15. Duty of Fair Representation

A. Overview

The "duty of fair representation" is the union's duty to fairly and adequately represent all employees in the bargaining unit in activities the union is statutorily obligated to perform. Primarily, the duty covers negotiating with the employer over terms of a collective bargaining agreement and enforcement of the agreement through processing grievances.

The duty, often called "the DFR," is imposed on a union that is recognized or certified as the "exclusive representative" of a bargaining unit. Because employees in the bargaining unit can only be represented by that one union, the duty has been created to assure that the union represents everyone fairly, regardless of membership in the union or other considerations, such as race, sex, political affiliation, or internal union politics.

The DFR generally does not extend to union representation outside of the collective bargaining contract (such as in court or administrative proceedings, including personnel or civil service hearings), since such proceedings are not under the union's exclusive control and the employee can obtain other representation. However, a duty may arise once the union voluntarily undertakes such representation.

1. Duty imposed by statute

The DFR is explicitly imposed by state employment

relations statutes governing state[1] public school,[2] and higher education[3] employees. A similar protection is granted to federal employees.[4]

However, the statutes governing local government and court employees do not expressly impose a duty of fair representation.[5] Courts are divided over whether the DFR exists. Most court decisions, as well as the Public Employment Relations Board, have held that the duty of fair representation does exist. In a case interpreting the Meyers-Milias-Brown Act, a court held that because the statute provides for exclusive representation, the DFR is implied under the MMBA.[6] PERB has reached the same conclusion.[7] Likewise, another court held that a duty was implied in a public transit district's labor relations statute.[8] Yet another court held that an obligation "akin" to the duty of fair representation may arise when an employee organization voluntarily agrees to represent an employee, even though it is not legally required

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[1]Dills Act, Gov. Code Sec. 3515.7(g).

[2]Educational Employment Relations Act, Gov. Code Sec. 3544.9.

[3]Higher Education Employer-Employee Relations Act, Gov. Code Secs. 3571.1(9e), 3578.

[4]5 U.S. Code Sec. 7114(a0(10.

[5]Meyers-Milias-Brown Act, Gov. Code Secs. 3500 et seq., governing city, county, and special district employees. Transit district employees are governed by separate labor relations provisions in the Public Utilities Code. Trial Court Employment Protection and Governance Act, Gov. Code Secs. 71630 et seq., governing court employees. Trial Court Interpreter Employment and Labor Relations Act, Gov. Code Secs. 71800 et seq., governing court interpreters.

[6]*Golden v. Local 55, IAFF* (9th Cir. 1980) 633 F.2d 817, 48 CPER 54. The court inferred a DFR in MMBA because another court had found DFR implied in the state Agricultural Labor Relations Act, which is comparable to MMBA. See *Lerma v. D-Arrigo Bros.* (1978) 77 Cal.App.3d 836, 44 CPER 5, at note 11.

[7]*Attard v. International Association of Machinists* (2002) PERB No. 1474-M, 153 CPER 75.

[8]*Logan v. Southern California Rapid Transit Dist.* (1982) 136 Cal.App.3d 116, 55 CPER 13.

to do so.[9] However, another court found that the MMBA does not imply a DFR.[10]

2. Conduct that breaches the DFR

A union violates the DFR only if its conduct is arbitrary, discriminatory, or in bad faith.[11] While each statute defines the duty somewhat differently, courts and agencies have for the most part interpreted it similarly, and allow unions to exercise reasonable discretion in carrying out their duties.

"Arbitrary conduct" may be found if the union's decision had no rational basis or was based on very poor judgment, or if the union simply demonstrated the lack of effort to carry out its duties. The union's misconduct need not be intentional, but in most cases more than mere negligence is required. For example, one instance of failing to take a grievance to the next step within the time limit probably will not amount to arbitrary action, but a pattern of careless representation may create a breach of the DFR.

"Discriminatory conduct" occurs if the union's representation of one employee or group is unfair in relation to how it has represented others. For example, if a union refuses to take a grievance to arbitration, but pursues similar grievances on behalf of other employees without a reasonable basis for different treatment, it may have breached its duty. Discriminatory representation may be based on race, gender, or some other category protected by anti-discrimination statutes, or it may be because the employee is not a union member or has spoken out against the union.

"Bad faith" is found when a union intentionally harms employees by acting unfairly in carrying out its representational duties.

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[9]*Lane v. IUOE Stationary Engineers, Loc. 39* (1989) 212 Cal.App.3d 164, 82 CPER 22.

[10]*Andrews v. Board of Supervisors of Contra Costa Co.* (1982) 136 Cal.App.3d 274, 55 CPER 17.

[11]The U.S. Supreme Court has applied this standard in private sector cases under the National Labor Relations Act. (See *Vaca v. Sipes* in Key Cases section, below.) That standard appears in provi-

The standard for determining whether a union has breached the DFR differs, depending on whether the action involved grievance processing or bargaining duties.[12]

Grievance processing. The duty may be breached in grievance processing if the union, for an impermissible reason, does not pursue a grievance.

A breach may occur if the union commits significant errors in processing the grievance, causing injury to the grievant, such as failing to make key arguments or introduce important evidence at the arbitration hearing, repeatedly missing deadlines, inadequately handling an investigation, or failing to inform the grievant of appeal rights. While an isolated instance of negligence or failure to raise every argument at arbitration would not breach the DFR, a particularly egregious mistake or a combination of errors might.

A union may refuse to pursue a grievance or stop short of arbitration without breaching the DFR if its decision is based on an honest, reasonable determination that the grievance lacks merit or may be unlikely to succeed before an arbitrator. The courts and the Public Employment Relations Board (PERB) have granted unions considerable discretion to determine the merits of a particular grievance or unfair practice charge. Even if the employee pursues the case without union representation and wins, the union may not have violated the DFR, as long as its judgment was honest and reasonable.

Even if a grievance clearly has merit, the union may refuse to pursue it if it determines that taking action would

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sions of the Dills Act and HEERA. While EERA does not contain language incorporating the same standard, the Public Employment Relations Board and the courts nonetheless have applied it in EERA cases. (See *Romero v. Rocklin Professional Teachers Assn.*, below.)

[12]Determining whether a DFR breach has occurred involves case-by-case factual inquiry. Some generally applicable principles that may be gleaned from existing case law are discussed here. See Key Cases, below, for cases establishing these principles.

not be in the best interest of the bargaining unit as a whole. The union may consider the costs of going to arbitration in reaching that decision.

The union may refuse to pursue a grievance without breaching the DFR if the employee has missed deadlines. When a union declines to pursue a grievance, a DFR charge may be avoided if a reasonable explanation for its decision is given to the grievant.

Bargaining. In general, the courts and labor relations agencies grant unions much wider discretion in carrying out bargaining duties than in processing grievances. It is more difficult to prove that the union breached the DFR when it was negotiating a contract or strike settlement because unions must have the ability to compromise during negotiations in order to reach a settlement.

The courts will not require the union to justify every bargaining decision or satisfy the interests of all unit members. The mere failure to propose a particular issue at the bargaining table or to negotiate a particular term into the agreement ordinarily will not amount to a breach of the DFR, even though the issue was of importance to certain employees in the unit.

However, the union may violate the DFR if negotiating a particular contract provision was clearly without rational basis and harmed unit employees. For example, negotiating a provision that waives employees' constitutional or important statutory rights may breach the DFR.

The duty of fair representation does not extend to how a union conducts its own internal affairs, but only to matters that affect the relationship between the employees and the employer. For example, a union is not required to give notice to bargaining unit members before presenting each contract proposal in negotiations, nor is it required to include employees who are not union members in a contract ratification vote or in meetings at which new contract terms are presented.

However, PERB has held that the DFR requires some consideration of the views of unit employees and some means for communicating those views. A breach may occur if the union fails, before the close of negotiations, to communicate with employees about a proposal that would have a substantial impact on the employees' relationship with the employer. The obligation may be fulfilled by distributing written materials to all employees or by making regular announcements regarding the status of negotiations.

B. Enforcement

Employees may be required to exhaust internal union complaint procedures before filing a charge with PERB or a complaint in court. However, if the employee can show that the union's procedure clearly would be futile or the remedy inadequate, this step may not be necessary.

Under the state, public school, higher education, and local agency bargaining statutes administered by PERB, a violation of the DFR is an "unfair practice" by the union and may be remedied by filing a charge with PERB.

State, local government, and court employees not under PERB's jurisdiction may challenge a union's action by filing a lawsuit. Local government employees also should check whether a local ordinance or charter provision governing employment relations provides an express DFR.

Federal employees alleging a DFR breach must file an unfair practice charge with the Federal Labor Relations Authority (FLRA).

PERB, the courts, or the FLRA may remedy a DFR breach by ordering the union to process a grievance, granting a make-whole monetary award, issuing a cease and desist order, and/or requiring the union to post the ruling that it has violated its duty to fairly represent employees. A remedy calling for back pay may be complicated if both the union and the employer are at fault, such as where the employer wrongfully discharged an employee and the union breached its DFR in pursuing the employee's grievance.

See the Introduction to Part II for a discussion of enforcement procedures through PERB, the courts, FLRA, or grievance arbitration.

C. Key Cases

Alexander v. Fontana Teachers Assn. (1984) PERB No. 416, 63X CPER 11. (Union afforded nonmembers sufficient notice of negotiation proposals by distributing negotiation surveys and information to all bargaining unit members and presenting repeated oral updates.)

Antilles Consolidated Education Assn. (1990) 36 FLRA 776. (The Federal Labor Relations Authority uses a two-step analysis to assess allegations that a union violated the DFR by discriminating on the basis of union membership. First, the FLRA determines whether the union's disputed activities were undertaken in the union's role as exclusive representative. Second, the FLRA determines whether the union discriminated on the basis of union membership.)

Brammell v. San Francisco Classroom Teachers Assn. (1984) PERB No. 430, 64 CPER 56. (More than mere negligence is required to breach DFR; cumulative errors, inaction, and faulty explanations together may demonstrate breach.)

California Teachers Assn. v. Governing Board of Lancaster Unified School Dist. (1991) 229 Cal.App.3d 695, 88 CPER 41. (Union may breach DFR by negotiating contract provisions that supersede mandatory statutory terms that benefit employees.)

Chestagne v. San Francisco Classroom Teachers Assn. (1985) PERB No. 544, 67X CPER 15. (DFR only applies to issues arising under collective bargaining agreement; union not required to provide representation in judicial or administrative proceedings to enforce statutory rights.)

Council of School Nurses v. Los Angeles USD (1980) 113 Cal.App.3d 666, 48 CPER 42. (PERB has exclusive jurisdiction over DFR enforcement; violations may not be litigated in court.)

DeFrates v. Mount Diablo Education Assn. (1984) PERB No. 422, 63X CPER 13. (No DFR breach where union agreed to eliminate a benefit for a small number of employees to gain a benefit for a larger number.)

Faeth v. Redlands Teachers Assn. (1978) PERB No. 72, 39 CPER 58. (Employee organization may exercise considerable discretion in conduct of negotiations; no violation when union does not go to impasse.)

Forslund v. Saddleback Valley Educators Assn. (1990) PERB No. 828, 86 CPER 68. (No DFR breach where union refused to pursue grievance, since decision based on honest, reasonable determination that grievance lacked merit.)

Gorcey v. Oxnard Educators Assn. (1988) PERB No. 664, 77 CPER 86. (A union may breach the DFR by negotiating a provision that would waive employees' statutory rights.)

Gorcey v. Oxnard Educators Assn. (1988) PERB No. 681, 78 CPER 81. (A union may breach DFR by failing to communicate a contract proposal to employees before the close of negotiations.)

Kimmett v. SEIU Loc. 99 (1979) PERB No. 106, 44 CPER 56. (Charge involving internal union affairs is not DFR claim; is outside PERB jurisdiction unless activity has substantial impact on employees' relationship with employer.)

Lane v. IUOE Stationary Engineers, Loc. 39 (1989) 212 Cal.App.3d 164, 82 CPER 22. (Union has duty akin to DFR where it voluntarily undertook to represent an employee in a matter not arising under the collective bargaining agreement.)

McElwain v. Castro Valley Teachers Assn. (1980) PERB No. 149, 48 CPER 65. (Grievance with arguable merit can be rejected without breaching DFR if victory would damage terms and conditions for bargaining unit as a whole.)

Romero v. Rocklin Professional Teachers Assn. (1980) PERB No. 124, 45 CPER 82. (DFR implied in EERA; PERB adopts standard for breach — conduct must be arbitrary, discriminatory, or in bad faith; greater discretion allowed in bargaining than in grievance processing.)