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## UNITED POWER TRADES ORGANIZATION February 28, 2013

### The Duty of Fair Representation

#### Historical origins:

The *principle of exclusivity* and *Steele v. Louisville and Nashville Railway*, 323 U.S. 192 (1944). This Supreme Court case involved a union that had a policy of refusing to process grievances for black employees. The Supreme Court ruled that since Congress gave the union the exclusive right to represent bargaining unit employees on grievances, the union could not refuse to do so for reasons that are arbitrary, capricious or discriminatory. For federal sector unions, the principle of exclusivity is in 5 USC 7114(a):

*“A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for and negotiate collective bargaining agreements covering all employees in the unit.”*

DFR does not apply if employee has a choice of representative.

Examples:           Proposed disciplinary actions.

*Sacramento Air Logistics Center*, 46 FLRA No. 81 (1992).

MSPB appeals.

*National Treasury Employees Union v. FLRA*, 800 F.2d 1165 (D.C. Cir. 1986).

EEO complaints.

Office of Special Counsel (OSC) complaints.

Workers compensation appeals (OWCP).

OSHA complaints.

Congressional requests and inquiries.

Inspector General (IG) complaints.

Retirement appeals (OPM) (MSPB)

Veterans' rights complaints (USERRA and VEOA appeals) MSPB, DOL, OSC)

Lawsuits in court.

Congressional inquiries

Inspector General complaint/ "Hotline" complaint

**DFR does apply if the union is the only representative the employee may select:**

X Grievances and arbitration

- X Collective bargaining (includes labor contracts, local supplemental agreements, memos of understanding, grievance settlements). *Loring Air Force Base*, 43 FLRA No. 90 (1992) (EDP case).
  
- X “Weingarten” meeting, where employee has requested union representative in an investigative meeting with management if he or she thinks the meeting might lead to discipline.

*Caution: Membership votes or polls--*

The union is not required to allow non-union members to vote on internal union issues, such as what the union’s proposals in contract negotiations should be or whether a labor contract will be ratified. The union is required to allow non-members to vote if a vote of employees is required by the provisions of a labor contract (for example, a contract article that allows a vote of employees to determine how “seniority” will be defined for the purpose of an overtime roster). *National Air Traffic Controllers Assn.*, 55 FLRA No. 103 (1999).

**If DFR Applies:**

- Union is not required to represent on all cases; it is only required to be fair.
  
- Union must avoid conduct that is arbitrary, hostile or discriminatory. Generally, conduct that is merely negligent is not a violation of the duty of fair representation.
  
- Union must evaluate the particular case, investigate the facts and reach a rational conclusion based on the merits of the case.

- No employee has the right to insist on representation from a particular union representative. The union decides who is assigned to the case.

*DFR Violations:*

- Union refused to process all grievances which had been filed by the previous union that represented the employees. *AFGE Local 888*, 141 LRRM 1081 (1992).
- Union settled a grievance involving hazard pay for exposure to dangerous conditions. Payments to employees were based on their status as union officers instead of their exposure to the hazard. *AFGE Local 2943*, 43 FLRA No. 90 (1992).
- Union made no effort to investigate reasons for employee's discharge, conducted no research, did not interview the employee to get his side of what happened. "Before assessing the merits of the grievance, a union must have an ample basis upon which to make such an assessment." *Tenorio v. NLRB*, 680 F.2d 598 (2d Cir. 1982).
- Charging non-members of the union a premium to participate in a dental/optical plan where members did not have to pay violated the duty of fair representation where the plan was a benefit provided by the employer as a result of collective bargaining with the union. *Overseas Education Association*, 36 FLRA No. 79 (1990).

**No DFR Violations:**

- Grievance filed late. Union president was ill and other union representatives were inexperienced. Union was “simply negligent.” *AFGE Local 3529*, 31 FLRA No. 108 (1988).
- Union did not file a grievance for the employee; instead union met with management in an effort to resolve the employee’s complaint informally. *AFGE Local 1457*, 43 FLRA No. 50 (1991).
- Union refused to process unmeritorious grievance. *Souter v. Auto Workers Local 72*, 143 LRRM 2269 (7<sup>th</sup> Cir. 1993).
- Union’s good faith choices about what witnesses to call, exhibits to introduce and theories to pursue in arbitration did not violate duty of fair representation. *Barr v. United Parcel Service*, 130 LRRM 2593 (2d Cir. 1989).
- Union’s refusal to arbitrate grievance after employee refused legitimate settlement offer. *Steelworkers District 38*, 110 LRRM 1123 (1982).

### **Remedies for Duty of Fair Representation Violations**

Employees represented by federal government unions cannot sue the union in court. Sole recourse is an unfair labor practice charge filed with FLRA. *Karahalios v. FLRA*, 109 S.Ct. 1282 (1989).

Employee may not attempt to avoid this result by suing the union under a state law claim for reasons like breach of contract, outrageous conduct or unlawful interference with an employment relationship. *IBEW v. Hechler*, 481 U.S. 851 (1987). Similarly, employee may not attempt to avoid this result by suing the union or the federal agency for violation of some federal law. *Abbott v. United States*, 144 F.3d 1 (1<sup>st</sup> Cir. 1998) (union settled overtime claim for group of employees; certain employees refused to join in the settlement and sued on their

own; case was dismissed; sole remedy against union for alleged violation of duty of fair representation was unfair labor practice charge); *same*, *O'Connor v. United States*, 308 F.3d 1233 (Fed. Cir. 2002) (settlement agreement between union and agency was binding on all employees covered by agreement).

If an employee has his rights violated by the employer and the union also violates the duty of fair representation (e.g., employee unlawfully fired; union arbitrarily refuses to take the case to arbitration), damages may be apportioned between both the employer and the union. *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983).

### ***Union Violations other than the Duty of Fair Representation--***

Union unfair labor practices are listed in 5 USC 7116(b). They are:

- Interfering with an employee in the exercise of any right guaranteed under the labor statute, or discriminating against or attempting to cause an agency to discriminate against an employee because of the exercise of a right guaranteed under the labor statute.
- Intimidating or coercing a union member for the purpose of hindering or impeding the member's work performance or productivity.
- Discriminating against an employee with regard to the terms of membership in the union on the basis of race, national origin, religion, sex, age, veterans status, political affiliation, marital status or handicap.
- Refusing to negotiate in good faith with agency management.
- To call or participate in a strike or work slowdown or to condone such activity by failing to take action to prevent or stop it.

- To refuse union membership to any bargaining unit employee, unless such refusal is based on 1) failure to meet occupational standards for admission to the union or 2) failure to pay dues.