
The Duty of Fair Representation



MODULE 302

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CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION



The Duty of Fair Representation

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The Duty of Fair Representation

CSEA STATUS AS EXCLUSIVE REPRESENTATIVE

When CSEA is selected by the majority of the employees in a bargaining unit, it gains the authority to speak and act on behalf of all unit employees whether or not they are union members or even want to be represented by CSEA.

This authority is known as the rule of exclusive representation.

Therefore, the individual employee does not have an absolute independent right to negotiate his/her terms of employment or to enforce his/her rights under a collective bargaining agreement. Furthermore, an employee does not have the option of being represented by another individual or organization if he/she is dissatisfied with enforcement of the contract or the progress of negotiations.

FAIR REPRESENTATION

The granting of this right of exclusive representation has led courts throughout the country to impose upon unions in general the duty of fairly representing all employees in the bargaining unit. The courts compare this duty to the obligation a government body owes to its electorate or a trustee owes to those he/she represents.

A distinctive feature of the California Educational Employment Relations Act (EERA) is that it expressly provides for the Duty of Fair Representation for unions representing public school employees. Government Code Section 3544.9 reads:

The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

The Duty of Fair Representation extends to all employees who are members of a bargaining unit, CSEA members, service fee payers, religious objectors, and non-members as well.

DEFINITION OF DUTY (What is “fair?”)

The courts have ruled a union’s power must be exercised “fairly, impartially and in good faith.” The union has a significant amount of discretion. Most recently the U.S. Supreme Court held a union violates the Duty of Fair Representation if it acts in an “arbitrary, discriminatory or bad faith” manner.

- A union acts in an **arbitrary** manner if it acts perfunctorily and without enough regard to the merits of the matter before it. That is, there is no reasonable basis upon which the union’s conduct can be explained or it just “goes through the motions” in processing a grievance.
- A union acts in a **discriminatory** manner if it acts unfairly in dealing with one person as compared to others similarly situated. Discrimination includes, but is not limited to, Civil Rights Act definitions.
- A union acts in **bad faith** if it acts with improper intent, motive and purpose.

Each test stands on its own. Any one test may be enough to show a violation of the Duty of Fair Representation. Action or inaction by a union that is unreasonable or arbitrary or that treats people differently may violate the Duty even though the union has acted in good faith and without hostility.

“...while the Duty of Fair Representation is quite stringent, it does not require the union to process every grievance to arbitration, or, for that matter, process every grievance even to the first step of the grievance procedure...”

In a 1980 decision, *Romero v. Rocklin Teachers Association*, PERB defined the Duty of Fair Representation for California school employee unions by adopting the federal test of whether or not a union’s action was “arbitrary, discriminatory or in bad faith.” In a direct quote from a previous federal court decision PERB explained:

A union must conform its behavior to each of these standards:

First, it must treat all factions and segments of its membership without hostility or discrimination.

Next, the broad discretion of the union in asserting the rights of its members must be exercised in complete good faith and honesty.

Finally, the union must avoid arbitrary conduct.

Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

It is important to note that while the Duty of Fair Representation is quite stringent, it does not require a union to process every grievance to arbitration or, for that matter, process every grievance even to the first step of the grievance procedure. The courts have recognized “though ... a union may not ignore a meritorious grievance or process it in a perfunctory fashion ... the individual employee does not have an absolute right to have his grievance taken to arbitration.” The union has the right to “sift out wholly frivolous grievances” and has a significant area of discretion in deciding which grievances to process and how far to process them.

In the end, the definition of the Duty of Fair Representation and the question of whether or not a union has met its Duty will depend on determining if the union’s actions were taken in good faith and were reasonable in light of the particular facts.

SCOPE OF THE DUTY

The obligation to “represent fairly” applies through all phases of the collective bargaining process, ***including negotiations and enforcing the terms of a contract***. In practical terms, however, the fairness test is applied differently in judging a union’s actions in contract negotiations as compared to administering the contract after it is in place. The duty does not extend to non-contractual matters, such as DMV hearings, unemployment appeals, workers compensation disputes, and any other non-contractual matter.

THE DUTY OF FAIR REPRESENTATION IN NEGOTIATIONS

The courts recognize a union needs more flexibility in negotiating contracts than in interpreting and applying existing contracts. CSEA chapters have considerable leeway in negotiating an agreement that advances the overall concerns of the bargaining unit at the expense of some individuals and groups within the unit. Relative advantages and disadvantages of different proposals to the various groups within the chapter must be weighed both singly and in combination. Any collective bargaining agreement represents not only a compromise between CSEA and the district, but also a compromise among individuals and special interest groups within the chapter.

In the words of the U.S. Supreme Court in *Vaca v. Sipes*:

A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals ... 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, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

“...A union’s duty to fairly represent employees does not encompass a obligation to negotiate any particular item. Because the task of bargaining demands a balancing of benefits against burdens, a union should not be required to justify every decision it makes at the bargaining table...”

The California Public Employment Relations Board (PERB) applies this principle to collective bargaining under the EERA. In PERB Decision No. 124 the Board states:

Because the task of bargaining demands a balancing of benefits against burdens, a union should not be required to justify every decision it makes at the bargaining table ... this Board advises that the standard for the Duty of Fair Representation as it arises in the negotiating process may not be the same as that applied in situations arising out of grievance situations involving the enforcement of a contract. A union’s duty to fairly represent employees does not encompass an obligation to negotiate any particular item.

Under this principle, a CSEA chapter may decide it would be more beneficial to negotiate district paid full-family medical insurance than negotiate a substantial wage increase, thus diverting a part of the money available for salaries. While some employees (particularly those who are without dependents, hold higher paying jobs or have alternative coverage through a spouse) might prefer a larger wage increase instead of fringe benefit improvement, their only recourse is through the democratic political process within CSEA. They can try to influence the bargaining committee to obtain a wage increase, but they cannot compel them to do so under the Duty of Fair Representation.

PERB has ruled a union is required to give “some consideration of the views of various groups of employees,” including non-members and has implied that participation at union meetings called to discuss negotiations satisfies this requirement. However, PERB has rejected the notion that non-members have a right to *vote* in contract ratification procedures reasoning that contract ratification is an internal union affair.

THE DUTY OF FAIR REPRESENTATION IN GRIEVANCE HANDLING

When a chapter negotiates a contract it is acting like a legislature establishing rules—like a legislature it is allowed a wide range of discretion. But when a chapter administers a contract by interpreting its terms and processing grievances, it is acting more like an administrative agency enforcing and applying legislation. It must act within the boundaries of the rules established by the contract. Thus, in grievance handling, a chapter's flexibility is more limited.

If the meaning of the contract and the facts concerning the grievance are clear, the only requirement is to enforce the compromise made when the contract was negotiated. If the contract is ambiguous, then the parties need flexibility to complete the compromise within the range of reasonable meanings of the agreement. If the facts are unclear, then the parties need freedom to agree on a reasonable determination of the facts.

CSEA's obligation of fair representation in processing a grievance is basically twofold:

1. It must process the grievance with some degree of care, make an appropriate investigation of the facts, and observe contractual time limits.
2. After making this investigation, it must decide if it will pursue the grievance further, especially whether or not it will take the grievance to arbitration. *This determination must not be arbitrary, discriminatory, or in bad faith.*

It is difficult to identify the precise factors leading to a conclusion in one case that a union has breached its Duty of Fair Representation and in another case that it has not. The following tests, which are only generalizations, may be helpful:

➤ ***Did the union approach the grievance with an open mind in an honest effort to achieve a fair result?*** If, for example, the union was merely looking for some excuse to drop the case, it violates its duty. Also a union may not refuse to take a grievance further because it is hostile to the grievant (perhaps because the grievant had opposed the local leadership in the past or because the grievant has refused to join the union).

➤ ***Did the union investigate the case with care and pursue all reasonable evidence suggested by the grievant?*** If not, its conduct is likely to be considered "arbitrary." For example, in a well-known case, truck drivers were discharged for allegedly padding their receipts for motel expenses. The grievants demanded the union investigate the motel records. The union refused. When it turned out the motel clerk had altered the motel records, the court held the union breached its Duty of Fair Representation in failing to investigate the case properly.

“...the union may properly decide not to pursue a case if it concludes there is a good chance it can not win. If the union reaches this conclusion in good faith, it satisfies the Duty of Fair Representation, even if mistaken about the merits of the case...”

➤ ***Has the union treated the grievance in the same way it has dealt with similar grievances in the past?*** If an individual can show the union has taken similar cases to arbitration, but now refuses to take this one, a violation of the Duty of Fair Representation may be shown due to discrimination.

➤ ***Is the union’s decision not to take the case consistent with a reasonable interpretation of the contract?*** The union may properly decide not to pursue a case if it concludes there is a good chance it cannot win. If the union reaches this conclusion in good faith, it satisfies its Duty of Fair Representation even if mistaken about the merits of the case. Thus, a union was upheld in a recent case in which it decided not to press a male employee’s challenge of a dress requirement that he wear a tie. The court held the union’s judgment that the grievance was a “bad case” was **not arbitrary**. The union’s position on “bad cases” or “close calls” will be particularly strong if it can point to considerations of time and costs in not pursuing a doubtful case. However, where the individual’s grievance is a strong one on its merits, and there is little doubt it would prevail in arbitration, the union may violate its obligation to the employee if it refuses to arbitrate the case.

In “fair representation” cases, the individual also has the burden of showing his/her grievance was indeed a sound one. In other words, the individual who insists a grievance be pursued must prove two important points: (1) the union acted improperly in dropping the case, **and** (2) on the merits, the grievance was valid. When it is considered many cases are lost in arbitration that appear to be sound, it is understandably difficult to be able to prove that a grievance could have been won in arbitration.

➤ ***Did the union do an adequate job in presenting the case?*** It is clear the union’s Duty of Fair Representation includes its conduct at an arbitration hearing. However, unions have a great deal of freedom in deciding how to present a case. Just because the union does a poor job in presenting the case does not necessarily mean it has violated its duty. More is required, such as a showing of bad faith or extremely inadequate preparation and presentation. For example, if the union meets only briefly or not at all with the grievant prior to the hearing, and as a result omits important evidence, a failure of fair representation may be shown.

REMEDIES FOR VIOLATION OF THE DUTY OF FAIR REPRESENTATION

If an employee proves his/her union has breached its duty, an order may be issued prohibiting the union from engaging in such conduct in the future. PERB could also order improperly disciplined employees reinstated with back pay or could order arbitration of the original dispute.

If an employee is reinstated with back pay or receives a monetary award the **employer** would only be liable for the loss the employee suffered as a result of the employer's violation. The **union** is liable for the amount, if any, of the employee's losses as increased by the union's failure to process the grievance, or to process it properly. In an improper discharge case, for example, the employer probably would have to reimburse the employee for lost pay up to the time the case would have been arbitrated. The union would be liable for the lost pay after that date, up to the time that PERB or the courts decided the case in the employee's favor.

AVOIDING THE CHARGE

While there is no way to absolutely prevent members and non-members from filing charges alleging violation of the Duty of Fair Representation, there are certain things that CSEA officers and stewards can do to reduce the likelihood of such charges and to win before PERB if charges are filed.

Obviously CSEA's primary object is to represent employees fairly and vigorously. The doctrine of "fair representation" may be viewed as no more than an additional incentive to do our job well.

Clearly, the way to avoid charges of unfair representation, and to win them if filed, is for CSEA grievance representatives not to act toward any bargaining unit employee in an arbitrary, discriminatory or bad faith manner.

The following steps can be taken to achieve this goal:

- 1. EDUCATION.** All CSEA officers should know the Duty of Fair Representation exists, and should know what standards of behavior it requires. In addition, all officers and stewards should be familiar with the terms of their collective bargaining agreement with the employer to determine if an employee's grievance is valid and what steps must be taken to process the grievance. Grievance representatives must be especially aware of time limits for filing a grievance and for taking it to the next step in the grievance procedure. Such knowledge is critical in view of some decisions holding that a union violates the Duty of Fair Representation if a grievance is lost because of the negligent failure to act in a timely fashion.

Chapters should make sure all newly elected or appointed grievance representatives receive training in processing grievances and the Duty of Fair Representation. At the minimum, before formal training occurs each grievance representative should receive a copy of CSEA training module, 301—*Introduction To The Duty of Fair Representation*.

2. Record Keeping. Since most Duty of Fair Representation charges involve claims the union did not act properly with respect to an employee's grievance, it is vital good records be kept about every grievance or potential grievance.

3. CSEA Internal Appeals Procedure. Some courts have held that an employee alleging violation of the Duty of Fair Representation may be required to exhaust internal union remedies, if they are available. CSEA Policy 606 provides: ... if a chapter refuses to provide assistance and/or request State assistance for a member confronted by a disciplinary action from the district of employment, or any adverse employment condition, the member may appeal the chapter's refusal and request assistance from the State Association. In interpreting this policy, "member" means any employee in a bargaining unit represented by CSEA, whether or not the person is an actual member of CSEA. A bargaining unit employee whose grievance is rejected by a chapter should be advised of his/her right to appeal. A sample letter, notifying employees of their right of appeal is included as Appendix C of this module.

"Clearly, the way to avoid charges of unfair representation...is for CSEA grievance representatives not to act toward any employee in the bargaining unit in a manner that is arbitrary, discriminatory or in bad faith."

It could happen that the time required to invoke arbitration is so short as to not allow time for the employee's appeal of the chapter's decision not to arbitrate. There are at least two ways to handle this problem. The chapter can attempt to negotiate an extension of time limits with the district until such time as the member's appeal can be processed. Alternatively, the chapter can request arbitration, but inform the employee the request will be withdrawn unless he/she is successful in the appeal to the State Association.

CONCLUSION

The book is still not closed on the subject of "fair representation," and the definition of the duty is still evolving in court and PERB decisions. Many labor representatives fear a court or board could find any conduct that can somehow be characterized as "unfair" to be a violation of the Duty of Fair Representation. Unfortunately, this fear could lead to the processing of all grievances, regardless of their merit, to the final step of the grievance procedure. This could eventually cause a breakdown in the system that would hamper the resolution of valid grievances. CSEA grievance representatives should continue to do their jobs honestly and sincerely without fearing charges and lawsuits. If they make reasonable decisions based on facts surrounding each dispute, they are likely to be sustained in any action taken.

PERB Decisions

SELECTED PERB DECISIONS RE DUTY OF FAIR REPRESENTATION UNDER EERA

(3544.9-3543.6(b) (Through October 1985))

- A. *Quarrick and O'Brian* (Mt. Diablo Unified School District) PERB Decision No. 68 (self representation not extended to arbitration, 3543; arbitration sole right of exclusive representative, 3543.1; duty of fair representation enforced by unfair practice procedure).
- B. *Faith and McCarty* (Redlands Teachers Association) PERB Decision No. 72 (1978) (negotiation discretion allowed).
- C. *Romero* (Rocklin Professional Teachers Association) PERB Decision No. 124 (failure to reopen agreement was reasonable exercise of discretion by exclusive representative).
- D. *Kimmet* (SEIU Local 99) PERB Decision No. 106 (duty limited to representation, not internal union affairs; breach of duty is unfair practice, 3543.6(b); financial report requirement not enforceable by unfair practice charge, 3546.5).
- E. *King* (Fremont Unified District Teachers Association) PERB Decision No. 125 (organization's grievance did not violate individual's right to self representation).
- F. *Castro Valley Unified School District*. PERB Decision No. 149 (no violation of DFR in union's refusal to arbitrate grievance, 3544.9, PERB reverses H.O.)
- G. *Pottorff* (SEIU Local 99) PERB Decision No. 203 (union's DFR continues until decertification election results are certified).
- H. *Hagopian* (San Francisco Federation of Teachers) PERB Decision No. 222. (Union's policy requiring non-member to pay a fee for arbitration breaches DFR, 3544.9, and violates non-member right not to participate in an employee organization, 3543 in violation of 3543.6(b). But see also 1980 revision to EERA Section 3546.3 which authorizes union to charge religious objectors the reasonable cost of using the grievance and arbitration procedures.)
- I. *Willis and Mills-Willis* (El Centro Elementary Teachers Association) PERB Decision No. 232 (union did not discourage non-members from exercising protected rights and attending union meeting by removing voting rights on contract ratification; PERB affirmed H.O. decision without discussion; H.O. decided that board's decision in

Kimmett (No. 106) implies “some consideration of the views of various groups of employees” but that union had met obligation by holding meeting at which members and non-members were allowed to participate. In view of this the denial of a vote to non-members lacked a substantial impact on the relationship of unit members to their employer; charge dismissed.

- J. *King City Joint Union High School District*. PERB Decision No. 197. (1982) (Union breached DFR by using non-members’ agency fee to provide liability insurance for members only.)
- K. *United Teachers of Los Angeles*. PERB Decision No. 258. (1983) (Employees’ allegation that union violated DFR by delaying arbitration hearing, failing to insist on expedited decision, and refusing to call certain witnesses failed because employee did not specifically allege that union’s conduct was arbitrary or discriminatory.)
- L. *Los Angeles Unified School District*. PERB Decision No. 311. (1983) (Where employee failed to leave handling of grievance to union and insisted on pursuing certain grievance matters personally, union acted properly in withdrawing from processing grievances.)
- M. *SEIU Local 99*. PERB Decision No. 341. (1983) (Despite inference that union’s handling of grievances was possibly negligent, unwise or unsatisfactory to grievants, absence of specific allegation that union acted in arbitrary, capricious or bad faith manner, or handling of arbitration hearing was improperly motivated, causes DFR charge to be dismissed.)
- N. *California School Employees Association*. PERB Decision Nos. 342 (1983) and 342a (1984). (Union’s decision to pursue issue in court rather than through PERB held not to be a violation of DFR even though court refused to take jurisdiction on grounds of non-exhaustion of PERB administrative remedies. The union’s decision not discriminatory, made in bad faith or arbitrary—but a conscious exercise of judgment.)
- O. *Fontana Teachers Association*. PERB Decision No. 416. (1984) (In absence of evidence that non-members were left completely uninformed or without an opportunity to express their viewpoints regarding contract negotiations, the union’s policy of not allowing non-members the right to vote on ratification was not in violation of the DFR.)
- P. *San Francisco Classroom Teachers Association*. PERB Decision No. 416. (1984) (Allegation that union promised to pursue grievance and seek extension of time limits, but failed to do so, states a prima facie violation of the DFR.)

- Q. *United Teachers of Los Angeles*. PERB Decision No. 438. (1984) (Employee's claim that union did not provide "effective advocacy" in handling grievance is not enough to support a prima facie violation of the DFR. Although not as aggressive as the employee would have preferred, the quality of union's representation is not measured against that which might have been provided by legal counsel.)
- R. *California School Employees Association*. PERB Decision No. 442. (1985) (Union's conducting a recall election to remove union officer is an internal union affair and does not involve the duty of fair representation.)
- S. *San Francisco Classroom Teachers Association*. PERB Decision No. 444. (1985) (Union's grievance settlement, which itself deviated from the terms of the collective bargaining agreement, did not violate the DFR because the settlement was properly based on consideration of benefit to the bargaining unit as a whole.)

Research Notes

I. DERIVATION OF THE DUTY

- A. The Duty of Fair Representation (DFR) is not explicitly stated in any federal labor relations statute. It is a judicially created doctrine, based on Section 9(a) of the National Labor Relations Act (NLRA), 29 USC Section 159(A), which, provides that a union selected by a majority of employees in a bargaining unit is their *EXCLUSIVE REPRESENTATIVE*.
1. Doctrine created by Supreme Court in cases under Railway Labor Act. *Steele v. Louisville & Nashville RR*, 323 U.S. 192 (1942). Case involved attempt by union to amend seniority provisions of collective bargaining agreement to eventually exclude all black foremen.
 2. Court later established doctrine under National Labor Relations Act. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).
 3. Breach of DFR may also be a violation of the Civil Rights Act of 1964, 42 USC Section 2000(e) 1-15.
- B. Breach of DFR first ruled an unfair labor practice by NLRB in 1962 (*Miranda Fuel Co.*, 140 NLRB 181).
- C. EERA distinct from federal law in expressly providing for DFR at Government Code Section 3544.9.
- D. PERB has ruled violation of DFR is an employee organization unfair practice in violation of GC 3543.6(b) (*Quarrick and O'Brien v. Mt. Diablo Education Association* 8/21/78 PERB Decision No. 68; *Jules Kimmitt v. SEIU*, Local 99 10/19/79 PERB Decision No. 106; *Thomas Romero v. Rocklin Teachers Professional Association* 3/26/80 PERB Decision No. 124. In these decisions PERB also adopted the federal standards and text (see below).

REASON FOR CREATING DUTY

“Railway Labor Act and NLRA make union selected by majority of employees in a unit the ‘exclusive’ representative of all the employees in the unit. Thus, by statute, the representative is clothed with powers like that of a legislature.

Legislature is subject to constitutional limitations. One of those is the equal protection clause. Fifth and Fourteenth Amendments prohibit government from denying citizens equal protection under the law.

Supreme Court recognized in *Steele* if Congress gave unions legislative-like powers by making them exclusive representatives,

and did not impose some duty on them to act fairly to all members, there would be constitutional questions involved as to legitimacy of giving unions such powers. The court avoided constitutional issue by finding intent on part of Congress to impose on bargaining representative "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." 392 U.S. at 203.

II. SCOPE AND NATURE OF DUTY

A. To Whom It Extends

To employees for whom the union is the exclusive representative.

B. Types of Acts Covered

Union's actions in negotiating (*Ford v. Huffman*), and enforcing (*Humphrey v. Moore*) 375 U.S. 335 (1964), the collective bargaining agreement.

See also: *Rocklin Teachers* (PERB Decision 124) expressing that different standards may apply in judging breach of DFR in negotiations as compared to grievance situations.

C. Definitions of the Duty

1. *Steele*—union's power must be exercised "fairly, impartially, and in good faith," 232 U.S. at 204. Discriminations based on race alone are a breach of the Duty. But later cases make clear that DFR is not limited strictly to racial discrimination.
2. *Vaca v. Sipes*—breach occurs when union's conduct toward member of unit is "arbitrary, discriminatory, or in bad faith." 386 at 207.

"Though . . . a union may not ignore a meritorious grievance or process it in a perfunctory fashion, . . . the individual employee (does not have) an absolute right to have his grievance taken to arbitration." Union has right to "sift out wholly frivolous grievances." *Humphrey v. Moore*, 375 U.S. 335, 349 (1964).

3. Union has a significant area of discretion in the exercise of its duty as the exclusive bargaining representative. It has a "wide range of reasonableness . . . subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford v. Huffman*, 345 U.S. at 337-38.
4. Courts have increasingly placed a greater burden on the union and a broader definition of what constitutes a breach of the DFR.
 - a. Action or inaction which is unreasonable or arbitrary, violates Duty even though union acts without hostile motive and in good faith. *Griffin v. Automobile Workers*,

469 F2d 181 (4th Cir. 1972). This principle in “Griffin” adopted by PERB in *Rocklin Teachers* (PERB Decision No. 124).

- b. Mere arbitrary action is a breach. *Berault v. Longshoremen*, 501 F2d 258 (9th Cir. 1974).
 - c. *Ruzicka v. G.M.*, F2d 306 (6th Cir. 1975)—union’s negligent failure to comply with contract time limits for filing grievance is perfunctory processing of grievance in violation of DFR. In 9th Circuit, mere negligence is not enough. *Dente v. M.M.P.*, 492 F2d 10, 11 (9th Cir.), cert. den., 417 US910 (1974).
 - d. *Holodnak v. Avco Corp.*, 514 F2d 285 (2d Cir. 1975)—union’s representation of a grievant was arbitrary and in violation of DFR because union representative, probably due to inadequate preparation, failed to assert or passively presented certain important claims.
 - e. *Gregg v. Teamsters*, (9th Cir. 1983)—Simple reliance on its attorney’s advice does not insulate union from DFR.
 - f. *Curtis v. Utu*, (8th Cir. 1983)—The DFR must be governed by the climate in which it functions. The perimeters cannot be too lax, or there will not be safeguards for the union member. However, to hold lay union representatives to the demanding test applied to a trained trial lawyer would defeat the aims of informality and speedy resolution contemplated by labor-management grievance procedures. Quoting from *Freeman v. O’Neal Steel* (5th Cir. 1980) and *Findley v. Jones Motor Freight* (3rd Cir. 1981): “A union representative is not a lawyer and he cannot be expected to function as one.”
5. Each case turns on its own facts—
- a. *Hershman v. Local 1245* involved decision of Sierra Pacific to demote employee. Union investigated case and concluded that company had sufficient grounds for its decision. Employee sued union. Claimed union’s investigation was inadequate. Court found no evidence of arbitrary or bad faith conduct on part of union and dismissed complaint as to Local 1245.

D. Enforcement of the Duty

1. Under NLRA, Duty was first enforced in the courts. *Ford v. Huffman* (1953)
2. In 1962, in *Miranda Fuel Co., Inc.*, 140 NLRB 181, held that a union’s failure to represent all of its employees fairly is also an unfair labor practice.

3. Breach of DFR an unfair practice under EERA, PERB has jurisdiction to enforce.

III. REMEDIES

A. Court Decisions

1. To win, employee need demonstrate a breach of the DFR and, if breach involves failure to process a claim, he/she must also show the claim was meritorious (i.e., there was a breach of the contract).
 - a. Damages
 1. Employee can receive back pay, the difference between what employee actually earned (or could have earned with due diligence), and what he would have earned but for the breach.
 2. Only employer, and not union, is liable for damages resulting from *employer's* breach of the contract. Union is liable to the extent that the *employee's* damages were increased by the union's refusal to process grievance. *Vaca*, 386 US at 198. See also US Supreme Court decision: *Bowen v. U.S. Postal Service* 1/11/83. But a union may be liable for attorney's fees if employee independently takes civil action against employer—even if employee unsuccessful (*Dutrisas v Caterpillar Tractor*, 9th Circuit, 1983).

Union and employer may be ordered not to enforce a discriminatory provision. *Steele*.

B. NLRB

1. Representation Cases
 - a. Board will not refuse to certify a union because of alleged discrimination by the union. *Handy Andy, Inc.*, 228 NLRB No. 59 (1977).
 - b. Board will, however, refuse to apply contract bar rule where collective bargaining agreement contains discriminatory provisions. *Pioneer Bus Co.*, 140 NLRB 54 (1962).
2. Unfair Labor Practice Cases
 - a. A breach of DFR is a violation by the union of 8(b)(1)(A), and 8(b)(2). *Miranda Fuel Co.*, 140 NLRB 181 (1962). If the breach involves a failure to process a grievance, that is also a violation of 8(b)(3). *Independent Metal Workers Union* (Hughes tool Co.), 147 NLRB 1573 (1964).

- b. An employer who participates in arbitrary union conduct violates 8(a)(1) and possibly 8(a)(3). *Miranda Fuel*.
- c. Board will order cease and desist orders; reinstate employees with back pay; or order arbitration.
- d. In the appropriate cases, Board may revoke the certification of a union that engages in unlawful discrimination. *Independent Metal Workers, supra*.

C. PERB

- 1. Available remedies same as NLRB. Under PERB, DFR charges limited to allegation that union violated Government Code Section 3543.6(b).

Sample 606 Appeal Letter

_____ (Date)

Dear (insert grievant name):

Re: Chapter Decision Not to Take Action — Right of Appeal — CSEA Policy 606

This letter is to inform you that the chapter has carefully reviewed the merits of your grievance (or disciplinary appeal). Based upon our review, we have concluded that the case is lacking in merit to the extent that it is highly unlikely that CSEA will be able to prevail in arbitration (or in an administrative hearing). Therefore, the chapter has a rational basis for not proceeding to arbitration (or to an administrative hearing) on your claim.

This communication is also to advise you that you have a right to appeal our decision pursuant to CSEA Policy 606, which is attached.

Your appeal should be submitted to: California School Employees Association, P.O. Box 640, San Jose, California 95106, Attn: Director of Field Operations.

Respectfully submitted:

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION

President, Chapter _____

Cc: AD

RR

FD

PUBLIC EMPLOYEE REPORTER – CALIFORNIA (PERC)

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