of being accused of harassment. When asked how many other accounts were out there that have an audit letter but no scratch or EPAS entries; you said you didn’t know. You agreed that it was safe to say that other employers did receive audit letters and were not in the system (EPAS, scratch pad). You explained that you were following that process as you were trying to meet your quota for audits and delinquencies.

“You were asked to address some of the inconsistencies between information gathered in the course of the investigation and your May 7, 2008 responses. In the first investigatory meeting you had denied making personal phone calls during work time. After reviewing with you input received from [Department] employee [Black], you acknowledged having the sexual conversation that [Doe] complained of. You defended your actions, however, by stating that the content of the conversation was consensual and, thus, did not create a hostile work environment. You were advised that sexually explicit conversations could create a hostile work environment when listeners perceive it as unwanted, unwelcome or offensive behavior.

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<sup>11</sup>Griffin apparently never provided any information to SEIU or the Department indicating that any websites the Department identified as personal were in fact work-related, although he appeared to contend at hearing that SEIU improperly failed to make this identification.

"You were also told that [Black] and [Doe] reported that you did say something to the effect that you were going to 'take down Dave along with Dennis.' You responded that you were not talking about Dave Jones and Dennis Seibel. You said you were talking about two men from the Central Arizona Labor Council named Dave and Dennis. But you then contradicted yourself by saying that you did not remember making that statement."<sup>12</sup>

24. At the hearing in this case, Griffin stated that he believed that Schneider inappropriately failed to intervene in the employer's questioning, particularly when that questioning became aggressive.<sup>13</sup> There is no other evidence in the record that the questioning was inappropriate in tone or content. Although Griffin indicated that stress makes it difficult for him to remember things, Griffin did not give any examples of answers he gave at the investigatory meetings that were erroneous because of stress.

25. After the June 4 meeting, Griffin left work and began an extended stress-related medical leave. Griffin met with his personal medical providers and was ultimately placed on sick leave from June 4 until August 18, 2008.

26. On July 10, Nathan sent Griffin a release form to permit the Department to obtain medical information to document his claim for accommodation. The release stated, in part,

"I, \_\_\_\_\_, request the health care provider named below to give my employer any requested confidential medical information pertaining to my present medical condition(s) as it relates to my employment with the [Department].  
My signature below authorizes my health care provider to respond to any requests for medical information received from the [Department]  
\* \* \*"

Griffin was incensed at this request. He believed that he had addressed and resolved a similar issue about medical information before. His anger over this issue was

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<sup>12</sup>Griffin did not contend this statement about Dave and Dennis was not a threat.

<sup>13</sup>See *Washington County Police Officers Association v. Washington County*, Case No. UP-15-90, 12 PECBR 693, *recons* 12 PECBR 727 at 728 (1991) ("During the questioning of the employee by the employer, the representative may participate only to the extent of seeking clarification of questions.").

a major factor in his response to every subsequent event in his disciplinary process, including the hearing in this case.<sup>14</sup>

27. On July 16, Department manager Jones notified Griffin that the Department was satisfied that Griffin had not used State time for "Vet meetings."

28. In the course of her representation of Griffin, Schneider exchanged numerous e-mails with Griffin. Most of those e-mails concerned matters not directly related to Griffin's discipline, such as the request for medical information and the motives of his accuser.

29. On August 18, one of Griffin's physicians released him to return to work without conditions effective that date. A handwritten notation on the release states that it would be helpful to Griffin if he were able to work with his leg propped up. Griffin did not request that accommodations be made for his leg, but when Department officials did not offer him a means to prop up his leg during his predissmissal meeting with them, Griffin concluded that they were deliberately attempting to cause him discomfort.

30. On August 22, the Department notified Griffin that it had begun a predissmissal process against him, and that a predissmissal hearing was scheduled for September 3, 2008. The letter cited the following facts in support of the proposed dismissal: (1) conducting graphically sexual phone conversations on work time in a loud voice, so that other workers heard his end of the conversation; (2) telling a co-worker that he, Griffin, would have to 'take down' his managers Jones and Seibel as a result of their actions regarding Griffin; (3) conducting extensive, lengthy personal phone calls during work time; (4) being absent from work for over four-and-a-half hours on May 2, 2008, but being able to account for only approximately two hours of time, including a lunch break; (5) extensively using his office computer to play video games and visit non-work related web sites; (6) sending employers audit notification letters when no audit was contemplated or appropriate; and (7) repeatedly speaking to coworkers who were neither managers nor Union representatives about the Department's ongoing investigation of him after managers told him to discuss the matter only with his steward.

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<sup>14</sup>Griffin was apparently subject to a permanent confidentiality requirement governing his duties in the military which arguably included his discussions with his mental health providers. Griffin believed that the general release sought by the Department would result in disclosure of the content of those discussions. Griffin's attempts to communicate these facts to others, however, were hampered by his apparent anger- or stress-induced incoherence on the subject. Griffin also appeared unable to fully grasp the notion that the Department sought his medical records as a routine response to his claim for medical accommodations.

31. Griffin and Chief Steward Schneider continued to communicate by e-mail. Griffin's e-mails generally focused on matters other than the acts for which he was being disciplined.

32. During late August or early September, Heather Blankenheim, an SEIU Internal Organizer assigned to the Department unit, became involved in Griffin's case. Blankenheim had joined SEIU approximately three years prior, and had worked for a teachers' union for three years prior to that.

33. Prior to the predismisal hearing, the Union conducted its own research into Griffin's internet use. SEIU's internal computer expert reviewed the 115 pages of internet usage logs supplied by the Department. The Union's expert concluded that the Department's charges were accurate. Blankenheim and Schneider considered this allegation particularly important, because, in their experience, the Department strictly enforced its rules regarding internet and computer usage, and the Union had been unsuccessful in overturning discipline for violations of those rules. They did not believe that Griffin's defense, that he used the internet and computer games for stress reduction, was likely to forestall discipline for this conduct.

34. Blankenheim and Schneider believed that Griffin failed to appreciate the seriousness of his actions in conducting phone calls of a sexual nature on work time, in a loud voice. They believed that Griffin's asserted defenses, that he engaged in this conduct for stress reduction and that the co-worker who complained about him sought to take his place in the Hillsboro office, were also unlikely to forestall discipline for this conduct. Blankenheim and Schneider also believed that Griffin did not appreciate the serious nature of engaging in a significant amount of personal business during his work hours, through internet use, personal telephone calls, and time out of the office for which he could not account.

35. Blankenheim and Schneider also believed that Griffin failed to appreciate the weakness of his defense that using "assistance letters" or audit notification letters to obtain documents was consistent with Department policies. Griffin also appeared to fail to appreciate the seriousness of his failure to regularly document his claimed work on his case files. Griffin repeatedly insisted in e-mails to Union representatives that the Pacific Cab file had been transferred to him from another auditor, and contained no scratch pad notes at the time of transfer. He did not discuss the seven other business files he was accused of failing to document.

36. Prior to the predismisal meeting, Schneider and Blankenheim met with Griffin. They discussed possible responses and defenses to the various charges, and told Griffin how they planned to respond.

37. On September 3, the Department held the predismisal meeting. The Department representatives at the meeting were Senior Human Resources Analyst Nathan, OHR Assistant Manager Bill Sexton, UI Tax Section Manager Rob Edwards, and UI Tax Field Operations Manager Dennis Seibel. Blankenheim and Schneider attended the hearing. Blankenheim took the lead and presented arguments that Griffin had provided them and that she and Schneider had developed.

38. At the beginning of the predismisal meeting, Griffin and Nathan heatedly discussed Nathan's July 10 request for a general release for Griffin's medical records. At hearing, Griffin stated that his exchange with Nathan led to an emotional breakdown which forced him to leave the room, overwhelmed by feelings he traced to his PTSD. He contended at hearing that during this time he was incapable of assisting in his own defense. Blankenheim and Schneider perceived Griffin to be angry and frustrated, and believed that he chose to leave the room, but also believed that he was able to communicate and otherwise aid them in his own defense. The SEIU representatives accompanied Griffin to a nearby room and discussed how to proceed. Blankenheim and Schneider then shuttled back and forth between the meeting and the room in which Griffin remained.<sup>15</sup>

39. The dismissal letter contains the following accurate summary<sup>16</sup> of what took place at that meeting:

"After Ms. Nathan opened the meeting, you [Griffin] raised your concern regarding your health issues and ability to provide information addressing the charges. You also commented about medical information from your health care provider that you had provided to [the Department's] Office of Human Resources. After some interaction between you and Ms. Nathan regarding your ability to participate in the pre-dismissal meeting, the meeting was stopped to allow you to confer with Ms. Blankenheim and Ms. Schneider. After conferring with you, Ms. Blankenheim and Ms. Schneider returned without you and the meeting continued with Ms. Blankenheim as your representative.

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<sup>15</sup>We find that the Union representatives' assessment of Griffin's ability to assist in his own defense was reasonable. Griffin did not tell the Union representatives that he was incapacitated and did not identify what he would have done differently if he had not been incapacitated. Griffin did not follow up after the meeting to address most of the issues he had been unable to address while the meeting was going on.

<sup>16</sup>Griffin did not dispute the accuracy of this account of the meeting.

“Ms. Blankenheim stated that no corrections or changes were needed within the background section of the August 22, 2008 notice of pre-dismissal proceedings. She stated that you wanted it noted that saying ‘I’m going to have to take Dave down too, as well as Dennis,’ as reflected within the investigation section of the notice is not something you would have said in the office and that you have no recollection of making this statement.

“To the charge of **inappropriate behavior**, Ms. Blankenheim expressed your concern that your co-worker [Doe] did not let you know she could overhear you; that had you known, you would have stopped the conversation. \* \* \*

“Ms. Blankenheim repeated your concern that saying something to the effect that UI Regional Tax Manager Dave Jones was going to go down with UI Field Operations Tax Manager, Dennis Seibel was not the type of statement you would have made and that you could not remember saying it. \* \* \*

“To the charge of **conducting personal business during paid work time**, Ms. Blankenheim expressed on your behalf that you spent some work time driving around the areas of businesses you were auditing to scope them out and identify any changes happening in the area, thus causing there to be work time that would not be recorded against a specific business. \* \* \*

“To the charge of **misuse of State equipment and work time**, Ms. Blankenheim stated on your behalf that the specifics of internet use could not be addressed. In response, Ms. Nathan confirmed with Ms. Schneider that the internet reports had been provided you in the course of the investigation. Ms. Blankenheim stated that, while she couldn’t address specifics, she felt that some personal use during paid work time likely did occur. She added that probably not all of the information listed was correct; that some screens may have been left open, but were not continuously being used. Ms. Blankenheim noted that you stated that some e-mails were personal to friends that you sent in an attempt to cope with your medical problems. She also acknowledged that you had played the Kenai River Run game multiple times as a stress release activity, but had limited that play to ten minute periods. \* \* \*

“To the charge of **failure to comply with UI Tax Employer audit rules, standards and practices**, Ms. Blankenheim initially requested additional time for you to review UI Tax Section’s Tax Audit manual. UI Tax Section

management Rob Edwards and Dennis Seibel agreed to provide Ms. Schneider access to the manual and Ms. Nathan offered an extended week for your representatives to review the information with you and provide your response back to the pre-dismissal meeting participants. The pre-dismissal meeting was stopped to allow Ms. Schneider and Ms. Blankenheim to confer with you.<sup>[17]</sup> After doing so, they returned and Ms. Blankenheim stated that she was prepared to respond on your behalf without delay.

“Ms. Blankenheim said you did not agree with the supporting facts within charge #4. She explained that the letters you used, along with the process you followed, equaled to posting a notice for the employer. Your contention was that your practice and actions were within the UI Tax Employer audit rules, standards and practices, but that you do not recall details about the specific employers listed in the charge. Ms. Blankenheim also noted that you had said that you had run similar ‘assistance letters’ by someone in management, but that you could not remember who the management person was. Why you did not document the issuance of those letters was not addressed. \* \* \*

“To the charge of your failure to follow management directives, Ms. Blankenheim acknowledged that you did violate management’s directive, but that you did so due to the amount of stress your were under. Ms. Schneider referenced a case stating that [Department] management could not direct employees to not discuss an investigation with co-workers.” (Emphasis in the original.)

40. In subsequent correspondence, Griffin argued that the Department’s failure to provide him with some means to elevate his foot at the meeting, and the Union’s failure to advocate for that, reflected harassment and discrimination against him. Griffin did not, however, tell anyone that he needed to elevate his foot while attending the predismisal meeting.

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<sup>17</sup>The hearing was recessed while the manual was located, and the representatives provided it to Griffin. They asked him to find the sections authorizing his conduct. Griffin declined to review the manual at that time or later. While Griffin contended that he was incapacitated, this does not explain his failure to review the manual at a later time. Griffin never subsequently provided any language from the manual which specifically authorized his conduct. He did point to some portions of his job description. Griffin also insisted that the Department’s manuals were so poorly maintained that fellow auditors considered them to be useless.

41. On September 4, Griffin e-mailed SEIU Executive Director Leslie Frane about Blankenheim's work in representing him. Griffin stated,

"Subject: Excellent Job!

"Dear Director,

"I have been a member of SEIU 503 for a little over 3 years and not a lot this local has done has impressed me. I was full time in the Labor Movement in Arizona for over 15 years and like AFSCME have always felt these two Union were more of a social fraternity! I was a full time rep for UFCW 99R for over 12 years and President of the Central Arizona Labor Council for 4 years (Top 40 Labor Councils of the AFL-CIO).

"I was VERY impressed with Heather [Blankenheim], my Union Rep, in her representation of me in a hearing with Employment HR. I can only hope she is being taken care of sufficiently. I will not speak for any other than her as I have no knowledge of their actions but almost 15 years ago I received: \$45,000 plus, gas card, Car provided and rotated every 2 years or 40,000 miles (I drove a Taurus, Dynasty, etc.), card for needs (take stewards out, hotels, meetings, etc.), medical as good or better than the members we represented and a pension that far exceeded what the member received. I only hope Heather is in this area with strong consideration for the 15 years that have passed, meaning she should be making in the area of \$60,000 -75,000 a year now which I am sure my position pays now!

"I would appreciate a responce back that this email was received.

"Thank you in advance for your acknowledgment of my correspondance,

"Robert T. Griffin. . .UNION YES!" (Capitalization and boldface in original.)

42. On September 15, Griffin e-mailed Blankenheim and Schneider a "Grievance" he wanted filed "ASAP." Griffin apparently sought to grieve Nathan and other Department officials' conduct in the predismisal meeting, claiming that this conduct was retaliation for Griffin's objections to Nathan's July 10 request for a release for medical information regarding Griffin's ability to work.

43. On September 22, Department Senior Human Resources Analyst Nathan informed Griffin that the medical providers who gave the Department information about

Griffin's ability to work had reached contradictory conclusions, and directed him to attend a medical evaluation with a Department-designated health care provider, Donald A. True, Ph.D.

44. Between September 30 and October 7, Griffin sent another grievance to Schneider for her to file. This grievance concerned his transfer from Hillsboro to Salem. Griffin contended that the transfer was harmful to his health and was in retaliation for a grievance he had filed in 2007.

45. On September 30 and October 3, Griffin reported for a fitness for duty examination with Dr. True. True provided the Department with a report regarding his examination.

46. On October 7, Blankenheim e-mailed Griffin to inform him that SEIU would not file his retaliation grievance because the events alleged in his September 16 submission took place in June and July 2008, and were therefore past the 30-day time limit for filing a grievance.

47. By letter dated October 9, Nathan notified Griffin that True's report did not relieve Griffin of responsibility for his misconduct, including his dishonesty during the investigation. Nathan stated:

“\* \* \* \* \*

“Dr. True wrote that you ‘were clearly diagnostic for PTSD, consistent with and confirming the VA diagnosis.’ He does not view you ‘as currently medically stable and ready to work full time.’ \* \* \*

“Dr. True noted that your excessive use of computer games during work time and your phone sex talk is associated with your PTSD condition. Further, you expressed to him that you used paid work time to play computer games as your own ‘personal accommodation’ to reduce your depression. To create your own accommodation, without discussing it with management and getting approval, is not acceptable and does not comply with the ‘interactive process’ that is a requisite of the Americans with Disabilities Act or Oregon statutes.

“Additionally, you reported that your phone sex conversations were to help a friend with her self-esteem. That too is unacceptable. There is no situation where an employer must allow its employees to overhear such conversations. Neither the playing of computer games while at work, nor having phone sex conversations in the workplace are excusable and will remain a part of the supporting facts within your pre-dismissal letter.

“Mr. Griffin, neither your medical care providers’ notes nor Dr. True’s psychological evaluation give any justification for your failure to perform your job and your dishonest behavior leading up to and through out the investigation. Specifically, you made inappropriate comments threatening UI Tax Section management, you were away from your work place for many unexplained hours, and you violated multiple critical protocols on compliance audits and employer contacts. All of these actions can reasonably be perceived as secretive and deceitful. Further, when you were questioned about these matters, it was determined by evidence and by your own conflicting statements that you were not being truthful. We know of no circumstance or medical condition, Mr. Griffin that would justify your lack of honesty.

“\* \* \* In the absence of any medical justification for your conduct identified within the August 22, 2008 pre-dismissal meeting notice, the Oregon Employment Department will continue to move forward with the dismissal action. If you have medical documentation which would mitigate that behavior, please present it to me no later than October 24, 2008. Failure to do so will result in the resumption of your dismissal process.”

48. On October 7, SEIU filed Griffin’s transfer grievance. The Department denied the grievance on November 19.

49. By letter dated October 29, the Department dismissed Griffin from State Service. The letter included the following responses to the arguments presented on Griffin’s behalf:

“To the charge of **inappropriate behavior**, Ms. Blankenheim expressed your concern that your co-worker [Doe] did not let you know she could overhear you; that had you known, you would have stopped the conversation. This information did not mitigate this supporting fact as the primary responsibility to conduct oneself in a manner that maintains a harassment free work environment is to be followed at all times; not just in response to a co-worker requesting you to stop an inappropriate behavior. The charge of you conducting explicit sexual conversations in the workplace in violation of UI Tax Section workplace policies and expectations and Department of Administrative Services (DAS) Policy on discrimination and Harassment Free Workplace, Policy #50.010.01 stands.

“Ms. Blankenheim repeated your concern that saying something to the effect that UI Regional Tax Manager Dave Jones was going to go down with UI Field Operations Tax Manager, Dennis Seibel was not the type of statement you would have made and that you could not remember saying it. This charge stands. Evidence supports that you did, in fact, make that type of statement in violation of Tax Section Workplace Policies and Expectations and DAS, Human Resources Services Division (HRSD) Policy #50.010.02 - Violence-Free Workplace.

“To the charge of conducting **personal business during paid work time**, \* \* \* This charge stands as just driving around is not a sanctioned activity; is not part of your assigned duties, nor does it add in any manner to your ability to conduct employer audits. Additionally, this response does not refute or mitigate the fact that you had multiple personal phone conversations with [Department] employee [Black]; in some cases lasting up to an hour in duration, or that you had two hours of unaccounted time when you conducted an audit with [employer DB].

“To the charge of **misuse of State equipment and work time**, \* \* \* Since any personal use of the [Department], State internet during schedule work time and any game activity violates the DAS Acceptable Use of State Information Assets Policy #107-004-110 this charge stands.

“To the charge of **failure to comply with UI Tax Employer audit rules, standards and practices**, \* \* \* Why you did not document the issuance of those [‘assistance’] letters was not addressed. After serious consideration of the investigation results in conjunction with the additional information provided by Ms. Blankenheim on your behalf, this charge stands. Your use of the ‘assistance letters’ in conjunction with your failure to document employer records constitutes serious violations of the UI Tax Section Employer audit rules, standards and practices.

“To the charge of your **failure to follow management directives**, \* \* \* Ms. Nathan contacted Department of Justice regarding [the *Thyfault*]<sup>18</sup> case and found that it was not a related case as it pertained to a directive to the employee and the union to not discuss the case in any manner. This charge stands, in this instance, as contacting two co-workers was not part

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<sup>18</sup>*Alberta Thyfault and Oregon Education Association v. Pendleton School District No. 16*, Case No. UP-101-91, 13 PECBR 380 (1991) AWOP 116 Or App 675, 843 P2d 514 (1992), *rev den* 316 Or 529, 854 P2d 940 (1993).

of building a defense and you knowingly violated management's directive when you discussed the allegations against you prior to the investigation being completed." (Emphasis in original.)

50. On November 3, Schneider informed Griffin that SEIU would file a grievance over his discharge. On November 6, Schneider and Griffin participated in a conference call with Department Senior Human Resources Analyst Jerry Cox regarding the grievance. Schneider communicated with Griffin prior to the call.

51. On November 8, Griffin filed "Union charges" with SEIU against Doe, contending that she had accused him of misconduct in order to gain a permanent transfer to the Hillsboro office.

52. On November 12, SEIU filed a grievance over Griffin's discharge. The Department denied the grievance on December 8. SEIU pursued the matter through all steps prior to the request for arbitration.

53. On November 17, Blankenheim informed Griffin that "as a union we are not set up to bring charges by one member against another member. I would encourage people in that office to report concerns about [a manager's] language to HR though."

54. In order to evaluate whether Griffin's case should be taken to arbitration, Schneider and Blankenheim reviewed Griffin's case and consulted with Blankenheim's supervisor.<sup>19</sup> Following that discussion and analysis, Schneider and Blankenheim agreed that SEIU should not take the matter to arbitration.

55. During December 2008 and January 2009, Griffin sent a series of e-mails to Blankenheim inquiring about the status of his grievances. Blankenheim apparently did not respond; she was unexpectedly out of the office during January. Griffin became increasingly frustrated at the lack of response.

56. On the morning of January 21, 2009, Griffin sent an e-mail to SEIU Executive Director Frane stating:<sup>20</sup>

**"Subject: Re: ASSISTANCE!**

"Thank you. . . I do not see how I am represented when I was terminated 10/31/2008, did not receive my 'all due' as state in the law. . my checks

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<sup>19</sup>The name of Ms. Blankenheim's supervisor does not appear in the record.

<sup>20</sup>Griffin's e-mails and other writings are reproduced as they appear in the record.

was incorrect and I have not received any vacation payout. The State Employment office has supervision contacting my Veteran's Representative with regard to my visits to him for employment assistance (Black Balling) now Robert Edwards has blocked my email address to the State! So now I can't email my Vet Reps, BOLI, Legislators or Union Steward! How is this legal and why won't the UNION do anything?

"Have Unemployment hearing tomorrow!

"I guess my problem is I was a UNION rep for UFCW for years. . .when I represented the membership . . . I was committed to being there for them . . . I was there representing them at all levels of discipline. I never left the office with out all telephone calls returned even if I had to call back in the evening. .I took my job as a 24/7 commitment not a 'job'! When some untimately got terminated, I was there to help provide for them. . .food from the food bank, financial assistance. .working with utilities, banks, mortgage company, etc. I was their friend and Union Brother ! I took care of their Unemployment hearing because I wanted to see what the company would be using in the arbitration hearing (some called this being prepared!) and it provided assistance to the member (even though they were not paying dues) who was unfamiliar with these proceedings! SEIU falls very short in this action of 'representation'!

"I have asked for my personnel file to review it, normally I would have done this as a Union Rep with my grievant to go over what management has put in it! SEIU nowhere to be found!

"Any one of my friends will tell you I believe in the UNION theology, However, I hate and despise a company UNION or one that is in bed with management!" (Emphasis in original.)

57. Later that day, Griffin received the following e-mail from SEIU Executive Director Frane:

"I am forwarding this e-mail to Heather Conroy, who is covering for Heather Blankenheim who is out on leave. Please direct any further inquiries to Heather and Heather."

58. Griffin did not receive a response from Conroy before his January 22, 2009 unemployment compensation hearing, at which Griffin represented himself.

59. On January 24, 2009, Griffin wrote to SEIU,

"I have heard nothing! Represented myself at hearing! Have contacted an attorney and waiting back as he is out of town.... . Contacted Rep Riley to get my email access to My State Veteran Representative as I have asked SEIU on numerous occasions to represent me in Black Balling by the State and have gotten NOT A FUCKING WORD FROM SEIU!

"My suit against the State of Oregon will include 'failure to represent' by SEIU! I am also including SEIU on my second EEOC charge!

"Have a nice DAY!" (Emphasis in original.)

60. On February 6, 2009, Schneider sent Griffin a letter she had drafted (after consulting with another SEIU Internal Organizer, because Blankenheim was out of the office) stating that SEIU had decided not to take his case to arbitration. The letter stated, in part:

"The union has reviewed your grievance for wrongful termination, reviewed the evidence provided by the employer and conducted our own investigation. We have determined we do not have a sufficient case to move this grievance forward.

"The employer claims just cause for dismissal based on five areas of misconduct. The five areas they have provided supporting facts for are inappropriate behavior, conducting personal business during paid work time, misuse of state equipment and work time, failure to comply with UI Tax employer audit rules, standards and practices, and failure to follow management directives.

"In regards to the charge of inappropriate behavior, you admit to the behavior that employer alleges. You admitted this behavior after first denying it occurred to your employer. The fact that your co-worker ([Doe]) did not confront you about the behavior before contacting management about her concerns is irrelevant to our case. We have reviewed DAS policy 50.0101.01, 'Discrimination and Harassment Free Workplace', which you acknowledged receipt of on April 10, 2008. Our investigation shows that you violated this policy.

"In regards to the charge of conducting personal business during paid work time, you provided information that you spent some work time driving around, scoping out areas in which audited businesses were located.

Unfortunately, this is not a valid defense, because as the employer has pointed out, what you were doing was not sanctioned or assigned work duties.

“In regards to the charge of misuse of state equipment and work time, you admitted to sending personal emails on paid work time as well as playing computer games on paid work time. Management presented evidence that you spent 895 minutes conducting personal business on paid work time during a three week period in April. You provided no evidence that this information was incorrect. We have reviewed the computer records that management referenced and have concluded that their findings are correct. Our investigation shows that you have violated the ‘Tax Section Workplace Policies and Expectations’.

“In regards to the charge of failure to comply with UI Tax employer audit rules, standards and practices, you asserted that your issuance of ‘assistance letters’ was within the UI Tax employer audit rules, standards and practices, but without providing the details of where this rule, standard or practice can be found, we cannot refute this claim. In any case, you admitted that you were not following all of the standard documentation procedures (Scratch Pads, EPAS).

“In regards to the charge of your failure to follow management directives, you acknowledged that you did so, citing the amount of stress you were under as a mitigating factor.

“We would have a tough case to make with any one of these charges alone. With all five charges combined and the evidence provided by your employer, as well as the investigation we've conducted on your behalf, we cannot prove to an arbitrator that you were terminated without just cause.

“Furthermore, as we have discussed, the employer has not made an issue of ‘theft of time’ as a reason for dismissal, but if this case were to go to arbitration we have no doubt the employer would raise this subject. After reviewing the computer records we have found that the employer has significant evidence to suggest that extensive ‘theft of time’ has occurred. This in and of itself is just cause for termination, and something the union would not be able to disprove.

“For all the reasons stated above, we will not be advancing this grievance to the arbitration level.”

## CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. SEIU's investigation of Griffin's discharge, its representation of Griffin in this matter, and its refusal to take the Griffin's discharge grievance to arbitration did not violate ORS 243.672(2)(a).

### Standards for Decision

ORS 243.672(2)(a) prohibits a labor organization from interfering with, restraining, or coercing any employee in or because of the exercise of rights guaranteed by the Public Employee Collective Bargaining Act (PECBA). One of a labor organization's duties under that statute is 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).

Griffin contends that the Department wrongfully discharged him and that SEIU failed to represent him properly regarding the discharge. Griffin can maintain an action against the Department for violation of the collective bargaining agreement only after proving that SEIU breached its duty to fairly represent him. *Dennis v. SEIU Local 503, OPEU and State of Oregon, Oregon State Hospital*, Case No. UP-26-05, 21 PECBR 578, 592 (2007); *Chan*, 21 PECBR at 574; *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, 418 (1993).

A labor organization may breach its duty of fair representation through deliberate decision-making or unintentional acts or omissions. *Balch v. Oregon Public Employees Union*, Case No. UP-6-96, 16 PECBR 478, 480 (1996). A union's decision not to pursue a grievance violates the duty of fair representation if the decision is arbitrary, discriminatory, or in bad faith. We have explained these standards as follows:

"A union's decision is 'arbitrary' if it lacks a rational basis. *Howard v. Western Oregon State College Federation of Teachers*, Case No. UP-80/93-90, 13 PECBR 328, 354 (1991). Its decision is 'discriminatory' if there is 'substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.' *Id.* \* \* \* A union's decision is in 'bad faith' if it intentionally acts against a member's interest, and does so

for an improper reason. *Stein v. Oregon State Police Officers' Association and Oregon State Department of State Police*, Case No. UP-41-92, 14 PECBR 73, 80 (1992).” *Chan*, 21 PECBR at 574, 575.

To prove that a union’s unintentional acts and omissions breached its duty of fair representation, a complainant must show that the union’s conduct involved more than ordinary negligence. *Ralphs*, 14 PECBR at 423. The following three conditions must be shown to prove that a union’s unintentional acts and omissions are so arbitrary that they violate the PECBA duty of fair representation:

- (1) The act or omission must show a “reckless disregard” for an individual employee’s rights.
- (2) The act or omission must “seriously prejudice” the employee.
- (3) “The policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case.” *Id.* at 424, citing *Robesky v. Qantas Empire Airways*, 573 F2d 1082, 98 LRRM 2090, 2095 (CA 9, 1978).

Griffin alleges that SEIU violated its duty of fair representation through both deliberate and negligent conduct. Griffin alleges that SEIU negligently failed to perform various activities in connection with representing him during the disciplinary and grievance process, negligently failed to understand the effects of PTSD upon his ability to assist in his representation, and deliberately chose not to arbitrate his discharge grievance.

### Negligence in Representation

In his post-hearing brief, Griffin identifies several instances of action and lack of action by SEIU that he believes demonstrate its negligence in representing him in connection with his discharge.

#### 1. Review of personnel file

Steward Schneider testified that she reviewed Griffin’s personnel file. Griffin argues that she could not have done so, because Department rules required that he give his permission first, and Schneider never sought his permission. Even assuming *arguendo* that Schneider did not review his personnel file, Griffin did not prove that any such failure was relevant to the loss of his grievance and the Union’s decision not to pursue the matter to arbitration. Thus, Griffin failed to demonstrate that SEIU’s conduct seriously prejudiced him.

## 2. Representation at unemployment compensation hearing

Griffin contends that he asked that SEIU represent him at his unemployment compensation hearing, which took place on January 22, 2009, but that SEIU failed to respond to his request. Griffin made his request the day before the hearing at a time when the person handling his case, Blankenheim, was unexpectedly out of the office for several weeks.

We conclude, however, that SEIU had no obligation to represent Griffin at his unemployment hearing. Our conclusion is based on the policies that underlie the PECBA duty of fair representation. When a group of employees choose a union to represent them, they relinquish their rights to act on their own in collective bargaining and grievance processing. The union becomes the employees' exclusive representative in these matters, and the law requires that the union fairly represent the employees. *Melendy v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. FR-3-08, 22 PECBR 975, 990 (2009). Here, the union had no exclusive right to act on Griffin's behalf at his unemployment hearing. Griffin was free to represent himself or hire a lawyer. Accordingly, we hold that SEIU had no obligation to represent Griffin at his unemployment hearing and did not breach its duty of fair representation when it failed to do so. *Id.* (Because the collective bargaining agreement gave an individual employee the right to request reclassification, the union's failure to represent an employee in her reclassification request did not violate the duty of fair representation.)

## 3. Investigation of past practice, disparate treatment, and motives of accuser

Griffin contends that SEIU failed to investigate his allegations that other Department employees in his workplace were not disciplined for using profanity, sexually harassing employees, sending unauthorized "assistance letters," and driving around looking for new employers in their service areas. He also contends that Doe sought his removal so that she could have his position. Griffin states:

"Not with standing, Mr. Griffin as a full time representative would have handled termination evidence as following:

"#1 - inappropriate behavior- reviewed [Department] Workplace Harassment document (C-118-FR-02-09) and presented it as [Department] policy 'first say NO'. Discussed with Mr. Griffin's co-workers to determine others [Doe] has overheard using similar language ([A.] uses profanity and has been report by fellow worker) but did not report. Competent union representative would do follow up on [Doe's] trip

to Mr. Griffin's home, accusation of sleeping at computer against Mr. Griffin and emails to Mr. Griffin when Mr. Griffin is under orders not to communicate. A competent union representative would have research similar incidents to determine their resolution. Mr. Griffin provided [Steward] Kay [Schneider] similar cases of Sexual Harassment ([B.] against [C.], Mr. Griffin was interviewed and supported [B.]'s accusation; [B.] against [D.], Mr. Griffin provided support for [B.]; accusations against [E.] for racial statement overheard on the telephone) for disparity of treatment as none of previously mentioned were relocated nor were their emails, calendar or telephone calls monitored or reviewed. They were never asked to provide complete medical records. From her testimony Kay did not research, interview or review these cases. As the Chief Union Steward, Kay makes the determination as to who handles the grievance and monitors the outcome. Kay has the opportunity to handle them herself or distribute them out to other stewards or union organizers. She reviews the outcome and determines if it goes before the arbitration committee. Thus Kay was aware of each grievance and its outcome. Chief Steward Kay's lack of action reflects SEIU Local 503's breaching its duty of fair representation where its actions were arbitrary, discriminatory, or performed in bad faith."

At hearing, Steward Schneider explained that she did not investigate further his claim of disparate treatment because: (1) Griffin did not suggest that Department management was aware of, and tolerated, profanity and other misconduct<sup>21</sup> in the office; (2) SEIU advocates believed that disparate treatment and past practice were difficult defenses to proven misconduct in arbitration; and (3) none of the prior events Griffin described were comparable to the severity and range of misconduct of which Griffin was accused, and did not dispute or had admitted. Thus, Griffin did not prove that the Union's failure to investigate these matters seriously prejudiced him.

Griffin also argues that SEIU failed to investigate Griffin's charge that his accuser, Doe, reported him to management in order to obtain a permanent transfer to the Hillsboro office. Even if this were true, Griffin fails to explain how Doe's motives for reporting him would excuse his misconduct, since Doe's allegations were corroborated by Griffin's files, telephone and internet records, and Griffin's own admissions. Griffin did not demonstrate that the Union's failure to investigate and present this defense was

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<sup>21</sup>We note that Griffin was accused of extended sexual conversations including graphic sexual material discussed in a loud voice, not mere profanity; the record does not show that Griffin ever claimed that such conversations were common in his office or were tolerated by the Department.

relevant to the loss of his discharge grievance or the Union's decision not to pursue the matter to arbitration. Accordingly, Griffin did not demonstrate that SEIU's actions seriously prejudiced him.

4. SEIU's alleged failures to prevent (1) Department harassment and abuse of Griffin at disciplinary meetings; (2) the Department's transfer of Griffin to an office where he had to work near a supervisor Griffin was accused of threatening; (3) hardship to Griffin of having to drive further to work; and (4) the Department's discarding of Griffin's medication

Griffin contends that SEIU failed to intervene to prevent Department managers from treating him poorly in disciplinary meetings. He argues,

"Mr. Griffin requested reports be made on his break downs in meetings and nightmares involving [the Department] and asked [Steward] Kay [Schneider] to follow thru on these requests. (harassment and verbal abuse!) Kay, knowing Mr. Griffin had PTSD from discussions with Mr. Griffin and as illustrated by her testimony to in Court, as Mr. Griffin's union representative failed to provide any union representation insuring these incidents were documented and processed."

We take this to mean that Griffin believed that Union officials should have documented and sent letters of complaint, or filed grievances, about Department managers' conduct in the investigatory or predissmissal meetings. We conclude that the Union's failure to take the actions Griffin wanted them to take does not breach its duty to fairly represent Griffin.

First, we note that at least some of the meetings were apparently tape recorded, and were therefore already documented, although transcripts or notes of those meetings have not been submitted as evidence in this case. Second, there is no evidence that any other participant in these meetings perceived Griffin to have "broken down," or that Schneider, an experienced steward, considered the managers' conduct to be noteworthy. The record in this case does not contain any credible evidence of harassment or verbal abuse at these meetings. Instead, it appears that the managers' persistent questioning unraveled Griffin's false denials about engaging in personal telephone conversations and playing computer games. Those denials were contradicted by multiple sources. Even if Department managers acted wrongfully in the meetings, and Union officials inappropriately failed to intervene, Griffin does not explain how the managers' alleged misconduct was relevant to the discipline he received for his own admitted conduct.

Griffin contends that SEIU failed to prevent his transfer from Hillsboro to Salem, where he had to work twenty feet from supervisor Jones, whom the Department contended he had threatened. Griffin argues,

“Mr. Griffin was accused of threatening his supervisors David Jones and Dennis Seibel, yet supervision and SEIU Local 503 felt there was no problem transferring Mr. Griffin from his Hillsboro Employment Office to the Salem Employment Office approximately 20 feet from David Jones. Kay’s testimony shows her lack of investigation when she states ‘I am unaware of any similar situation’ and fails to intervene in such bizarre treatment of Mr. Griffin putting him in direct contact with David Jones on consistent basis thus exasperating the situation.”

Griffin identifies no contract rights regarding transfer or supervision that the Department violated through this transfer that SEIU could have asserted on his behalf, nor does he identify any impairment of his grievance caused by the transfer or supervision. SEIU did file a grievance over the transfer, and raised the issue of hardship with the Department. SEIU’s decision not to pursue the transfer issue as a defense to Griffin’s discipline was reasonable and based on its assessment of facts that Griffin admitted were true. Accordingly, SEIU’s response to Griffin’s transfer did not demonstrate reckless disregard of Griffin’s rights in violation of its duty to fairly represent him.

Griffin argues that SEIU’s actions regarding medication Griffin left behind in his Hillsboro cubicle indicate that it failed in its duty to represent him:

“Dave Jones emailed Mr. Griffin and [Steward] Kay [Schneider] stating he was going to dispose of Mr. Griffin's medicine located in Mr. Griffin’s desk at the Hillsboro office. Kay made no attempt to stop this action when Dave Jones emailed her of this action (C-81-FR-02-09) nor explained how it could happen (numerous of Complainant's Exhibits). Chief Steward Kay's actions reflect SEIU Local 503's breaching its duty of fair representation where its actions were arbitrary, discriminatory, or performed in bad faith.

“Dave Jones requested Mr. Griffin expense (replacement of soon to be disposed of medicine) the loss as ‘out of pocket’ on an expense report (C-118-FR-02-09). Mr. Griffin did not (once again failing to follow Management directive), as he felt this activity was in violation of what was an approved expendable on Mr. Griffin's expense report. Kay provided no

union representation; recommendation, comment or direction in handling this situation. Chief Steward Kay's actions reflect SEIU Local 503's breaching its duty of fair representation where its actions were arbitrary, discriminatory, or performed in bad faith." (Emphasis in original.)

Griffin does not explain how SEIU's alleged inaction regarding Griffin's medication and reimbursement for that medication has any bearing on the loss of his termination grievance or upon SEIU's failure to advance his case to arbitration, or how failing to raise the issue as a defense would have aided him. Griffin has failed, therefore, to show how SEIU's conduct prejudiced him.

#### 5. Response to e-mails

Griffin argues that SEIU failed to respond to his e-mails and telephone calls:

"Mr. Griffin on many occasions emailed (see exhibits C-Exhibit 15-FR-002-09 in 8/08 to ending emails exhibiting total frustration for lack of representation) requesting follow up, investigations and communications; yet, SEIU Local 503 representatives **Did Not Respond!**. Mr. Griffin, per his testimony, telephoned SEIU Local 503 representatives and left messages; yet, SEIU Local 503 representatives **Did Not Respond.** C-Exhibit 84-FR-002-09 (Mr. Griffin was CC'd) Illustrates SEIU Director Leslie Frane directing Mr. Griffin's email to Heather Conroy; yet, Complainant Counsel can produce nothing showing Ms. Conroy ever attempted to email or call Mr. Griffin, because she didn't and none exist. Mr. Griffin's attempt for representation was ignored. Thus once again reflecting SEIU Local 503's representatives breaching its duty of fair representation where its actions were arbitrary, discriminatory, or performed in bad faith.

"\* \* \* \* \*

"Mr. Griffin called S.H. to find out how the Union was to represent him on his case. From this information Mr. Griffin took an aggressive approach continually calling, emailing and mailing requests for information, updates and meetings to push union for fair representation. He failed because union representatives did not respond to his litany of requests."

The record shows that SEIU officials responded to Griffin's e-mails and inquiries through the time of his predismisal meeting. It appears that Union officials did not

respond to most of Griffin's e-mails in December 2008 and January 2009. The record shows that SEIU representatives regularly communicated with Griffin about his investigatory and predissmissal meetings and related matters despite Griffin's challenging communication style. Griffin has not demonstrated how SEIU's failure to respond to his e-mails for a two-month period prejudiced him. Griffin points to no viable argument that SEIU failed to raise on his behalf because of its alleged failure to respond to his requests. Griffin did not prove that any failure by the Union to respond to him was relevant to the loss of his discharge grievance and the Union's decision not to pursue the matter to arbitration.<sup>22</sup> Griffin did not demonstrate that SEIU's failure to respond to him for a two-month period violated the Union's duty to fairly represent him.

## 6. Mental health and disability issues

Griffin argues:

"[Steward] Kay [Schneider] gave little credence to [the Department's] request for Dr. True's Psychological Evaluation of Mr. Griffin. Yet report reflects health problems that defend and explains all of Mr. Griffin's actions in regard to allegations for termination. In fact Dr. True states 'accommodations are more appropriately considered once Mr. Griffin has been treated for his PTSD condition more fully', implying Mr. Griffin is unable to perform sufficiently to return to work. Mr. Griffin and Mr. Greene,<sup>23</sup> experienced full-time Union Representatives, concur this evidence is paramount to Mr. Griffin's case. Chief Steward Kay's lack of representations reflect SEIU Local 503's breaching its duty of fair representation where its actions were arbitrary, discriminatory, or performed in bad faith.

"Mr. Griffin and Mr. Greene, as full-time union representatives, feel that the situation could have been resolved with Mr. Griffin. When Mr. Griffin filed a grievance against management, rather than comply with request to provide medical records, provided a review of his medicine.

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<sup>22</sup>See *Melendy*, 22 PECBR 975 (2009) where complainant alleged, *inter alia*, that the union breached its duty of fair representation because it failed to respond to her requests for assistance with her reclassification request. We dismissed the complaint for failure to state a cause of action under the PECBA.

<sup>23</sup>Griffin called Robert Greene, a business agent for the UFCW union, to testify regarding the actions a union official may take in representing an employee accused of misconduct.

With this information; resume showing he was an MP in the U. S. Army from 1968 - 1970 with a top secret clearance, PTSD sessions and the medicine review; they would have recommended an immediate medical leave and a psychological evaluation, which management concurred only their actions and Dr. True psychological evaluation was a year after the fact. Chief Steward Kay's actions (lack of such actions and request) reflects SEIU Local 503's breaching its duty of fair representation where its actions were arbitrary, discriminatory, or performed in bad faith." (Emphasis in original.)

We understand Griffin's argument to be that his medical conditions were both responsible for his alleged misconduct and rendered him at least temporarily unable to work. Griffin argues that SEIU, therefore, had a duty to thoroughly investigate his health conditions and raise these conditions as a defense against his discharge. Griffin also alleges that the Department's handling of his health issues demonstrates misconduct by Department officials.

Griffin never, however, pressed SEIU to offer his health conditions as a defense on his behalf at the time he was discharged. In addition, Griffin was extremely protective of his medical information, and wanted the Union to file a grievance over the Department's request for that information. These facts suggest that it is doubtful that Griffin would have allowed Union officials access to information about his health. It is also unclear that Griffin's assertion—that he could not do his job unless allowed to play games on the Internet, engage in sexually explicit phone conversations, drive around during work time, and disregard agency policies regarding his files—would be a viable defense.

Griffin did not prove that the Union's failure to thoroughly investigate and pursue a mental impairment defense adversely affected his grievance concerning his discharge. Accordingly, Griffin failed to prove that this conduct prejudiced him and was so negligent as to violate its duty to fairly represent Griffin regarding his termination.

## 7. Work rules

Griffin states:

"#4 – failure to comply with UI Tax Employer audit rules, standards and practices - 'Description of Duties' (C-Exhibit 28-FR-02-09) provides 'Independently identify and conduct audits on firms suspected of being out of compliance with State and Federal Unemployment Laws' along with

'assist employers and their representatives to resolve issues of proper classification of workers, recordkeeping, and reporting, by analyzing their business models and applying the appropriate statute, rule and precedential law' thus assistant letters were appropriate well with in Mr. Griffin's 'Description of Duties'. [Steward] Kay [Schneider] did not interview Mr. Griffin's co-workers nor reviewed Mr. Griffin's 'Description of Duties' or understand the vast independence of auditors. Chief Steward Kay's actions reflect SEIU Local 503's breaching its duty of fair representation where its actions were arbitrary, discriminatory, or performed in bad faith.

"#5-failure to follow management directives- Mr. Griffin has in the past failed to follow 'Management Directives' and was not disciplined: Do not take cash as a means of collecting on delinquent accounts; forcible convert Corporations to sole proprietors; classify medicine removed from Mr. Griffin's desk and disposed of as 'out of pocket' and report as such; etc." (Emphasis in original.)

We understand Griffin's arguments are: (1) his "assistance letters" and other work practices were authorized by his job description and SEIU could have confirmed this with his fellow auditors; and (2) both he and others in his position regularly disregarded management directives and were not disciplined. Union officials explained that they did not investigate these assertions because of Griffin's admissions at the investigatory meetings and because of other evidence of his misconduct. The Union's decision not to investigate was reasonable and based on a rational assessment of the facts. It did not, therefore, indicate a reckless disregard for Griffin's rights in breach of the Union's duty to fairly represent him. *See Martin v. Ashland School District #5; Morris, OSEA; Fields, Helman Elementary*, Case No. UP-30-01, 20 PECBR 164, 177 (2001) (because complainant admitted to improperly touching a student, a union did not breach its duty of fair representation when it failed to interview witnesses).

#### 8. Last chance agreement, resignation in lieu of termination

Griffin argues,

"Mr. Griffin and Mr. Greene, full time representatives, agree to the importance of a 'Last Chance Agreement' and Mr. Griffin has used it on numerous occasions to save a member their job! Neither [Steward] Kay [Schneider] nor Heather Blankenheim (SEIU Local 503 Organizer of three years, hereinafter referred to as Heather) used such recourse. Chief

Steward Kay and Heather's actions and statements reflect SEIU Local 503's breaching its duty of fair representation where its actions were arbitrary, discriminatory, or performed in bad faith.

"Another positive ending for the grievant to an ugly situation is the Discharge or Resignation. Mr. Griffin has used this alternative on rare occasions, as a Union Representative, because in his years of service rarely did the situation get this far. Because of the serious of the charge of sexual harassment, Mr. Griffin and Mr. Greene, as experienced union representatives, testified they would have tried to negotiate a VQ [voluntary quit] as the charge of sexual harassment (*especially when the incident was 'over hearing' a fellow workers discussion on the telephone and comments were not directed towards fellow worker*) clearly involving an accusation of moral turpitude that carries an enormous social stigma, and in some cases an employee's life is on the line, because substantiation of the misconduct can damage the person's standing in the community and destroy important personal and professional relationships. Heather in her closing testimony answering the question, why the union did not pursue either of these methods her statement was 'they [Department] wanted him (Mr. Griffin) terminated!' Heather's actions and statements reflect SEIU Local 503's breaching its duty of fair representation where its actions were arbitrary, discriminatory, or performed in bad faith." (Emphasis in original.)

We understand this to mean that Griffin believes that SEIU should have pursued a last chance agreement, or attempted to get the Department to agree to Griffin's resignation in lieu of termination. Griffin did not dispute, however, that he never asked SEIU to pursue these options, and, in fact, never wavered in his determination to contest the Department's charges through arbitration. SEIU witnesses explained that SEIU did not pursue last chance agreements because of their past experience with them, and that, for its part, the Department showed no inclination to agree to anything less than termination. SEIU demonstrated that its failure to pursue alternatives to Griffin's discharge with the Department was a reasonable decision based on consideration of the facts and the Union's past experience. As a result, this conduct did not demonstrate a reckless disregard for Griffin's rights and did not breach SEIU's duty to fairly represent him.

We conclude that Griffin failed to meet his burden to prove that SEIU processed this grievance in a negligent manner. Nor did Griffin demonstrate that SEIU's actions resulted from hostility towards him or that SEIU's predissmissal or dismissal meeting strategies involved bad motives. SEIU presented many defenses suggested by Griffin, and

chose some legal theories, strategies, and tactics in the matter that were different from those urged by Griffin. The evidence demonstrates that SEIU's decisions were made in good faith and were designed to obtain the best possible outcome for Griffin. See *Gibson-Boles v. Oregon AFSCME Council 75, and State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-46-01, 20 PECBR 483, 506 (2003). While it is true that the Union did not do everything Griffin wanted it to do regarding his case, the Union reasonably concluded that much of what Griffin wanted it to do was in fact irrelevant, if not counterproductive, to his case.

#### Intentional Conduct: Refusal to Arbitrate

Decisions about whether to file a grievance, how far to pursue it, and whether to proceed to arbitration lie at the heart of a labor organization's function, and this Board has repeatedly stated that these decisions are entitled to "substantial deference." *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98, 18 PECBR 79, 88 (1999), citing *Bjornsen, et al. v. Jackson County Sheriffs' Officers Association and Jackson County*, Case Nos. C-130/131/132/133/134/135-83, 8 PECBR 6783 (1985). See also *Dennis*, 21 PECBR at 592. We recently summarized our standards in this area as follows:

"To establish that a union breached its duty of fair representation by refusing to process a grievance, a complainant 'must present facts which, if proven, would establish that the labor organization had a hostile motive, acted dishonestly, or made its decision not to pursue the grievance without any basis.' A union is not required to file a grievance if the decision not to do so was a rational one. 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. \* \* \* [A] union has 'broad discretion' when deciding whether to file or pursue a grievance. For a union's actions to fall outside this broad discretion, they must be 'wholly 'irrational' or 'arbitrary.'" We defer to a union's decision-making to permit it to be free to act in what it perceives to be the best interests of its members, without undue fear of lawsuits from individual members. Generally, we do not substitute our judgment for that of a union that rationally decided not to process a grievance. Instead, we determine whether a union conducted a proper investigation and used a rational method of decision-making in reaching its conclusion." *Id.* at 592-593 (citations and paragraph breaks omitted).

Griffin argues that SEIU's decision not to advance his case to arbitration violated its duty to fairly represent him. In addition, Griffin contends that the Union also breached its duty of fair representation by failing to allow him to meet face-to-face with

Union officials, and failing to provide him with an arbitration screening panel, like the complainant in *Dennis*. We consider each of these allegations in turn.

Griffin did not prove that Union officials acted dishonestly, with a hostile motive, or had no basis for choosing not to pursue his grievance. The record shows that SEIU's decision not to take his grievance to arbitration "was a rational one." *Id.* at 592. The Union adequately investigated critical facts. See *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) (a union has discretion to investigate a potential grievance, so long as it undertakes a reasonable, good-faith investigation). The Union then reviewed the evidence, and discussed the matter with experienced stewards and Union professional staff. It is unnecessary to determine whether a union correctly interpreted the facts. As discussed above, we do not substitute our judgment for that of a union. If a union's decision not to pursue a potentially meritorious grievance is rational, it does not breach the union's duty of fair representation. *Dennis*, 21 PECBR at 595, citing *Ekstrom and Bedortha v. OSEA*, Case No. UP-54-93, 14 PECBR 565, 567 (1993). 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).

Griffin's own conduct created difficulties for SEIU in defending him. His inability to remember many of the events at issue damaged his credibility. Griffin further impaired his credibility when he initially denied, then subsequently admitted, that he had engaged in much of the wrongful conduct. By taking the position that he did—insisting that certain conduct was consistent with the employer's policy manual but refusing to review the manual—Griffin did little to help his case. Griffin's core justification for his conduct—that his PTSD both caused his conduct and prevented him from providing information necessary to exonerate him—may be described as unfortunate. It does not, however, demonstrate that SEIU acted unreasonably or inappropriately in choosing not to pursue an arbitration hearing at which SEIU could not persuasively contradict the evidence against Griffin.

We reject Griffin's assertion that SEIU should have allowed him to meet face-to-face with SEIU officials by using an arbitration panel to decide whether to take his grievance to arbitration. In *Dennis*, we found that SEIU's arbitration screening process allowed grievants to argue in favor of arbitration to a panel of three Union members and staff. Neither in *Dennis*, nor in any other decision, have we held that the duty of fair representation requires that labor organizations use this process. Here, the

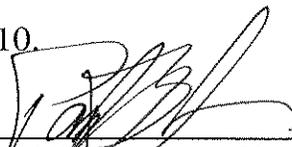
evidence shows that SEIU takes cases through the arbitration screening process only upon the recommendation of a steward or SEIU staff member. In Griffin's case, Stewards Blankenheim and Schneider were very familiar with the facts of Griffin's case and had represented Griffin in meetings with Department managers. Neither believed that Griffin's case had a reasonable chance of prevailing at arbitration, and neither recommended that the Union arbitrate the case.

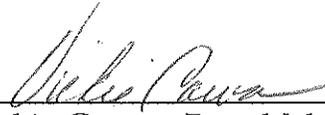
We conclude that Griffin failed to establish that SEIU breached its duty to fairly represent him. We will dismiss the complaint against SEIU. Because Griffin must prevail against SEIU in order to litigate his claim against the Department, we will dismiss that claim as well.

ORDER

The Complaint is dismissed.

DATED this 15 day of November, 2010.

  
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Paul B. Gamson, Chair

  
\_\_\_\_\_  
Vickie Cowan, Board Member

  
\_\_\_\_\_  
Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.