

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-04-09

(UNFAIR LABOR PRACTICE)

KATHRYN TEETER and)	
DIXIE KEEPERS,)	
)	
Complainants,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
SERVICE EMPLOYEES)	AND ORDER
INTERNATIONAL UNION,)	
LOCAL 503, and STATE OF)	
OREGON, OREGON)	
HEALTH LICENSING AGENCY,)	
)	
Respondents.)	
_____)	

None of the parties objected to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on May 18, 2010, following a hearing conducted on January 6, 2010, in Salem, Oregon. The hearing closed on February 9, 2010, upon receipt of the parties' post-hearing briefs.

Roger Hennagin, Attorney at Law, Roger Hennagin PC, Lake Oswego, Oregon, who represented Complainant Teeter, made no appearance at the hearing.

Robert L. Sepp, Attorney at Law, Roger Hennagin PC, Lake Oswego, Oregon, represented Complainant Keepers.

Marc A. Stefan, Supervising Attorney, Service Employees International Union, Local 503, Salem, Oregon, represented Respondent Union.

Donna Sandoval Bennett, Senior Assistant Attorney General, State of Oregon, Department of Justice, Salem, Oregon, represented Respondent State.

On July 24, 2009, Complainants Kathryn Teeter and Dixie Keepers filed an unfair labor practice complaint against the Service Employees International Union Local 503 (Union or SEIU) and the State of Oregon, Oregon Health Licensing Agency (State or OHLA). The complaint, as amended on September 30, 2009, alleges that the State violated ORS 243.672(1)(g) by arbitrarily and unlawfully discharging the Complainants from their positions with OHLA for political reasons. The complaint further alleges that the Union violated ORS 243.672(2)(a) and (d) for unfairly refusing and failing to assist or advise Complainant Teeter or file a grievance on her behalf in regard to her discharge; and for unfairly refusing to assist or advise Complainant Keepers or file grievances on her behalf in regard to her duty-station-at-home status or her subsequent discharge.

The State filed a timely answer. The Union failed to file an answer. On December 4, 2009, the ALJ notified the Union that, pursuant to OAR 115-035-0035, it would not be allowed to present evidence but would be allowed to present legal argument.

As explained in Ruling 1 below, the ALJ properly dismissed Teeter's claims without a hearing because she was not working in a position represented by SEIU at the time she was terminated. SEIU therefore had no duty to represent her.

Keeper's claims were bifurcated to address the allegations against the Union first. *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722 (1984). The issue is:

Did SEIU violate ORS 243.672(2)(a) or (2)(d) by failing to provide advice to Keepers or to file a grievance on her behalf regarding her termination and the events that led up to it?

RULINGS

1. We adopt the ALJ's pre-hearing ruling dismissing Complainant Teeter's claims because Teeter was not in an SEIU-represented position at the time of the events upon which the complaint is based. For purposes of dismissing a complaint prior to a hearing, we assume that 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).

The complaint does not allege that Teeter was an SEIU-represented employee at the time of her termination. The complaint merely alleges that Teeter was in a position represented by SEIU in 2007 and 2008. During the investigation of the complaint, the ALJ was informed that at the time of the alleged events, Teeter was working in a management service position. On September 3, 2009, the ALJ notified Complainant Teeter that she proposed to dismiss Teeter's portion of the complaint on the basis that as a management service employee, Teeter was not entitled to representation by SEIU. The ALJ gave Teeter until September 18 to amend the complaint to include an allegation that she was in an SEIU-represented position at the time of the events giving rise to this complaint. After Teeter failed to file an amended complaint or otherwise respond, the ALJ properly dismissed the portions of the complaint related to Teeter's claims.

Under the Public Employee Collective Bargaining Act (PECBA), a labor organization's duty to represent an individual only exists if "it is the exclusive representative of a bargaining unit and it is in a position to assert PECBA rights on behalf of an individual *who is in that bargaining unit.*" *Reidy v. Oregon Public Employees Union*, Case No. UP-73-87, 10 PECBR 180, 182 (1987) (emphasis added). Since Teeter was not a member of a bargaining unit represented by the Union at the time she was terminated, the Union had no duty to represent Teeter and could not have violated ORS 243.672(2)(a) or (d). Where a complainant is not successful in proving its duty of fair representation claim against the union, the complaint against the employer will be automatically dismissed. *Mengucci*, 8 PECBR at 6734.¹

2. The ALJ correctly ruled that the Union did not show good cause for failing to file an answer, was not entitled to present evidence at the hearing, and was limited to presenting legal arguments. OAR 115-35-0035(3).

Pursuant to ORS 243.676 and OAR 115-035-0030, the Union was formally served with the complaint by mail on October 27, 2009. OAR 115-035-0035(1) provides that the "respondent shall have 14 days from date of service of the complaint in which to file an answer." Consistent with these rules, the notice of hearing stated: "Respondents have 14 calendar days from the date of mailing or personal service of this complaint within which to file an answer with this Board." (Bold typeface in original.) This Board's files indicate that the Union received the notice of hearing by certified mail on October 28, 2009.

¹Hereinafter, the term "Complainant" will refer solely to Keepers.

On November 18, 2009, the ALJ notified the parties that the Union failed to file an answer and directed the Union to show good cause why sanctions should not be imposed under OAR 115-035-0035(3), which provides that “[i]f the respondent fails to file a timely answer, absent a showing of good cause, it will not be allowed to present evidence at the hearing, and will be restricted to making legal arguments.” The Union did not respond to the ALJ’s request and accordingly did not establish good cause for failing to file an answer. As a consequence, the ALJ correctly prohibited the Union from presenting evidence at the hearing.

3. In an October 27, 2009 pre-hearing letter, the ALJ directed the parties to exchange exhibits and witness lists seven days prior to the hearing. Complainant Keepers sent her exhibits and witness list to the State, but failed to send them to the Union. At the hearing, the Union objected to the testimony of Complainant’s witness, Susan Wilson, on this basis. The State also objected to the testimony of this witness as irrelevant. When the ALJ asked Complainant to show good cause for failing to send its witness list to the Union, the Complainant stated that she had assumed the Union was no longer participating in these proceedings because it failed to file an answer, respond to the ALJ’s request to show good cause, or make a timely response to a subpoena issued to it by Complainant.

The ALJ properly allowed the witness to testify. The purposes of OAR 115-010-0068, under which the ALJ had directed the parties to exchange witness lists, are “to streamline proceedings, eliminate undue surprise, and facilitate discussion of a possible settlement.” *AFSCME Council 75, Local 3694, v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 63 (2007), *aff’d*, 234 Or App 553 (2010). Since the Union was not entitled to present evidence or cross-examine witnesses and the parties choose to file post-hearing briefs, the proceedings were not unduly prolonged, and any undue surprise to the Union did not prejudice the presentation of its case. We also find that Wilson’s testimony, which addressed the status of Keepers’ limited-duration appointment at the time of her dismissal, is relevant, and we will consider it.

4. Complainant objected to the State’s presentation of witnesses and evidence during the hearing since the issue was limited to whether the Union violated the PECBA. Complainant argued that allowing the State to present witnesses and evidence in support of the Union’s case nullified the effect of the ALJ’s ruling that the Union was not entitled to present evidence. The Complainant pointed out that all of the witnesses called by the State were employees of the Union.

The ALJ properly allowed the State to present its case. Although the issues against the Union and the State were bifurcated for hearing purposes, the State is still a party

to this proceeding. As a party, the State is entitled to participate and present evidence in the hearing. *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20*, Case No. UP-15/16-92, 15 PECBR 85, 87-88 (1994).

In addition, in 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. *Wing Kai Chan v. Bill Leach and Karen Stubblefield, Clackamas Community College; and Diana Mckeever and Colline Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563, 573-574 (2006), *recons den* 21 PECBR 597 (2007). 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.

5. Although the Respondents stipulated to the admission of Exhibits C-12 and C-13 during the pre-hearing conference, these exhibits were not formally received into the hearing record. Exhibits C-12 and C-13 are now received.

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

FINDINGS OF FACT

1. The Union is the exclusive representative of a bargaining unit of State employees which includes classified and unclassified employees working at OHLA. OHLA is an agency of the State, a public employer.

SEIU/State Collective Bargaining Agreement

2. The Union and the State are parties to a collective bargaining agreement which was executed on September 1, 2007, and was effective through June 30, 2009 (SEIU/State Agreement). The SEIU/State Agreement covers SEIU-represented employees at OHLA.

3. Article 20 of the SEIU/State Agreement, entitled "INVESTIGATIONS, DISCIPLINE, AND DISCHARGE," provides in part:

"Section 2. Suspension With Pay or Duty Stationed at Home Pending an Investigation by the Agency's Human Resource Office. The employee shall be notified in writing of the initial reason for the action within seven (7) calendar days of the effective date of the action. The

Agency will conduct the initial interview with the employee within thirty (30) calendar days of notification of the action. The investigation shall be completed within one-hundred twenty (120) calendar days. However, if the investigation is not concluded within the timeline, the Agency will notify DAS and the Union of the specific reason(s) and the amount of additional time needed which shall be no more than thirty (30) days at a time.”

4. Article 21 of the SEIU/State Agreement, which establishes the contractual grievance process, defines grievances “as acts, omissions, applications, or interpretations alleged to be violations of the terms or conditions of this Agreement.” Under the grievance process, an employee or the Union may file a grievance within 30 days of their knowledge of the basis of a grievance. The last step in the grievance process for most grievances is binding arbitration. The article states that the grievance process is the “sole and exclusive method of resolving grievances, except for the following Articles.” The list of excluded articles includes “Article 22--No Discrimination.”

5. Article 22 of the SEIU/State Agreement, entitled “NO DISCRIMINATION,” provides in part that:

“Section 1. It is the policy of the Employer and the Union not to engage in unlawful discrimination against any employee because of race, color, marital status, religion, sex, national origin, age, mental or physical disability, or any other protected class under State or Federal law. * * * To this end, the Parties further agree to apply the provisions of this Agreement equally to all employees in the bargaining unit without regard to their status in any of the categories specified above and to support application of federal and state laws and regulations, where applicable.”

Under Article 22, Sections 3 and 4, grievances alleging unlawful discrimination on the basis of gender identity, sexual harassment, or sexual orientation may be appealed to the Agency Head and Department of Administrative Services (DAS), and then may be arbitrated. Article 22, Section 4 further provides that grievances alleging all other forms of discrimination listed in Section 1, and which are unsuccessfully appealed to the Agency Head, “may be submitted by the Union or the grievant to the Bureau of Labor and Industries or the EEOC for resolution, if not already so filed.” Such grievances “do not proceed to arbitration.” *In the Matter of the Petition For Declaratory Ruling Filed by the State of Oregon, Department of Administrative Services*, Case No. DR-03-08, 22 PECBR 867, 868 (2008).²

²We take official notice of the findings of fact and conclusions of law in *In the Matter of the Petition For Declaratory Ruling Filed by the State of Oregon, Department of Administrative Services*, Case No. DR-03-08, 22 PECBR 867(2008).

6. Under Article 51 of the SEIU/State Agreement, the State is entitled to hire employees into limited-duration positions for 1) special studies or projects; or 2) short-term or transitional workload purposes. The State is required to notify such employees that their limited-duration position could end at any time. These appointments generally last a period of less than two years and the employees are not entitled to layoff rights. Employees hired for special studies or projects are entitled to be placed on the agency's recall list after working for two years. Employees hired for workload purposes are entitled to layoff rights after working in the position for 17 months. In addition, a regular-status employee who is assigned to a limited-duration position is entitled to layoff rights. Except for these limitations, employees in limited-duration positions are entitled to the other rights and benefits provided under the SEIU/State Agreement.

Facts Leading to the Complaint

7. Dixie Keepers worked in a limited-duration position with the State Land Conservation and Development Department (LCDD) from June 30, 2006 to October 19, 2007. That position was represented by AFSCME. On October 22, 2007, Keepers began work at OHLA in a limited-duration position as an operations and policy analyst 2. On September 1, 2008, OHLA reassigned Keepers to work out of class as a principal executive manager C. Throughout her employment at OHLA, Keepers was in a position represented by SEIU.

8. During her employment at OHLA, Keepers' job duties changed three times. Prior to the termination of her position, Keepers' primary function was to work with the Sex Offender Treatment Board. Keeper prepared the policies and procedures for the Board; acted as the lead over the Board's administrative assistants during their preparations for weekly Board meetings; oversaw compliance with public meeting laws and rules; ensured accuracy of meeting minutes; received incoming calls regarding the new sex offender treatment program; and was the first contact for applicants for certification under that program.

9. Keepers is the sister of Richard McNew, who was the OHLA administrative services director during Keepers' employment at the agency.

10. Sometime prior to July 11, 2008, SEIU Internal Organizer Bobbie Muncrief became concerned that OHLA employees were afraid of some of their managers. On July 11, 2008, Muncrief sent some OHLA bargaining unit employees an invitation to an August 9 meeting. Muncrief did not send the invitation to Keepers. At the time she issued the invitation, Muncrief did not know that Keepers was McNew's sister.

The invitation stated:

“We would like to invite you to a meeting offsite so we can talk openly without fear of being overheard or having Richard McNew walk in on us. Clearly, this constitutes an Unfair Labor Practice.

“I have heard some outrageous remarks made by Richard and it’s time we come up with a plan to deal with what is going on in your Agency. It really sounds out of control.

“It’s time to quit living in fear. It’s time to hold the Agency to the Union’s collective Bargaining agreement.

“I’m hearing that some folks are being required to take huge salary decreases. Folks are being intimidated and told not to apply for other jobs. All of this is a violation of your rights. We have to stop this now and we must do this together.

“Not everyone is getting this invitation. If you have any questions or concerns please feel free to contact me. My contact information is listed below.

“* * * * *

“AGENDA:

- “1. Tell our stories
- “2. Make a plan to deal with a bully boss
- “3. Talk about what supporting each other looks like[.]”

11. Keepers, who became aware of the invitation after it was issued, complained about it to the Union. After Keepers met with Donna Glathar, Muncrief’s supervisor, Glathar told Muncrief that the invitation was inappropriate and directed her to talk with the Union’s OHLA local leaders. Muncrief subsequently cancelled the August 9 meeting and held a meeting with OHLA employees at which she apologized for the invitation. Keepers attended this meeting.

12. On January 31, 2009, Tina McCallister, an OHLA local Union leader and steward, held a meeting with OHLA employees at the Union’s office. Keepers was not invited to the meeting. Union Political Organizer Melissa Unger invited Claudia Black, a Governor’s office representative, and Diana Foster, DAS Human Resources Director, to the meeting. Muncrief and Union Organizer Joseph Schaeffer also attended this

meeting. During the meeting, OHLA employees raised concerns about their working conditions. They complained that some of their OHLA managers were bully bosses who frequently moved their work cubicles and took other actions against them. Some complaints were directed at Keepers' brother, McNew.

13. Keepers arrived at work early on Monday, February 2. She stepped out of her office at approximately 7:30 a.m., and in the hallway, she observed SEIU Organizer Muncrief, Union Steward McCallister, and another person who she later learned was Department of Justice (DOJ) Investigator Carlos Revelez. On returning to her office, Keepers observed DOJ Attorney Donna Sandoval Bennett, Muncrief, McCallister, and two State police officers in the office of the regulatory manager. When Keepers entered her office, she observed that OHLA Executive Director Susan Wilson was leaving and asked where Wilson was going. Wilson told Keepers that she could not talk about it and left the office. After this, Keepers observed Bennett, Governor's Office Representative Black, and the two State police officers enter the policy division manager's office, after which that manager also left.

14. Bennett, Black, and the two State police officers then approached Keepers. Bennett introduced herself and asked Keepers if she was Richard McNew's sister. When Keepers confirmed that she was, Bennett told Keepers that for Keepers' protection, she was being placed on duty-station-at-home status. Keepers was told to get her purse and coat and go home. When Keepers asked if she was in trouble, Bennett said no, that it was not about Keepers, but her association with McNew. Keepers was escorted off of the OHLA premises by the two officers. Neither Muncrief nor McCallister were present when Keepers was notified that she was to be duty stationed at home.

At some point that day, Keepers was provided a written notice of the conditions of her duty station, including a requirement to be at home from 8:00 a.m. to 5:00 p.m. with a one-hour lunch. She was not to have any contact with employees at the agency or be in the OHLA parking lot, and she was not to be on State property unless she had a business need. Bennett called Keepers later that afternoon to confirm these conditions of her leave.

15. That same day, Marsha Hunter, another OHLA employee represented by the Union, was also placed on duty-station-at-home status. Hunter contacted the Union and requested assistance for herself and Keepers.

16. Because of Keepers' prior complaint against Muncrief, Glathar assigned SEIU Organizer Schaeffer to meet with Hunter and Keepers. Keepers, Hunter, and

Schaeffer met on February 3 or 4, 2009.³ During the meeting, Schaeffer was aware that Keepers was McNew's sister. Schaeffer told Keepers and Hunter about the meeting he attended the prior weekend at which significant issues had been raised by OHLA employees about their managers, including complaints that McNew was a bully boss. These employee complaints resulted in the investigation at OHLA.

Schaeffer reviewed Hunter's and Keepers' duty-station notices and determined that OHLA had failed to provide a reason for their status. Schaeffer told Hunter and Keepers that this violated the SEIU/State Agreement, but advised them against filing a grievance because he believed it was clear they had been duty stationed at home due to the agency's investigation. Schaeffer said he would determine why they had been duty stationed at home, but explained that while the Union could grieve the failure to include a reason under the contract, it did not have the ability to grieve the fact that they were duty stationed at home. Schaeffer did not see any other contractual basis under which he could file a grievance.

Schaeffer recommended that Hunter and Keepers "lay low, keep your head down, let's see if this blows over you without, without involvement." He said if this was successful, they could then go back to work with a clean record, which would not even reflect the reason they had been placed on leave. Schaeffer and Keepers discussed the fact that since Keepers was in a limited-duration position, she had no expectation of continuing employment, and her job could end at any time.

17. Schaeffer and Glathar believed that the Union had a limited ability to challenge the State's right to place employees on duty-station status as long as the State followed the procedures provided under the SEIU/State Agreement. As a result, the Union had filed very few grievances over employees being duty stationed at home in the past. Schaeffer recalled that he had previously filed a grievance when an employee lost overtime pay while duty stationed at home. Keepers had not worked overtime in her limited-duration position. The Union had also objected to duty-station restrictions in the past that limited an employee's right to talk to the Union.

18. On February 5, 2009, Keepers telephoned Schaeffer and complained about the conditions under which she was duty stationed at home. She said she felt like she was under house arrest. Schaeffer again advised Keepers to lay low and hope that things

³Schaeffer testified that according to his calendar, the meeting with Keepers and Hunter occurred on February 3. However, Hunter and Keepers both testified that the meeting occurred on February 4. Keepers testified that it was originally scheduled for February 3, but changed to February 4. Resolution of this conflict is not critical to our decision.

would blow over. Schaeffer did not offer to look into Keepers' duty-station restrictions.

19. While duty stationed at home, Keepers received the salary and benefits to which she was entitled under the SEIU/State Agreement.

20. On February 9, 2009, OHLA sent Keepers a letter, which stated in part:

"Last Monday, February 2, you were placed on Duty Station at Home status while a workplace assessment is done within the agency. As you were told at that time, this assessment does not reflect on you or your workplace performance. To be more specific, please receive this letter as notice that your at-home status is in keeping with Article 9, Sections (d) and (g) of the collective bargaining agreement."⁴

21. On March 10, 2009, Keepers was directed to attend a meeting with OHLA Interim Human Resources (HR) Manager Cynthia Forest and DOJ Attorney Bennett. During the meeting, Forest and Bennett notified Keepers that her position with OHLA was being terminated effective March 15, 2009, because it was no longer needed.

22. That day, Muncrief sent Schaeffer an e-mail which stated:

"Joe, I just received a call from Cindy Forest, OHLA interim HR, they have let Dixie [Keepers] go. She was a limited duration employee and never held a permanent position with the State. All of her LD positions were under 17 months. I think we are done here. The Agency has decided to keep her in pay status until she receives her 80 hrs for insurance purposes. I thanked the Agency for this consideration for our employees."

Muncrief had verified with HR Manager Forest that Keepers' prior position with LCDD was not a regular status position and that neither of her positions had lasted for more than 17 months since these conditions might have established a basis for the Union to assert that Keepers was entitled to layoff rights.

23. By letter dated March 11, 2009, Keepers was provided a written notification of the termination of her position, which stated:

"Over the last several weeks management has made an assessment of the

⁴Article 9, Sections (d) and (g) of the SEIU/State Agreement provide that management has the right to "[r]eassign employees" and "[d]etermine methods, means, and personnel by which operations are to be conducted."

ongoing needs of the Oregon Health Licensing Agency. Each position has been evaluated regarding its contribution to business needs. This letter serves as notification that effective March 15, 2009, your limited duration appointment as an Operations and Policy Analyst 2 working out of class as a Principal Executive Manager C, is ending with the Oregon Health Licensing Agency.

“You are not eligible for layoff rights under the SEIU collective bargaining agreement (CBA) and you do not have return rights to your previous limited duration position at the Department of Land Conservation and Development under the AFSCME collective bargaining agreement.

“Any medical and dental insurance benefits you currently have through your state employment will continue through the month of April. Payroll or a third party administrator will contact you about continuing your insurance through COBRA.”

24. On March 11, 2009, Keepers sent Schaeffer an e-mail notifying him that her position had been terminated. Schaeffer did not respond to this e-mail.⁵

25. On May 29, 2009, Keepers sent Schaeffer an e-mail in which she stated:

“We haven’t spoke since February 4th and I emailed you on 3/11 but never received and [sic] answer back. As you know I was released from my position on March 15th by DOJ [Department of Justice]. It was certainly not what I was expecting but that is in the past. I am writing because I need to know if all avenues of assistance with SEIU 503 have ended which I assume ended 3/15 when I was terminated but I want to move forward with assistance in other areas and need to know the doors are closed with the union before I do. I’m just checking to make sure there was no other recourse with the Union so no toes were stepped on. If you cannot answer this would you please advise who to contact by email or telephone?”

⁵ Keepers testified that she sent Schaeffer an e-mail on March 11, although she did not introduce this e-mail into evidence. Schaeffer testified that, although he apologized to Keepers for not responding to the March 11 e-mail in his May 30 e-mail, he neither recalled receiving that e-mail nor was able to find any record of receiving it when he searched his prior e-mails in his computer. However, Schaeffer also apparently did not recall that Muncrief e-mailed him on March 10 that Keepers’ position had been eliminated, since he told Keepers in his June 2 e-mail that he had not been aware of the decision to terminate her position until a few weeks after the fact. Therefore, we find that it is more likely than not that Keepers sent the March 11 e-mail.

26. After receiving Keepers' e-mail, Schaeffer discussed Keepers' situation with Muncrief and Glathar, who told Schaeffer that based on the information they had regarding Keepers' employment at OHLA and LCDD, they did not believe that the Union could file a grievance over the termination of Keepers' limited-duration position. Schaeffer, Muncrief, and Glathar do not believe employees have the right under the SEIU/State Agreement to file a grievance over the termination of a limited-duration position and, to their knowledge, the Union has only filed such grievances for limited-duration employees who were entitled to bumping or layoff rights.

27. On May 30, 2009, Schaeffer responded to Keepers by e-mail:

"I apologize for missing your last email. As I remember your situation you were a limited duration employee and we don't have any recourse when they decide to let you go. Generally speaking we don't have any way to assist people after their position is eliminated. Did you encounter any problems when you filed for unemployment? I have testified on behalf of former members in that setting."

28. Keepers responded to Schaeffer's e-mail on May 31, 2009, in which she stated, in part:

"Joe can I ask one more question? Going back to the week before or however long this started before it submerged, I understand from the newspapers, that the meetings were held the prior week before the 'investigation' and also over the weekend. So when I was put on leave on Monday by DOJ, and Bobbie was there and my union rep why didn't she come in and be there for me as my union representative? I'm sure that it was also known my position was being ended so why didn't someone call me about [sic] representation and to see if I just wanted the union there? The only time I spoke to anyone from 2/2 to 3/13 was you on the 3/4. No one kept me in the loop and I paid my dues just like everyone else but was treated like the enemy. I did nothing wrong other than I was Richard's sister. And trust me he did not show or give me a break on any aspect of my job but yet I ended up being collateral damage."⁶

⁶While not critical to our decision, we note that some of Keepers' statements in this e-mail are inconsistent with her testimony. Both Keepers and Hunter testified that Schaeffer had previously told them what occurred at the January 31 meeting when they met with him on February 4. In addition, while Keepers states she had not talked with Schaeffer since February 4, she testified that she called and spoke to Schaeffer on February 5 about her duty-station conditions. (Findings of Fact 16 and 18.)

29. On June 2, 2009, Schaeffer replied that he had attended the meeting that led to the investigation, at which more than 20 OHLA employees

“laid it all out for DAS and the Governor’s office. The employees chose who to invite and they probably just did not know you well enough to feel safe with you being there. Just like I meet with you and Marsha without anyone else.

“Honestly though we had no idea you were let go until after the fact. I was not in the loop until few weeks had passed. Limited duration positions have no job security and come with this risk. Unfortunately you were caught up in one of the worst cases of abuse we have seen here at the Union and I’m sure you were not the only one who suffered without reason.”

30. At some unidentified time after the February 4 meeting, Hunter returned to work with no loss of pay or benefits.

31. Sometime prior to August 12, 2009, Muncrief requested that HR Manager Forest provide her written confirmation of the terms of Keepers’ limited-duration positions with the State. On August 12, 2009, Forest sent Muncrief an e-mail which set out Keepers’ work history in her limited-duration positions at LCDD and OHLA.

32. The Union did not file a grievance on Keepers’ behalf regarding her duty-station-at-home status or the termination of her limited-duration position with the agency.

CONCLUSIONS OF LAW

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

2. The Union did not violate its duty to fairly represent Keepers under ORS 243.672(2)(a) or (d).

3. Because Keepers did not prove that the Union violated its duty of fair representation, we also dismiss her claim against the State under ORS 243.672(1)(g).

DISCUSSION

Keepers alleges that the Union violated ORS 243.672(2)(a) and (d) when it “refused to assist or advise [Keepers] in any manner and unlawfully failed and refused to file grievances” on Keepers’ behalf. (Second Amended Complaint at 6.) Keepers also

argues that the Union's actions breached its covenant of good faith and fair dealing under the SEIU/State Agreement because the language of that agreement requires the Union to "exercise good faith in determining whether or not to file a grievance on [Keepers'] behalf." (Keepers' Post-Hearing Brief at 8.)

Alleged Violation of ORS 243.672(2)(a)

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. *Putvinskis 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). "The duty of fair representation is a judicially-created *quid pro quo* or trade-off for the authority and discretion granted by law to a labor organization that is an exclusive representative." *Id.* A union breaches its duty of fair representation when its refusal to process or pursue a grievance is "arbitrary, discriminatory or in bad faith." *Coan and Goar v. City of Portland, Bureau of Parks*, Case No. UP-23/24/25/26-86, 10 PECBR 342, 351 (1987), *AWOP*, 93 Or App 780, 764 P2d 625 (1988) (citing *Vaca v. Sipes*, 386 US 171, 190, 87 S Ct 903, 17 L Ed 2d 842 (1967)).

Since Keepers does not assert that the Union acted discriminatorily or in bad faith, we consider whether the Union's decision not to file a grievance on Keepers' behalf was arbitrary. An "arbitrary" decision by a union is one that lacks a rational basis. *Howard v. Western Oregon State College Federation of Teachers*, 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 that

"[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 [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)] (citing cases). In addition, '[t]he duty of fair representation does not require a union to represent a bargaining unit member in the same manner as an attorney represents a client.' *Putvinskis 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, [v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO]*, Case Nos. UP-68/69-91, 14 PECBR 409, 422 (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.”

Keepers’ primary claim is that the Union violated its duty of fair representation when it failed to identify and file a grievance under Article 22, Section 1. Article 22, Section 1 prohibits the State from engaging in unlawful discrimination based on “race, color, * * * or any other protected class under State or Federal law.” Keepers argues that the Union failed to determine whether she had a grievance under Article 22, Section 1 because OHLA allegedly duty stationed her at home and then terminated her based on her relationship with her brother, in violation of ORS 659A.309(1). That statute makes it an

“unlawful employment practice for an employer solely because another member of an individual’s family works or has worked for that employer to :

“(b) Bar or discharge from employment an individual * * *.”

This case raises issues similar to those we addressed in *Coan and Goar*, 10 PECBR 342. In that case, the complainants alleged that the union failed to pursue an arguably meritorious grievance challenging a reorganization which eliminated the complainants’ positions. The union representative based his decision not to file a grievance on his view that the contract did not cover issues related to the reorganization. The union representative reached his decision even though the complainants told him that they believed the reorganization was a pretext for replacing them, as older long-term workers, with younger workers.

We framed the question in *Coan and Goar* as whether the union representative's "assessment of Complainants' contract rights was erroneous, and if so, whether the failure to grieve was due merely to an error in judgment or rather was the result of a decision so lacking in rational basis as to be arbitrary." 10 PECBR at 351. After finding that the jobs held by the complainants before the reorganization and those held by the younger less-senior workers after the reorganization were remarkably similar, we determined that the union representative "failed to raise a potentially meritorious contract claim." 10 PECBR at 352. In spite of this, however, we held that the union's decision

"was not arbitrary. It was based on a contract provision which, by its literal terms, ostensibly removes all contractual restrictions from Civil Service reclassifications. That such a construction of the contract was wrong is not determinative. [The union representative] exercised good faith and honest judgment and indeed expended considerable effort in representing the interests of Complainants through the only means he believed available to him. The duty of fair representation requires no more." 10 PECBR at 353.

We reach the same conclusion here. Schaeffer exercised good faith and honest judgment in evaluating, providing advice, and making his recommendations regarding Keepers' duty-station status. In advising against filing a grievance, Schaeffer relied on his experience with and understanding of the terms of Article 20 which, on its face, appears to permit the State to duty station employees at home so long as it meets certain procedural requirements. Schaeffer met with Keepers, reviewed her duty-station notice, and determined the notice violated the procedural requirements of the contract because it failed to provide a reason. After Schaeffer met with Keepers, he contacted the State regarding the deficient notice, and the State issued a revised notice.⁷ He believed there was little more he could do under the terms of the contract as he understood them. Schaeffer also relied on the fact that Keepers' status was one part of a larger investigation by the State, and his expectation that the best course for Keepers and the Union was to allow the investigation to proceed.

Much like the union representative in *Coan and Goar*, Schaeffer failed to identify a potential discrimination grievance. Article 22, Section 1 of the SEIU/State Agreement prohibits discrimination based on an employee's protected class status under state or

⁷Although the record does not specifically reflect that the State revised its notice in response to Schaeffer's contact, we conclude it is likely this occurred because the revised notice was sent soon after Schaeffer told Keepers and Hunter that he would contact the State to determine the reason for their status.

federal law. ORS 659A.309(1)(b) prohibits discharge of an employee solely because a member of the person's family works for the employer. Keepers believed the State decided to duty station her at home because of her relationship with her brother.⁸ Schaeffer had all of the facts that would have allowed him to identify such a grievance. He was aware that Keepers had been placed on duty-station status in the context of the OHLA investigation and that Keepers was the sister of McNew, one of the managers who was the target of the investigation. Keepers herself had been notified that she was placed on duty-station status due to this relationship.

In these circumstances, Schaeffer's failure to identify a potential discrimination grievance under Article 22, Section 1 does not violate the Union's duty to fairly represent Keepers. A duty-station grievance under Article 22, Section 1 is not obvious on the face of the contract. To the contrary, a different contract article (Article 20) appears on its face to allow OHLA to duty station Keepers at home. Recognizing the discrimination grievance would require knowledge of state and federal anti-discrimination laws, matters outside the contract. A union is not required to provide the same level of representation an attorney would provide to 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). Therefore, although Schaeffer's failure to recognize a potential grievance under Article 22, Section 1 may have been an error in judgment, it was not so lacking in a rational basis as to be arbitrary.⁹

The same is true of Schaeffer's determination that the Union had no basis to grieve the termination of Keepers' position. Schaeffer, Muncrief, and Glathar all represented Keepers in good faith based on the only means they believed existed under the SEIU/State Agreement. All were experienced working with employees in limited-duration positions, and recognized that Article 51, by its terms, provides limited rights to such employees regarding the continuation of their positions. Based on their investigation, they determined that Keepers had not worked in either of her limited-duration positions long enough to accrue any layoff or bumping rights, and decided not to file a grievance on this basis. While the Union relied on the information provided by

⁸For purposes of this decision, we assume, but do not decide, that such a claim was potentially meritorious and express no opinion about the legal viability of such a claim.

⁹There is no evidence that Keepers asked Schaeffer to consider whether she had a viable grievance because she was duty stationed due to her relationship with her brother. Therefore, unlike *Coan and Goar*, this is not a situation where the Union refused to file a grievance on a basis identified by the grievant.

the State in reaching this conclusion, Keepers has not shown that the information provided was inaccurate, or that the Union had reason not to rely on that information. Keepers also does not assert that her position was terminated in violation of her rights as an employee in a limited-duration position under Article 51. Her sole argument is based on the existence of a potential grievance under Article 22, Section 1. Again, while the Union's failure to identify this potential grievance may have been in error, it did not lack a rational basis.

Although not clearly pled in the complaint, Keepers bases her claim not only on the Union's decision not to file a grievance, but also on its failure to investigate the circumstances thoroughly before making that decision. This Board will only find that unintentional acts or omissions by union officials are actionably arbitrary in a duty of fair representation case when three conditions are established:

"(1) The act or omission reflects a reckless disregard for the rights of the individual employee.

"(2) The act or omission seriously prejudices the injured 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." *Ralphs*, 14 PECBR at 424 (citing *Robesky v. Qantas Empire Airways Ltd.*, 573 F2d 1082, 1090 (9th Cir 1978)).

Keepers has not carried her burden of proving that the Union's actions here were actionably arbitrary. First, the Union's actions did not reflect a reckless disregard for Keepers' rights. As explained above, the Union made a reasoned decision that no basis for a grievance existed based on its rational interpretation of Keepers' rights under the SEIU/State Agreement. In addition, it is not clear what relevant new information the Union could have obtained through an investigation, since the Union already knew that Keepers had been duty stationed at home because of her relationship with her brother. Second, Keepers also failed to show that she was seriously prejudiced by the Union's failure to investigate and identify a potential grievance under Article 22, Section 1. Even if the Union had identified such a grievance, contract Article 22, Section 4 apparently would prevent the Union from pursuing such a grievance to arbitration. In addition, the Union's failure to file a grievance did not preclude Keepers from pursuing a claim on her own through the Bureau of Labor and Industries or EEOC, should she have chosen to

do so.¹⁰ We need not consider the third condition (*i.e.*, whether the policies underlying the duty of fair representation would be served by shielding the Union from liability), since the first two conditions have not been met.

Finally, Keepers argues that if the Union had conducted an appropriate investigation, it would have uncovered numerous other violations of Keepers' rights. Specifically, Keepers alleges that an investigation would have determined that Keepers was unlawfully prevented from contacting her Union because she was not allowed to talk to her Union steward; was not entitled to take rest breaks as required under OAR 839-020-0050; and was not entitled to exercise her constitutional rights to travel and assemble on public property. However, Schaeffer was aware of the restrictions placed on Keepers. During the February 4 meeting, he reviewed her duty-station notice, which imposed those restrictions, and he talked with Keepers about these restrictions on both February 4 and 5. Schaeffer understood that the Union had little contractual basis to challenge these restrictions, and he determined that Keepers' situation provided no basis for filing a grievance. While the restriction against Keepers contacting employees at the agency might be interpreted to limit her contact with the OHLA union steward, the restriction clearly did not limit her access to the Union's staff representatives. In fact, Keepers admitted that she talked with Schaeffer while she was duty stationed at home. There is also no evidence that Keepers told Schaeffer she was prohibited, or believed that she was prohibited, from taking rest breaks. In addition, the Union had no duty to investigate a violation of her constitutional rights, since the Union's obligation to represent employees is limited to claims under the SEIU/State Agreement. Therefore, Keepers did not prove that the Union failed to represent her in regard to the restrictions placed on her while she was on duty-station status.

In conclusion, the evidence does not show that the Union's conduct was arbitrary, discriminatory, or performed in bad faith. The Union provided Keepers advice and professional support based on its reasonable interpretation of the restrictions of its collective bargaining agreement with the State. Therefore, we dismiss this portion of the complaint against the Union.

Alleged Violation of ORS 243.672(2)(d)

Keepers alleges that SEIU violated ORS 243.672(2)(d) by failing to comply with its duty of fair representation. ORS 243.672(2)(d) provides that a labor organization commits an unfair labor practice if it violates "the provisions of any written contract

¹⁰We also note that under the contact grievance procedure, Keepers could have filed a grievance on her own, without assistance from the Union.

with respect to employment relations * * *.” Keepers also asserts that the Union’s conduct breached the covenant of good faith and fair dealing found in every contract. Under this claim, Keepers argues that

“[t]he plain language of the CBA states that if an eligible employee suffers an adverse employment action, and brings that issue to the Union’s attention, that the union will Grieve it. It is not unreasonable, for Keepers, to expect that the Union would exercise good faith in determining whether or not to file a grievance on her behalf.” (Complainant’s Post-hearing brief at 8.)

We will dismiss Keepers’ subsection (2)(d) claim that the Union violated the SEIU/State Agreement. A represented employee’s right to seek relief against a union is limited to claims under ORS 243.672(2)(a). In *Mengucci*, 8 PECBR at 6731, we stated that “subsection (2)(a) is the appropriate [section] under which an employee should plead an alleged breach of a union’s duty of fair representation.” In dismissing the employee’s claim under subsection (2)(d), we explained that

“the ‘written contract with respect to employment relations’ covered by subsection (2)(d) refers to a collective bargaining agreement between a union and an employer; a union’s contractual duties thereunder are to the employer. A union’s duty of fair representation, on the other hand, arises from the union’s statutory status of being the exclusive representative for collective bargaining purposes of all employees in the bargaining unit which it represents. ORS 243.650(8); Loren Caddy and Walter Van Hooser v. Multnomah County Deputy Sheriffs Association, Case No. C-62-84, 7 PECBR 6545 (June 29, 1984).” *Mengucci*, 8 PECBR at 6730. (Emphasis in original.)

This same rationale applies to Keepers’ claim that the Union breached its covenant of good faith and fair dealing. This Board has recognized that an implied covenant of good faith and fair dealing exists in collective bargaining agreements. *Mapleton Education Association v. Mapleton School District 32*, Case No. UP-142-93, 15 PECBR 476, 492-94 (1994). As stated above, however, the Union’s contractual duties under the SEIU/State Agreement are to the State, not to the bargaining unit employees. Therefore, we will dismiss this portion of Keepers’ claim against the Union.

Alleged Violation of ORS 243.672(1)(g)

As part of her hybrid duty of fair representation claim, Keepers also alleges that the employer violated the collective bargaining agreement in violation of ORS 243.672(1)(g). In light of our disposition of the case against the Union, there is no

need for a hearing on the subsection (1)(g) claim. It fails as a matter of law. Where no violation against the union is found, the complaint against the employer is automatically dismissed. *Chan*, 21 PECBR at 573-574; *Tancredi*, 20 PECBR at 975-977; *Mengucci*, 8 PECBR at 6734. Therefore, we will also dismiss the complaint against OHLA.

ORDER

The complaint is dismissed.

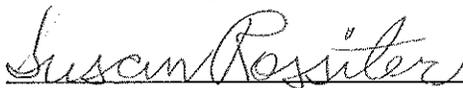
DATED this 29 day of July 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.