

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-31-04

(DUTY OF FAIR REPRESENTATION)

ROBERT L. TANCREDI, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 JACKSON COUNTY SHERIFF'S )  
 EMPLOYEE ASSOCIATION and )  
 JACKSON COUNTY SHERIFF'S OFFICE, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

DISMISSAL ORDER

Jeffrey H. Boiler, Attorney at Law, Boiler Law Firm, 925 County Club Road, Suite 125, Eugene, Oregon 97401, represented Complainant.

Mark Makler, Attorney at Law, Garrettson, Goldberg, Fenrich & Makler, 5530 S.W. Kelly, Portland, Oregon 97239, represented Respondent Association.

C. Akin Blitz, Attorney at Law, Bullard, Smith, Jernstedt & Wilson, 1000 S.W. Broadway, Suite 1900, Portland, Oregon 97205, represented Respondent Jackson County.

On June 23, 2004, Complainant Robert Tancredi filed this unfair labor practice complaint alleging that Jackson County Sheriff's Employee Association (Association) violated ORS 243.672(2)(a) and (d) and its duty of fair representation by not pursuing a grievance over Jackson County Sheriff's Office's (County) termination

of Complainant's employment. As a remedy Complainant requested that this Board order arbitration of Complainant's termination, reimburse Complainant's filing fees, and award reasonable representation costs and a civil penalty. The complaint did not name the County as a respondent, did not allege that the County breached the collective bargaining agreement in violation of ORS 243.672(1)(g),<sup>1</sup> and did not seek Complainant's reinstatement.

On July 7, 2004, Complainant filed a supplemental pleading in support of his request for a civil penalty against the Association.

By letter dated August 9, 2004, Administrative Law Judge (ALJ) James Kasameyer informed Complainant that this Board will not order arbitration unless the employer is made a party to the unfair labor practice proceedings and that reinstatement is not possible without including the County as a respondent. Thereafter, the case was reassigned to ALJ Vickie Cowan.

On September 24, 2004, Complainant filed an amended complaint naming the County as a respondent and alleging that the County violated ORS 243.672(1)(g) because it terminated Complainant without just cause under the labor contract between the Association and the County. The amended complaint did not seek a remedy against the County. The amended complaint did not reference the Association, nor did it seek a remedy against the Association. ALJ Cowan treated this amended complaint as supplementing, not replacing, the initial complaint.

On December 10, 2004, the ALJ formally served the complaint and notice of hearing on all parties, setting this matter for hearing on April 11-13, 2005.

On December 23, 2004, the Association timely filed its answer and moved to dismiss the complaint for failure to state a claim, or in the alternative, to make the complaint more definite and certain. The ALJ granted the motion to make more definite and certain and requested that Complainant amend his complaint to comply with Employment Relations Board (ERB) rules.

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<sup>1</sup>ORS 243.672(1)(g) provides that it is an unfair labor practice for an employer to "[v]iolate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them."

On January 21, 2005, the County informally moved that the complaint be dismissed against both the Association and it, on the basis that the complaint showed on its face that the Association had not violated any duty of fair representation it owed Complainant; and on the basis that Complainant had not timely filed its complaint against the County.

Complainant filed his second amended complaint on February 7, 2005, seeking Complainant's reinstatement with full back pay, representation costs, and/or arbitration of Complainant's termination grievance. In it, Complainant alleged that the Association had violated its duty of fair representation in a number of particulars, and that the County had violated the labor contract by terminating him without just cause. The second amended complaint did not reference any provision of the Public Employees Collective Bargaining Act (PECBA).

In correspondence accompanying the second amended complaint, Complainant's counsel responded to the County's untimeliness argument as follows:

\*\*\* The September 20, 2004 packet from the Board contained evidence of this potential evidentiary basis for a claim against the County, for the first time. The claim is failure to abide by the grievance procedures in the [labor contract]. This is the claim that raises the argument regarding the County as a necessary party for just adjudication. \*\*\*

The ALJ served Respondents with the second amended complaint. On February 24, 2005, the Association timely filed its amended answer denying the allegations, moving that this Board dismiss the complaint for failure to state a claim, order Complainant to pay the Association's representation costs, and award a civil penalty.

On February 25, 2005, the County timely filed its answer and moved to dismiss the complaint as being untimely filed. The County also sought its representation costs, and a civil penalty.

### BACKGROUND

In reviewing a complaint to determine whether it states a claim under the PECBA, we assume that the facts alleged in the complaint are true. *Clark v. OSEA and*

*Lincoln County School District*, Case Nos. UP-102/103-89, 12 PECBR 49 (1990). We may also rely upon facts material to the dispute which are disclosed by respondents to ERB and to the complainant during preliminary investigation, and to which the complainant does not object. We may treat a fact to be undisputed, even if a party claims otherwise. *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495 (1993). Except as otherwise noted, the facts set forth below are taken from Complainant's pleadings.

The Association is the exclusive representative of a bargaining unit of Sheriff's Department employees employed by the County, a public employer.

Tancredi began working for the County as a corrections deputy on or about May 27, 2002. He remained in that position until his termination on December 23, 2003.

In August 2003, a female inmate at the jail alleged that Tancredi had engaged in unwanted touching and participated in sexually explicit conversations with female inmates. On August 29, 2003, the County placed Tancredi on administrative leave with pay while it investigated the allegations.

The Department of Justice (DOJ) conducted a criminal investigation of the allegations. The County separately conducted its own internal affairs (IA) investigation. As part of the criminal investigation, DOJ Attorney Todd Gray interviewed Sheriff's Deputy Christopher Zornes. Zornes worked the graveyard shift with Tancredi and had worked the same shift on the dates in question. Zornes was an Association representative. Zornes indicated that he did not personally care for Tancredi. He described him as not a go-getter, not a team player, and one who avoided work. In Zornes' opinion, Tancredi was not a truthful person and he spent an unusual amount of time in the female portion of the jail. As a result of its own internal investigation, the County made a preliminary determination to terminate Tancredi.

On November 25, 2003, the Tancredi criminal matter was presented to a Jackson County grand jury. The grand jury returned a not true bill of indictment relative to the potential criminal charges of official misconduct in the first degree. No criminal charges were pursued.

On December 22, 2003, the County conducted a pre-disciplinary meeting with Tancredi. Union President Randy Pollard accompanied Tancredi. They submitted

a written statement in lieu of testimony. After the pre-disciplinary meeting, the County terminated Tancredi's employment.

On or about December 30, 2003, Tancredi requested that the Association grieve his termination. President Pollard agreed to file a grievance.

The Association asked its lawyers to review the merits of the grievance and its possible outcome. By letter dated January 5, 2004, Association Attorney Rhonda Fenrich provided Association President Pollard with her analysis of the Tancredi case. Fenrich noted that Tancredi had been discharged for allegedly: (1) providing his PO box to a female inmate so that he could exchange photos with her; (2) having a female inmate perform oral sex on him, without her consent; (3) engaging in inappropriate conversations with female inmates; (4) and using excessive force on a juvenile. She indicated that Tancredi had admitted that he gave his PO box to a female inmate, had engaged in inappropriate conversations with female inmates, and had used a "groin" hold on a juvenile. Tancredi had denied receiving oral sex from a female inmate. Fenrich reviewed all materials furnished the Association during the pre-disciplinary interview, including materials related to the County's internal investigation. In her analysis, Fenrich went through the seven traditional tests for just cause. She told the Association that it had about a 50 percent chance of overturning the termination and replacing it with a 30-day suspension, but that the chances of winning would improve if Tancredi passed a polygraph examination regarding the sexual misconduct charge. Thereafter, Tancredi agreed to take a polygraph test.

On or about February 4, 2004, Tancredi took and failed a polygraph examination regarding the sexual misconduct charge.

On February 23, 2004, Fenrich notified Tancredi that he had failed the polygraph examination. She stated that she had requested the polygrapher not prepare a written record of this fact, because she did not want it to be available for litigation discovery in the future. Fenrich further informed Tancredi that, based on the fact that he failed the polygraph, she had informed the Association that she did not believe it could prevail in Tancredi's arbitration. By letter dated March 10, 2004, Fenrich formally informed Tancredi that the Association's executive board had decided not to proceed to arbitration on his termination. She stated that this decision was made after consideration of the evidence produced by the County during its investigation, her meeting with Tancredi, and the results of his polygraph examination.

In January 2004, Tancredi applied for unemployment benefits. He was deemed eligible. The County appealed this determination to the Employment

Department. On February 27 and March 15, 2004, a hearing on the County's objections was conducted. The hearings officer ruled that Tancredi was not disqualified for benefits based on misconduct. The County did not appeal this decision to the Employment Appeals Board.

On April 14, 2004, Tancredi requested that the Association provide him with a copy of its investigation file. On April 14, Fenrich responded that Tancredi must request the IA investigation and tape recording from the County, and that Tancredi had already been provided with all other correspondence regarding his grievance.

Tancredi again requested copies of the Association's file. By letter dated April 28, 2004, Fenrich responded:

"I have enclosed copies of the grievances filed on your behalf. I do not possess any inmate statements. I do not have a mechanism for copying the internal affairs tape-recording, however, I would be happy to copy it at your expense.

"As for correspondence between myself and the Executive Board, you have no right to these documents as the Association, as my client, has not agreed to waive privileges associated with these documents. The Association represented you to the utmost of its abilities based upon the internal affairs investigation and your polygraph results. All correspondence regarding this matter with you has been consistent — if you had passed the polygraph the Association would not have hesitated in arbitrating your case. Since you did not, it was not in the best interests of the Association to arbitrate your termination.

"I understand you are upset with your termination, but as legal counsel for the Association it is my legal opinion that the Association would not be successful in gaining your reinstatement with the County. Based upon our analysis, the Board elected to not risk the financial costs of a losing arbitration."

Tancredi alleges that Fenrich's letter did not include a copy of his grievance.

On or about April 26, 2004, Tancredi received a copy of his personnel file from the County. The file included the DOJ criminal investigation, the IA investigation, and other personnel records normally associated with employment. The file did not include a copy of Tancredi's grievance.

### DISCUSSION

The County terminated Complainant's employment on December 23, 2003. On February 23, 2004, the Association's attorney told Complainant that she would not recommend that the Association pursue his grievance. On March 10, 2004, the Association's attorney advised Tancredi by letter that the Association would not proceed with his grievance. Complainant subsequently filed an unfair labor practice complaint on June 23, 2004, alleging that the Association violated its duty of fair representation by refusing to file a grievance on his behalf and by refusing to process his grievance to arbitration. The initial complaint did not name the County as a respondent, nor did it allege facts which would implicate the County. On September 24, 2004, in response to a letter from the ALJ, Complainant amended his complaint to include the County as a respondent.

The Association moves to dismiss the complaint for failure to state a claim for violation of its duty of fair representation under ORS 243.672(2)(a). The County moves to dismiss the breach of contract complaint against it under ORS 243.672(1)(g) as untimely. We will address the Association's claim first.

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 ORS 243.782." Under this section, a labor organization has a duty to fairly represent those bargaining unit employees for which it is the exclusive representative. To establish a violation of the duty of fair representation in a case involving a union's decision not to file or arbitrate a grievance, Complainant must prove that the union acted in bad faith, or was arbitrary or discriminatory. See *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 (2000); and *Bjornsen v. Jackson County Sheriffs' Officers Association and Jackson County*, Case Nos. C-130/131/132/133/134/135-83, 8 PECBR 6783, 6792-95 (1985).

ERB accords substantial discretion to unions in deciding whether to arbitrate, or even to file a grievance. *Conger v. Jackson County and OPEU*, Case No. UP-22-98, 18 PECBR 79, 88 (1999). 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 State 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).

As we stated in *Putvinskas*, 18 PECBR at 898, “[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.” Therefore, a union’s failure to take witness statements or to allow the union member to rebut aspects of the union’s investigation does not breach the duty of fair representation.

A union has the discretion to withdraw a grievance based on its judgment that there is insufficient evidence to support the claim. *Balch v. OPEU*, Case No. UP-6-96, 16 PECBR 478 (1966). 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). Nor is a violation established by the fact that the union’s acts benefit the complainant to a lesser degree than others, or even that those acts adversely affect the complainant. Moreover, a union’s good-faith decision not to pursue a potentially meritorious grievance is not a breach of its duty of fair representation. *Ekstrom and Bedortha v. OSEA*, Case No. UP-54-93, 14 PECBR 565, 567 (1993) (union decided not to pursue grievance after consulting expert and making well-reasoned decision not to proceed). In other words, a union may act within a wide range of reasonableness when deciding to file or pursue a grievance. For a union’s actions to fall outside this wide range of reasonableness, they must be “wholly ‘irrational’ or ‘arbitrary.’” *Baltus v. Multnomah County School Dist. 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 (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 v. OPEU, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409 (1993). Generally, we do not substitute our judgment for that of a union that rationally decided not to process a grievance. Instead, we determine whether a union conducted a proper investigation and used a rational method of decision-making in reaching its conclusion. *Putvinskas, supra*.

The case before us is a hybrid duty of fair representation case. Before Complainant can maintain an action against the County for violation of the collective bargaining agreement, he must first prove that the Association breached its duty to fairly represent him. *Ralphs, supra*.<sup>2</sup>

Here, Complainant alleges that the Association deliberately decided not to file and/or pursue a grievance on his behalf, and that an Association representative made statements to an investigator during a criminal investigation which may have put Complainant in a bad light. Complainant further argues that his grievance was meritorious based on favorable rulings from the grand jury and the unemployment hearings officer.

Complainant first alleges that the Association did not file or prosecute a grievance on his behalf. The Association alleges that it did file a timely grievance which it later decided not to pursue to arbitration. Although there appears to be a factual dispute over whether the Association filed a grievance, we do not need to resolve this dispute because it is not determinative. Our analysis is the same whether a grievance was not filed, or whether a labor organization chooses not to take a grievance to arbitration. 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 (1991). Indeed, a union does not violate its duty of fair representation if it mistakenly fails to file a meritorious grievance, so long as union's decision is not arbitrary or in bad faith. *Veysey v. ATU, Division 757*, Case No.

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<sup>2</sup>For this reason, we disagree with the approach taken by our concurring colleague, whose approach we view as inconsistent with our long-standing doctrine of bifurcation of duty of fair representation (DFR) cases as set forth in *Ralphs v. OPEU, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409 (1993), and in the many other decisions cited above. In accordance with that doctrine, we may not skip the case against the Association and proceed directly to the case against the County. In this regard, our procedures in DFR cases differ from those federal cases cited in our colleague's concurrence

UP-113-91, 13 PECBR 683 (1992). What is important is the process by which the Association determined not to pursue the grievance, not whether the grievance was filed. *Balch, supra*. The Association did not violate the Act even if it did not file a written grievance.

The Association president accompanied Complainant to the pre-disciplinary hearing at which they presented a written statement. The Association reviewed the evidence accumulated during both the criminal and the internal affairs investigation. This information was submitted to the Association's attorney for review. The Association's attorney stated that the Association had a 50-50 chance of reducing the discharge to a 30-day suspension, based on this information and the information she received from Complainant. Association counsel believed that if Complainant passed a polygraph about the sexual misconduct charge, the Association's chances of prevailing would increase substantially. However, Complainant failed the polygraph examination. All of this information was then reviewed and considered by the Association's executive board. After review, the executive board voted not to pursue the grievance because they did not think it would be successful. We find nothing irrational about the Association's investigation or how it made its decision.

In *Balch, supra*, we dismissed a duty of fair representation complaint without hearing, based on an analysis of the exclusive representative's decision-making process. We observed that the undisputed evidence indicated that the Union deliberately closed Complainant's grievance because it believed there was insufficient evidence to support her claim. *See also Houchin v. SEIU, Local 49 and Centennial School District*, Case No. UP-37-92, 14 PECBR 395 (1993) (union's decision to drop grievance was rational and did not violate the duty of fair representation). The same result is required here.

Complainant also alleges that the Association violated its duty of fair representation by allowing or directing Association Representative Zornes to make comments during a criminal investigation that may have put Complainant in a bad light. This does not lead to a different result.

In the first place, Complainant alleges no facts in support of his allegation of Association involvement in Zornes' comments. Zornes was being interrogated regarding a potential criminal violation. There are no allegations that Zornes' statements were untruthful. Zornes was Complainant's coworker. He also happened to be a union representative. However, being a union representative does not require one to lie or

remain silent on behalf of another union member, especially during a criminal investigation. Further, Complainant does not allege that Zornes was the Association's decision-maker or that he even took part in the decision-making process.

Finally, Complainant alleges that his grievance was meritorious based on favorable findings in his unemployment case and the grand jury. We do not agree with Complainant's argument. ORS 657.273 prohibits our use of unemployment decisions, findings, conclusions, final orders, and judgments for the purpose of claim or issue preclusion; and they are not admissible as evidence in a hearing before this Board. The issues presented here are not identical to those issues presented in the unemployment proceedings and the grand jury, nor was the Association a party to those proceedings. Therefore, we will not consider the findings of the unemployment hearings officer or the grand jury as evidence supporting Complainant's allegations.

The facts as alleged are insufficient to state a claim against the Association. Therefore, the complaint will be dismissed as to it. This being the case, Complainant's claim against the County fails also. *Putvinskas, supra*.

Even if it were appropriate to require a hearing on Complainant's claims against the Association, there exists a separate and independent basis for dismissing the breach of contract claim against the County. Complainant's claim against the County is untimely, and fails on this basis alone.

ORS 243.672(3) provides: "An injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice." In a duty of fair representation case, the 180-day limitation period, for both the union and employer, begins when the Complainant knew, or should have known, that the Association would not or did not pursue Complainant's grievance. *Morris v. DCTU and Portland Public Schools*, Case Nos. UP-1/2-94, 15 PECBR 138, 140 (1994); and *Ralphs, supra*, 14 PECBR at 416.

On February 23, 2004, Complainant knew that the Association's attorney had told the Association that she did not think it could prevail on Complainant's grievance. On March 10, 2004, the Association's attorney advised Complainant in writing that the Association would not proceed to arbitration on his behalf. Although Complainant timely filed an unfair labor practice complaint against the Association on June 23, 2004, Complainant did not name the County as a respondent until September 24, 2004. The County asserts that Complainant knew on February 23, 2004,

that the Association would not take his grievance to arbitration, and that Complainant waited at least 214 days after Complainant knew of the potential duty of fair representation violation to file a complaint against it. This is well beyond the 180-day statute of limitations. We find that, at the latest, Complainant knew that the Association would not process his grievance by March 10, 2004. His complaint against the County was not filed until September 24, 2004, well beyond the statutory 180-day limitation period.

In correspondence referred to earlier, Complainant's attorney states that until September 20, 2004, Complainant had no knowledge of any evidentiary basis for a claim against the County for failing to abide by the collective bargaining agreement. On that date Complainant's attorney received an information packet from this Board indicating that the Association had filed a grievance on Complainant's behalf. On this basis, Complainant argues that his complaint against the County was timely. This argument lacks merit. The claim against the County arose when the Association notified Complainant that it would not pursue his grievance. The complaint is untimely based on the date of that notice.

Complainant also argues that the amended complaints relate back to the initial complaint for statute of limitations purposes. For guidance on such issues, this Board has looked to the Oregon Rules of Civil Procedure (ORCP), specifically ORCP 23 C. *Martin v. Ashland School District #5 and OSEA*, Case No. UP-30-01, 20 PECBR 164 (2003).

ORCP 23 C provides:

“\* \* \* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, such party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining any defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party brought in by amendment.”

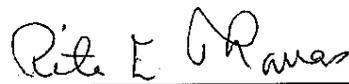
After reviewing the four corners of the document, we conclude that Complainant's original complaint states a claim only against the Association. The County was not a named party, the complaint does not allege facts which would implicate the County, and the County did not have notice of a claim against it prior to the running of the statute of limitations. Under these circumstances, the addition of the County as a respondent by amended complaint does not relate back to the time before the limitations period expired. Therefore, the case against the County is untimely and must be dismissed. (See *Krauel v. Dykers Corp.*, 173 Or App 336, 21 P3d 1124 (2001).)<sup>3</sup>

ORDER

The complaint is dismissed.

DATED this 1<sup>st</sup> day of June 2005.

  
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Paul B. Gamson, Chair

  
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\*Rita E. Thomas, Board Member

  
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James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>3</sup>In *Krauel v. Dykers Corp.*, 173 Or App 336, 21 P3d 1124 (2001), plaintiff was injured at a bowling alley. Four days before the statute of limitations was to expire, plaintiff filed a complaint alleging that defendant was negligent in maintaining the bowling alley floor. Three days after the statute of limitations ran, plaintiff filed a first amended complaint. A month later, plaintiff filed a second amended complaint in which she added an additional defendant. The court held that plaintiff sought to add a new party after the statute of limitations had run and, therefore, the complaint could not relate back to the time before the limitations period expired. The complaint against the second defendant was untimely and the complaint was dismissed.

\*Board Member Thomas Concurring:

I concur with the dismissal of this complaint but for different reasons. Under the facts of this case, where the complaint failed to state a claim and was untimely as to the County, it should have been dismissed because of the untimely filing of the complaint against the County. There was no available remedy without the County as a party here. Consequently, we need not reach the merits of the claim against the Association.

This case constitutes a hybrid duty of fair representation (DFR) case. To prevail, Complainant must prove that both the Association breached its duty of fair representation, and that the County violated the collective bargaining agreement. *Ralphs, supra*; and *Matos v. Kurz-Hastings*, 701 F. Supp. 1135 (1988).<sup>4</sup>

Complainant requested as a remedy that the Association be compelled to arbitrate this matter.<sup>5</sup> We have not previously addressed the question of a remedy, if the employer has been dismissed, or is not a party to a DFR complaint.<sup>6</sup> I believe we should address this here and look to the private sector for guidance on this issue.

The federal courts have long held that an employee may not prevail against a union for a duty of fair representation violation unless and until the employee establishes that the employer violated the collective bargaining agreement. *Matos, supra*.

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<sup>4</sup>In *Matos*, the employee brought a hybrid DFR case against his employer and the union. The Court granted summary judgment to both the employer and the union because the employee failed to come forward with any factual evidence in support of the requisite first element of a hybrid DFR case of action—that the employer breached the collective bargaining agreement.

<sup>5</sup>This question was raised only once before in *Veysey v. ATU, Division 757*, Case No. UP-113-91, 13 PECBR 683 (1992). However, because we dismissed the case on other grounds, we did not determine whether we could compel a union to arbitrate a case in which the employer was not a party.

<sup>6</sup>ORS 243.676(2) provides for remedies beyond back pay under a request to force arbitration. However, to reach those remedies, a complaint must state a claim for which remedies may be awarded. If this case were not dismissed for being untimely as to the County, the facts in the complaint itself indicate that the Association has met or exceeded its duty of fair representation.

In *Curtis v. Transportation Union*, 648 F2d 492, 107 LRRM 2442 (1981), the case against the employer was dismissed prior to trial. The court subsequently concluded that the union had failed to provide the employee with adequate representation. However, because the employer, a necessary party, had been dismissed and there could be no remedy, the court dismissed the case against both the employer and the union.

In 1998, the National Labor Relations Board (NLRB) adopted the federal court's stance regarding damages in hybrid DFR cases. *Iron Workers Local Union 377*, 326 NLRB 375, 159 LRRM 1097 (1998).

Even if Complainant could establish that the Association violated its duty to fairly represent him, the County is a necessary party to this action. We dismiss the complaint against the County as untimely, therefore, Complainant cannot obtain a remedy for the County's alleged violation of the collective bargaining agreement. Since it is impossible for Complainant to obtain relief, the claims against the Association must also be dismissed.<sup>7</sup> See *Matos, supra*.<sup>8</sup>

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<sup>7</sup>In the words of an old song, "you can't have one without the other."

<sup>8</sup> Even if Complainant were able to prove his case against the Association, an award against a union cannot include damages attributable solely to the employer's breach of contract. *Vaca v. Sipes*, 386 US 171, 64 LRRM 2369 (1967).

