# Union Unfair Labor Practices

The vast majority of unfair labor practice cases involve charges filed by unions or employees against employers. However, in addition to refusal to bargain in good faith cases discussed in the preceding chapter, the major area where developed case law exists concerning unfair labor practice charges against unions is with respect to duty of fair representation cases. There also have been cases in a few other areas which will be discussed in this section.

A union has a duty of fair representation of employees even if the governing labor relations act does not contain an explicit duty of fair representation; a union's status as exclusive bargaining representative is the source of such a duty.[1] A union has a duty to fairly and equitably represent all employees in the bargaining unit in its negotiations with management, and a breach of that duty would be an unfair labor practice.[2] A union's duty of fair representation means that it must serve the interests of all employees without hostility or discrimination, exercise its discretion in good faith, and avoid arbitrary conduct.[3]

In cases where at issue is how the terms of a collective bargaining agreement affect an individual employee, the complete satisfaction of all who are represented is hardly to be expected in the give and take of the negotiations process.[4] Differences inevitably arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees, the mere existence

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[1] Vaca v. Sipes, 368 U.S. 171, 177 (1967). Davidson v. VSEA, 33 VLRB 60, 67 (2014). Alexander v. VSEA, 32 VLRB 31 (2012). Ilges v. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO, 11 VLRB 235, 239 (1988).

[2] Davidson v. VSEA, 33 VLRB at 67. Wilson v Williamstown Staff Association, 14 VLRB 197, 200 (1991).

[3] Id.

[4] Id. Lary v. Upper Valley Teachers' Association, 3 VLRB 416, 420-421 (1980). Legacy v. Southwestern Vermont Education Association, Educational Personnel Unit, Vermont-NEA, NEA, 17 VLRB 181, 185-86 (1994). LaBerge v. AFSCME Council 93, Local 1201, AFL-CIO, 30 VLRB 10, 17 (2008).

of which does not make them invalid.[5] In situations involving internal union strategy in collective bargaining negotiations, a union will be found to have breached its duty of fair representation only if its actions can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary.[6]

In acting on a charge filed by a municipal employee, the VLRB indicated that the union's duty to fairly and equitably represent all employees extends to all members of the bargaining unit, not just to members of the union.[7] This duty extends to both the negotiations for a contract and the enforcement of the provisions of a collective bargaining contract.[8] The union's duty of representation means that it must serve the interests of all employees, union and non-union, without hostility or discrimination, exercise its discretion in good faith, and avoid arbitrary conduct.[9]

The Board concluded that a union did not violate its duty of fair representation by denying an employee access to a meeting convened by the union to discuss bargaining proposals due to the employee's non-membership in the union. The Board stated:

> As exclusive bargaining representative, the Union has the responsibility to formulate employees' bargaining positions. How the Union formulates such bargaining proposals is an internal union affair from which non-union employees may be excluded. Just as a contract ratification may be properly limited to union membership, so too the preliminary meetings to formulate proposals which lead to a negotiated contract may be restricted to union members. To fulfill its responsibility to fairly represent all bargaining unit members, unions must allow non-union employees some method of communicating their views to the union so the union may ascertain the wishes of non-union employees and take them into account. However, a union does

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[5] Id.
[6] Brittner v. Lovell, AFSCME Council 93, Local 3797, 24 VLRB 250, 253-54 (2001). LaBerge v. AFSCME Council 93, 30 VLRB at 18-19.
[7] Ilges v. Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO, 11 VLRB 235, 239 (1988),
[8] Id.
[9] Id.

not have to allow non-union employees to attend union meetings where bargaining proposals are formulated.[10]

Also, the Board has concluded that a union may restrict accessibility to bargaining proposals developed by the union to union members. The Board indicated that a union must allow non-union employees some method of communicating their views to the union on wages, hours and conditions of employment which they may desire as a result of contract negotiations so the union may ascertain the wishes of non-union employees and take them into account, but this obligation does not require that union bargaining proposals are made accessible to non-union employees. [11]

When an allegation is made that a union has not fairly represented employees in handling grievances, the following standards provide guidance in determining whether an unfair labor practice has occurred: 1) an individual employee does not have the absolute right to have his or her grievance taken to arbitration, 2) a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, 3) a union must engage in more than mere negligence to violate its duty of fair representation.[12]

Also, a union's grievance handling is lawful where, in denying a grievance, established procedures are followed and these procedures fall within the wide range of reasonableness afforded a union representative.[13] A union's duty of fair representation does not require it to process a frivolous appeal[14], and a union need not process an employee's grievance if the chances for success are slight.[15] The duty

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[10] Id. at 242-243.
[11] Mesick v. Local 1343, AFSCME, AFL-CIO, 14 VLRB 161 (1991).
[12] Davidson v. VSEA, 33 VLRB at 68. Duran v. IBEW Local 300, 19 VLRB 256 (1996). Ploof v. Village of Enosburg Falls, 147 Vt. 196, 201 (1986).
[13] Davidson v. VSEA, 33 VLRB at 68. Alexander v. VSEA, 32 VLRB at 39-40.
[14] Davidson v. VSEA, 33 VLRB at 68. Ploof, 147 Vt. at 201.
[15] Davidson v. VSEA, 33 VLRB at 68. Alexander v. VSEA, 32 VLRB at 39.

of fair representation also does not prevent a union from settling a grievance prior to arbitration on terms not satisfactory to the employee.[16] Further, in generally assessing a union's duty of fair representation, it is recognized that union discretion is essential to the proper functioning of the collective bargaining system.[17]

The Board held in a recent case that a teacher who had resigned had not set forth sufficient factual allegations warranting issuing an unfair labor practice complaint against her union for its representation of her. The former teacher had signed an agreement releasing the union from any claims and actions which she may have against the union based on its representation of her. The Board concluded that the teacher had not set forth sufficient factual allegations supporting her claim that she resigned under duress due to the union's actions. Moreover, even leaving aside the Board conclusion on duress, the Board determined that the former teacher had not set forth sufficient factual allegations warranting the issuance of an unfair labor practice complaint because the release barred the teacher from recovering on a claim against the union concerning its representation of her unless she offered to return the things of value which she received in giving the release, and the teacher made no such offer.[18]

The unfair labor practice provisions of most of the Vermont labor relations acts make it an unfair labor practice for a union to restrain or coerce employees in the exercise of their rights, and to cause or attempt to cause an employer to discriminate against an employee in violation of the applicable labor relations act.[19] In one municipal case, the Board determined that a union violated these provisions of the Municipal Act by maintaining and enforcing a provision of the collective

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[16] Ploof, 147 Vt. at 201.
[17] Davidson v. VSEA, 33 VLRB at 68. Alexander v. VSEA, 32 VLRB at 39.
[18] Boleski v. Hartford Education Association/Vermont-NEA, 32 VLRB 191 (2012).
[19] 3 V.S.A. §962(1) and (3), 3 V.S.A. §1027(1) and (3), 21 V.S.A. §1621(b)(1) and (2), 21 V.S.A. §1637(c)(1), 21 V.S.A. §1726(b)(1) and (3), 33 V.S.A. §3612(c)(1) and (2).

bargaining agreement providing "superseniority" for union shop stewards for purposes other than layoff and recall, including bidding for preferential jobs. The Board concluded that the "superseniority" clause would be justified only if the union could establish that it operated to ensure or improve representation of union-represented employees in contract administration matters, and that the union was not able to so establish in this case.[20]

In a case filed by a state employee under the State Employees Act alleging that his union had committed unfair labor practices against him, the Board construed the following provision of the Act:

> It shall be an unfair labor practice for an employee organization or its agents . . . to restrain or coerce employees in the exercise of the rights guaranteed to them by law, rule, or regulation. However, this subdivision shall not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein, provided such rules are not discriminatory.[21]

The Board concluded that this provision of SELRA did not reach the internal affairs of the union at issue in this case if they do not affect a member's employment status and relationship as an employee with his employer and do not impair any policy embedded in SELRA.[22] The Board further held that the union was free to enforce a properly adopted rule which reflects a legitimate union interest and impairs no policy embedded in SELRA.[23]

The Board held that the removal of the employee from various union positions was wholly an internal union matter of governance which had no effect on his employment status and his relationship as an employee with his employer. The

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[20] Dube v. Teamsters Local 597 and Chittenden County Transportation Authority, 3 VLRB 70, 82-88 (1980); *Affirmed*, 139 Vt. 394 (1980).
[21] 3 V.S.A. §962(1).
[22] Davidson v. VSEA, 33 VLRB 75, 83-84 (2014).
[23] Id. at 84.

Board further concluded that the union was free to enforce its Articles of Association generally prohibiting holding union positions while also being a member of a rival union. The Board reasoned that this provision reflects a legitimate union interest because the employee's retention of union positions would have allowed him to remain privy to union strategy and tactics in opposition to the election petition filed by the rival union. The Board disagreed with the employee that this provision of the Articles of Association impairs a policy embedded in SELRA, concluding that the employee had not established that the union may have interfered with his rights to file a petition to replace the union as representative.[24]

The employee further alleged that the union committed an unfair labor practice by retaliating against him for filing an unfair labor practice charge against the union The Board concurred that a union would violate SELRA if it retaliates against a member for filing an unfair labor practice charge against the union because it would interfere with the member's right guaranteed by SELRA to file an unfair labor charge. However, the Board concluded that the employee had failed to demonstrate that the union may have retaliated against him because he was seeking to file an unfair labor practice charge.[25]

Most of the Vermont labor relations acts make it an unfair labor practice for an employee organization or its agents to "restrain or coerce an employer in the selection of representatives for the purpose of collective bargaining or adjustment of grievances".[26] In one case, a school board contended that teacher associations violated this provision by sending an e-mail to the school board chairperson indicating that unions would picket the chairperson's law office unless he convinced the school board to return to the bargaining table. The chairperson subsequently

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[24] Id. at 84-85
[25] Id. at 85-87.
[26] 3 V.S.A. §962(2), 3 V.S.A. §1027(2), 21 V.S.A. §1621(b)(1)(B), 21 V.S.A. §1726(b)(2).

withdrew from negotiations, indicating that the e-mail created the appearance of a conflict of interest for him pursuant to the school board's conflict of interest policy.

The VLRB determined that the school board had the burden of showing by direct or circumstantial evidence that the teacher associations acted with the intent to seek the chairperson's removal from involvement in the dispute over the successor collective bargaining agreement by creating a conflict of interest, or the appearance of a conflict of interest, for him. The VLRB concluded that the school board had not met this burden where the evidence did not indicate the associations were aware of the school board's conflict of interest policy or discussed the issue of the chairperson's conflict of interest.[27]

[27] South Burlington Board of School Directors v. South Burlington Educators' Association and Vermont-NEA, 32 VLRB 56, 82-86 (2012).