

THE DUTY OF FAIR REPRESENTATION

A White Paper by UNLV School of Law Student Yuen Ting Ha

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(1) What is a union's duty of fair representation?

As an exclusive bargaining agent, a union has a duty to fairly represent both members and non-members who are within the bargaining unit. A duty of fair representation includes a union's responsibility to bargain for and to enforce the collective bargaining agreement, as well as process meritorious grievances filed by the employees within the bargaining unit. A breach of the duty of fair representation is a violation of law. The Local Government Employee-Management Relations Board (hereinafter referred as the "Board") has jurisdiction to hear cases involving the breach of the duty of fair representation by unions representing local government employees in the State of Nevada.¹

(2) What is the origin of the duty of fair representation?

The doctrine of the duty of fair representation is judicially created law.² Even though there is no language within the agency's enabling statute (NRS Chapter 288) that establishes the duty of fair representation explicitly, this duty had been recognized by both the Supreme Court of the United States and the Nevada Supreme Court.

In Vaca v. Sipes, the Supreme Court of the United States affirmed the doctrine of the duty of fair representation by deriving such duty from the National Labor Relations Act ("NLRA").³ The EMRB often looks to NLRB precedents. To this end, the Nevada Supreme Court has also recognized the duty of fair representation owed by unions representing local government employees from NRS 288.270(1), (2).⁴ Pursuant to NRS 288.270(2), the prohibited practices of an employee organization include:

- (a) Interfere with, restrain or coerce any employee in the exercise of any right guaranteed under this chapter.
- (b) Refuse to bargain collectively in good faith with the local government employer, if it is an exclusive representative, as required in NRS 288.150.

¹ Rosequist v. Int'l Ass'n of Firefighters Local 1908, 118 Nev. 444, 449, 49 P.3d 651, 654 (2002), overruled on other grounds by Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 170 P.3d 989 (2007).

² Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985).

³ Vaca v. Sipes, 386 U.S. 171, 181-183 (1967).

⁴ Cone v. Nevada Serv. Employees Union/SEIU Local 1107, 116 Nev. 473, 479, 998 P.2d 1178, 1182 (2000).

Bargaining collectively includes the entire bargaining process, including mediation and fact-finding, provided for in this chapter.

- (c) Discriminate because of race, color, religion, sex, age, physical or visual handicap, national origin or because of political or personal reasons or affiliations.

(3) Who can a complainant sue on breach of duty of fair representation?

A complainant can file a claim for a breach of the duty of fair representation against his/her union, but not a malpractice claim against the attorney who is employed by the corresponding union.⁵ Legal representation provided by the union to the employees in its bargaining unit is considered a service.⁶ Therefore, a union is responsible for any shortcoming or inadequacy for the legal service that it provides to the employees that it represents.⁷ On the other hand, without any restriction from a union's bylaws, a complainant who is not a member has the right to retain his/her own attorney and to refuse representation from his/her union but must pay for those services.

(4) What union's conduct constitutes a breach of the duty of fair representation?

A union is given broad discretion to make decisions and to act in what it perceives to be the best interests of its members.⁸ However, it does not mean that a union can act freely and without any limitation. Under the doctrine of the duty of fair representation, the law requires that when a union represents or negotiates on behalf of the employees in its bargaining unit, it must conduct itself in a manner that is not "arbitrary, discriminatory, or in bad faith."⁹

(5) What type of conduct is considered "arbitrary"?

In Air Line Pilots Association, International v. O'Neill, the Supreme Court of the United States held that arbitrary actions are ones which "can be fairly characterized as so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary'."¹⁰ In that case, a union's decision to settle an ongoing strike with the employer was within "a wide range of reasonableness" even though not all employees' interests were maximized.¹¹ Although the Court recognized that the settlement was not the wisest choice, it held that the union did not breach its duty of fair representation since it decided to settle with the employer after a reasonable consideration of different factors, including costs associated with future litigation and job

⁵ Weiner v. Beatty, 121 Nev. 243, 250, 116 P.3d 829, 833 (2005).

⁶ Id.

⁷ Id.

⁸ Vaca v. Sipes, 386 U.S. 171, 191 (1967).

⁹ Id. at 190.

¹⁰ Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 78 (1991) (internal citation omitted).

¹¹ Id. at 81.

security for some employees.¹² Therefore, a bad judgment made in good faith generally does not constitute as arbitrary conduct performed by the union.

In Peterson v. Kennedy, the Ninth Circuit also supported the notion that union conduct need not be perfect and mere negligent conduct does not constitute as a breach of the union's duty of fair representation.¹³ The court held that a good faith and non-discriminatory judgmental error on the part of the union in handling a grievance was not an arbitrary conduct.¹⁴ In that case, the union did not breach its duty of fair representation even though its representative gave erroneous advice to an employee in filing the appropriate type of grievance.¹⁵

On the other hand, the court follows a general principle that a conduct is deemed arbitrary if a union fails to perform a procedural or ministerial act without any rational basis, and the act itself does not require the exercise of judgement.¹⁶ Also, the act must prejudice a strong interest of the employee.¹⁷ In Galindo v. Stookey, the employee was laid off by the employer because his union failed to notify the employer about the employee's steward status.¹⁸ Since notifying an employer of someone's steward status was a ministerial act that required no judgement on the part of the union, the court held that the union breached its duty of fair representation.¹⁹

Throughout the years, the Local Government Employee-Management Relations Board has decided numerous cases with issues revolving around the duty of fair representation. In George v. Las Vegas Police Protective Association Metro, Inc., the union refused to proceed on a grievance filed by one of its members, Ginger L. George, who was a Las Vegas City Corrections Officer.²⁰ She suffered a work-related injury and she felt that she was not properly placed in a light-duty status position by the City of Las Vegas.²¹ Therefore, she contacted both the union representative and the union attorney for assistance, but her request was disregarded.²² The Board held that LVPPA breached its duty of fair representation because it failed to inform George of the reasons why it could not represent her, failed to inform her of her right to file a formal grievance, and failed to provide any investigation into her complaint.²³ In a recent case, the Board held that a union breached its duty of fair representation when it refused to pursue a meritorious grievance absent any valid or compelling reasons.²⁴ The union in that case had determined that the employer's false statements charge against the complainant was baseless.²⁵

¹² Id. at 79.

¹³ Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985).

¹⁴ Id. at 1255.

¹⁵ Id.

¹⁶ Galindo v. Stookey Co., 793 F.2d 1502, 1514 (9th Cir. 1986).

¹⁷ Id.

¹⁸ Id.

¹⁹ Id. at 1514-1515.

²⁰ George v. Las Vegas Police Protective Ass'n Metro, Inc., Item No. 485A, EMRB Case No. A1-045693 (2001).

²¹ Id. at 3-4.

²² Id. at 7.

²³ Id. at 9.

²⁴ Simo v. City of Henderson, Item No. 801, EMRB Case No. A1-046111 (2015).

²⁵ Id. at 8.

Nevertheless, the union refused to pursue the apparently valid grievance without a rational justification and as a result, it breached its duty of fair representation.²⁶

In brief, as stated in Vaca v. Sipes, “a union breaches its duty of fair representation if it ignores a meritorious grievance or processes it in a perfunctory manner”.²⁷ Although different cases present different scenarios and fact patterns, unions are generally expected to conduct at least a minimal investigation on the merits of the grievance in order to satisfy its duty of fair representation. Arbitrary conduct, such as a failure to perform ministerial or procedural act, absent any valid justification may accordingly be determined to be a violation of the duty of fair representation.

(6) What type of conduct is considered “discriminatory”?

Pursuant to NRS 288.270(2), an employee organization is prohibited to discriminate willfully because of “race, color, religion, sex, age, physical or visual handicap, national origin or because of political or personal reasons or affiliations.” In general, a union is required by law to apply its policies and procedures in a fair and consistent manner towards all members within the bargaining unit. In Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, etc. v. Lockridge, the Supreme Court of the United States held that a complainant must show “substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives” in order to prove a certain union conduct to be discriminatory.²⁸

In Bisch v. Las Vegas Metropolitan Police Department, the complainant, Laurie Bisch, alleged that her union breached the duty of fair representation by refusing to provide representation after she retained her own attorney.²⁹ The Board held that the union did not discriminate against Bisch by withdrawing representation since it was a “straightforward application of its previously-enacted bylaws” for the union to defer representation to a complainant’s private counsel.³⁰ The withdrawal was not directed towards Bisch personally, but instead, it was merely a union policy to withdraw representation after its member retained private counsel.³¹ Therefore, the union did not breach its duty of fair representation in this case.

However, in Fraley v. City of Henderson, the union engaged in discriminatory conduct by refusing to proceed on Officer Fraley’s grievances solely based on political reasons and affiliations.³² Therefore, the Board found that the union breached its duty of fair

²⁶ Id. at 9.

²⁷ Vaca v. Sipes, 386 U.S. 171, 191 (1967).

²⁸ Amalgamated Ass’n of St., Elec. Ry. and Motor Coach Emp. of Am. v. Lockridge, 403 U.S. 274, 301 (1971).

²⁹ Bisch v. The Las Vegas Metro. Police Dept., Item No. 705B, EMRB Case No. 705B (2010).

³⁰ Id. at 5.

³¹ Id.

³² Fraley v. City of Henderson, Item No. 547, EMRB Case No. A1-045756 (2004).

representation.³³ In addition, without any rational reasons, a union is prohibited by law to show disparate treatment towards employees within the same bargaining unit.³⁴ In Spannbauer v. City of North Las Vegas, the union breached its duty of fair representation because it failed to represent two employees in an equivalent manner without any rational reasons, even though both of them were similarly situated.³⁵

Although the general rule of thumb is to avoid disparate treatment to the employees within the same bargaining unit under similar situations, there are still exceptions. For example, favoring employees with more seniority over those who have less seniority has been viewed as a valid and justifiable reason to support unequal treatment.³⁶

(7) What types of conduct is considered to be “in bad faith”?

In Humphrey v. Moore, the Supreme Court of the United States established that a union’s actions are in bad faith if the complainant presents “substantial evidence of fraud, deceitful action or dishonest conduct by the union”.³⁷ In that case, the Supreme Court of the United States held that the union was not acting in bad faith since its false assurances of job security to the employees were due solely to lack of information.³⁸ Since there was no evidence to show that the union was engaging in a conspiracy with the opposing party, its conduct was not performed in bad faith and no breach of the duty of fair representation was found.

Unfortunately, there are not a lot of cases in which the courts clearly classify certain union conduct as performed in bad faith. Many of the cases about the duty of fair representation revolve around conduct that is deemed to be arbitrary and/or discriminatory by the courts.

(8) When can a complainant file a claim against the union for breach of the duty of fair representation?

According to NRS 288.110, the Board can only consider complaints filed within 6 months after the occurrence of the incident which gave rise to the complaints. Although there are exceptions to this general rule, a complainant should file a claim against his/her union for breach of the duty of fair representation as soon as he/she becomes aware of the breach. For example, if an employee believes that his/her union refuses to proceed with his/her grievance in a way that is arbitrary, discriminatory, or in bad faith, then the employee should file a claim for breach of the duty of fair representation as soon as he/she becomes aware of the denial from the union. Also, in concurrence with filing the complaint to the Board, the complainant should also exhaust any available internal appeal or other remedy offered by the union.

³³ Id. at 25.

³⁴ Spannbauer v. City of North Las Vegas, Item No. 636C, EMRB Case No. A1-045885 (2008).

³⁵ Id. at 17.

³⁶ Humphrey v. Moore, 375 U.S. 335, 347 (1964).

³⁷ Id. at 348.

³⁸ Id. at 348-349.

(9) What are the possible remedies that a complainant may be awarded if a breach of fair representation is found?

Looking at a number of cases decided by the Board, the following are the remedies awarded to complainants where the Board found a breach of the duty of fair representation:

1. An order directed to the union for it to cease and desist its breach of the duty of fair representation;
2. An order compelling the union to proceed on a grievance which it had wrongfully refused to handle;
3. Back pay and or lost earnings to which the complainant was entitled;
4. An order compelling the union to post a notice on its breach of the duty of fair representation in conspicuous places; and/or
5. Reimbursement or reasonable attorney's fees and costs.

What about punitive damages? First, it must be noted that NRS Chapter 288 does not allow for punitive damages. This also comports with federal law in a case in which the Supreme Court of the United States declared that no punitive damages can be awarded against a union that breaches its duty of fair representation.³⁹ In Foust, the Court explicitly stated that “general labor policy disfavored punishment”.⁴⁰ Instead of imposing punitive damages to the unions that breach their duties of fair representation, the Court’s objective “should be fashioned to make the injured employee whole”.⁴¹

It is very important to note that, even though the remedies listed above are those the Board has awarded in the past, any remedies awarded will vary on a case by case basis.

“About the EMRB”

The Local Government Employee-Management Relations Board (EMRB), a Division of the Department of Business and Industry, fosters the collective bargaining process between local governments and their employee organizations (i.e., unions), provides support in the process, and resolves disputes between local governments, employee organizations, and individual employees as they arise.

³⁹ Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 52 (1979).

⁴⁰ Id.

⁴¹ Id. at 49.