

## THE DUTY OF FAIR REPRESENTATION

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This memorandum is intended to provide background on the duty of fair representation. It is not intended to constitute binding legal advice; local collective bargaining chapters should confer with their own lawyers for questions concerning their obligations under the duty of fair representation.

### I. WHAT IS THE DUTY OF FAIR REPRESENTATION?

In the private sector, the duty of fair representation (DFR) is not created by statute. Rather, it is a judicially-created federal common law doctrine that has been incorporated into labor law. For state public employees, however, the duty may also be created by statute, often as part of a state's Public Employment Relations Act or Board (PERA or PERB). The duty is intended to ensure fair treatment to all employees in a bargaining unit who are represented by an exclusive bargaining agent. It seeks to ensure that unions and employers are sensitive to individual rights and interests of those not in the majority. State and federal courts and the National Labor Relations Board (NLRB) have concurrent jurisdiction over DFR actions. The legal issue in a DFR suit is whether the union's acts or omissions are "arbitrary, discriminatory or in bad faith."

### II. THE EMERGENCE OF THE DUTY: THE KEY CASES

In Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944), the United States Supreme Court struck down under the Railway Labor Act (RLA) a seniority system that discriminated against blacks. The Court ruled that the RLA implicitly "imposes on the bargaining agent . . . the duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts without hostile discrimination against them." At the same time, "the statutory representative . . . is [not] barred from making contracts which may have unfavorable effects on some members of the craft represented."

In Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the Court extended that duty to the National Labor Relations Act (NLRA): "[The union's] statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interest of all . . . without hostility to any."

In Syres v. Oil, Chemical & Atomic Workers, Local 23, 350 U.S. 892 (1955), the Court confirmed that federal courts and the Board have concurrent jurisdiction over DFR suits. In this case, black oil workers alleged that their union negotiated a contract providing for separate lines of seniority based on race.

In Miranda Fuel Co., 140 NLRB 181 (1962), rev'd, 326 F.2d 172 (2d Cir. 1963), the National Labor Relations Board (NLRB) found that violation of the common law DFR constituted an unfair labor practice (ULP) under the Taft-Hartley Act. The Board stated that the Act guarantees the right to be free from "unfair or irrelevant or invidious treatment" by exclusive bargaining representatives.

In Vaca v. Sipes, 386 U.S. 171 (1967), the Court held that union conduct that is "arbitrary, discriminatory or in bad faith" violates the DFR. A union has the "statutory duty to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."

In Air Line Pilots Association v. O'Neill, 499 U.S. 65 (1991), the Court reformulated the arbitrariness prong of the Vaca standard and applied it to contract negotiations as follows: "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside the 'wide range of reasonableness' . . . as to be irrational." The Court also held that "any substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." In that case, the Court found that the union had not breached its DFR when it agreed to strike settlement terms that a group of strikers found unacceptably burdensome. See also Stevens v. Moore Bus. Forms, 18 F.3d 1443 (9th Cir. 1994) (even an "unwise" or "unconsidered" union decision will not rise to the level of irrational conduct under O'Neill); Graphic Communications Local 4 (San Francisco), 249 NLRB 88 (1980) (NLRB stating that whether the duty of fair representation is violated "turns on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations"). The "discrimination" and "bad faith" prongs articulated in Vaca, however, still require an inquiry into the subjective motivation behind the union's actions. Trnka v. Auto Workers Local 688, 30 F.3d 60 (7th Cir. 1994); Ooley v. Schwitzer Div., Household Manufacturing Inc., 961 F.2d 1293 (7th Cir. 1992).

In Marquez v. Screen Actors Guild, 525 U.S. 33 (1998), the Court held that within a "wide range of reasonableness," the union has "room to make discretionary decisions and choices, even if those judgments are ultimately

wrong." The Court ruled that a union does not breach its DFR when it negotiates a union security clause that tracks the language of the NLRA without explaining in the agreement that individuals need only pay "representational costs" related to collective bargaining, grievance adjustment, and contract administration.

### III. THE DFR CASE LAW

The DFR duty is broad and "[u]nder the doctrine, a union must represent fairly the interest[s] of all bargaining-unit members during the negotiation, administration and enforcement of collective bargaining agreements." IBEW v. Foust, 442 U.S. 42 (1979). That duty extends to all persons within the bargaining unit, whether or not they are union members. Smith v. Sheet Metal Workers, 500 F.2d 741 (5th Cir. 1974).

#### A. THE DUTY TO ARBITRATE GRIEVANCES

Usually DFR issues concern whether a union is required to arbitrate a particular grievance. The fact that a union initially grieved a matter does not bind it to arbitrate the case, and a union clearly is not obligated to arbitrate a grievance on the demand of an aggrieved employee. Vaca v. Sipes. A union also need not arbitrate a case in which the chances of winning are slight, Williams v. Sea-Land Corp., 844 F.2d 17 (1st Cir. 1988), and, generally, courts will not second guess a union's considered judgment that a grievance will not succeed at arbitration. Wilder v. GL Bus Lines, 164 LRRM 2906 (2000), aff'd in relevant part, 258 F.3d 126, 168 LRRM 2203 (2d Cir. 2001); see also Jones v. UPS, 461 F.3d 982 (8th Cir. 2006); Freeman v. O'Neal Steel Co., 609 F.2d 1123 (5th Cir. 1980); King v. Space Couriers, Inc., 608 F.2d 283 (8th Cir. 1979). Mere negligent conduct on the part of the union will not violate the union's DFR. Steelworkers v. Rawson, 495 U.S. 362 (1990).

However, unions should be especially sensitive to the following situations:

- arbitrating a grievance in a "perfunctory" way that is "no more than going through the motion, involving no real effort to put forward a position." Stevens v. Teamsters Local 1600, 794 F.2d 376 (8th Cir. 1986).
- declining to initiate grievance procedures based on an employee's membership status in the union. American Postal Workers, 328 NLRB No. 37 (1999); Abilene Sheet Metal v. NLRB, 619 F.2d 332 (5th Cir. 1980) (DFR breached when union refused to represent grievant because of non-member status and previous non-union employment).

- refusing to arbitrate a grievance based on the potential grievant's disloyalty to the union or personal animosity. NLRB v. Pacific Coast Utility Service, 638 F.2d 73 (9th Cir. 1980); California Union of Safety Employees (Baima), PERB Dec. No. 967-S (1993) (DFR breached when union refused to process grievance because employee threatened union with lawsuit); Communications Workers Local 3410, 328 N.L.R.B. No. 135 (1999) (DFR breached when union failed to process grievance of individual who had opposed incumbent union officers); Smith v. Exxon Mobile Corp., 2005 U.S. Dist. LEXIS 14965 (D.N.J. 2005) (while conceding that "hostility alone would not constitute a breach of the duty of fair representation," court determined that DFR was breached where union officer had "openly hostile attitude" toward grievant and union "condoned the management's retaliatory response" to grievant's complaints).
- inadequately investigating a grievance by overlooking critical facts or witnesses. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976); Graphic Communications, Local 4, 104 LRRM 1050 (NLRB 1980); see also Garcia v. Zenith Electronics Corp., 58 F.3d 1171 (7th Cir. 1995) (a union "must provide 'some minimal investigation of employee grievances'").
- refusing to permit a nonmember to attend a union meeting at which his pending grievance is to be discussed and a determination made regarding whether to proceed, Oil, Chemical & Atomic Workers Local 5-1114, 131 LRRM 1734 (NLRB 1989), or failing to provide employees access to their grievance files and charging unreasonable copying costs. Letter Carriers Branch 758, 162 LRRM 1091 (NLRB 1999).
- failing to disclose critical information to union officers voting on whether to take employee's grievance to arbitration, Radtke v. Am. Fed'n of State, County & Municipal Employees, 376 F.Supp.2d 893 (E.D. Wis. 2005).

B. THE FAILURE TO PROCESS A GRIEVANCE IN A TIMELY MANNER

Most collective bargaining agreements provide time limitations for filing and processing grievances and submitting them to arbitration. Generally, if a union ignores a grievance and allows the time period to lapse, a violation of the DFR occurs if the grievance has merit. Foust v. IBEW, 572 F.2d 710 (10th Cir. 1978), modified, 442 U.S. 42 (1979). A court found a union violated its DFR when it filed a grievance one day late and the arbitrator refused to hear the case. The union argued that its business agent had been on vacation. The court ruled the union responsible for "irresponsible inattention." Venci v. Operating Engineers Local 18, 137 F.3d 420 (6th Cir. 1998). "A union may refuse to process a grievance or handle the grievance in a particular manner for a multiple of reasons but it may not do so without reason." Griffin v. Auto Workers, 469 F.2d 181 (4th Cir. 1972). However, if the union determines that the grievance is so meritless that it would lose in arbitration, the union's failure to file the grievance in a timely manner will not constitute a DFR violation. Kissinger v. U.S. Postal Service, 801 F.2d 551 (1st Cir. 1986).

C. DFR IN CONTRACT NEGOTIATIONS

DFR issues also arise during contract negotiations when the exclusive bargaining agent is balancing the demands of competing constituencies.

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, always subject to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). As the U.S. Supreme Court later reiterated, "[a]ny substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibility." Air Line Pilots Association v. O'Neill, 499 U.S. 65 (1991).

Basically all contract negotiations involve decisions that help some and

hurt others--that is the nature of negotiations. According to one commentator, a "decisive factor" when courts consider DFR cases involving contract negotiations is whether "the union acted to serve the interests of the employees as a whole even though a smaller number of minority groups fared less well as a result." Patrick Hardin, *Developing Labor Law* 584 (1992 & 2002 Supp.). One labor lawyer broke out the types of DFR cases that arise during contract negotiations and ratification into three broad categories: (1) misrepresentation, (2) failure to disclose material information, and (3) refusal to ratify a contract.

Courts have found that unions have breached their DFR in contract negotiations in the following situations:

- Failure to disclose material information: union deliberately failed to inform workers in the bargaining unit that the employer was threatening to abolish their jobs if the union persisted in its wage demands during negotiations. Warehouse Union Local 680 v. NLRB, 652 F.2d 1022 (D.C. Cir. 1981).
- Misrepresentation: when union "induced" employees to join wildcat strike, and then employer fired members, strikers could sue for breach of DFR based on the union's alleged misrepresentation of strike repercussions. Alicea v. Suffeld Poultry, Inc., 902 F.2d 125, 133 (1st Cir. 1990).
- Refusal to ratify: former employees sued union for breaching its DFR when it failed to ratify an amendment to a settlement agreement under procedures set forth in the union's constitution. The federal appellate court found no breach because the constitution did not specifically require ratification of all contracts, but merely provided the procedure to do so. White v. White Rose Food, 237 F.3d 174 (2d Cir. 2001).

The Board and courts have found no DFR breach in the following contract negotiation situations, even though the union's conduct adversely affected a group or class of unit members:

- union complied with valid affirmative action plan of the employer. IBEW v. City of Hartford, 462 F. Supp. 1271 (D. Conn. 1978).
- union agreed to seniority credit for military service to veterans, even though those who would benefit had not

previously worked for employer. Ford Motor v. Huffman.

- airline temporarily and then permanently demoted junior captains to rectify staffing imbalance. Because the union had acted in good faith and had not singled out the demoted captains, the union was justified in privileging the interest of the majority over the interests of the demoted captains Griffin v. Air Line Pilots, 32 F.3d 1079 (7th Cir. 1994); see also Cooper v. TWA Airlines, 274 F. Supp. 2d 231 (E.D. N.Y. 2003) (Court upheld union agreement to allow the furlough and elimination of severance pay of flight attendants with the lowest seniority to help stave off the airline's demise, because the nature of collective bargaining often ensures that some groups are dissatisfied, and the union's actions were justified to benefit the union as a whole.).
- union representative mistakenly assured employees that a special fund guaranteed payment of a severance package. However, when the employer went bankrupt, no such fund materialized. Anderson v. Paperworkers, 641 F.2d 574 (8th Cir. 1981).
- union failed to inform members before ratification vote that approval would result in the waiver of an expected pay increase because union had not acted in bad faith. Teamsters Western Conference, 105 LRRM 1271 (NLRB 1980).

#### D. DFR IN AGENCY FEE SITUATIONS

A breach of the DFR may be found in the improper development or enforcement of agency fee procedures. See, e.g., Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000) (union breached its DFR when it failed to (1) provide enough information to objectors about the allocation of expenses and activities; (2) explain how the national union's affiliates used chargeable monies; and (3) provide adequate notice to new employees who are potential objectors); IUE Local 444 (Paramax Sys. Corp.), 153 LRRM 1098 (NLRB 1996) (union violated DFR when it failed to provide non-member with breakdown of its major categories of expenditures and differentiation of chargeable and non-chargeable expenses). But see Conrad v. Int'l Ass'n of Machinists & Aerospace Workers, 338 F.3d 908 (3rd Cir. 2003) (union did not violate DFR when employer failed to allow employee to deduct agency fees from paycheck upon the union's request, because the employer was not required to do so under the CBA).

#### IV. DFR PROCEDURES

The collective bargaining agent rather than an individual union officer is the proper party defendant in a DFR action. Evangelista v. Inland Boatmen's Union of the Pacific, 777 F.2d 1390 (9th Cir. 1985); Capozza Tile Co. v. Joy, 223 F.Supp.2d 307 (D. Me. 2002). Typically, the employer and union will both be defendants for breach of the collective bargaining agreement.

Generally an employee (in the private sector) may pursue a DFR claim by filing a charge with the NLRB or by filing suit in federal court within 6 months of the union's action, Del Costello v. Teamsters, 462 U.S. 151 (1983), or within the applicable time limitations of the state agency (for employees in the public sector).

Plaintiffs in DFR suits seeking compensatory damages have the right to a jury trial. Teamsters Local 391 v. Terry, 494 U.S. 558 (1990).

Courts apportion liability between the employer and the union based on the damages caused by each party. Bowen v. U.S. Postal Service, 459 U.S. 212 (1983). While compensatory damages may be awarded to an injured employee, punitive damages are not available. IBEW v. Foust, 442 U.S. 42 (1979) (ruling punitive damages could not be sought from the union for DFR breach where the union failed to pursue the grievance because, to allow otherwise, would destabilize unions and disrupt responsible grievance handling, thus undermining important goals of the collective bargaining system). Some courts have awarded attorneys' fees to successful plaintiffs. Cruz v. Electrical Workers, 34 F.3d 1148 (2d Cir. 1994).

#### V. DFR CASES INVOLVING FACULTY UNIONS

Some cases exist that involve DFR claims by individual professors against faculty unions. Examples include:

Fosbroke v. Emerson College, 1982 U.S. Dist. LEXIS 11025 (D. Mass. 1982).

In this case, a former tenured professor alleged that the union's failure to take her grievance to arbitration violated the union's DFR. The professor was a member of the Emerson College Chapter of AAUP. The professor claimed that she had been terminated because of her medical disability and, therefore, was entitled to severance pay. The college contended that the professor had decided not to return and, therefore, was not entitled to such pay. The professor's lawyer contacted the AAUP chapter president, and the chapter president stated that "the chapter could not assist her at that time . . . [because] plaintiff had not



followed the grievance procedures" under the CBA. The professor argued "that the Union had a duty to examine fully the merits of the plaintiff's claim and to bring the claim to arbitration immediately."

The court found in favor of the faculty union:

The Union's response . . . was entirely proper. This is not a situation where the Union arbitrarily refused to take a grievance to arbitration . . . ; nor is it a situation where the Union's conduct seriously undermined the integrity of the arbitration process. . . . In the instant case, the Emerson College Chapter of the AAUP could not properly intervene in the dispute until the first steps in the grievance procedure were exhausted.

Kaplan v. Ruggieri et al., 547 F. Supp. 707 (E.D.N.Y. 1982).

In this case a full-time assistant professor brought a number of claims against St. John's University administration and the St. John's University AAUP Chapter. The professor contended that the union breached its DFR when it failed to take two grievances to arbitration: he wanted to challenge a course schedule change and his tenure denial. The union submitted a grievance on the professor's behalf challenging the schedule change. "The grievance procedure is a multistep procedure leading to arbitration at step III. Plaintiff's grievance was appealed to step II, but was not pursued to binding arbitration." The court found that the union had not breached its DFR because, citing Vaca v. Sipes, "a union does not breach its duty of fair representation . . . merely because it settled the grievance short of arbitration." Therefore, although "the Union urged plaintiff to accept the scheduling change and initially asserted that this complaint was not subject to grievance-arbitration, [ultimately] the grievance was processed by the Union."

The court also rejected the professor's claim that the union breached its DFR by failing to grieve his denial of tenure. The court found that the CBA defined grievance as excluding tenure matters and, therefore, the union did not breach its DFR in failing to bring the tenure-denial grievance.

Commodari v. Long Island University and Long Island University Faculty Federation, 89 F. Supp. 2d 353 (E.D.N.Y. 2000), *aff'd*, 2003 U.S. App. LEXIS 6352 (2d Cir., Apr. 2, 2003).

An assistant professor brought a number of legal claims, including that the union breached its DFR when it failed to grieve his allegation of an improper termination notice. The union had filed a grievance on behalf of the professor

and brought it to arbitration, claiming that his termination notice violated the CBA by not convening a meeting of the department chair and department personnel committee. The arbitrator ruled in favor of the professor.

The following year, the institution issued another termination notice to the professor and, this time, the union declined to pursue the matter because it found the termination notice to conform to the CBA.

The court found that the union had not breached its DFR to the professor. The court reasoned that it need not “find on the merits that the union’s interpretation of the CBA” was correct, but only that it was reasonable: “the Union’s duty of fair representation was fulfilled as long as its decision was based on an ‘informed, reasoned’ interpretation of the CBA.” The court found the union had correctly interpreted the CBA, and that the union president had explained to the professor on the second occasion why the union did not believe LIU’s termination notice violated the CBA both in person and in a letter. “In these communications, Dr. Allen reviewed the relevant provisions of the CBA for Dr. Commodari and explained that the Union believed the [second] . . . notice and the review that preceded it comported with the relevant terms of the CBA.”

The federal appellate court upheld the lower court ruling, finding it “utterly implausible” that the union breached its DFR. The court also rejected Commodari’s motion for sanctions. In 2002 he alleged that the union engaged in “scare tactics” in an attempt to force him to drop his lawsuit. The court found the professor’s claim “wholly frivolous.”

Stiner v. University of Delaware, 2004 U.S. DIST. LEXIS 17221 (D. Del. 2004) (unpublished).

A full-time tenured professor sued the administration, the local AAUP union, and individual union officials, including the president of the local AAUP union, for a number of claims, including breach of the union’s DFR. The professor argued that the local chapter breached its duty to him because it failed to pursue his claim alleging that there was insufficient publication of criteria for faculty evaluations even though the union concurred with the grievance. The court ruled for the AAUP chapter, finding not arbitrary AAUP’s decision not to pursue Stiner’s grievance because the union had met with the university, which had agreed to standardize publication of evaluation criteria.

Naclerio v. Adjunct Faculty Ass’n. Nassau Comm. College, 1 Misc. 3d 135A,\_(N.Y. Sup. Ct. 2003)

A community college faculty member brought suit in small claims court

against his union for breach of DFR. The faculty member claimed that the association failed to put his name on the list of "bargaining unit member payees" for a grievance arbitration hearing against the community college and that it failed to re-open the proceedings four years later after the initial arbitration. The appellate court overturned the small claim court's award of \$3,000 for the professor, stating that the faculty member had failed to show that the association acted in bad faith, with discriminatory purpose, or in an arbitrary manner.

Sabol v. Am. Ass'n of Univ. Professors, 2005 Mich. App. LEXIS 1674 (Mich. Ct. App. July 12, 2005) (unpublished opinion), rev. den. 476 Mich. 854 (Mich. Sup. Ct. 2006)

A chemistry Ph.D. was hired to fill a one-year position at a state university. While he was serving in the one-year position, a tenured position in the same field opened, for which he interviewed. The university then terminated its tenure search and converted the vacancy to a new one-year position, for which it eventually hired an outside candidate. The Ph.D. contacted the AAUP chapter's grievance officer for advice; the officer, after consulting with the chapter's attorney, advised him that because he had received low student evaluations, there were no grounds for a grievance absent evidence of discrimination. The chapter's executive committee then met and unanimously decided not to pursue a grievance on the faculty member's behalf.

The faculty member filed a charge with the state Employee Relations Commission, charging that the chapter breached its duty of fair representation by failing to represent him and failing to completely investigate his claims. The Commission rejected his claims, noting that his low student evaluations justified hiring an outside candidate, and concluding that the faculty member had failed to show that the chapter refused to file a grievance on his behalf out of "personal hostility, indifference, negligence, or arbitrary refusal." The state appeals court upheld the Commission's decision, noting that the grievance officer "promptly responded to and reviewed Sabol's inquiries and allegations," "responded at length to Sabol within five days of Sabol's initial inquiry," and promptly responded when he received requested documents from Sabol, and that the chapter and Sabol engaged in extensive email correspondence. The union therefore "determined in good faith that a grievance was unwarranted and appropriately refused to pursue a frivolous claim."

## VI. PRACTICAL TIPS IN AVOIDING DFR VIOLATIONS

1. Be sure to obtain all relevant facts, interview important witnesses, consider the relevant contract language and past practices to establish a reasoned basis for proceeding or declining to proceed with arbitration.
2. Some unions find it helpful to communicate a tentative decision to an employee and offer the employee with the opportunity to make an appeal to the union's executive board about why the issue should be arbitrated.
3. Be consistent--in cases that have no merit do not proceed out of fear of threatened litigation by a disappointed potential grievant. By doing so, you may establish an unhelpful track record.