

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-17-07

(UNFAIR LABOR PRACTICE)

ALEXANDER WIESE,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
MULTNOMAH COUNTY	)	CONCLUSIONS OF LAW
CORRECTIONS DEPUTY	)	AND ORDER
ASSOCIATION AND	)	
MULTNOMAH COUNTY,	)	
	)	
Respondents.	)	
_____	)	

None of the parties objected to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on February 20, 2008, following a hearing on December 5, 2007 in Portland, Oregon. The record closed on January 17, 2008, following receipt of the parties' post-hearing briefs.

Glenn Solomon, Attorney at Law, 400 S.W. 6th Avenue, Suite 400, Portland, Oregon 97204, represented Complainant.

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris & Kaplan, 111 S.W. 5th Avenue, Suite 1650, Portland, Oregon 97204, represented Respondent Association.

Kathryn A. Short, Assistant County Counsel, Multnomah County, 501 S.E. Hawthorne Boulevard, Suite 500, Portland, Oregon 97214, represented Respondent County.

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On May 22, 2007, Complainant Alexander Wiese filed an unfair labor practice complaint against the Multnomah County Corrections Deputy Association (Association) and Multnomah County (County). The complaint, as amended on

August 21, 2007, alleges that the Association and the County violated “ORS 243.672(2)(a) and (g)” by “violating [Wiese’s] right to fair representation and constructively terminating his employment by giving Weiss [*sic*] false and misleading information for reasons that were discriminatory.”<sup>1</sup>

The matter was bifurcated to first address the allegations that the Association violated its duty of fair representation. *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722 (1984)

The Association and the County filed timely answers.

The issue is: Did the Association violate its ORS 243.672(2)(a) duty of fair representation regarding the investigation into Wiese’s contact with inmates and his subsequent resignation from his position as a Multnomah County Corrections Deputy?

### RULINGS

1. After the hearing, the Association moved to amend paragraph 6 of its answer to conform to the evidence presented at hearing: on November 28, 2006, Wiese met separately with Darcy Bjork and not in the presence of Jennifer Ott or Ronald Bishop. The amendment is allowed.

2. The other rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

1. The Association is the exclusive representative of a bargaining unit of corrections officers employed by the County, a public employer.

### Background

2. The Association and the County are parties to a collective bargaining agreement effective 2004 to 2010. The agreement, which was provided to Association members, includes the following provisions:

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<sup>1</sup>Wiese alleges that the Respondents violated “ORS 243.672(2)(a) and (g)” However, an employer breach of contract is appropriately raised under ORS 243.672(1)(g). We will construe this portion of the complaint as having been filed under (1)(g) instead of (2)(g).

(a) Article 18 permits the County to discipline employees for just cause  
Such employees

“\* \* \* shall have the right, subject to the provisions of the Association Constitution, to appeal the action through the Grievance Procedure. The Association shall submit such grievance at Step III of the grievance procedure not later than ten (10) working days after the effective date of the disciplinary action.”

(b) Article 19 establishes an employee’s right to representation and provides in part: “All Employees in bargaining unit whom [*sic*] are the subjects of a complaint or investigation shall be entitled to \* \* \* the right to Association representation prior to or during the interview in accordance with State law.”

(c) Article 20, Section 1, establishes the parties’ grievance process. Grievance Step III, the step at which discipline is appealed, states: “If the grievance has not been answered or resolved at Step II, the Sheriff or the Association may \* \* \* request arbitration by written notice to the other party.”

(d) Article 20, Section 2, entitled “Stewards and the Investigation of Grievances,” provides:

“\* \* \* Employees selected or elected by the Association as employee representatives shall be known as ‘Stewards’. The names of the stewards shall be certified in writing to the County by the Association. Upon notification to the supervisor and the tentative cause of a grievance, a steward(s) may investigate a grievance(s) and represent employees in grievances and ‘Weingarten’ meetings during working hours without loss of pay. \* \* \*”

3. The Association’s Constitution, available on its website, defines the roles of Association officers. In relation to grievance processing, the Constitution states that the executive vice president is the “chief investigator and processor for all grievances and arbitrations of the Association;” that the east and west vice presidents shall “[a]ctively engage in contract administration and be the primary investigator and processor for all grievances of the Association in their respective areas;” and that the stewards shall “[a]ctively engage in contract administration and be the investigator and processor for all grievances of members of the Association in their respective areas.”

Article 7, Section 1 of the Association's Constitution, entitled "Power to Bind Association," provides:

"Except to the extent specified in this constitution, no officer of the Association shall have the power to act as agent for, or otherwise bind the Association in any way whatsoever. No member or group of members or other persons shall have the power to act on behalf or otherwise bind the Association except to the extent specifically authorized in writing by the President or Executive Board of the Association."

4. The County Sheriff's Office receives hundreds of complaints each year about its employees. If an employee's supervisor determines that the complaint needs to be investigated, the supervisor refers the complaint to the Internal Affairs Unit (IAU), where an investigator is assigned to conduct a Pre-Investigation Assessment (PIA). During the PIA, the investigators collect related information and conduct interviews to determine whether the complaint is unfounded, should be handled by the employee's supervisor, or needs further investigation. The employee is generally not notified of the PIA because it is considered an assessment of the complaint, not an investigation of the employee.

After the PIA is concluded, the PIA report and information are forwarded to command staff. If command staff determine that further investigation is necessary, they refer the complaint back to IAU for a full investigation and the employee and the Association are formally notified of the investigation. If the IAU determines that criminal activity may have occurred, it suspends its investigation and refers the matter to the Sheriff's Detective Unit. If the Detective Unit and/or District Attorney's office determines that there will be no criminal prosecution, or when the criminal prosecution has been completed, the matter is referred back to IAU to continue its investigation.

5. The Association provides representation for employees throughout the IAU investigation process. Sometimes employees bring someone else, such as a spouse, into the interview process with them. If the matter becomes a criminal investigation, the Association refers the employee to an attorney. If the employee is disciplined, the Association's practice is to file a grievance to preserve time lines. The Association then conducts its own fact finding and presents the grievance to its Executive Board (Board). The Association also invites the affected employee to address the Board about the grievance. The Board, based on its constitutional responsibility to authorize the spending of Association funds, makes the final decision regarding whether a grievance will be arbitrated. The Association has a grievance committee that presents grievance recommendations to the Board.

6. Between 2002 and March 2007, the County processed at least five complaints alleging fraternization or sexual contact between employees and inmates. The Association represented, as needed, employees who were the subject of these complaints. The County determined some of the complaints were unfounded as a result of the PIA. In one case, the County did not notify the deputy that a complaint had been filed; therefore, the Association did not contact the deputy regarding the matter. Another complaint was not sustained after a formal investigation in which the deputy received Association assistance. In two other cases, the employees, who were represented by the Association, resigned after the complaints were forwarded to the District Attorney's office for criminal prosecution.

#### Wiese Complaint

7. In 1995, Alexander Wiese was employed by the County as a corrections record technician. In 1998, he worked as a corrections technician in the Parole and Probation Department. In April 2000, Wiese became a corrections deputy in the Sheriff's Office and a member of the Association's bargaining unit. Wiese was required to have a Department of Public Safety, Standards, and Training (DPSST) certification prior to his employment as a corrections deputy. Wiese had no prior discipline with the County.

8. In approximately 2001, Wiese sought Association assistance concerning a seniority issue. An Association attorney represented Wiese and Wiese regained lost seniority. During a serious illness, Association members donated leave to Wiese.

9. The Sheriff's Office has a strict policy against fraternization with inmates. At the time of Wiese's issue, the Sheriff's Office was under public and political pressure because of several embarrassing incidents. One of these incidents, the Green case, involved a law enforcement deputy who had allegedly sexually abused female suspects. During the same time period, a grand jury report criticized the Sheriff's Office.

10. Wiese was assigned to supervise the kitchen at the Inverness Jail. Inmate LB was a female inmate housed in Dorm 2 of the Inverness Jail and assigned to kitchen duty. Wiese and LB had a personal relationship. Sometime prior to November 7, Wiese told his wife and children that he had personal feelings for a jail inmate.

11. On November 7, 2006, Wiese submitted an Information Report to his supervisor, Captain Raimond Adgers, in which he stated that he and his wife were in the process of separating or divorcing and that he was concerned his wife or her friend would file a complaint alleging he was involved with an inmate in the kitchen.

12. On November 8,<sup>2</sup> Captain Adgers met with Wiese regarding the report. Adgers asked Wiese if he had been in any situations that might be perceived as inappropriate inmate contact. Wiese said no.

13. During October or November, Amie Banta, a corrections deputy assigned to Dorm 2 of the Inverness Jail, had several discussions with Wiese about Wiese's family problems, including his fear that his wife was going to file a complaint that he was involved with an inmate. Wiese told Banta that he had notified Captain Adgers of his concern.

14. On November 13, Deputy Banta was involved in a search for contraband in Dorm 2 inmate cells during which a pen was found in Inmate LB's drawer. It was determined that Inmate LB should be written up. Inmate LB claimed she had been set up. Wiese then investigated the incident and, as a result, Inmate LB was not disciplined. A conflict developed between Inmate LB and other inmates. Wiese spoke with Inmate LB and another inmate about the conflict. Wiese told Banta that he believed Inmate LL had his phone number and planned to plant it on Inmate LB. Banta told Wiese that this was serious and he should write a report.

15. Later that day, Banta raised the phone number issue with Wiese and Sergeant Stephen Alexander, the Association information officer and an Association Board member. Alexander has no responsibility for grievance processing. Alexander told Wiese that he needed to write a report immediately. The next day, Wiese told Banta that he was no longer concerned because the phone number Inmate LL had was not his number.

16. On November 19, Wiese asked Captain Adgers to meet with him and Association Steward Deputy William Taylor concerning the inmate fraternization issue. On November 20, Wiese, Taylor, and Adgers met in Adgers' office. Wiese told Adgers that he "has had verbal conversation [*sic*] with Inmate [LB]" while working in the kitchen and that he "understood that he may have fraternized with Inmate [LB]," but that he "has not professionally crossed the line with the inmate." Adgers told Wiese that the issue would be forwarded to IAU for investigation; that Wiese would be transferred to a different assignment; and that Wiese should not contact Inmate LB, either directly or indirectly.

17. On November 21, Wiese told Banta that she may be contacted as a result of the IAU investigation. Wiese told Banta that he had told Adgers that he had

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<sup>2</sup>All following events occurred in 2006 unless otherwise indicated.

feelings for Inmate LB. He also told Banta that he planned on spending time with Inmate LB after she got out of jail. On November 22, Banta told Adgers that Wiese had talked to her regarding his association with Inmate LB. Adgers directed Banta to file an Information Report about the contact.

18. On November 23, Sergeant Stephen Piña received several anonymous inmate Kytes. Kytes are forms used by inmates to communicate with jail staff and request services. The Kytes contained detailed information about Wiese, the relationship between Wiese and Inmate LB, and Wiese's separation from his wife. The Kytes alleged that Wiese had a relationship with Inmate LB, that he wrote her letters, downloaded songs for her on the kitchen computer, and gave her special privileges. The Kytes also alleged that Wiese planned on living with Inmate LB after she was released. Piña provided an Information Report, including the Kytes, to Adgers and Wiese.

19. Wiese showed the Kytes to Deputy Taylor. Taylor asked Wiese if this was all there was to the situation and Wiese said there was nothing more. Taylor told Wiese he needed to know everything that happened so he could better represent Wiese. Wiese mentioned he thought he should resign. Taylor told him that if there was no more to the situation, then the Association could fight it. Taylor told Wiese he might be suspended. Taylor encouraged Wiese not to take any rash action, to allow the investigation to proceed, and to take things one day at a time. During this or a later conversation, Wiese told Taylor that he wanted his friend, Deputy Don Bryant, to represent him. Taylor told Wiese "That's fine. Let him know. If he needs anything, I'll be right here to help him."

20. On Friday, November 24, Captain Adgers placed Wiese on paid administrative leave pending an investigation. Deputy Taylor was not on duty, so Adgers arranged for Association Steward Sergeant Scott Yon to be present at the meeting. Wiese told Yon that he wished to be assisted by his friend, Deputy Bryant. Although Wiese knew that Bryant was not an Association steward or representative, he wanted Bryant because he felt he could trust him. Yon allowed Bryant to attend the meeting. During the meeting, Adgers told Wiese about peer support and confidential counseling available through the County. After the meeting, Wiese asked Bryant to warn Inmate LB that she may be contacted as part of the investigation.

21. That weekend, Wiese told Bryant that he had not been forthright with Adgers. They talked about the Green case and what impact that might have on Wiese's situation. On Sunday, November 26, Wiese told Adgers that he had hit "rock bottom." Wiese asked Adgers to provide him additional assistance and to meet with him. Adgers told Wiese he would contact him the next day with counseling information.

22. On November 27, Adgers provided Wiese with a phone number to arrange counseling and told Wiese he could not meet with him because the matter was being handled by IAU. Later that day, Bryant told Adgers that Wiese wanted Bryant to represent him during the investigation and that Wiese had not told Adgers everything about his contact with inmates, including the fact that Wiese had written letters to inmates. Adgers asked Bryant if he had discussed this with any members of the Association's Board. Bryant stated that he had and that the Association would allow Bryant to represent Wiese. Adgers told Bryant that he would forward this information to IAU and ended their conversation.

23. Beginning November 27, IAU Inspectors Sergeant Doug Shaut and Sergeant Debbie Moore began the PIA on the Wiese complaint. Between November 27 and November 30, they conducted approximately six interviews, searched several inmate cells, and collected information. In addition, Deputy Dick Biles conducted a search of the Inverness Jail kitchen computer. The investigators discovered love letters and love song lyrics which Wiese had given Inmate LB. In the letters, Wiese refers to Inmate LB as "My Beautiful Butterfly;" refers to himself as "Your Butterfly Catcher;" states "I LOVE YOU [LB];" and discusses what it will be like when they are together after Inmate LB is released. The inspectors also found Inmate LB's diary in which she made affectionate references to Wiese.

24. On or about November 27, Sergeant Alexander stopped to talk to Deputy Bryant. Alexander was not familiar with the details of the Wiese situation, but was aware that Bryant was somehow involved in the matter. The Wiese situation came up in their conversation and Bryant told Alexander he was not going to represent Wiese further. Alexander told Bryant that this was good because Bryant could not bind the union or file a grievance on the union's behalf.<sup>3</sup> Bryant understood Alexander to mean that Bryant could not file a grievance for Wiese, and that the Association would not file a grievance for Wiese since Wiese had chosen Bryant to represent him. Bryant did not speak with anyone else in the Association about Wiese's situation or grievance options

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<sup>3</sup>Don Bryant testified: "Sergeant Alexander said because he chose to take a person that wasn't an official appointed union steward, that I couldn't file a grievance and that since he didn't take an official union steward, that they weren't going to file a grievance." However, Alexander testified that he told Bryant that Bryant could not file a grievance or bind the Association, but he never told Bryant that the Association was not going to file a grievance. While both testified credibly, we find it more likely than not that Bryant misunderstood what Alexander said. Alexander, who had participated as a Board member in a number of decisions regarding other grievances, knew that any decisions about processing a grievance for Wiese would be made by the Board. Since Wiese's situation had not even been discussed at a Board meeting, it is unlikely that Alexander would tell Bryant that the Board would not process the Wiese grievance

and did not question Alexander. After this conversation, Bryant felt that Wiese had limited options because Wiese already admitted to Adgers that he had fraternized with an inmate, a clear policy violation. Bryant thought Wiese would probably face a suspension or dismissal.

25. Later that day, Bryant told Wiese that Alexander informed him that because Bryant was not an official union steward, he could not file a Step 1 grievance for Wiese and the union would not file a grievance because Wiese did not have an officially appointed union steward. Wiese did not contact any other Association representative to confirm what Bryant had told him. Bryant also told him that because of the Green case and the recent grand jury report, he thought Wiese would be used as a scapegoat so the County could say they were cleaning up the place. Wiese told Bryant he would not proceed unless he was represented.

26. On the evening of November 27, Wiese discussed his options with his wife. He felt pressured to resign because he did not want to further stress his family. At this time, Wiese was still planning to be with Inmate LB after her release and was concerned that she would be hassled in jail because of their relationship. He told his children that he would have a relationship with Inmate LB when she was released. He also felt he had no options because he believed the Association would not represent him. Wiese also believed that, based on other fraternization complaints, he would avoid criminal investigation if he resigned and might possibly get a corrections job in another county.<sup>4</sup> Wiese drafted his resignation letter that night.

27. That evening or the next morning, Wiese told Bryant that he was going to resign to save his family any more heartache and to avoid publicity. He asked Bryant to help him arrange submission of his resignation. Bryant contacted Sergeant Darcy Bjork, the Association's east vice president, and asked him to set up a meeting for Wiese to submit his resignation. Bjork was aware of the Wiese complaint because Deputy Taylor kept him informed about the status of the investigation.

28. On the morning of November 28, at Bjork's request, Wiese met with Bjork to discuss the consequences of his resignation. Wiese showed Bjork his resignation letter and informed Bjork he was resigning. Wiese told Bjork that "his main reason for resigning was to keep the County's face a little cleaner than it would be by having my situation be drug through the news, to save the union any more embarrassment than it

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<sup>4</sup>While Wiese did not testify that he resigned because of a concern about Inmate LB or the hope that he would be able to obtain future employment, the evidence showed that he told others that these reasons were part of his resignation decision.

needed to be had, and to protect my family.” Bjork did not try to talk Wiese out of resigning and, as a result, Wiese assumed Bjork thought he should resign.

Bjork told Wiese that as a result of the resignation, the IAU investigation would cease. He told Wiese he did not know enough about the complaint to know if there would be a criminal investigation, but he would keep Wiese informed.<sup>5</sup> Wiese knew that the Association had no control over the criminal process. Bjork also told Wiese that when someone resigned, a Form 4 is forwarded to DPSST. DPSST then determines whether a revocation hearing should be held regarding the employee’s certification. Wiese believed that if he resigned, all investigations would cease.

29. After meeting with Bjork, Wiese met with Chief Deputy Ronald Bishop and Human Resources Director Jennifer Ott. Wiese presented his resignation letter and told them that he was resigning to avoid further embarrassment to the Sheriff’s Office. Bishop accepted Wiese’s resignation letter, which provided:

“It is with deep personal regret and sorrow I am resigning from the sheriff’s office, for personal and professional reasons.

“Over the past 11 years, I have truly enjoyed my employment with Multnomah County. But, at this time, I have many personal issues occurring in my life, and do not believe remaining employed with the county would be beneficial.

“I truly enjoyed being a member of a very professional, well trained organization, and will miss the ‘family’ that I was allowed to be a member of. I hold all of my former coworkers, and supervisors in the highest regard, and will truly miss the camaraderie that is shared.

“I would like to thank the agency, for the experience, and wish the department the best of luck, in the future.”

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<sup>5</sup>Wiese testified that Bjork led him to believe no criminal investigation would occur if he resigned. While Wiese may have been left with that impression, it is unlikely Bjork would have guaranteed this in light of his lack of familiarity with the basis of the complaint and his experience as an Association representative. Wiese had also already formed this belief based on his understanding of how other fraternization complaints had been handled

30. After his meeting with Bishop and Ott, Wiese returned to the jail to pick up his things. He saw Bjork, who told him that the Sheriff had decided to forward all internal investigations to the Detective Unit for criminal investigation. Bjork told Wiese he would keep Wiese informed of what was happening with the detectives and the District Attorney.

31. At the time Wiese resigned, the County had taken no disciplinary action against Wiese which the Association could grieve. Wiese felt no animosity or hostility from the Association or its representatives.

32. After Wiese resigned, he called Inmate LB's mother, JB and told her he wanted to pick up Inmate LB after she got out of jail and asked JB to tell LB. He also told JB that he resigned because he wanted the investigation to cease so he could work as a deputy in another county, and he wanted to stop the harassment of LB at the jail.

33. Wiese also contacted Banta and told her that he resigned because he did not want to drag his family through the investigation and he did not want an internal affairs investigation. Wiese apologized to Banta for getting her involved in his situation.

34. Inmate LB was released from jail in December 2006 and moved to Bend. Soon after, LB told her mother that she had a new boyfriend and did not want to pursue a relationship with Wiese.

35. After Wiese's resignation, the PIA was terminated and the matter was referred to the Sheriff's Detective Unit. On March 21, 2007, Wiese was indicted for Official Misconduct in the First Degree, a Class A misdemeanor. ORS 162.415(1).<sup>6</sup> On August 14, 2007, Wiese pled no contest and was convicted of this charge in the

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<sup>6</sup>ORS 162.415 provides:

**“Official misconduct in the first degree.** “(1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit or to harm another:

“(a) The public servant knowingly fails to perform a duty imposed upon the public servant by law or one clearly inherent in the nature of office; or

“(b) The public servant knowingly performs an act constituting an unauthorized exercise in official duties.”

Multnomah County Circuit Court. As part of his plea, Wiese relinquished his DPSST certification.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Association did not violate its duty to fairly represent Wiese under ORS 243.672(2)(a).

### DISCUSSION

ORS 243.672(2)(a) makes it an unfair labor practice for a labor organization to “[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782.” This statute requires a labor organization to fairly represent all employees in a bargaining unit for which it is the exclusive representative. A union may breach its duty of fair representation when its refusal to process or pursue a grievance is arbitrary, discriminatory, or in bad faith. *Tancredi v. Jackson County Sheriff’s Employee Association and Jackson County Sheriff’s Office*, Case No. UP-31-04, 20 PECBR 967, 973 (2005); and *Ralphs v. OPEU and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409, 422 (1993). Duty-of-fair-representation cases are generally based on two types of conduct: negligent acts or omissions by the union; or arbitrary, discriminatory, or bad faith conduct by the union. *Putvinskas v. Southwestern Oregon Community College Classified Federation and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 894 (2000). Wiese alleges both types of conduct in this case. He contends that the Association negligently failed to inform him that the Association would not represent him in his employment matters unless he used an Association steward as his representative. Wiese also asserts that the Association discriminated against him by treating him differently from other employees who were subject to fraternization complaints. We consider each of these contentions.<sup>7</sup>

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<sup>7</sup>Wiese’s complaint alleges that the County violated the collective bargaining agreement and ORS 243.672(1)(g) by “constructively terminating” him from his employment with the County. Wiese filed no grievance regarding this matter, even though the collective bargaining agreement has a grievance procedure that culminates in arbitration. We ordinarily require a party to exhaust its remedies under a contract grievance procedure before filing an unfair labor practice complaint under subsection (1)(g). Here, exhaustion would not be required if Wiese proves this allegation that the Association breached its duty to fairly represent him. *West Linn Education Association v. West Linn School District No. 3JT*, Case No. C-151-77, 3 PECBR 1864, 1871 (1978).

## Unintentional Act or Omission Claim

Wiese contends that the Association neglected to tell him that “he needed to have a union steward as his representative in order to have union representation.” We note that Wiese has inaccurately described the Association’s position. The Association constitution specifically gives vice presidents and stewards responsibility for contract administration and grievance processing. The Association executive board decides whether a grievance will be taken to arbitration. We do not interpret this constitutional provision and practice as requiring use of an Association steward in order to have Association representation. We will, however, consider Wiese’s assertion as an argument that the Association was negligent in failing to inform him fully about the process for pursuing a grievance.

Ordinary negligence on the part of union officials is insufficient to create liability for a breach of the union’s duty to fairly represent its bargaining unit members. *Coan and Goar v. City of Portland and Municipal Employees Local 483*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342, 351(1987), *AWOP*, 93 Or App 780, 764 P2d 625 (1988) We will find that unintentional acts or omissions by union officials are actionably arbitrary in a duty-of-fair-representation case when three conditions are shown:

“(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 423-24, citing *Robesky v. Qantas Empire Airways Limited*, 573 F2d 1082, 98 LRRM 2090, 2095 (9<sup>th</sup> Cir 1978).

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The County also argues that any unfair labor practice concerning Wiese’s separation from employment with the County is moot because Wiese cannot return to his County position since he no longer possesses the requisite DPSST certification. However, under our doctrine of bifurcation, a complainant may proceed against a union, even where the complainant has failed to file a timely complaint against the employer. See *Tancredi v. Jackson County Sheriff’s Employee Association and Jackson County Sheriff’s Office*, Case No UP-31-04, 20 PECBR 967, 975 n 2 (2005). We will not dismiss this complaint as moot.

Here, Wiese failed to demonstrate that the Association acted with “reckless disregard” for his rights. At the time Wiese resigned, the County had not completed its IAU investigation and did not know whether it would discipline Wiese. Because there was no County action to grieve, no Association official acted improperly by failing to tell Wiese about the appropriate process for pursuing a grievance.

In addition, information about help and advice available from the Association and information about the grievance process was readily available to Wiese. Association Steward Taylor counseled Wiese about his situation, advised Wiese against taking any rash action, and offered Association help in fighting any inappropriate disciplinary action.<sup>8</sup> Wiese insisted on having Deputy Bryant, a friend who was not an Association steward or officer, represent him. Even after Taylor knew that Wiese was working with Bryant, Taylor continued to offer his assistance. The Association is not responsible for Wiese’s choice to forgo Association representation. Nor is the Association responsible for Wiese’s reliance on Bryant’s erroneous advice that the Association would not pursue a grievance on Wiese’s behalf because he chose Bryant to represent him.

The Association also had written information about the requirements and process for filing a grievance. Wiese knew about this information, but did not consult it.

### Discrimination Claim

Wiese asserts that he was treated differently than other employees accused of fraternizing with inmates and that, contrary to that practice, he was advised to resign and told he would not be represented by the Association. “[A]n unfair representation charge which alleges discrimination carries with it the burden to produce ‘substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives[.]’ *Motor Coach Employees v. Lockridge*, 40[3] US 274, 77 LRRM 2501, 2512 (1971).” *Howard v. Western Oregon State College Federation of Teachers and Western Oregon State College*, Case Nos. UP-80/93-90, 13 PECBR 328, 354 (1991) “Discrimination refers to treatment different from that afforded to others who are similarly situated.” *Chan v. Clackamas Community College and Clackamas Community College Association of Classified Employees*, UP-13-06, 21 PECBR 563, 575 (2006), citing *Strickland v. Oregon*

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<sup>8</sup>We note that Wiese was not entirely candid with Bryant. After the County discovered the anonymous Kytes in which inmates alleged that Wiese had a relationship with Inmate LB, Bryant asked Wiese if there was anything more to the situation. Wiese assured Bryant that there was nothing more. This, in fact, was not true; Wiese had developed a romantic relationship with LB. It is difficult for a union to represent its members fairly when a member is unwilling to speak candidly about his or her actions.

*Public Employees Union, Local 503, Case No. UP-134-90, 13 PECBR 113, 124 n 6 (1991).* Wiese did not prove that the Association's conduct was discriminatory or that any Association representative advised him to resign.

Association Representatives Taylor and Yon accompanied Wiese when he met with Captain Adgers about the fraternization complaint. Taylor advised Wiese that the Association could fight his complaint. Even after Wiese opted to have Bryant represent him, Wiese admits that Taylor offered to help. Wiese, however, chose not to seek further Association assistance. Without consulting the Association about his options, including pursuing a grievance, Wiese chose to resign.

There was no evidence that Wiese was treated differently than other employees who had been the subject of fraternization complaints. Wiese did not establish that other employees had been allowed to pursue a grievance without an Association representative. Wiese also admitted that Association officials had not shown him any animosity and had represented him in the past.

We are not persuaded that Bryant's statement that the Association would not represent Wiese was the primary reason for Wiese's resignation. Wiese was concerned about his family's feelings and about potential publicity resulting from the complaint. Wiese also relied on other factors in making his resignation decision, including his desire to pursue a relationship with Inmate LB and his future ability to obtain work. As pointed out by the Association, the County's fraternization policy made it unlikely that Wiese could continue to work for the County while living with Inmate LB.

Wiese also failed to prove that the Association improperly pressured him to resign or promised him that no further action would be taken if he did resign. No Association representative advised him to resign. Wiese made his decision to resign before he talked to Bjork. Bjork told Wiese that the internal investigation would be terminated, but that he was unsure about a criminal investigation. Wiese knew that the Association had no control over the criminal process. After Wiese resigned, the Sheriff decided to refer his complaint for criminal investigation. Bjork's advice to Wiese was "reasonable and given honestly and in good faith." *Bauman v. Beaverton School District 48 and Oregon School Employees Association, Case Nos. UP-64/65-93, 15 PECBR 151, 158 (1994).*

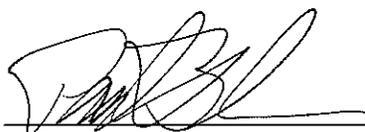
The Association's conduct was not arbitrary, discriminatory, or performed in bad faith. The Association appropriately represented Wiese, providing advice and professional support until, contrary to the Association's advice, Wiese resigned his employment. We will dismiss the complaint against the Association.

Where no violation against the union is found, the complaint against the employer will be automatically dismissed. *Mengucci*, 8 PECBR at 6734; *Tancredi*, 20 PECBR at 975-77. Therefore, we will also dismiss the complaint against the County.

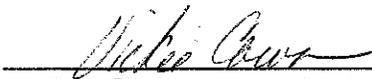
ORDER

The complaint is dismissed.

DATED this 6<sup>th</sup> day of June 2008.



\_\_\_\_\_  
Paul B. Gamson, Chair



\_\_\_\_\_  
Vickie Cowan, Board Member



\_\_\_\_\_  
Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.