STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

TREVOR ANTHONY, Complainant, and AFSCME IOWA COUNCIL 61, Respondent.	)	CASE NO. 100027

ORDER NUNC PRO TUNC

Due to oversight, the Decision on Appeal in this matter issued February 19, 2016, was filed without attaching the Appendix referenced in the decision. The omission shall be corrected nunc pro tunc by the filing of the February 19, 2016 decision with the Appendix attached, as was originally intended.

DATED at Des Moines, Iowa, this 22nd day of February, 2016.

PUBLIC EMPLOYMENT RELATIONS BOARD

Jamie K. Van Fossen, Member

Mary T. Gannon, Member

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STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

TREVOR ANTHONY, Complainant, and AFSCME IOWA COUNCIL 61, Respondent.	)	CASE NO. 100027

DECISION ON APPEAL

This case is before the Public Employment Relations Board (PERB or Board) on Trevor Anthony's appeal from a proposed decision and order issued by an administrative law judge (ALJ) following an evidentiary hearing on Anthony's prohibited practice complaint. In her proposed decision issued November 18, 2015, the ALJ concluded that that Anthony had not established that AFSCME Iowa Council 61 failed to fairly represent him when he was discharged from the Des Moines Water Works (DMWW) and that it had thus not committed a prohibited practice within the meaning of Iowa Code section 20.10(3)(a). The ALJ proposed dismissal of Anthony's complaint.

Counsel for the parties, Patrick Anderson for Anthony and Mark Hedberg for AFSCME, telephonically presented oral arguments to the Board on February 10, 2016. Both parties filed briefs outlining their respective positions prior to oral arguments.

Pursuant to Iowa Code section 17A.15(3), on appeal from an ALJ's proposed decision we possess all powers that we would have possessed had we elected, pursuant to PERB rule 621–2.1, to preside at the evidentiary hearing in the place of the ALJ. Pursuant to PERB rule 621–11.8 and subrule 621–9.2(3),

on this appeal we have utilized the record as submitted to the ALJ. Based upon our review of this record, as well as the parties' briefs and oral arguments, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the proposed decision and order attached as "Appendix A," are fully supported by the record. At oral argument, the parties indicated they did not have any issues with the ALJ's findings of fact. We adopt the ALJ's factual findings as our own, with the following additions:

The collective bargaining agreement (CBA) between the DMWW and AFSCME provided, in relevant part:

> ARTICLE 9
> GRIEVANCE PROCEDURE
> ...
>
> 9.2 Definition
> A grievance is defined as a timely filed claim on behalf of an employee covered by this Agreement which alleges that there has been a violation of a provision of this Agreement by the Employer. All references to "days" in this Article shall mean workdays.
>
> ...
>
> ARTICLE 10
> DISCIPLINE AND DISCHARGE
> Disciplinary action may include oral reprimand, written reprimand, suspension, or discharge. The type of corrective action that is applied is generally determined by the seriousness of the offense. Those offenses of less serious nature do not usually require immediate dismissal, but may require some form of corrective action; progressive discipline will be followed where applicable. Offenses of a serious nature may justify immediate discharge without prior warning or attempts at remedial action. An employee may be disciplined or discharged for any reason, which is for just cause. . . .

Anthony had been under the same work restrictions due to injury for at least six months before the December 22 meeting. During this time, he come

back off and on and DMWW had provided him with different work that had accommodated his restrictions.

In the meeting on December 22, 2015, DMWW representatives, Anthony and his AFSCME union representative, Middleton, went over several documents regarding his job duties. One document was a one-page grid titled "Building Maintenance Utility Worker-Essential Job Functions (Sub-tasks impacted by work restriction of 15[]lb and overhead work)." Middleton took notes of Anthony's suggested accommodations for his restrictions.

On the one-page grid, there are 13 functions listed with all but two impacted by Anthony's work restrictions. In the first grid box, the function constituted 10 percent of his job and provides:

> 1. Performs maintenance painting by applying paint to surfaces with airless, pot sprayers, brush and roller type equipment.
> Carry Ladder (6' @ 20lbs, 8' @ 30lbs, 10' @ 39lbs)
> Paint walls (5 gallons @ 50lbs to 60lbs)

Middleton wrote, "use a 2 wheeler" alongside the sub-tasks impacted.

Some examples of the remaining functions impacted by the work restrictions include: replacing windows; installing door frames and hanging doors; performing carpentry; erecting buildings, walls and rafters; installing and finishing drywall, drop ceilings, and siding; operating power equipment; and moving office furniture.

The two functions not impacted by Anthony's restrictions constituted nine percent of his essential job functions. The remaining 91 percent of his job functions was impacted in some form by Anthony's restrictions. For instance, there were nine essential functions that required Anthony to carry a ladder

weighing 20 to 39 pounds. Several functions required Anthony to carry lumber weighing 15.9 to 47 pounds. Moving boxes, tables, chairs, book cases and desks were sub-tasks impacted as well as more than a dozen others.

For each function, Middleton took notes of what Anthony had suggested for accommodations. As one example, for the second function where "Replace doors" was the sub-task impacted, Middleton wrote, "2 wheeler cart and 2 people." For the third function of cleaning and maintaining equipment, Middleton's notes indicate accommodations that would require help getting things to the dumpster, Anthony carrying lumber on his left side, and using a cart for the drywall.

CONCLUSIONS OF LAW

We have carefully considered Anthony's arguments in our review of the ALJ's conclusions. Except as noted below, we agree with the ALJ's conclusions as set out in the Appendix and adopt them as our own, with the following additional discussion:

The ALJ correctly quoted the standard for evaluating duty of fair representation claims as provided in Iowa Code section 20.17(1). Accordingly, the public employee must "establish by a preponderance of the evidence action or inaction by the organization which was arbitrary, discriminatory, or in bad faith." We agree with the analysis and conclusions as reached by the ALJ that Anthony failed to meet this burden.

Anthony argues AFSCME did not complete an investigation as to the validity of DMWW's reasons for terminating Anthony's employment; AFSCME

"ignored an otherwise meritorious grievance;" AFSCME should have challenged DMWW's assertions that accommodations were not viable; and AFSCME deliberately misled Anthony as to Middleton's opinion of the December 22, 2015 meeting.

After accommodating Anthony's restrictions for six months, DMWW terminated his employment because he was unable to perform the functions of his position. AFSCME representative Middleton and Anthony were present for the December 22, 2015 meeting when the parties discussed the 91 percent of Anthony's job functions he could not complete due to his restrictions. Not once did Anthony refute his inability to perform these tasks with the restrictions. It is undisputed Anthony could not perform the essential functions of his job. A further "investigation" was unnecessary.

Although Anthony claims AFSCME ignored a "meritorious grievance," he fails to identify what that is. As Article Nine of the parties' CBA provides, a grievance is a claim that the contract had been violated. Yet Anthony does not identify what provision of the contract he believes was violated.

Even assuming Anthony's termination was subject to the just cause standard under Article 10 of the CBA, Middleton's determination that DMWW had just cause for the termination and there was not a contract violation to grieve was reasonable given her experience as a union representative and her presence at the December 22 meeting. Middleton was aware DMWW had previously accommodated Anthony for at least six months by giving him other work on and off. Anthony's suggested accommodations speak for themselves as to their viability given his restrictions and the vast majority of his job functions.

For example, it would not even be possible for Anthony to lift and move 20-plus-pound ladders to a two-wheeler given his 15-pound lifting restriction. Also, regardless of Middleton's positive spin of the December 22 meeting to Anthony, there is no evidence she ever attempted to mislead him as to the merit of a grievance challenging his termination.

Like the ALJ, we conclude Anthony has failed to establish by a preponderance of the evidence that AFSCME breached its duty of fair representation by action or inaction that was arbitrary, discriminatory, or in bad faith.

The Board has fully considered all of Anthony's other arguments on appeal. None have persuaded us to reach conclusions different than those reached by the ALJ. Accordingly, we enter the following:

ORDER

The prohibited practice complaint of Trevor Anthony is DISMISSED. Costs as described in the ALJ's proposed decision are taxed to the Complainant in accordance with PERB rule 621–3.12.

DATED at Des Moines, Iowa, this 19th day of February, 2016.

PUBLIC EMPLOYMENT RELATIONS BOARD

Michael G. Cormack, Chair

Jamie K. Van Fossen, Member

Mary T. Gannon, Member

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STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

TREVOR ANTHONY, Complainant,	)	
and	)	Case 100027
AFSCME IOWA COUNCIL 61, Respondent.	)	

PROPOSED DECISION AND ORDER

Complainant Trevor Anthony filed this prohibited practice complaint with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 20.11 and PERB rule 621—3.1. The complaint as amended alleges that Respondent AFSCME Iowa Council 61 (AFSCME) committed a prohibited practice within the meaning of Iowa Code section 20.10(3)(a) when it failed to fairly represent Anthony following his termination of employment from the Des Moines Water Works (DMWW). AFSCME denies its commission of a prohibited practice.

Pursuant to notice, an evidentiary hearing was held before me on August 19, 2015, in Des Moines, Iowa. Anthony was represented by Patrick Anderson and AFSCME was represented by Mark Hedberg. The parties submitted post-hearing briefs on September 21, 2015.

STATEMENT OF THE CASE

Anthony originally filed this complaint *pro se* with PERB on March 27, 2015, alleging AFSCME committed a prohibited practice when it "failed to represent [him] fairly in an issue with [his] employer." Supporting exhibits filed

with the complaint elaborate the "issue" Anthony references in his complaint is a lengthy series of events that occurred after Anthony suffered an injury at work and his termination from the DMWW. Anthony subsequently filed amended complaints on April 10, 2015, and April 15, 2015. While the April 10 and April 15 filings purport to amend the complaint, they make no substantive changes to the allegations but instead show that Anthony was seeking to fix a document labeling error he made when he originally filed the complaint. AFSCME did not object to these "amendments."

Notice of Hearing was issued on June 25, 2015, setting the hearing for August 19, 2015. Anderson appeared on Anthony's behalf on August 12, 2015, and on August 18, 2015, Anderson filed an amended complaint. Pursuant to PERB rule 621—2.9, a complaint may be amended upon motion at any time prior to the decision. Consequently, the undersigned treated the August 18 amended complaint as a motion to amend and allowed the parties an opportunity to respond. Complainant argued the amendment is not intended to change the original complaint that AFSCME breached its duty of fair representation but rather to narrow the issues for hearing. Respondent resisted the motion but stated it preferred to go forward with the hearing. After hearing the parties' arguments, I granted the Complainant's motion to amend the complaint.

Based upon the entirety of the record and having considered the arguments of the parties, I issue the following proposed findings of fact and conclusions of law.

FINDINGS OF FACT

Anthony was employed within a bargaining unit of DMWW employees represented for purposes of collective bargaining by AFSCME Local 3861, an affiliate of Respondent AFSCME. The unit is composed of all full-time and regular part-time employees of DMWW, and excludes, *inter alia*, managerial, professional and supervisory employees. Respondent and DMWW are parties to a collective bargaining agreement (CBA) effective from January 1, 2013 through December 31, 2015. Since the start of his employment, Anthony was a fairly involved dues-paying member of AFSCME and had even served on the contract negotiation team as part of his union involvement.

Anthony began his employment with the DMWW in February 2002 as a Building Maintenance Utility Worker. His job involved a wide range of duties including painting, carpentry and masonry work, installing, repairing and replacing windows, door frames, siding and roofs, and building and renovating furniture. The performance of these duties required an ability to frequently lift materials weighing up to 50 pounds.

In January 2013, Anthony injured his right arm, shoulder and wrist while lifting a table at work. Anthony was transported to the emergency room for immediate treatment. The follow-up surgeries and treatment for this injury required Anthony to take time off from work.

In March 2013, Anthony contacted the Workers' Compensation Commission to inquire about the status of his workers' compensation claim and found out the DMWW had not filed a claim on his behalf. Anthony claims

the DMWW engaged in a series of retaliatory actions against him in the form of disciplinary actions after he made this inquiry to the Workers' Compensation Commission.

On June 4, 2013, Anthony received a written warning, dated May 31, 2013, for "disruptive behavior" he exhibited during a training class. On June 7, 2013, AFSCME filed a grievance on Anthony's behalf contesting the discipline under Article 10 (Discipline and Discharge) of the CBA. The grievance was accompanied by several signed statements from co-workers who stated they did not witness Anthony being disruptive at the training. The final disposition of this grievance is unclear from the record before me.

In October 2013, Anthony was investigated for conducting personal business during work time. AFSCME represented Anthony during the investigation and the parties agree AFSCME stood up for him during this investigation and no discipline was issued.

Anthony received satisfactory or above satisfactory performance evaluations during his tenure with DMWW except the annual performance evaluation he received on November 5, 2013. Anthony met or exceeded expectations in all evaluated areas on the 11/5/13 evaluation except "teamwork." He received a mark of "improvement needed" and the comments referenced the discipline for disruptive behavior he received in June 2013. AFSCME grieved the 11/5/13 performance evaluation under Article 10 (Discipline and Discharge) and section 16.6 (Performance Evaluation) of the CBA, arguing the issue was still in dispute as part of a different grievance and

this equates to "double discipline." The final disposition of this grievance is also unclear from the record before me.

On November 26, 2013, the DMWW notified Anthony he was scheduled to participate in a pre-disciplinary hearing on November 27, 2013, during which the DMWW sought to investigate two separate incidents. Jeanne Middleton, the local union secretary, was present during the meeting as Anthony's union representative. One incident discussed at this meeting pertained to events that occurred during a doctor's appointment for Anthony's workers' compensation claim. Anthony admits he resolved this dispute with the DMWW as advised by his workers' compensation attorney and the Union had no further involvement with that particular dispute.

The second incident discussed at the meeting was regarding a threat Anthony reportedly made on November 25, 2013, in violation of the DMWW's Violence in the Workplace policy. Following the 11/27/13 meeting, the DMWW did not discipline Anthony but instead presented him with a "last chance notice" that essentially stated future instances of similar, i.e. threatening, nature will not be tolerated and will result in further disciplinary action up to and including termination. It was both Middleton and Anthony's understanding that Anthony's refusal to sign the last chance notice would result in his immediate termination from employment.

Anthony was given time to think and discuss the notice with his union representative. Middleton advised Anthony that it was his decision whether he signs the notice. After taking some time to consider his decision, Anthony

signed the notice. Thereafter, he asked Middleton whether the Union will file a grievance regarding the last chance notice. Middleton explained to Anthony that he signed the notice voluntarily. Additionally, since he still had his job, there was no adverse action for the union to grieve. The parties agree the last chance notice had expired by December 31, 2014, and had no known bearing on the DMWW's termination decision.

While not entirely clear from the record before me, it appears Anthony's initial injury was designated as a work-related injury and he was granted workers' compensation benefits. However, in June 2014, he received an email from a DMWW human resource representative stating his "recent shoulder injury" was denied as a workers' compensation injury. Anthony provided Middleton with a copy of this email. She advised him to seek the advice of an attorney regarding the denial of his workers' compensation claim because those claims are outside the scope of the CBA.

On December 3, 2014, following a six-month leave of absence for his injury, Anthony was released back to work with modified duties. By this time, Anthony had exhausted all accrued vacation, personal sick leave, and catastrophic leave donated to him by other employees. Anthony's treating physician restricted his duties to "no repetitive overhead work [and] no lifting more than 15 pounds." The work restrictions did not have an end-date, but Anthony was scheduled for a follow-up examination in 12 weeks from the date of the release. Upon presenting the work release to his supervisor, the supervisor's initial response was that he did not know whether the Employer

could accommodate him within the listed restrictions, but the request would be forwarded to the HR department. Anthony made a formal request for accommodations.

On December 22, 2014, the Employer held a meeting with Anthony to discuss his work release and the accommodations Anthony was seeking. Present at this meeting were Anthony, his supervisor, the department director, the HR director, and Middleton, as his union representative. The Employer reviewed Anthony's essential job functions and solicited suggestions on how Anthony could perform those within his work restrictions. Anthony made several suggestions, the majority of which involved using a two-wheeler for moving materials and having the assistance of another employee when needing to lift overhead or when the weight exceeds 15 pounds.

Following the meeting, Anthony and Middleton talked and both expressed they thought the meeting "went good." Anthony had no other discussions with the union after this meeting and he did not request for the union file a grievance following the accommodations discussion with the Employer. While not sharing her conclusions with Anthony or the Employer, Middleton had concluded that Anthony could not perform the essential functions of his job and the accommodations he suggested were unreasonable, and in some instances, unsafe. For example, when putting up sheetrock, Anthony suggested he could have another employee hold it and he could use his non-injured hand to put it up. Middleton believed the Employer would essentially need to create a new job to accommodate Anthony. To her

knowledge, the Employer had not made such accommodations for anyone. Additionally, Anthony's work restrictions were for an indefinite period of time, and Middleton only knew of accommodations the Employer made for restrictions with a certain end-date.

On January 3, 2015, Anthony received a letter of termination, dated December 31, 2014, from the DMWW. The letter stated, in part:

> Based on [the 12/22/14] meeting, we believe that the accommodations you discussed were not within your restrictions, and in some cases would pose a direct threat to your safety. After waiting six months for your possible return, we have a business need to fill your position. We do not have the ability to continue to hold this position open pending the outcome of your next scheduled doctor's appointment in March, 2015.

Anthony called Middleton sometime in early January to inquire what the union would do regarding his termination. Middleton informed him the union did not have anything to grieve because his employment was terminated due to the DMWW's conclusion that Anthony could no longer perform the essential functions of his job, not for disciplinary reasons that would be grievable under the CBA. Middleton advised Anthony to seek the advice of an attorney because work accommodation is not within the scope of the CBA. In her capacity as the local union secretary for sixteen years, Middleton has frequently been confronted with employees who seek to grieve issues that are not contained in the CBA. She consistently turns them away and does not file a grievance if the issue is not grievable under the CBA.

On January 9, 2015, Anthony met with Greg Lewis, an AFSCME staff representative, to discuss his termination. Anthony asked Lewis to file a

grievance over his termination "under the ADA." Lewis explained the union cannot file a grievance under the ADA and that Anthony should get an attorney.

Lewis then conferred with Middleton regarding Anthony's termination. After speaking with Middleton, Lewis confirmed there was no viable grievance the union could file in Anthony's situation because the ADA and job accommodation issues are outside of the CBA. Anthony could not cite to a provision of the CBA that spoke to the Employer's obligation to provide job accommodations to employees with restrictions. Nevertheless, Anthony still maintains that he was able to perform the essential functions of his job and the union never grieved his termination to "test the claims of Management concerning [his] inability" to do his job.

Anthony presented a list of six DMWW employees who purportedly received preferential treatment and representation by the Union after they were terminated or needed accommodations to keep their job. Of the six employees listed, the record is undisputed that four of those employees were not within the AFSCME-represented bargaining unit and the Union had no involvement in their specific work accommodations or arrangements. Only two of the six employees Anthony listed were part of the bargaining unit. One employee was terminated for sleeping on the job, which was a disciplinary discharge grievable under the CBA. This employee's termination had nothing to do with job accommodations and he was reinstated through an arbitrator's award. The second employee suffered an injury that may have required accommodations,

but upon returning to work, the employee sought a reassignment to a different position on his own without any involvement from the union.

After the separate inquiries Anthony made to Middleton and Lewis, wherein both advised Anthony to seek the advice of an attorney, the Union took no other action on his termination through the CBA grievance procedure. The Union had concluded there was no need to "investigate" the termination because Middleton was present for the reasonable accommodation meeting with the Employer and she understood that Anthony could not perform his job duties within the work restrictions that were placed on him. She had further concluded the accommodations Anthony requested were unreasonable and unsafe. But even if the accommodations were deemed reasonable, both Lewis and Middleton concluded the Union had no way to grieve the termination because the CBA does not require the Employer to provide any sort of accommodation.

CONCLUSIONS OF LAW

Anthony's complaint as amended alleges that AFSCME breached its duty of fair representation when it failed to grieve Anthony's termination from the DMWW in order to "test" the Employer's purported reason for termination.

AFSCME's "duty of fair representation" arises from Iowa Code section 20.17(1) which provides, in relevant part, that "[t]he employee organization certified as the bargaining representative shall be the exclusive representative of all public employees in the bargaining unit and shall represent all public employees fairly." A breach of the employee organization's section 20.17(1) duty

of fair representation constitutes a prohibited practice within the meaning of Iowa Code section 20.10(3)(a). *See, e.g. Barnes and AFSCME Iowa Council 61,* 15 PERB 8762; *Elahi and AFSCME Iowa Council 61,* 14 PERB 8663; *Kunzman and Teamsters Local 828,* 05 PERB 6602. This subsection provides:

> 3. It shall be a prohibited practice for public employees or an employee organization or for any person, union or organization or their agents to:
> a. interfere with, restrain, coerce or harass any public employee with respect to any of the employee's rights under this chapter or in order to prevent or discourage the employee's exercise of any such right, including, without limitation, all rights under section 20.8.

In the leading United States Supreme Court case addressing the duty of fair representation, *Vaca v. Sipes,* 386 U.S. 171 (1967), the Court articulated the basic standard for evaluating duty of fair representation claims and held that a plaintiff, in order to prevail, must prove that the "union's conduct toward a member of the collective bargaining unit [was] arbitrary, discriminatory, or in bad faith." *Id.* at 190. The *Vaca* standard was adopted by PERB in *Kenneth Ross and AFSCME Council 61,* 85 PERB 2562. This language was later codified by the Iowa Legislature, and since 1991, Iowa Code section 20.17(1) has contained the following language:

> To sustain a claim that a certified employee organization has committed a prohibited practice by breaching its duty of fair representation, a public employee must establish by a preponderance of the evidence action or inaction by the organization which was arbitrary, discriminatory, or in bad faith.

Accordingly, in order to establish the commission of a prohibited practice based upon a breach of the union's duty of fair representation, Anthony bore the

burden of showing that AFSCME acted in a manner which was arbitrary, discriminatory, or in bad faith.

I. Arbitrary

Anthony argues AFSCME acted arbitrarily when it failed to grieve his termination because it took no steps to investigate and "test" the DMWW's claimed reason for Anthony's termination. Anthony has failed to prove AFSCME's inaction was arbitrary in this situation.

The Iowa Supreme Court has said that a "union behaves arbitrarily toward an aggrieved union member if it ignores a meritorious grievance for no apparent reason or processes it with only perfunctory attention." *Norton v. Adair Cnty.*, 441 N.W.2d 347, 358 (1989). "Arbitrary action has [also] been defined as a 'willful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case.'" *Id.* (*quoting Powers v. Fisher Controls Co.*, 246 N.W.2d 279, 292 (Iowa 1976)).

Anthony argues AFSCME's inaction falls under these definitions. Namely, Anthony says the union took no action to investigate the DMWW's claims and "test" the claim that he truly could not perform the essential functions of his job. He further argues AFSCME simply accepted the DMWW's claim. The facts presented fail to support Anthony's argument in this regard.

There are several instances that demonstrate AFSCME did consider the "facts or circumstances" of Anthony's case. First, Middleton was present for the meeting the Employer had with Anthony to discuss his job requirements and possible accommodations. Middleton concluded after the meeting that

Anthony's specific accommodation requests were unreasonable and, in some instances, unsafe. Regardless of Middleton's conclusions on the accommodations request, she knew the final decision-maker on that issue was the Employer. There was no contractual provision in the CBA that would compel *any* accommodations.

Next, the union had two separate conversations with Anthony following his termination. Both conversations conveyed the consistent message that this termination was not grievable under the CBA. Anthony initially spoke to Middleton wherein she informed him the CBA does not have a provision that the Union can rely upon to grieve his termination. He then met with Lewis to discuss his termination and asked the union to file a grievance "under the ADA." Lewis told him the union cannot file "ADA" claims because those are outside of the CBA. Both Lewis and Middleton told Anthony he should contact an attorney to seek further guidance as this was not an issue the union could grieve.

Following their separate conversations with Anthony, Middleton and Lewis conferred regarding Anthony's case. Their assessment as communicated to Anthony did not change. Both understood this was not a disciplinary issue but instead a termination due to Anthony's inability to perform the essential functions of his job without accommodations that, as evidenced by the termination letter, the Employer was not willing to provide. Based on their knowledge of the CBA, Middleton and Lewis agreed the union could not grieve

the issue because its duty to represent employees only extends to enforcing those rights contained in the CBA.

Anthony argues the union's duty to represent him is more expansive than the four corners of the CBA because, as the certified representative under Iowa Code chapter 20, AFSCME has a duty to fairly represent bargaining unit members on "any issue affecting employment." Anthony further argues that Article 10 (Discipline and Discharge) of the CBA does not qualify or limit the type of terminations that can be grieved. Consequently, even granting the cited reason for Anthony's termination was an inability to perform his job, Anthony essentially argues the union had a duty to do more to "test" the validity of the Employer's claims. In this case, I need not address the legal scope of AFSCME's duty of fair representation because even assuming, without concluding, that Anthony had a viable grievance under the CBA, it does not show the union acted arbitrarily.

The mere fact that a union could have done more than it did in certain circumstances does not amount to a violation of the union's duty of fair representation. *See, e.g., Rickerd and AFSCME Iowa Council 61*, 07 PERB 7019, at 16. The United States Supreme Court has held that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Even when mistakes are made, "mere negligence, poor judgement, or ineptitude on the part of the union is insufficient to establish a breach of the duty of fair representation. *Kunzman*, 03 PERB 6602, at 10 (*quoting Stevens v.*

Teamsters Local 600, 794 F.2d 376, 378 (8th Cir. 1986)). Consequently, even if AFSCME erroneously assessed that this termination could not support a viable grievance under the CBA, that conclusion was reached following consideration of the facts and circumstances of Anthony's case. Thus, even if the conclusion was erroneous, it was plainly not arbitrary.

II. Discriminatory

Anthony has also failed to establish that AFSCME discriminated against him. In the context of unfair representation claims,

> [D]iscriminatory action occurs when the certified representative unjustifiably treats the complainant(s) in a manner different from others in the represented bargaining unit, such as by utilizing a different procedure or decision-making process in the handling of a grievance.

Barnes, 15 PERB 8762, at 9-10. The discriminatory treatment must be based on an improper basis, such as gender, race, or union membership status. *Kinnard and AFSCME Iowa Council 61*, 96 PERB 5275, at 6.

There is no dispute the union told Anthony they "do not cover the American with Disabilities Act" and subsequently refused to file a grievance over his termination. The relevant inquiry is whether the union made this conclusion utilizing a different decision-making process than it uses for other members of the bargaining unit. *See, e.g., Elahi*, 14 PERB 8663; *Kunzman*, 05 PERB 6602.

Anthony put forth a list of DMWW employees for whom he claims the union provided representation following a termination or when they needed job accommodations. Of the six employees, the record is undisputed that four

employees are excluded from the AFSCME-represented bargaining unit because they are managerial, supervisory, or confidential employees. As a matter of law, AFSCME could not provide union representation to these four employees. The record is clear that AFSCME did not provide representation to these four employees.

Two of the employees whom Anthony discussed are included in the bargaining unit, but their situations were factually different than Anthony's situation. While one of the employees may have needed job accommodations following an injury, this employee voluntarily sought a job reassignment where he would not need any accommodations. This was all done without the union's knowledge or involvement.

The second bargaining unit employee Anthony described was terminated for sleeping on the job. The union grieved his termination and he was eventually reinstated through arbitration. However, that employee was terminated for disciplinary reasons and the union was able to grieve it under Article 10 of the CBA claiming the Employer did not have "just cause" to terminate. AFSCME argues, and I agree, that Anthony's situation is factually different than the employee who was terminated for sleeping on the job. While AFSCME reached different conclusions whether a termination is grievable for these two bargaining unit members, the evidence establishes the decision-making procedure was identical. The union looked to the CBA language to determine whether a grievance was viable.

The evidence in the record further shows that Anthony is not the first bargaining unit employee for whom the union did not file a grievance after examining the CBA language. Middleton testified that it her capacity as the union secretary for the last sixteen years, she has to turn employees away almost daily because they seek to grieve issues that are not addressed in the CBA. The grievance procedure is defined to deal with alleged contract violations and if she finds that the employee's issue is not contained in the CBA, she does not file a grievance. The decision-making process is identical for all bargaining unit employees and this process was followed in Anthony's case.

III. Bad Faith

Finally, Anthony has failed to establish that AFSCME's action or inaction was in bad faith. In order to establish "bad faith" in the context of fair representation claims, the Complainant must show the union's conduct was "fraudulent, deceitful or dishonest." *Kunzman,* 05 PERB 6602, at 10-11.

Similar to the discussion under the arbitrary prong, even assuming that AFSCME made an error in judgment regarding its ability to grieve Anthony's termination, Anthony failed to introduce any evidence that shows the union deceived or was dishonest with him. AFSCME promptly told him he had to seek recourse in another forum because the CBA contains no language regarding job accommodations.

Anthony also appears to suggest the union's failure to file a grievance was in bad faith because they simply accepted Management's decision without "a full investigation of the Employer's claims for termination." There is nothing

in the record that indicates fraud, deceit or dishonesty. The union knew Anthony returned to work with job restrictions and he requested accommodations from the Employer. AFSCME also knew the Employer's decision regarding accommodations was solely for the DMWW to make and the union had no viable avenue to challenge it. There is nothing in the record that indicates fraud, deceit or dishonesty on the part of the union.

Accordingly, I hereby propose the following:

ORDER

The prohibited practice complaint filed by Anthony is DISMISSED. The costs of reporting, $90.00, and of the agency-requested transcript and postage, $301.74, are assessed against the Complainant pursuant to PERB rule 621—3.12. A bill of costs will be issued to the Complainant in accordance with PERB subrule 621—3.12(3).

DATED at Des Moines, Iowa, this 18th of November, 2015.

J. Sarajlija

Jasmina Sarajlija
Administrative Law Judge

Electronically filed.
Served upon parties via eFlex.