

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-26-05

(UNFAIR LABOR PRACTICE)

TRICIA DENNIS,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
SEIU LOCAL 503, OPEU AND	)	CONCLUSIONS OF LAW
STATE OF OREGON,	)	AND ORDER
OREGON STATE HOSPITAL,	)	
	)	
Respondent.	)	
_____	)	

The parties did not object to the Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on August 18, 2006, following a hearing on January 9, 2006 in Salem, Oregon. The hearing closed with the receipt of the parties' post-hearing briefs on February 1, 2006.

Arthur B. Cummins, Jr., Attorney, 180 Church Street S.E., P.O. Box 183, Salem, Oregon 97308, represented Complainant.

Elizabeth Baker, Attorney, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Respondent Union.

Heather Pauley, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent State.

On June 7, 2005, Tricia Dennis filed this action against SEIU Local 503, OPEU (SEIU or Union), and, by an amended complaint filed July 22, 2005, against the State of Oregon, Oregon State Hospital (Hospital or State). She alleged that the Hospital wrongfully terminated her and that SEIU breached its ORS 243.672(2)(a) duty to fairly represent her by refusing to arbitrate the grievance over her termination. SEIU and the Hospital filed timely answers on November 22 and November 23, 2006, respectively.

The ALJ bifurcated the proceedings and heard Dennis' complaint against SEIU on January 9, 2006. The issue in this first phase of the hearing is: Did SEIU's refusal to submit the Dennis grievance to arbitration violate its ORS 243.672(2)(a) duty of fair representation?

For reasons discussed below, we conclude that SEIU did not breach its duty to fairly represent Dennis. In addition, because Dennis may pursue her complaint against the State only if she first prevails against SEIU, we must also dismiss her claim against the State.

### RULINGS

1. SEIU moved to dismiss the matter at the close of Complainant Dennis' case, arguing that Dennis failed to state a claim that the Union violated its duty of fair representation. The ALJ acted within his discretion by denying the motion and completing the hearing.
2. The remaining rulings of the ALJ have been reviewed and are correct.

### FINDINGS OF FACT

#### **Parties**

1. The Hospital is a public employer and SEIU is a labor organization that represents a bargaining unit of Hospital employees. During the time period relevant to this complaint, Dennis worked as a Hospital mental health therapy shift coordinator (MHTSC), a position in the SEIU bargaining unit.

#### **SEIU Arbitration evaluation**

2. During the events at issue here, the Hospital and SEIU were parties to a collective bargaining agreement which prohibited the Hospital from imposing

discipline on an employee without just cause. The agreement also included a dispute resolution process ending in arbitration.<sup>1</sup>

3. SEIU's governing documents are a constitution, bylaws, and administrative policies and procedures. SEIU's bylaws provide in part:

"Section 11. In the representation of public employees on grievances, disciplinary actions, or any other claims, or complaints, the Union retains the right to refuse to file or pursue any such matter at the Employment Relations Board, at arbitration, or in the courts if, in the judgment of the Union, the merits of the case justify such a decision.

"\* \* \* \* \*

#### "ARTICLE X - DUTIES OF OFFICERS

"Section 1. The President:

"\* \* \* \* \*

"(n) Shall chair the Union's Grievance Appeals Committee."

4. Article 10 of the SEIU Administrative Policies and Procedures concerns "Individual Employee Representation." It provides, in part:

"Section 7. Arbitration Screening and Appeal Procedures

"(a) There shall be two (2) levels of review of grievances considered for arbitration: the first before an Arbitration Screening Panel, and the second before the President.

"(b) An arbitration screening Panel is convened for each review. The Panel shall include at least two (2) members:

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<sup>1</sup>The collective bargaining agreement is not part of the record in this case.

“staff advisor  
“chief steward where possible  
“stewards.

“Members are neutral or not connected with the grievance or the agency involved. The Stewards shall rotate through this assignment from meeting to meeting, based on regional Arbitration Screening Panel rotations lists.

“(c) The Labor Education and Research Center of the University of Oregon provides an ongoing Arbitration Screening training to all stewards who may be selected for Arbitration Screening Panels. Priority for selection to the Panels will be given to stewards who have completed training.

“(d) Decisions of an Arbitration Screening Panel to deny arbitration of a grievance shall be appealable by the grievant(s) to the second level of review, c/o the President within ten (10) calendar days of notice from the Panel.

“(e) The second level of review shall consist of the President. The decision at this level shall be final.”  
(Bold typeface in original.)

5. SEIU stewards undergo training regarding the grievance process. The training includes the seven steps of just cause, grievance investigation, and grievance evaluation. Stewards use preprinted forms to track grievance timelines, and employer and employee contentions. They also use checklists when they investigate and evaluate grievances.

6. In April 1995, the Hospital hired Dennis as a MHTSC. Her duties included assigning non-nursing work to mental health therapy technicians and therapists; providing care and treatment to mentally, emotionally, behaviorally, or physically impaired patients; and reviewing work assigned by professional staff and the

therapy coordinator to ensure accuracy, completion of tasks, and compliance with rules and procedures. Dennis also taught a computer class and provided individual instruction to patients.

7. In November 2001, the Hospital disciplined Dennis by imposing a one-step salary reduction for, in part, “repeatedly engag[ing] in behavior that is in violation of acceptable boundaries with mentally ill patients.” The Hospital contended Dennis’ behavior was not therapeutic for the patients and violated Hospital policies. Hospital officials warned Dennis that similar behavior in the future would result in discipline, including termination.

8. In August 2002, the Hospital disciplined Dennis by imposing a one-step salary reduction for, in part, “using a patient’s personal equipment instead of obtaining and using hospital equipment.” Dennis was warned that similar violations in the future could result in the initiation of predissmissal proceedings.

9. In a September 2002 performance appraisal, Dennis’ supervisor stated, “[t]his has been a difficult year for Tricia due to ongoing disciplinary actions, which have originated from her inability to set limits with patients.”

10. On March 20, 2004, Dennis was injured on the job and placed on light duty work. She was scheduled to return to her regular duties on July 9, 2004.

11. Shortly after May 20, 2004, Hospital managers contacted Dennis about a report they had received from a patient, John Doe.<sup>2</sup> According to the Hospital:

“On 5/20/04 [Doe] reported to Sharon Perry, Unit Director, that two to three months prior, you asked [Doe] if you could use his personal computer because you needed a printer that had scan capability. [Doe] stated that you used his computer in his hospital room to generate the written text for a campaign poster for a coworker of yours, LH<sup>3</sup>, who was

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<sup>2</sup>John Doe is a pseudonym. The Hospital identified the patient to Dennis early in its investigation.

<sup>3</sup>LH refers to bargaining unit member Lori Hays. Hays accepted responsibility for the events and was disciplined, but not terminated.

running for a union office. [Doe] also stated that you used [Doe]'s scanner to scan a Polaroid picture of LH, and that you used his printer to print the picture on the posters and flyers. He stated that you told LH to pay him five dollars for the use of his computer equipment, and she did pay him."

12. Hospital policies bar employees from borrowing, selling, or purchasing personal property from patients.

13. On June 14, 2004, Dennis attended an investigatory meeting regarding the allegations, accompanied by SEIU Steward Kurt Hendrick.

14. On July 16, 2004, Dennis attended a predissmissal meeting, accompanied by SEIU Steward Hendrick and SEIU Organizer Rusa Fischer. Dennis and the SEIU officials responded to the accusations. The Hospital later stated, in the termination letter, that Dennis' responses "raised concerns that required the Department's additional consideration."

15. Shortly after the predissmissal meeting, SEIU Organizer Fischer told Dennis that arbitration was expensive, and that she expected the Union to decline to arbitrate her case because of the cost. Dennis told Fischer that she would be willing to pay for the arbitration. Dennis did not know if Fischer passed this information on to the Union.

16. On August 25, 2005, Cheryl Miller, Hospital human resources manager, informed Dennis by a hand-delivered letter that Dennis was terminated effective that date.

17. In its termination letter, the Hospital stated that during March or April 2004, Dennis used a Hospital Polaroid camera to take a picture of coworker Lori Hays so the picture could be used on Hays' campaign flyers for an SEIU election.

The letter stated, "[a]t the above fact-finding meeting on 6/14/04, you stated that you did use the hospital camera for LH's campaign picture, and that you knew at the time of the incident it was a violation of hospital policy. You also stated 'I have been through all this before,' and confirmed that you were previously disciplined for similar behavior of using a patient's personal equipment "

Hays told Hospital officials that she knew Dennis was using the unit's camera and [Doe]'s personal computer equipment for her campaign posters/flyers. Hays stated that she had asked Dennis, "should we be doing this," and that Dennis replied, "oh, don't worry about it."

During a follow-up interview, Doe told Hospital officials that he saw Dennis take Hays' picture with the Polaroid camera, and that afterwards, Dennis asked Doe if she could use his computer and printer/scanner to produce posters/flyers for Hays' campaign. Doe stated that Dennis and Hays went to his room, Dennis sat next to Doe at his desk while Hays sat on Doe's bed, and Dennis prepared the text and used the scanner/printer for Hays' campaign poster. Dennis said that the process took about twenty minutes, and afterwards Dennis deleted everything she did from Doe's computer.

The dismissal letter continued:

"\* \* \* At the above investigatory meeting, you stated that you did use the patient's personal computer equipment to produce posters/flyers for LH's campaign. However, you stated that the patient asked you if you wanted to use his computer equipment, not that you asked the patient. You also stated that you knew at the time of the incident, that your actions were a violation of hospital policy. In the investigatory meeting Mr. Kreutzer asked you 'since you have previous discipline for similar actions, why did you repeat those actions?' You replied 'I just wanted to help LH with her campaign.' You also stated, that LH never asked you to use the hospital camera or the patient's personal computer equipment."

A coworker of Dennis told Hospital officials that, during a conversation with Doe about recent Union office changes, Doe told the coworker that Dennis and Hays used his personal computer and scanner/printer to make campaign posters for Hays. The coworker told Doe that he should report the use to the unit director. The coworker told Hospital officials that she has worked with Doe for about three years, that he is intelligent and has high credibility with staff and patients, and that he is not the type of person who would lie or misrepresent what had happened. The coworker also

noted that Doe was close to being discharged from the Hospital. Hays told Hospital officials that she cannot think of a reason why [Doe] would lie about this matter, "and that he is not the type of person who would lie."

The dismissal letter continued:

"• You instructed LH to pay [Doe] five dollars for the use of his personal computer equipment for LH's campaign. However, in the investigatory meeting you denied instructing LH to pay the patient, and that you knew nothing about any money paid to the patient. You also stated that you knew at the time of the incident, that it is a violation of hospital policy to offer patients payment for the use of their equipment. The patient states that he was present when you instructed LH to pay him five dollars.

"\* \* \* \* \*

"During a follow-up interview with patient [Doe], he states that you and Ms. Hays were standing together with [Doe] when MS. [sic] Hays gave him two dollars for the use of his equipment, and that you said to Ms. Hays 'give him five dollars,' at which time Ms. Hays gave [Doe] three more dollars.

"• You failed to report the unauthorized use of hospital equipment, use of a patient's personal equipment, and payment of money to the patient. You did not report the incident to management at the time of the incident or at a later point in time."

18. The termination letter also referred to Dennis' prior instances of discipline described above.

19. On September 10, 2004, SEIU Steward Hendrick filed a grievance regarding Dennis' termination. On that same day, Hendrick requested copies of the Hospital's "complete investigatory file" regarding the matter and of Polaroid pictures submitted by Dennis at the July 16 pre-dismissal meeting.

20. On September 29, the Hospital superintendent denied the grievance. On October 7, Hendrick moved the grievance to step two, filing an appeal with the DAS Labor Relations Unit. In his appeal letter, Hendrick stated, in part:

“Upon further review of the grievance, we found the following discrepancies:

- “1. A witness was not interviewed during the investigation.
- “2. There is no hard evidence of the alleged action taking place on the patient’s computer.”

21. On October 25, Hendrick sent a letter to Cheryl Miller, Hospital director of human resources. He stated that, “[d]ue to requests made by telephone that have not been returned, I am requesting the following items in writing.” His requests included investigation reports regarding interviews with Joanna Leahman and Lori Hays, and “[p]roof that the patient’s printer and scanner was actually used by Trish Dennis on the day the allegation took place.”

22. Miller responded to Hendrick’s requests in a letter dated October 28, 2004. She indicated that the investigation reports had been, or would be, provided. As to the proof regarding the printer and scanner, Miller wrote, “[t]he proof that the patient’s computer/scanner was used by [Dennis], is in Ms. Hays’s [*sic*] admission and Ms. Dennis’s admission to Mr. Kreutzer, and Ms. Dennis’s admission at the pre-dismissal hearing that was taped. You have been provided a copy of that tape.”

23. Doe was released from the Hospital in November 2004.

24. At some point in the grievance process, Fischer told Dennis that the Hospital had offered to settle the case by permitting Dennis to resign without the discipline in her work record. Dennis rejected the settlement offer.

25. In a letter dated December 17, 2004, Hendrick informed the Labor Relations Unit that “[d]ue to the lack of response at Step 3, we are now moving this grievance to arbitration.” The demand to arbitrate was timely filed.

26. SEIU's Administrative Policies and Procedures require an SEIU arbitration screening committee to approve before a grievance proceeds to an actual arbitration hearing. SEIU Steward Hendrick helped Dennis prepare for the meeting with the screening committee<sup>4</sup>

27. SEIU screening committee stewards are experienced and have attended three levels of steward training, including training regarding the grievance and arbitration process. They are from a different local than the grievant, and serve on a rotating basis.

28. Screening criteria include just cause issues such as prior warnings; fairness of the rule allegedly violated; reasonableness of the level of discipline; whether the employer conducted an adequate investigation and gave the grievant due process; whether the employer used progressive discipline; whether evidence and witnesses exist to support the grievant's position; outcomes of similar arbitration cases; and the value and impact of the potential remedy in light of the cost to the Union.

29. On February 1, 2005, Dennis met with the SEIU screening committee. The committee consisted of Craig Chadwick, a chief steward from SEIU's Oregon Department of Transportation local, and Carlene Downing, a steward from SEIU's Oregon Department of Revenue local. SEIU Organizer Bob Rossi was assigned as staff to the committee.<sup>5</sup> SEIU Organizer Fischer and Hospital Chief Steward Jackie Pierce were also present. The meeting took place in a conference room in SEIU headquarters in Salem. As was customary, the committee had several grievances to review that evening. The Dennis grievance was scheduled to be heard first.

30. The committee was provided with a inch-thick packet of materials regarding the Dennis grievance about a week before the meeting.

31. Prior to the start of the meeting, Dennis told Rossi, Fischer, and Pierce that she expected her attorney to attend, but that he had not arrived. Rossi

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<sup>4</sup>Dennis was generally pleased with the representation provided by Hendrick.

<sup>5</sup>Rossi had nine years of experience representing employees in SEIU bargaining units. SEIU has five "types of membership: active, semi-active, associate, retired, and staff." The record does not disclose whether Rossi was a staff member of SEIU.

responded that it was important for the committee to stick to its schedule. Dennis' attorney did not attend the meeting.<sup>6</sup>

32. Dennis began her presentation by addressing her remarks to Rossi. Rossi interrupted and directed Dennis to address her remarks to Chadwick and Downing, stating that they would be making the decision about her case.

33. As part of her presentation, Dennis referred to the fact that the Hospital had not provided her or the Union with a copy of the hard drive of Doe's computer.<sup>7</sup>

34. During the presentation of the Dennis grievance, Rossi asked Fischer whether she thought the case should be pursued to arbitration. Fischer replied in the affirmative. Downing stated that she agreed with Fischer.

35. After Dennis' presentation, Dennis, Fischer, Hendrick, and Pierce left the room and waited in the hall while the committee discussed the case in private. The committee's options were to approve or reject the grievance for arbitration, or to ask those involved to obtain additional evidence and return to the committee for rescreening.

36. Rossi reviewed the arbitration screening criteria with the committee, including the seven tests of just cause. The committee reviewed what it perceived to be the strengths and weaknesses of the case. Strengths of the case included differences between the statements of Hays and Doe; a statement from Charge Nurse Joanna Lehman supporting Dennis' contention that the patient approached her and Hays (contradicting notes of Hospital officials who interviewed Lehman); Hays' acceptance

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<sup>6</sup>SEIU locks its headquarters in the evening. The main door (one of five) has a buzzer that can be heard throughout the building when people seek entry after hours. Dennis' attorney arrived at the SEIU headquarters after 6:00 p.m., approached a door and found it locked. The attorney apparently did not approach the main door, did not sound the buzzer, and was not able to enter the building that evening. Dennis and her attorney were not aware that the building would be locked and had made no arrangements to deal with this obstacle.

<sup>7</sup>Dennis argues that the data on Doe's computer hard drive was critical to her case, "proof positive of her innocence." Dennis appears to assume, but never proved, that the data she sought remained present on the hard drive, that the date and time function on Doe's computer was set or operating properly, that the Hospital had the ability to obtain the hard drive from Doe, and that Dennis could prove she was out of the area at the date and time recorded on the computer.

of responsibility for the flyer; and evidence supporting the contention that the flyer was completed after Dennis left the area.

37. The weaknesses of the case as reviewed by the committee included the facts that both Doe and Hays contradicted Dennis' version of events, and Dennis' prior discipline for similar conduct. Another, major weakness was that Dennis had no convincing refutation of the termination letter's summary of Dennis' statements at the investigatory meeting, specifically:

“\* \* \* At the [June 14] investigatory meeting, you stated that you did use the patient's personal computer equipment to produce posters/flyers for LH's campaign. However, you stated that the patient asked you if you wanted to use his computer equipment, not that you asked the patient. You also stated that you knew at the time of the incident, that your actions were a violation of hospital policy. In the investigatory meeting Mr. Kreutzer asked you 'since you have previous discipline for similar actions, why did you repeat those actions?' You replied 'I just wanted to help LH with her campaign.' You also stated, that LH never asked you to use the hospital camera or the patient's personal computer equipment.”<sup>8</sup>

38. In Rossi's experience, recovering data from computers for use as evidence at arbitrations was expensive and inconclusive at best. It was also, in his experience, “pretty nearly impossible” for SEIU to obtain hard drives or other personal property of inmates or patients at the Oregon Youth Authority or Hospital

39. Chadwick stated his belief that all such grievances should be taken to arbitration, and he did not participate meaningfully in the meeting after that. Instead, Chadwick spent the rest of the meeting talking on his cell phone.

40. Rossi was surprised by Chadwick's behavior. As far as Rossi could recall, nothing like this had happened at an arbitration screening committee meeting before

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<sup>8</sup>Under cross-examination at the hearing in this case, Dennis was asked about statements on page 3 of the dismissal letter purporting to repeat Dennis' statements about use of the Hospital camera. Dennis testified that she had not noticed the quotation before and that it was “wrong.”

41. Downing equivocated about whether the grievance should be arbitrated, but ultimately concluded that it should not. Chadwick's view did not waver, and he opposed rescreening the grievance.

42. Rossi eventually broke the tie between Chadwick and Downing and voted not to take the Dennis grievance to arbitration. Rossi could not recall a prior instance where SEIU staff had broken a tie between screening committee stewards.

43. Rossi emerged from the meeting after approximately half an hour, appearing irritated. Pierce asked Rossi how much longer they would have to wait for the committee's decision. Rossi said that they wouldn't get an answer that night and kept walking down the hall.

44. SEIU informed Dennis of the committee's decision in a letter from Rossi dated February 2, 2006. The letter told Dennis that she could appeal the decision of the committee to Union President Joe DiNicola. Dennis appealed to DiNicola through a letter dated February 12, 2006. She argued that the 30 minutes allotted for her presentation to the screening committee was not sufficient, that the facts showed that she was terminated without just cause, that the patient's computer should have been examined, and that she had several questions for Hospital managers that she wished the Union's attorney or her own attorney to ask during an arbitration hearing.

45. Under SEIU practice, the Union president would overturn the recommendation of the screening committee only if the grievant presented him with new, favorable facts or evidence that had not been presented to the committee. DiNicola reviewed Dennis' letter and the grievance file, checking to see that the steward had diligently performed his task. He concluded that the letter presented no new evidence. DiNicola denied Dennis' appeal in a letter dated March 14, 2005. SEIU did not arbitrate the grievance over Dennis' termination.

#### CONCLUSIONS OF LAW

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

2. The Union's refusal to take the Dennis grievance to arbitration did not violate ORS 243.672(2)(a).

ORS 243.672(2)(a) prohibits a labor organization from interfering with, restraining, or coercing any employee in or because of the exercise of rights guaranteed

by the Public Employee Collective Bargaining Act (PECBA). The statute requires a labor organization to fairly represent all employees for whom it is the exclusive representative. *Chan v. Clackamas Community College*, Case No. UP-13-05, 21 PECBR 564, 575 (2006).

Dennis contends that the Hospital wrongfully terminated her and that SEIU failed to represent her properly regarding the termination. Before she can maintain an action against the Hospital for violation of the collective bargaining agreement, she must first prove that SEIU breached its duty to fairly represent her. *Chan*, 21 PECBR at 575; *Ralphs v. OPEU and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409, 417-18 (1993).

Duty of fair representation complaints are usually based on objections to either (1) a union's deliberate decision-making, or (2) a union's unintentional acts or omissions (negligence). *Ralphs*, 14 PECBR at 422-23. As we have explained:

“\* \* \* A union's deliberate actions in processing or refusing a grievance may violate the duty of fair representation if the union acted arbitrarily or in bad faith. To be processed to hearing, a duty of fair representation unfair labor practice complaint must allege facts to support a claim that the union acted arbitrarily or in bad faith; a complaint which does not allege any such facts will be dismissed without a hearing. *See Moustachetti v. AFSCME, Local 1246*, Case No. UP-42-90, 12 PECBR 174 (1990). A union may also breach its duty of fair representation by unintentional acts or omissions. We have held that a union's negligent and unexcused failure to timely file a grievance was an action so perfunctory that it violated its duty to fairly represent its members. *Ralphs v. OPEU and Oregon Executive Department*, Case No. UP-68/69-91, 14 PECBR 409 (1993).” *Balch v. Oregon Public Employees Union*, Case No. UP-6-96, 16 PECBR 478, 480 (1996).

Dennis alleges that the Union engaged in deliberate acts. Specifically, Dennis argues that the Union violated its duty to fairly represent her by choosing not to arbitrate her termination grievance, and that, as part of that failure, the Union chose not to obtain a copy of Doe's computer hard drive or question Doe about his affidavit. Dennis also argues that the Union's arbitration screening process was flawed.

This Board's comments which recognize the deference provided to labor organizations in their grievance and arbitration decisions are legion. A union's decision about "whether to file or how far to pursue a grievance is entitled to substantial deference." *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98, 18 PECBR 79, 88 (1999), citing *Bjornsen, et al. v. Jackson County Sheriffs' Officers Association and Jackson County*, Case Nos. C-130/131/132/133/134/135-83, 8 PECBR 6783 (1985).

To establish that a union breached its duty of fair representation by refusing to process a grievance, a complainant "must present facts which, if proven, would establish that the labor organization had a hostile motive, acted dishonestly, or made its decision not to pursue the grievance without any basis." *Jackson County*, 18 PECBR at 88, citing *Coan and Goar v. City of Portland and LUINA, Municipal Employees Local 483*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342 (1987), *adhered to on reconsideration*, 10 PECBR 438, *AWOP 93 Or App 780, 764 P2d 625* (1988).

A union is not required to file a grievance if the decision not to do so was a rational one. *Howard v. Western Oregon State College Federation of Teachers, Local 2278, OFT, and WOSC*, Case Nos. UP-80/93-90, 13 PECBR 328, 355 (1991). A union's good-faith decision not to pursue a potentially meritorious grievance, even if mistaken, is not a breach of its duty of fair representation. *Chan*, 21 PECBR at 576 (citing cases). In addition, "[t]he duty of fair representation does not require a union to represent a bargaining unit member in the same manner as an attorney represents a client." *Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 898 (2000). This discretion extends to how the union investigates a potential grievance, so long as some reasonable good-faith investigation is undertaken. *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20, and Metropolitan Exposition Recreation Commission*, Case Nos. UP-15/16-92, 15 PECBR 85, 106 (1994), *AWOP 134 Or App 414, 894 P2d 1267* (1995).

A union has the discretion to withdraw a grievance based on its judgment that there is insufficient evidence to support the claim. *Tancredi v. Jackson County Sheriff's Employee Association*, Case No. UP-31-04, 20 PECBR 967, 974 (2005). The cost of arbitration is also a legitimate factor for the union to consider. *Strickland v. OPEU*, Case No. UP-134-90, 13 PECBR 113, 123-24 (1991).

Thus, a union has "broad discretion" when deciding whether to file or pursue a grievance. *Chan*, 21 PECBR at 575. For a union's actions to fall outside this broad discretion, they must be "wholly 'irrational' or 'arbitrary.'" *Baltus v. Multnomah*

*County School District No. 1J and Portland Association of Teachers*, Case Nos. UP-51/52-94, 15 PECBR 764, 778 (1995) quoting *Air Line Pilots v. O'Neill*, 499 US 65, 78, 136 LRRM 2721, 2726 (1991).

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. 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. *Putvinskis*, 18 PECBR at 895.

Finally, "the PECBA does not require a union to afford a grievant with the grievant's choice of representative, even where the grievant is willing to pay the costs." *Randolph*, 15 PECBR at 104. See also *Strickland*, 13 PECBR 113.

Dennis argues that the Union failed to adequately represent her by (1) failing to obtain critical evidence which would have exonerated her, *i.e.*, Doe's hard drive; (2) failing to conduct additional investigation into the statements of coworker Lori Hays and Doe; and (3) using a flawed arbitration screening process. Dennis argues that the Union's arbitration screening process is "flawed because it does not provide for the event of a tie between panel members as occurred here and because it does not require findings to support a decision not to arbitrate." (Complainant's Post-hearing Brief at 3.)

**I. Dennis did not prove that SEIU could have obtained the hard drive or that the hard drive contained any pertinent evidence.**

Dennis argues that the hard drive of Doe's computer contained critical exculpatory evidence that SEIU was required to obtain from the Hospital, and, failing that, the Hospital's "refusal to respond to the union's requests for this exculpatory evidence alone is justification for the union to send this matter to arbitration." (Complainant's Post-hearing Brief at 1-2.) Dennis argues that the computer hard drive would have identified the date and time that Hays' Union election flyer was created, and that the date and time would have been after her shift was over.<sup>9</sup>

The computer at issue was Doe's personal property. Dennis presented no evidence that the Hospital had the power to hand over Doe's computer or hard drive to the Union, or that the Union could have obtained the hard drive from Doe (or whether

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<sup>9</sup>Dennis apparently assumes that she could prove she was no longer present at work after her shift ended.

it still existed and he still possessed it) during its investigation. Nor did Dennis present any evidence that Doe's computer hard drive, in fact, contained any evidence, or that the evidence it contained was available at a reasonable cost. Hospital officials quoted Doe to state that the document was deleted as soon as it was printed. If that were true, the recovery of that data would move into the realm of computer forensics. Rossi testified that the Union's experience with computer forensics was that it was expensive and inconclusive.

The burden of proof in this proceeding is on Complainant Dennis. OAR 115-035-0042(6). In this proceeding, Dennis has the same relationship to Doe's hard drive as the Hospital and Union; that is, the hard drive is potentially relevant evidence in the hands of a non-party. Dennis did not call Doe as a witness, and she did not subpoena or produce Doe's computer hard drive. Dennis presented no evidence that she sought the hard drive informally. Thus, Dennis made the same decision in this legal proceeding that the Union made during its investigation—to not obtain Doe's computer hard drive—even though she had access to discovery tools and subpoena power, whereas the Union, during its investigation, was without subpoena power or access to third-party discovery tools.<sup>10</sup>

Whatever evidence may have been on Doe's computer hard drive, the Union arbitration screening committee also had evidence that coworker Hays and patient Doe contradicted Dennis' version of events, and that Dennis had admitted at least a portion of the wrongful conduct in her taped interview. It was reasonable for the Union to base its decision regarding arbitration on the evidence at hand.

## 2. Hays and Doe statements

Dennis argues that the Union failed to conduct an adequate investigation of her grievance by failing to conduct additional investigation into the statements of coworker Lori Hays and Doe. Dennis contends that Hays took responsibility for the flyer, that Doe was easily manipulated, and that Doe's affidavit was drafted by someone else. The salient fact was, however, that both witnesses to the events contradicted Dennis. The Union acted within its broad range of discretion in not seeking additional evidence about Hays and Doe prior to deciding whether to proceed to arbitration.

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<sup>10</sup>It may be that, at this late date, the hard drive no longer exists or contains no relevant evidence; however, in part due to decisions made by Dennis, we have no evidence upon which to base such a conclusion. Nor could we conclude that the hard drive actually contained evidence at any time during which the Union could have obtained it.

### 3. Arbitration screening procedures and Union president review

Dennis argues that “[t]he ARB Screening Process \* \* \* is flawed because it does not provide for the event of a tie between panel members as occurred here and because it does not require findings to support a decision not to arbitrate.” (Complainant’s Post-Hearing Brief at 3.) Our task is to determine whether the Union’s decision was wholly irrational or arbitrary, not whether its procedures could be improved. The Union’s duty of fair representation does not require it to provide for a different method of tie-breaking or a formal statement of findings in support of its reasons not to arbitrate.<sup>11</sup>

Dennis has not proven that Union officials had a hostile motive, acted dishonestly, or made their decision not to pursue the grievance without any basis. The Union’s decision not to take her grievance to arbitration was a rational one. The Union investigated the facts, reviewed the evidence collected by the Hospital and Union, permitted Dennis to make a live presentation to the grievance screening committee, permitted Dennis to appeal the committee’s decision, and discussed the matter with experienced stewards and Union professional staff. The central facts of her case were that the other witnesses to the events contradicted Dennis’ version, Dennis had previously been disciplined for similar conduct and was warned that similar future conduct could result in her dismissal, and Dennis’ own statements to the employer undercut her case. We need not decide whether the Union’s interpretation of the facts is correct. So long as it is rational, we will not substitute our judgment for that of the Union. If a union acts in good faith, it need not pursue even a potentially meritorious grievance. *Ekstrom and Bedortha v. OSEA*, Case No. UP-54-93, 14 PECBR 565, 567 (1993).

The record shows that the Union’s decision not to take the Dennis grievance to arbitration was rational and based on a careful, good faith examination of the evidence. We conclude that Dennis has failed to establish that the Union breached its duty to fairly represent her. We will dismiss the complaint against the Union.

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<sup>11</sup>Dennis also argues that she should have been permitted to proceed to arbitration by paying for it herself. That offer was not made to the arbitration screening committee. In any event, the duty of fair representation does not require a union to approve a case for arbitration just because the grievant offers to pay for it. See *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20, and Metropolitan Exposition Recreation Commission*, Case Nos. UP-15/16-92, 15 PECBR 85 (1994), *AWOP 134 Or App 414, 894 P2d 1267* (1995). See also *Strickland v. State of Oregon, Department of Human Resources, Employment Division*, Case No. UP-70-91, 13 PECBR 602 (1992)

Dennis must prevail against the Union in order to litigate her subsection (1)(g) claim against the Hospital. Because she has not prevailed against the Union, we will dismiss the complaint against the Hospital. *Tancredi*, 20 PECBR at 977.

ORDER

The complaint is dismissed.

DATED this 3<sup>rd</sup> day of January 2007.

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\*Donna Sandoval Bennett, Chair



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Paul B. Gamson, Board Member



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James W. Kasameyer, Board Member

\*Chair Bennett is recused from this matter.

This Order may be appealed pursuant to ORS 183.482.