

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-03-10

(UNFAIR LABOR PRACTICE)

TAMI GRISHAM-TITTLE,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
AMERICAN FEDERATION OF)	AND ORDER
STATE, COUNTY and MUNICIPAL)	
EMPLOYEES, LOCAL 1246-3,)	
)	
and)	
)	
STATE OF OREGON,)	
DEPARTMENT OF)	
ADMINISTRATIVE SERVICES,)	
)	
Respondents.)	
_____)	

None of the parties objected to a Recommended Order issued on November 30, 2010, by Administrative Law Judge (ALJ) Peter A. Rader following a hearing on September 1 and 2, 2010, in Salem, Oregon. The record closed on September 20, 2010, following receipt of the parties' post-hearing briefs.

Richard E. Slezak, P.C., Attorney at Law, Salem, Oregon, represented Complainant Tami Grisham-Tittle.

Allison Hassler, Oregon AFSCME Legal Counsel, Eugene, Oregon, represented Respondent American Federation of State, County and Municipal Employees.

Stephen D. Krohn, Senior Assistant Attorney General, State of Oregon, Department of Justice, Salem, Oregon, represented Respondent State of Oregon, Department of Administrative Services.

On March 9, 2010, Complainant Tami Grisham-Tittle (Grisham) filed this unfair labor practice complaint against the American Federation of State, County and Municipal Employees, Local 1246-3 (Union) and the State of Oregon (State), Department of Administrative Services (Department or DAS) following her dismissal from State service. She alleges the Union violated its duty of fair representation under ORS 243.672(2)(a) and (d)¹ by arbitrarily failing to investigate or evaluate her grievance, by failing to pursue her grievance to arbitration, and by failing to inform her of its decision not to pursue her grievance to arbitration.

The complaint further alleges that the Department violated ORS 243.672(1)(f) and (g) by arbitrarily and unlawfully discharging Grisham, by failing to impose progressive discipline, and by failing to respond to the grievance at step 4 of the grievance process. Grisham seeks reinstatement with back pay or, in the alternative, asks that she be allowed to pursue her grievance to arbitration at step 5 of the grievance process. The Union and Department timely filed answers in compliance with OAR 115-035-0035.

Prior to hearing, the case was bifurcated to hear the claims against the Union first.²

The issue is:

Did the Union violate ORS 243.672(2)(a) in investigating and evaluating Grisham's grievance, in failing to take the grievance to arbitration, and in failing to inform Grisham of its decision not to proceed to arbitration?

¹We have previously held that a represented employee's right to seek relief against a union is limited to claims under ORS 243.672(2)(a). *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722, 6731 (1984). Accordingly, we dismiss the allegation that the Union's actions violated ORS 243.672(2)(d).

²In our Conclusions of Law, we hold that the Union did not violate its duty to fairly represent Grisham and dismiss her claim against the Union. As explained in our Conclusions of Law, we also dismiss Grisham's claim against the Department.

RULINGS

1. The ALJ properly ruled that the Department's counsel could act as the Union's co-counsel at hearing. The Department's interest in having the Union prevail is equal to the Union's because, if it does, the case against the Department is automatically dismissed. *Mengucci*, 8 PECBR at 6734.

In a case where complainants alleged the union violated its duty to fairly represent them, we permitted the state to present the union's case, even though the union was unable to present evidence because it failed to file a timely answer. *Teeter and Keepers v. Service Employees International Union, Local 503, and State of Oregon, Oregon Health Licensing Agency*, Case No. FR-04-09, 23 PECBR 831 (2010). We explained:

“* * * [I]n a hybrid duty of fair representation case such as this, Complainant must prove her case against the Union before she can proceed against the State; if she fails to prove her claim against the Union, we will automatically dismiss the case against the State. In other words, establishing that the Union did not violate its duty of fair representation is a complete defense to the claim against the State. The State is entitled to present this defense to its own liability even if the Union does not participate.” *Id.* at 835 (citations omitted).

Our reasoning in *Teeter* is persuasive when applied to the facts here. If, in a hybrid duty of fair representation case, the State is entitled to defend itself by presenting the union's entire case-in-chief, it is certainly entitled to serve in a lesser role—that of co-counsel.

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

FINDINGS OF FACT

1. The Union is a labor organization under ORS 243.650(13), and the exclusive representative of an approximately 700-member bargaining unit of State employees. The Department is a State agency and public employer under ORS 243.650(20).

2. The Department and the Union were parties to a collective bargaining agreement (Agreement) which was in effect from July 1, 2007 through June 30, 2009. The Agreement covers the Union-represented employees working in the State Operated Community Program (SOCP). At all relevant times, Grisham was a member of the Union bargaining unit.

The Parties' Agreement

3. Article 14 of the 2007-2009 Agreement between the Union and Department provided for a 5-step grievance process which culminated in binding arbitration at step 5.

4. Section 5 of Article 14 of the Agreement entitled "GRIEVANCE PROCEDURE" provided:

"Section 5. Arbitration.

a. Any grievance, having progressed through the steps as outlined in this Agreement and remaining unresolved following Department of Administrative Services response, may be submitted by the Union to arbitration for settlement. To be valid, a request for arbitration must be in writing and mailed or delivered to the Department of Administrative Services within fifteen (15) calendar days of the receipt of the response from the Department of Administrative Services with a copy to the Employment Relations Board requesting a panel of five (5) Oregon arbitrators be sent to each side.

"Failure to file for arbitration within the specified fifteen (15) calendar day period shall constitute forfeiture of claim and the case shall be considered closed by all parties."

5. Article 15 of the Agreement entitled "DISCIPLINE AND DISCHARGE," provided:

"Section 2.

A written predissmissal notice shall be given to a regular-status employee against whom a charge is presented. Such notice shall include the known complaints, facts and charges, and a statement that the employee may be dismissed. The employee shall be afforded an opportunity to refute such charges or present mitigating circumstances to the Appointing Authority or his/her designee at a time and date set forth in the notice, which date shall not be less than seven (7) calendar days from the date the notice was received, unless an earlier time is requested by the employee and agreed to by the Program. The employee shall be permitted to have an official representative present. The Appointing Authority may suspend the employee with pay or without pay or the employee may be allowed to continue work, as specified with the predissmissal notice.

“Section 3.

a. The dismissal of a regular-status employee may be appealed by the Union to the Department of Administrative Services, Labor Relations Unit, pursuant to Article 14, Section 2, Step 4. The appeal must state the reasons for the appeal and be submitted to the Labor Relations Unit in writing within ten (10) calendar days from the effective date of the dismissal. If not resolved at that level and properly appealed to arbitration pursuant to the grievance procedure, such appeal shall be heard by the arbitrator, and the final decision and order of the arbitrator shall be made thirty (30) calendar days following the close of the hearing.”

Factual Background

6. Grisham was hired in 1998 as a full-time habilitative training technician for SOCP. SOCP, which is part of the Seniors and People with Disabilities cluster within the Department of Human Services (DHS), operates 32 group homes in eight counties for developmentally disabled adults who require significant assistance with their daily activities. During her employment at SOCP, Grisham worked as an habilitative training technician at various facilities, including Eliot, Hawthorne, Ina, and Cade group homes.

7. Section 3 of Grisham’s job description, which she last signed on August 21, 2008, identifies her general duties as providing training and/or assistance to residents with hygiene, nutrition, housekeeping, behavioral management, safety, health care, and other daily activities. Sections 4, 5, and 10 of her job description list frequent driving and maintaining a valid driver’s license as requirements of her job.

8. In March 2006, Grisham was arrested for Driving Under the Influence of Intoxicants (DUII), which resulted in a 90-day suspension of her driver’s license. As part of the DUII process, she entered a diversion program where she was diagnosed as alcoholic.

9. At the time of her 2006 arrest, Grisham was working at the Ina group home. As a result of her license suspension, she was not permitted to drive a State vehicle until her driving privileges were restored. She transferred to the night shift, which allowed her to keep her job. At that time, workers in the Ina group home were not required to drive at night. Grisham had no previous disciplinary problems.

10. By letter to Grisham dated July 13, 2006, Department of Human Resources (HR) Manager Terri Millsap acknowledged that Grisham’s license was reinstated and that she was now permitted to drive a State vehicle. The letter also states:

“Please understand that driving is an essential function of your position as a Habilitative Training Technician 2 at Ina group home. Any further convictions, which result in your inability to drive, as outlined in DHS policy 50.200.11A,³ will result in commencement of the pre-dismissal process.”

11. DHS Policy AS-080-005 provides, in relevant part:

“7. Employees and other individuals who are required to drive in order to perform their job duties must have an acceptable driving record. Examples of offenses that may render a driving record unacceptable include but are not limited to:

“a A major traffic offense in the last 24 months. This can include reckless driving, driving under the influence of intoxicants
* * *

“b. A felony revocation of driving privileges or felony or misdemeanor driver license suspension within the last 24 months.”

Facts Giving Rise to the Complaint

12. In October 2008, Grisham was working as an Habilitative Training Technician II at Cade group home, where her duties included regularly driving clients to appointments.

13. On October 18, 2008, Grisham was arrested for DUII, reckless driving, failure to carry proof of insurance, and failure to maintain a safe distance from an emergency vehicle. She was not on duty at the time, but her arrest resulted in an immediate 90-day suspension of her driver’s license.

14. The next day, Grisham contacted 26-year Union Council Representative Colleen Savage, who advised her to contact her supervisor as soon as possible. As a former Union steward, Grisham had known Savage for ten years.

³DHS safe driving policy 50.200.11A cited by Millsap was renumbered to AS-080-005 in 2003.

15. Savage's duties as a council representative include assisting members with grievances and interpersonal relations, bargaining contracts, and representing members during grievance proceedings at the Department level. The two women spoke again the following day.

16. On October 21, 2008, Grisham discussed her arrest with Terry Walker, her supervisor at Cade group home. Walker told her they would have to modify her job duties to accommodate this development. Part of the accommodation was to have another staff person drive Grisham on her clients' appointments. Driving at night was a required job function at Cade group home so Grisham could not avoid driving by switching to the night shift, as she did in the past.

17. In a letter dated October 23, 2008, HR Manager Millsap informed Grisham that she was restricted from driving either a State vehicle or her own personal vehicle while conducting State business.

18. On November 19, 2008, the Marion County Circuit Court granted Grisham's hardship application so that she could drive to and from work. She was required to have an Interlock device installed on her personal vehicle, which is a computerized breath analyzer connected to the ignition system. It prevents someone from operating a vehicle if the alcohol content in the driver's breath exceeds a preset limit.

19. On January 20, 2009, Grisham pled guilty to DUII and reckless driving and was given a choice of 180 hours of community service or 48 hours in jail. She chose jail and went back into treatment for her alcoholism. The Court suspended her driver's license until January 20, 2010, which added a year to the previous 90-day suspension, although she was permitted to drive to and from work with the Interlock device on her personal vehicle. She notified her employer of the additional one-year license suspension.

20. By letter dated April 23, 2009, HR Manager Millsap told Grisham that she was subject to dismissal for failing to maintain an acceptable driving record and for failing to meet the requirements to operate a State vehicle as stated in her position description. The letter, which set out the facts and the driving requirements of her job, advised Grisham that a pre-dismissal meeting was scheduled for May 11, 2009, to allow her to present mitigating circumstances.

21. Grisham contacted Savage and the two met on at least two occasions prior to the pre-dismissal meeting to discuss how to prepare for it. Documents they compiled included a summary of Grisham's work history, an explanation of her current status, a list of options for her employer to consider, a letter of apology, and a statement of support from her co-workers.

22. Savage accompanied Grisham to the pre-dismissal meeting at which HR Manager Millsap, Program Administrator Laura Traeger, and Union Recording Secretary Rose Darcey were present. Savage presented documents and spoke on Grisham's behalf, but the prevailing sentiment at the meeting was concern about safety issues, particularly the Interlock device required for Grisham to operate a State vehicle. Although no decision was made at the time, Grisham left the meeting with the impression that she would be fired.

23. On June 12, 2009, Grisham's supervisor Walker met her at work and handed her a letter discharging her. Grisham promptly left the premises but contacted Savage later that day to discuss appealing the decision.

24. On June 19, 2009, Savage timely filed a written appeal of Grisham's dismissal to DAS State Labor Relations Manager Tom Perry. Perry administers 37 collective bargaining agreements, including the one covering employees in the SOCP. It is Perry's job to investigate grievances that are filed with his office. If DAS does not respond to a grievance at step 4 of the process within 15 days, which Perry did not, the Union can automatically proceed to arbitration.

25. The Union has a 12-person executive board, six of whom are voting members. The executive board typically meets twice a month to conduct business. Among other things, the board can determine whether to pursue an employee's grievance to arbitration. Employees who seek Union support in their grievances are permitted to attend the meetings and present evidence in support of their requests. The board may ask questions or request additional information, but voting takes place in private.

26. The executive board's recording secretary at the time, Rose Darcey, lives next door to Grisham and drove her to the executive board meeting on September 23, 2009. Darcey was also a voting member of the board.

27. Sometime prior to the board meeting, Savage conferred by telephone with the Union's attorney and informed the board that she had done so.⁴

28. Savage, in her role as Grisham's advocate, prepared a packet of information for the board, which included the pre-dismissal letter, the documents submitted at the pre-dismissal meeting, Grisham's statement, and the termination letter. She sat next to Grisham and made a presentation at the meeting, at which all six of the board's voting members were present.

⁴Savage testified about the content of her conversation with the Union's attorney but the parties agreed, and we do too, to strike that portion of her testimony from the record.

29. After questioning, Grisham was escorted out of the room so that the board could deliberate and vote in private. Savage remained in the room during deliberations, although she did not vote.

30. In considering whether to support a union member's request for arbitration, the board typically considers seven factors, called a just cause test, in which the board applies the following advisory criteria:

- "1. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
- "2. Was the employer's rule or managerial order reasonably related to the orderly, efficient and safe operation of the employer's business?
- "3. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
- "4. Was the employer's investigation conducted fairly and objectively?
- "5. At the investigation did the judge obtain substantial evidence or proof that the employee was guilty as charged?
- "6. Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?
- "7. Was the degree [of] discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer?"

31. In the executive board's discussions about Grisham's case, a question arose as to why the Department waited for more than seven months before terminating her, during which time she worked without incident. The board concluded the State acted reasonably by waiting until after Grisham's January 2009 sentencing, which is when it learned of the additional one-year suspension, before initiating pre-dismissal proceedings.

32. A second issue arose concerning past discharge cases. Savage could only find one case in which the Department did not discharge an employee with two DUII convictions; that incident occurred in the 1990s and involved a management-level

employee whose DUII convictions were seven to eight years apart. The board concluded that this one exception did not establish a pattern or practice. In addition, Savage was also aware that HR Manager Millsap did not act alone in her decision making but would have consulted with Grisham's program director before reaching a decision.

33. The board considered the seven factors in the just cause test and voted unanimously not to file for arbitration on Grisham's behalf at step 5 of the grievance process. Board member Andy Battan brought Grisham back into the room and told Grisham about the board's vote.⁵ Upset by the board's decision, Grisham spoke with Darcey and Savage in the days following the meeting. Savage considered the grievance as closed, however.

34. There was no evidence that the board had any animosity or ill-feelings towards Grisham.

35. Despite the board's denial, it asked Savage to contact Grisham's managers to see if there were any circumstances under which she might be rehired. Sometime between September 23 and October 23, 2009, Savage met with SOCP Program Director Deanna Bathke and HR Manager Millsap. They told Savage that SOCP was unwilling to rehire Grisham because, for reasons of client safety, it would not permit an Interlock device to be installed on a State vehicle.

36. By letter dated October 23, 2009, Savage told Grisham that SOCP would not rehire her, but that she might want to try finding work at a local casino that was hiring and providing bus service to its employees.

37. By e-mail dated December 9, 2009, Savage told DAS Labor Relations Manager Perry that AFSCME was withdrawing Grisham's grievance.

⁵Grisham's testimony showed no signs of deception, but her memory of dates, conversations, and events was so inconsistent that her testimony, at least on issues material to this complaint, was not reliable or credible. Her demeanor demonstrated confusion over questions regarding the sequence of events, she could not recall conversations or receiving correspondence, and she became flustered when her testimony was contradicted by her own previous testimony. She initially testified that she did not meet Savage prior to the pre-dismissal meeting and went into the meeting "cold." When questioned about her resume, one of the documents she presented at the predismisal meeting, Grisham remembered that she did speak and meet with Savage, a statement Savage confirmed. Although the complaint alleged that Grisham was never informed of the executive board's decision not to pursue her grievance to arbitration, at hearing she testified that board member Andy Battan brought her back into the room to tell her of the board's decision at its September 23, 2009 meeting. In contrast, the testimony of Savage regarding the meeting was clear, detailed, linear, and consistent with the available written evidence. We therefore rely on Savage's testimony where it conflicts with Grisham's.

38. From Grisham's arrest through the grievance process, Savage had some contact with Grisham in person, by telephone, e-mail, or written correspondence, on average every two weeks, although some of those contacts may have involved another grievance in which Savage also represented Grisham.

CONCLUSIONS OF LAW

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

2. The Union did not violate ORS 243.672(2)(a) in its investigation and evaluation of Grisham's grievance, by its refusal to take the grievance to arbitration or by its failure to tell Grisham that it would not take the grievance to arbitration.

DISCUSSION

ORS 243.672(2)(a) makes it an unfair labor practice for a labor organization to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782." Under this statute, a labor organization is required to fairly represent all employees in a bargaining unit for which it is the exclusive representative. *Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 894 (2000). This Board accords a labor organization substantial discretion in deciding whether to arbitrate, or even to file, a grievance. *Conger v. Jackson County and Oregon Public Employees Union*, 18 PECBR 79, 88 (1999). Furthermore, a union has the discretion to withdraw a grievance based on its judgment that there is insufficient evidence to support the claim. *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, even if wrong, is not a breach of its duty of fair representation as long as the union's decision was based on "good faith and honest judgment." *Coan and Goar v. City of Portland, Bureau of Parks*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342, 353, *recons* 10 PECBR 433 (1987) *AWOP*, 93 Or App 780, 764 P2d 625 (1988). A union violates the duty of fair representation only when its refusal to process or pursue a grievance is "arbitrary, discriminatory or in bad faith." *Goar*, 10 PECBR at 351 (citing *Vaca v. Sipes*, 386 US 171, 64 LRRM 2369 (1967)).

Grisham does not assert that the Union acted discriminatorily or in bad faith, so we examine the Union's processing of her grievance to determine if the Union's conduct was arbitrary. An arbitrary decision by a union is one that lacks a rational basis. *Howard v. Western Oregon State College Federation of Teachers, Local 2278, OFT*, Case No. UP-80/93-90, 13 PECBR 328, 354 (1991).

In *Dennis v. SEIU Local 503, OPEU and State of Oregon, Oregon State Hospital*, Case No. UP-26-05, 21 PECBR 578, 592-593 (2007), we explained:

“A union’s good-faith decision not to pursue a potentially meritorious grievance, even if mistaken, is not a breach of its duty of fair representation. *Chan*, 21 PECBR at 576 (citing cases). [*Chan v. Clackamas Community College and Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563 (2006), *recons den*, 21 PECBR 597 (2007).] In addition, ‘[t]he duty of fair representation does not require a union to represent a bargaining unit member in the same manner as an attorney represents a client.’ *Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 898 (2000). This discretion extends to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken. *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20, and Metropolitan Exposition Recreation Commission*, Case Nos. UP-15/16-92, 15 PECBR 85, 106 (1994), *AWOP*, 134 Or App 414, 894 P2d 1267 (1995).

“* * * * *

“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. *Ralphs*, 14 PECBR at 422 [*Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO*, Case Nos. UP-68/69-91, 14 PECBR 409 (1993)]. 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. *Putvinskas*, 18 PECBR at 895.”

Grisham alleges that the Union violated its duty to fairly represent her by inadequately representing her during the grievance procedure, by failing to thoroughly investigate and evaluate her grievance, by deciding not to take her grievance to arbitration, and by failing to tell her about this decision. We analyze each of these contentions in turn.

Grisham bases her assertion that the Union did not adequately represent her during the grievance process on her claims that she had only sporadic contact with Savage, that the Union did not prepare her for the pre-dismissal meeting, and that the Union provided little explanation of her grievance rights after her dismissal. The

evidence does not support these contentions. Savage had some form of contact with Grisham approximately every two weeks throughout the grievance process. Savage met with her twice prior to the pre-dismissal meeting to prepare the materials and acted as her representative at that meeting. Savage timely appealed Grisham's dismissal at step 4 of the grievance process, she scheduled the case on the executive board's calendar, she researched prior employer decisions regarding dismissals for multiple DUIIs, she consulted with the Union's counsel and she appeared as Grisham's representative at the executive board meeting. As discussed above, the evidence (which includes Grisham's testimony) demonstrates that the executive board told Grisham immediately after its vote that it would not take her grievance to arbitration. In addition, Savage talked with Grisham the next day regarding the board's vote.

At the board's request, Savage also met with Grisham's employer to find out if there were any circumstances under which Grisham might be rehired. On October 23, 2009, Savage wrote to Grisham informing her that she could not persuade her supervisors to rehire her due to concerns about client safety and the need for an Interlock device to be installed on a State vehicle. Based on these facts, Grisham did not meet her burden to show that the Union acted arbitrarily or unreasonably in investigating Grisham's grievance or in representing her.

Grisham next asserts that the Union arbitrarily failed to evaluate her case as to the likelihood of prevailing at arbitration. We disagree. The Union's executive board evaluated her case by using the same seven factors it typically uses to assess all grievances. In applying those factors, it reasonably concluded that Grisham had forewarning in 2006 of the consequences of a second DUII conviction; that the orderly, efficient, and safe operation of her employer's business required her to maintain a valid driver's license; that her employer had verified her conviction and conducted a fair and objective investigation with substantial evidence of the violations; that there was only one case in Savage's 26 years in which an employee with two DUII convictions was not dismissed; and that the seriousness of the offense, along with the safety issues it posed, justified discharge. Based on these factors, the Union reasonably concluded that Grisham was unlikely to prevail if the Union took her grievance to arbitration. The Union's decision was rational and not arbitrary.

Finally, Grisham argues that the September 23, 2009 executive board meeting was a "bad faith attempt to cover up" the Union's failure to comply with the grievance timelines. According to Grisham, the Union scheduled the executive board meeting to consider her grievance after the contractual deadline for requesting arbitration. Grisham contends that the executive board's September 23 meeting was, therefore, a meaningless "sham hearing" because it occurred when it was too late to request arbitration.

As discussed above, the Union's executive board made a considered and thorough evaluation of the facts surrounding Grisham's dismissal at its September 23 meeting.

Savage adequately investigated the grievance and competently represented Grisham at the board's meeting. The executive board's decision not to take Grisham's grievance to arbitration was based on its good-faith judgment that the Department was justified in discharging Grisham and that the Union had little chance of success in arbitration. There is no evidence that the executive board ever considered the timeliness of a demand for arbitration when it evaluated Grisham's grievance.⁶ Accordingly, the evidence does not support Grisham's contention that the October 23 executive board meeting was a "sham hearing," held to disguise the Union's failure to comply with grievance procedure timelines.

The Union's actions throughout Grisham's grievance process indicate that it undertook reasonable steps to advise and represent Grisham, to fairly investigate and evaluate her grievance, and to assist her after her discharge. Grisham failed to establish that the Union acted arbitrarily in violation of its duty to fairly represent her under ORS 243.672(2)(a) and we dismiss the complaint against the Union.

When we hold that the union did not violate subsection (2)(a), we dismiss the complaint against the employer. *Mengucci*, 8 PECBR at 6734; *Tancredi*, 20 PECBR at 975-77. Therefore, we also dismiss the complaint against the Department.

ORDER

The complaint is dismissed.

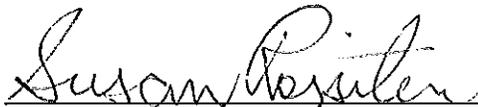
SIGNED AND ISSUED this 31 day of March 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

⁶This issue was not properly before the executive board. Whether a request for arbitration is timely is a matter for the arbitrator, not the union or employer, to decide. *Teamsters Local 670 v. City of Ontario*, Case No. UP-40-08, 23 PECBR 210, 217 (2009) (procedural questions, such as timeliness, are left to the arbitrator).