

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-3-08

(UNFAIR LABOR PRACTICE)

ANN E. MELENDY,)
)
 Complainant,)
)
 v.)
)
 SERVICE EMPLOYEES INTERNATIONAL)
 UNION LOCAL 503, OREGON PUBLIC)
 EMPLOYEES UNION and STATE OF)
 OREGON, DEPARTMENT OF HUMAN)
 SERVICES, OREGON STATE HOSPITAL,)
)
 Respondents.)
 _____)

DISMISSAL ORDER

Ann E. Melendy, 

Joel L. Rosenblit, Legal Counsel, Service Employees International Union Local 503,(SEIU) Oregon Public Employees Union,(OPEU), 1730 Commercial Street S.E., Salem, Oregon 97309-0159, represented Respondent Union.

Linda J. Kessel, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent, State of Oregon, Department of Human Services, Oregon State Hospital.

Ann E. Melendy (Complainant) filed an unfair labor practice complaint on October 1, 2008. The complaint alleges that Service Employees International Union Local 503, Oregon Public Employees Union (Union), violated its duty of fair representation under ORS 243.672(2)(a), and that the State of Oregon, Department of

Human Services, Oregon State Hospital (Department) breached the collective bargaining agreement in violation ORS 243.672(1)(g).¹

On October 24, 2008, the Union moved to dismiss the complaint on grounds that it was untimely filed. By letter dated October 29, 2008, the Administrative Law Judge (ALJ) informed Complainant that her complaint fails to allege a violation of the Public Employee Collective Bargaining Act (PECBA) that occurred within the applicable statute of limitations, and gave Complainant an opportunity to show cause why the complaint should not be dismissed as untimely.

On November 12, 2008, Complainant filed a submission entitled “Motion to Not Dismiss Unfair Labor Practice Complaint, Complainant’s Response to Motion to Dismiss Filed By Joel Rosenblit on 10/24/2008, and Complainant’s Amended Unfair Labor Practice Complaint and Amended Exhibits.” (Bold typeface in original.) On November 18, 2008, the Department replied to Complainant’s response and requested that the complaint be dismissed as untimely and for failing to state a claim. On November 24, 2008, the Union replied to Complainant’s response and reiterated its Motion to Dismiss the complaint, as amended.

Essentially, the amended complaint alleges that the Union violated its duty of fair representation when it failed to assist Complainant in her effort to pursue a position reclassification request, and that the Department violated the collective bargaining agreement in its review of her reclassification request.

For purposes of this Order, we assume the well-pled facts in the complaint are true. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-6-04, 20 PECBR 677, 678 (2004). We also can rely on undisputed facts we discover during our investigation of the complaint. *Upton v. Oregon Education Association/UniServ*, Case No. UP-58-06, 21 PECBR 867, 868 (2007); ORS 243.676(1)(b).

We have gleaned the following facts from the complaint, amended complaint, and exhibits submitted as part of the complaint.²

¹The original complaint alleged that the Union violated ORS 243.672(2)(g), but on November 12, 2008, Complainant advised the ALJ that (2)(g) was a typographical error and amended the complaint to allege a violation of ORS 243.672(2)(a).

² The original complaint consists of 7 pages of unorganized, non-enumerated, and non-sequential assertions, accompanied by approximately 120 pages of documents. The amended complaint consists of 24 pages of similar assertions, accompanied by approximately 174 pages of documents (some duplicating those submitted with the original complaint).

Background: 2002 to March 2008

1. During the relevant times and events, the following individuals held positions with the Union:

Roxanne Barnstead – Organizer
Joseph DiNicola – President
Leslie Frane – Executive Director
Donna Glather – Field Coordinator
Lori Randolph – Vice President
Penny VanSanten – Steward

2. During the relevant times and events, the following individuals held positions with the Department:

Nancy Frantz-Geddes – Director of Nursing
Farrell (Chip) Killen – Human Resource Analyst
Marilyn Nichols – Executive Support Specialist
Kent Rice – Classification Analyst

3. In 2002, Complainant began working as an office specialist (OS2) for the Food and Nutrition Services Department at the Oregon State Hospital, which is part of the Department of Human Services. At all relevant times, Complainant was in a bargaining unit represented by the Union.

4. In October 2006, Complainant contacted a Union steward, Penny VanSanten, and asked for help in requesting a job reclassification. Based on her job duties, Complainant believed she was entitled to be reclassified to a higher administrative specialist (AS) position.

5. The Employer and Union are parties to a collective bargaining agreement. Article 81(2) of the agreement establishes a process for employees to request that their position be reclassified. It provides in relevant part:

“(a) Reclassification upward is a change in classification of a position by raising it to a higher classification. Employees may seek reclassification to any non-supervisory or non-managerial classification in the Executive Branch(DAS) of government whether or not the classification is included in Appendix B of this Agreement * * *

“* * * * *

- “(b) Employees may request reclassification by submitting a written explanation of the request, a Human Resource Services Division Position Description Form signed by the supervisor and the employee, and all other relevant evidence for the proposed classification to the Agency Appointing Authority. Within sixty (60) days, unless otherwise mutually agreed in writing, the Agency shall review the merits of the request based on the final position description signed by the Appointing Authority. The Union shall be entitled during the sixty (60) day review period and prior to issuance of the Agency decision to meet with the Agency or to present further written arguments in support of the request. The Agency will notify the employee of its decision and provide a copy of the final position description signed by the Appointing Authority. Should the duties of the position support the proposed reclassification, the Agency shall make a determination whether to seek legislative approval for reclassification or remove selected duties within one-hundred twenty (120) days, however, this time period may be extended upon mutual agreement of the Parties.
- “(c) If approved by the Legislative Review Agency or the Department of Administrative Services, the effective date shall be the first of the month following the month in which the reclassification request was received by the Agency. The employee will receive a lump sum payment for the difference between the current salary rate, including work out-of-class pay if any and the proposed salary rate, for the time period beginning the first of the month following the month in which the reclassification request was received by the Agency to the effective date.”

6. The collective bargaining agreement includes, as an appendix, a time line for reclassification requests and an instructional flow chart for the reclassification process. Any employee may file a reclassification request without support from or other action by the Union, and there is no particular time period or deadline for filing the request.

7. On January 3, 2007, Complainant asked VanSanten for the Department's web page address which has instructions and an explanation of the reclassification process. On January 4, 2007, VanSanten provided Complainant with the web address.

8. On September 12, 2007, Complainant wrote VanSanten:

"I am waiting to receive my signed PD [position description] that has been updated. The tasks I do are that of an ASI [Administrative Specialist] and I have the ASI description from DAS [the Department of Administrative Services] I am wanting to have my position reclassified, as I have done the duties continually. I would like information from you on how to get this done and would like for you to please hold my hand during this process, because I am clueless on what I am doing. Will you please help me?"

On September 12, 2007, VanSanten responded, "Absolutely, let me know when you get the PD and we will start the process."

9. On September 28, 2007, Complainant asked VanSanten if she had "spoken with the person at SEIU re: my updated PD?"³ On the same day, VanSanten responded, "Yes I have I would like to get together with you and her to discuss the in and out of the reclass. I will get into contact with you with some available dates and times."⁴

10. On December 7, 2007, VanSanten wrote Complainant: "Hi Ann: I looked your paper work over and I need you to also give the reasons why the things you do match the other job better than the job you are currently in. Does that make sense to you if not call and I can explain it better over the phone."

³The individual referred to appears to be Roxanne Barnstead, an organizer with the Union. We find nothing in Complainant's submitted materials to explain why VanSanten needed to speak to Barnstead about reclassification.

⁴Because the e-mail communications between the participants were informal, they contain numerous typographical and grammatical errors. It would be unnecessary and distracting to consistently note the incorrect usage in the quoted material. Instead, we reproduce the e-mail communications as written, other than to insert names to provide proper identification.

11. On January 23, 2008, VanSanten wrote Complainant:

“Hi Ann I hate to be a pain in your petuit, but I need a comparison of the duties that your currently doing and how they match up with the job you are trying to re-class to. I am also in a class this Saturday because some of the language has changed in the re-class process so I am going to learn it. Other then that your specks look great. I will call you next week to set a time to get together to get this started.”

12. On March 4, 2008, VanSanten instructed Complainant how to file the documents for her request for reclassification and work-out-of classification authorization. VanSanten wrote Complainant about work-out-of classification status:

“Your Manager would have to ask for the out of class pay justifying why you are doing a position that is above your current one and that would actually help in the end, but usually they will ask why you are doing the duties and they like to put time lines on how long you would be doing it for. Each one is different so talk to your supervisor about asking for it.”

Complainant’s Request for Reclassification, March to August 2008

13. On March 5, 2008, Complainant filed a classification review request with the Department as provided for in Article 81(2) of the collective bargaining agreement. Complainant sought upward reclassification to an administrative specialist (AS2) position.

14. Apparently, the Department lost or mishandled Complainant’s original March 5, 2008, request for reclassification and work-out-of classification authorization. In April or May, Complainant provided the Department with another copy of her request.

15. In May 2008, Complainant and VanSanten exchanged a series of e-mails concerning the review process.

On May 20, Complainant wrote: “I turned over the list of duties to you and Lori Randolph [Union vice president] on February 29th, 2008. I still have not heard back from either one of you or Roxy [Barnstead, Union organizer] So, the 90 day wait is coming up shortly, is there anything else I need to do?”

On May 20, VanSanten responded: "Did he [Complainant's supervisor] update your description and place those duties in it that is what I think we were waiting for. Let me know."

On May 20, Complainant wrote back:

"Yes, that has been done. You were going to review my duties that I typed out and meet with [Barnstead] re: my reclassification. I did go to [human resources] like you suggested re: the out of class until then, they did not deny my duties, they just wanted to know where the funds were going to come from. So then I went to Nancy [Frantz-Geddes, director of nursing] and she said she would get hold of Bob [Furlow, finance, Department]. well I have not heard anything there either. So, no one denies that I do or don't do the duties I do, they just do not know where to get the funds. I don't care where they get the funds, I continue to work in a AS2 position as a OS2! When I asked [Lori Randolph] about [it] she said she was just sitting in on the meeting because she had never done this before and wanted to know how and that she would speak with you. I just know it has been almost been 90 days and I have not heard from you, [Barnstead] or [Randolph] re: my reclassification and would like to know if I am lost in the shuffle."

On May 21, VanSanten responded: "Not a problem, I have a meeting tonight with [Barnstead] and will talk to her and get a meeting set with you and her to do this Thanks"

On May 29, Complainant inquired: "[H]ave you heard anything from [Barnstead]? Today is the 90 day mark and I know you said 60 or 90 days and I would hear something Just wondering ma'am!"

On May 29, VanSanten answered: "I can't remember why I told you 60-90 days there is not time limit on a reclass I am still waiting on [the senior organizer] to set up a date to meet with us I will let you know she is on vacation this week. Sorry we are so disorganized a lot is happening lately * * *."

16. On August 8, 2008, the Department issued its classification review which concluded that Complainant's position "is most appropriately classified as an **Administrative Specialist 2.**" (Emphasis in original.) Kent Rice, a classification analyst for the Department, informed Complainant that "[t]his only represents the classification

to which the current duties best compare. Management always has the right to remove or add duties, re-align work or reclassify positions.” Complainant was also informed that she was “entitled to receive work out of class pay at the higher classification effective the first month following the date of the review request. Your work-out-of class will be effective April 1, 2008. Please consult your supervisor as to how management will proceed in your particular situation.”

17. Complainant received out-of-class pay retroactive to April 1, 2008, which is specified in Article 81(2)(c) of the collective bargaining agreement as the earliest possible date for relief based on a March 5, 2008 request for reclassification

18. Notwithstanding the Department’s decision to authorize Complainant to work out of classification, with retroactive compensation to April 1 at the AS2 level, Complainant was dissatisfied with the Department’s response to her reclassification request. She asserts in her amended complaint that the Department injured her in the following ways:

(a) Complainant asserts that “[m]y reclassification did not go smoothly and was contested by Management,” and thus “Management acted in ‘Bad Faith’ by denying my rights as per the [collective bargaining agreement] and SEIU 503 breached [*sic*] its Duty to [*sic*] Fair Representation.”

(b) Complainant asserts that she “was damaged by my employer on at least three (3) occasions when my employer mishandled; lost; failed to process in a timely manner; my Request for Reclassification and Work out of Class Authorization during the time frame of April 5th to October 1st, 2008.”

(c) Complainant asserts that “[b]etween Thursday, May 8th, and Tuesday, May 20th, 2008, my Work out of Class Authorization and DHS Classification Review Request paperwork was returned to me through inter office mail, with a post-it on it asking, ‘Where is the money going to come from?’ I subsequently resubmitted my paper work for the second time to Nancy Frantz-Geddes [director of nursing] during the May 8th to May 20th time frame.”

(d) Complainant asserts that “[o]n or before Tuesday, June 17th, 2008 * * * my employer apparently completely lost my Work out of Class Authorization and DHS Classification Review Request paperwork ”

(e) Complainant asserts that “[i]n June, just prior to Tuesday, June 17th, 2008, I contacted Farrell ‘Chip’ Killen [analyst] with Human Resources and he knew nothing of my Request for Reclassification and Work out of Class Authorization.

However, my Final Position Description had been signed on April 28th, 2008 and filed at Human Resources. My Request for Reclassification and Work out of Class Authorization had never been processed through HR! Fortunately, I had photocopies of the signed documents and faxed them to HR.”

(f) Complainant asserts that “[o]n Wednesday, June 18th, 2008, I contacted Nancy Frantz-Geddes’ assistant, Mary F. Nichols * * * to inquire where my paperwork for Request for Reclassification and Work out of Class Authorization had gone.” Nichols responded, “you guys have it.”

(g) Complainant asserts that the Department did not review her reclassification request within 60 days as she believed is required by Article 81(2)(b) of the collective bargaining agreement.

19. Notwithstanding the Department’s decision to authorize Complainant to work out of classification, with retroactive compensation to April 1 at the AS2 level, Complainant was dissatisfied with the response of the Union to her reclassification request. She asserts in her amended complaint that the Union injured her in the following ways:

(a) Complainant asserts that she “was damaged by my Union on at least four (4) occasions when they ignored my pleas for help or acted with indifference or hostility during the time frame of April 5th to October 1st, 2008.” She claims that from May 6, 2008, the Union ignored her pleas for help and demonstrated disinterest in (a) investigating her employment conditions; (b) investigating the unprofessional, negligent, bad faith and possibly unlawful processing of her request for reclassification and work out of class authorization; (c) communicating with her in any way whatsoever; and (d) representing her in any way beyond collective bargaining.

(b) Complainant asserts that on May 6, 2008, she asked Randolph whether she had heard anything from Barnstead regarding Complainant’s reclassification. Randolph stated she was not working on Complainant’s reclassification, but that VanSanten was working on it and was to be meeting with Barnstead. Complainant claims to be “shocked” because Randolph had “never once told me that she was not representing me, or that she had no desire too [*sic*] I thought my union was going to be there for me once again they were not!”

(c) On May 20, 2008, Complainant e-mailed VanSanten and inquired about VanSanten’s progress in following up on her reclassification with Barnstead. Complainant claims she “anticipated being able to sit down with Roxy [Barnstead] and discuss how my paperwork for my Request for Reclassification and Work out of Class

Authorization had been apparently mishandled from March 5th, 2008 to when my paperwork was returned to me through inter office mail, with a post-it on it asking, 'Where is the money going to come from?' sometime between May 8th and May 20th, 2008 ”

20. On August 10, 2008, Complainant wrote the Union president, Joe De Nicola, complaining about the

“lack of support I have received from my union representatives. I recently (February 2008) contacted my union representatives * * * for help in requesting a reclassification of my position from OS2 to AS2. I provided documentation supporting my interest in being reclassified to an AS2, from an OS2 providing specifics and how I meet the minimum qualifications according to the DAS job description, met, conferenced, corresponded with my union representatives and left the matter in their hands after being reassured that they would act in my behalf. After waiting 90 days * * * I recontacted my representatives and received assurances that they would file the necessary paperwork. After the 90 days had elapsed * * * and no apparent action had been taken, I contacted HR myself and requested a reclassification in June 2008. * * * I am disappointed that my paperwork was not filed by my union representatives when they said they would file it. I feel that I have been monetarily damaged by the nonperformance of my union representatives. * * * This has disheartened me toward the union, caused me grief, anxiousness, and makes me wonder if I have been discriminated against * * * because I was not a disciplinary case. I am requesting 6 years of union dues to date and would like to be considered exempt from having to pay them in lieu of not being fairly represented * * * by my union. I would also be interested in having a meeting if there are any questions. * * * I would like correspondence back from you within 30 days re: my situation with a proposed resolution to this!”

21. On August 27, 2008, Complainant and union vice-president Lori Randolph had a Group Wise Messenger e-mail conversation that implied that Randolph had been informed of the contents or substance of Complainant’s letter to DiNicola.

“[LR]: by the way, thanks for smearing me

“[LR]: really appreciate it

“[AM]: mmm I am not sure what you are talking about

“[AM]: I wrote a letter to the union because of lack of union support only

“[AM]: You accepted my paper work in February and I spoke with you again in May and then said you were not going to help out, after I thought you had been working on it. It was really frustrating to me and you never reassigned the paperwork over to anyone either

“[LR]: I told you it was penny’s [VanSanten] case, not mine. I was observing, that’s all

“[LR]: it was never mine to reassign

“* * * * *

“[AM]: Lori, you sat in on the meeting and you collected my paperwork and in May was when you said it was Penny’s

“[AM]: Duty to fair representation was breeched

“[AM]: and I do feel you and Penny did not act on my behalf

“[AM]: Why should you two have discriminated against?

“[LR]: Apparently you didn’t understand that Penny was the steward, and there is only ONE steward per case. She was mentoring me, and the fact that I had a copy of the paperwork meant nothing

“[AM]: Why take something if you are not going to do anything about it

“[LR]: You volunteered the paperwork. Penny asked me if I wanted to sit in. That doesn’t mean I was equally responsible. But you failed to understand that, because no one explained it

“[AM]: you never made that clear until may Lori

“[AM]: I will never slander your name or Penny’s name to any employees ever, I was entitled to Duty of Fair Representation and did not receive it.

“[LR]: I think you believed what you wanted to believe regarding my role. I agree (and Penny agrees) that she overextended herself, and she apologized. Actually, she knows now that it was ridiculous to take your case because your manager was willing to give you the promotion. So you never needed union representation for this.

“* * * * *

“[AM]: That is not true, and paperwork is needed and my union should have been there for me, you and Penny, that is what I pay my union dues for.

“* * * * *

“[LR]: A desk audit doesn't require the union

“[AM]: Is that Roxy, who Penny said she told and Roxy never got back with me either?

“[LR]: Penny set up a meeting with you Roxy and someone named Pete and you didn't show up

“[LR]: at SEIU HQ

“[AM]: No, she never told me that

“[AM]: she said she was meeting with Roxy and I have that in an archived e-mail

“[LR]: Roxy knew about it because she was there

“[AM]: she was meeting, not her, I and Roxy

“[AM]: I can't understand why my union would not be there for me when I asked for help over and over?

“[LR]: Unfortunately we have a shitload of things going on at all times, and we tend to prioritize disciplinary and termination matters

“[AM]: why was I discriminated against, is it just because I was not in trouble?

“[LR]: sorry but that's the reality

“[AM]: why, I pay my dues too?

“[LR]: and if you ever need representation for a disciplinary matter, trust me, we will put a reclass on the back burner to help you keep your fucking job

“[LR]: got it?

“[AM]: Lori, what about fair representation to all union members?

“[LR]: Okay, so we've got seven people in predissmissal and we're on a tight deadline, and your situation has to wait.

“[LR]: that's it

“[AM]: why?

“[LR]: not enough stewards

“[AM]: I pay my dues too

“[AM]: So, who is going to pay me monetary damages then?

“[LR]: for what?

“[AM]: for not helping me when I asked for help and that costs me money too
“[AM]: it costs me monthly wages
“[LR]: really? you lost your job?
“[AM]: No, I lost out on money
“[LR]: you got paid to sit there and work on your job description
“[LR]: sue the state for having you in the wrong classification
“[AM]: Why should I be discriminated against because I have done nothing wrong
“[LR]: union doesn’t pay your wages
“[LR]: file a grievance ann
“[AM]: No, I did my job description from home
“[AM]: our meeting only was during worktime
“[LR]: go to hr and tell them you’ve been discriminated against
“[LR]: because they’ve had you in the wrong class for x amount of time and you want back wages
“[LR]: apparently your manager agrees with you, so it shouldn’t be a problem
“[AM]: Well Lori, I need to work, I wish my union would have represented me and not discriminated against me.
“[LR]: the sad reality is that, while penny tried to get it, as chief steward she had way too much on her plate. no one intentionally discriminated against you.

22. On August 28, 2008, Complainant wrote to DiNicola complaining about the e-mail conversation she had with Randolph. On September 4, DiNicola met with Complainant. On September 18, 2008, Complainant again wrote to DiNicola:

“It has been two weeks since we had our meeting. Donna [Glather, Union field coordinator] was to meet with [Leslie] Frane [Union executive director] last week and I thought get back to me? I am wanting an update on what my union is going to do for me to make me whole? (I am very upset and I do want you to know you have been very kind and helpful).

“If I don’t receive information back via e-mail soon, I will consider that my union has let me down once again.

“I am tired of being dismissed and all talk by my union with no action! Where is my UNION? I will gladly seek and have full intent of seeking legal help if no results. I have my dates and I have established merit and have the documentation on where and why my union failed me.” (Emphasis in original)

23. On September 22, 2008, Complainant again e-mailed DiNicola, asking, “[h]ave you heard anything yet regarding me and my DFR? My frustration continues and I was hoping that you might have heard something back. Please let me know if you have any news for me.” Within an hour, DiNicola responded to Complainant:

“I phoned Donna Glather again today and also sent her an e-mail message asking for an update. No response yet.

“When I last spoke with Executive Director Frane, she told me that Donna would be the appropriate staff member to respond to your concerns. As you recall, when we met with Donna in my office, she told us that she would need to check in with Leslie Frane regarding next steps.

“As we have discussed, I do not supervise SEIU Local 503 staff. I will continue to ask Donna and Executive Director Leslie Frane to address the issues you have raised.”

DISCUSSION

This Board has reviewed the amended complaint, the accompanying documents, the parties’ arguments, and the pertinent legal authorities. For the reasons explained below, we conclude as follows: (1) allegations that the Union failed to fairly represent Complainant in the period leading up to her March 5, 2008 reclassification request are untimely; (2) allegations that the Union failed to fairly represent Complainant with respect to her reclassification request after March 5, 2008 fail to state a valid claim for relief under the PECBA; and (3) allegations that the Department failed to comply with provisions of the collective bargaining agreement fail to state a valid claim for relief under the PECBA. Accordingly, we will dismiss the complaint

Pre-March 2008 Events

ORS 243.672(3) provides that “[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice.” Complainant filed her original complaint on October 1, 2008.⁵ By statute, her complaint (and the subsequent amended complaint) is timely for unfair labor practices that occurred on or after April 4, 2008.

Complainant alleges that the Union failed to assist her in preparing and submitting a request for a position reclassification. According to Complainant, she first requested Union assistance in October 2006. She made additional requests in January and September 2007. On March 5, 2008, when the Union allegedly failed to respond to her requests for assistance, Complainant filed the reclassification request on her own. At the latest, the alleged unfair labor practice occurred on March 5 when Complainant decided to file the reclassification request on her own.⁶ The October 1 complaint is untimely as to these allegations because it was filed more than 180 days after Complainant filed her reclassification request. *Upton v. Oregon Education Association/UniServ*, 21 PECBR at 869-70; *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722, 6729 (1984). We will therefore dismiss them.

Post-March Events

As noted, Complainant filed her requests for reclassification and out-of-class pay on March 5, 2008. Although the requests themselves are beyond the statute of limitations, Complainant also alleges numerous Union actions and failures to act that occurred on or after April 4. Those allegations are timely and we will consider them. We conclude that even if Complainant proved all of the timely allegations in her amended complaint, she still would not prevail as a matter of law.

⁵Although Complainant amended her complaint about six weeks later, the amendment “relates back” to the original filing date. That is, the amended complaint retains the original October 1 filing date for statute of limitations purposes. See *Oregon Public Employees Union v. State of Oregon, Department of Administrative Services*, Case No. UP-112-93, 15 PECBR 567, 569 (1995); *Martin v. Ashland School District #5*, Case No. UP-30-01, 20 PECBR 164, 166 (2003); ORCP 23 C.

⁶In her amended complaint, Complainant concedes that on March 4, 2008, Union steward VanSanten contacted Complainant and instructed her on how to file the documents for her reclassification and out-of-classification requests.

A complainant in a duty of fair representation case must prove three elements: (1) the union had a duty to represent Complainant in the manner alleged; (2) the union breached its duty; and (3) Complainant was injured by the breach. If a complainant fails to prove any of these essential elements, we will dismiss the complaint. Here, Complainant fails at each step.

We first determine whether the union had a duty to represent Complainant in the manner she alleges. The nature of the union's duty depends on the particular circumstances of the case. *Hadley, et al. v. Multnomah County Deputy Sheriffs' Association and Multnomah County*, Case No. FR-1-08, 22 PECBR 416 (2008). "The duty of fair representation exists in at least two situations: negotiating collective bargaining agreements and processing grievances." *Bjornsen, et al. v. Jackson County Sheriff's Officers Association and Jackson County*, Case No. C-130/131/132/133/134/135-83, 8 PECBR 6783, 6792 (1985) (footnotes omitted).

There are at least two problems with the complaint in this regard. First, Complainant never told the Union what she wanted it to do after she filed her reclassification request with the Department on March 5, 2008. She was concerned that the Department might have lost or mishandled her request, but she rectified that problem by providing the Department with another copy of her reclassification request. Complainant was also concerned that the Department took more than 60 days to respond to her request. Again, it is uncertain what she wanted the Union to do. She never asked or suggested that the Union file a grievance over the purported delay.

When an employee wants the union to take some action on the employee's behalf, at a minimum, the employee must be clear about the nature of the action requested. Here, Complainant generally complained about how the Department was handling her request, but she never requested any specific action by the Union. In these circumstances, the Union had no duty to act because Complainant never made her request clear.

More fundamentally, Complainant's claim is contrary to the policies that give rise to the duty of fair representation. The duty exists primarily in regards to contract negotiation and grievance processing. In these areas, the union acts on behalf of the employees, and the employees relinquish the right to act on their own. Because the employees relinquish their rights to the union, the law places an obligation on the union to fairly represent the employees. Here, the union did not have the exclusive right to act. Article 81(2)(a) and (b) of the collective bargaining agreement expressly gives individual employees the right to request reclassification on their own. Complainant alleges that she did so, without union assistance. In these circumstances, the duty of fair representation, if it exists at all, is minimal.

Even if we assume, *arguendo*, that the Union owed Complainant a duty, we nevertheless dismiss the complaint because Complainant failed to prove that the Union breached its duty. Because the allegations concern contract rights and contract administration, we use the standards that apply to grievance cases. Under those standards, a complainant must establish that the union's actions were arbitrary, discriminatory, or in bad faith in processing or refusing to process a bargaining unit member's grievance. *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 (1991) "In such cases, we give substantial deference to the union's judgment because we believe that a union should be granted a 'wide range of reasonableness' in making judgments about employee grievances." *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). We explained that a union must be

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

See also Bjornsen v. Jackson County Sheriffs' Officers Association and Jackson County, 8 PECBR at 6795; *Dennis v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Oregon State Hospital*, Case No. UP-26-05, 21 PECBR 578, 592 (2007); *Chan v. Clackamas Community College and Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563, 564 (2006); *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98, 18 PECBR 79, 88 (1999).

In determining whether the Union fairly represented Complainant, the issue before us is not the merits of Complainant's reclassification claim, but whether the Union's actions were arbitrary, discriminatory, or in bad faith.

"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 v.*

Clackamas Community College and Clackamas Community College Association of Classified Employees, 21 PECBR at 574-575.

Accordingly, a complainant in a duty of fair representation case must allege facts which, if proven, would establish that the union's conduct was arbitrary, discriminatory, or in bad faith. *Dennis v. Service Employees International Union Local 503 Oregon Public Employees Union*, 21 PECBR at 592. See also *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98, 18 PECBR 79, 18 PECBR at 88; *Coan and Goar v. City of Portland, Bureau of Parks and Laborers International Union of North American, Municipal Employees Local 483*, Case Nos. UP-23/24/25/26-86 10 PECBR 342 (1987). A complainant must do more than make conclusory assertions that the labor organization acted in a proscribed manner. It is not enough that Complainant was upset about the Union's responses to her concerns. This Board has previously dismissed a complaint, without a hearing, where Complainant "alleged facts that would show a disagreement with the Union about how to handle his problems on the job" because such "allegations do not establish the elements necessary for a DFR complaint." *Whitacre v. Benton County and Oregon AFSCME, Council 75*, Case No. UP-47-89, 12 PECBR 55, 57 (1990).

Even though Complainant never specified what she expected the Union to do after she filed her reclassification request, she submitted materials which demonstrate that the Union deferred acting on her behalf in favor of representing seven employees who were facing dismissal or disciplinary action. A union has limited resources and can lawfully prioritize how to use them, so long as the decision is rational. We conclude that it was not irrational for the Union to give priority assistance to employees facing dismissal or discipline before helping Complainant with her reclassification request, particularly when Complainant was entitled to (and did) file the reclassification request on her own without Union involvement.

Complainant has failed to allege conduct that occurred on or after April 4 from which we can conclude that the Union's actions were arbitrary, discriminatory, or in bad faith. When a complainant fails to allege such facts, we will dismiss the complaint for failure to state a claim. *Moore v. Mount Hood Community College Classified Employees Association and Mount Hood Community College*, Case No. UP-39-99, 18 PECBR 279 (1999); *Borchadt v. Lane County and Lane County Public Works Association, Local 626*, Case No. UP-152/153-92, 14 PECBR 516 (1993); *Linville v. Lane County Public Works Association, Local 626*, Case No. UP-83-92, 13 PECBR 675 (1992); *Pannas v. Salem-Keizer Association of Classified Employees*, Case No. UP-87-92, 13 PECBR 680 (1992); *Johnson v Oregon School Employees Association*, Case No. UP-9-92, 13 PECBR 489 (1992); *Mitseff v Service Employees International Union No. 140 and Portland Public School District No. 1*, Case No. UP-21-91, 13 PECBR 43 (1991).

Even if we assume, *arguendo*, that the Union breached a duty it owed to Complainant, we nevertheless dismiss the complaint because it does not establish that Complainant was seriously injured by the breach. A complainant in a duty of fair representation case must show that the union's act or omission seriously prejudiced the rights of the injured employee. *Ralphs*, 14 PECBR at 424. Complainant has not alleged any such injury.

Here, we can consider only those injuries Complainant allegedly suffered on or after April 4, 2008. Complainant filed her requests for reclassification and out-of-class pay on March 5, so nothing the Union did or failed to do during the statutory time period prejudiced or otherwise compromised Complainant's right to file the requests. Further, the Department accepted the out-of-class pay request and paid Complainant retroactive to April 1. As a result, Complainant lost no pay during the statutory time frame due to an act or omission by the Union.

Complainant alleges that she expended time and incurred expense in preparing and pursuing her requests. Much of that alleged injury occurred more than 180 days before she filed the complaint. In any event, these incidental expenses are not the type of serious and prejudicial injuries necessary to support a fair representation claim. Complainant was ultimately able to assert her rights and receive all of the pay she believes she was owed. We conclude that none of the Union's actions or inactions during the statutory time limit materially damaged or injured Complainant, or jeopardized or prejudiced any of her rights. We will dismiss a duty of fair representation complaint where there was no showing of serious injury, damage, prejudice, or jeopardy to a complainant or to her rights. *See Houchin v. Service Employees International Union, Local 49 and Centennial School District*, Case No. UP-37-92, 14 PECBR at 407 (1993).

For the reasons set forth above, we will dismiss the complaint against the Union.⁷

⁷Complainant suggests that the Union violated the federal Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). (Amended Complaint at 24.) We lack jurisdiction to consider an alleged violation of this federal law. In addition, we note that although many provisions of the PECBA are patterned after the National Labor Relations Act, the Oregon Legislature "did *not* choose to include provisions patterned on the LMRDA." *Witherell v. Marion County Law Enforcement Association*, Case No. UP-42-94, 15 PECBR 729, 741 (1995) (emphasis in original). As a result, the "PECBA does not prescribe specific rules for the conduct of a union's internal affairs." *St. John v. Oregon School Employees Association*, Case No. UP-70-90, 12 PECBR 409, 410 (1990).

Where no violation is found against the labor organization in a duty of fair representation case, the complaint against the public employer will automatically be dismissed. *Chan v. Clackamas Community College and Clackamas Community College Association of Classified Employees*, 21 PECBR at 573-574; *Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP-31-04, 20 PECBR 967, 975 (2005); *Mengucci v. Fairview Training Center and Teamsters Local 223*, 8 PECBR at 6734. Therefore, we will dismiss the complaint against the Department.

ORDER

The complaint is dismissed.

Dated this 29th day of January 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.