



**The Duty  
of Fair  
Representation**

Office of Congressional  
Workplace Rights

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Labor-Management Forum

*advancing  
workplace rights,  
safety & health, and  
accessibility in the  
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**Welcome**

## Introduction

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## Topics

- Statutory framework
- Defining the duty of fair representation
- When unions act discriminatorily
- When unions act arbitrarily or in bad faith
- Remedies for violations

## Statutory Framework

5 U.S.C. § 7114(a)(1) - 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. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

## Statutory Framework

§ 7116(b) it shall be an unfair labor practice for a labor organization to...

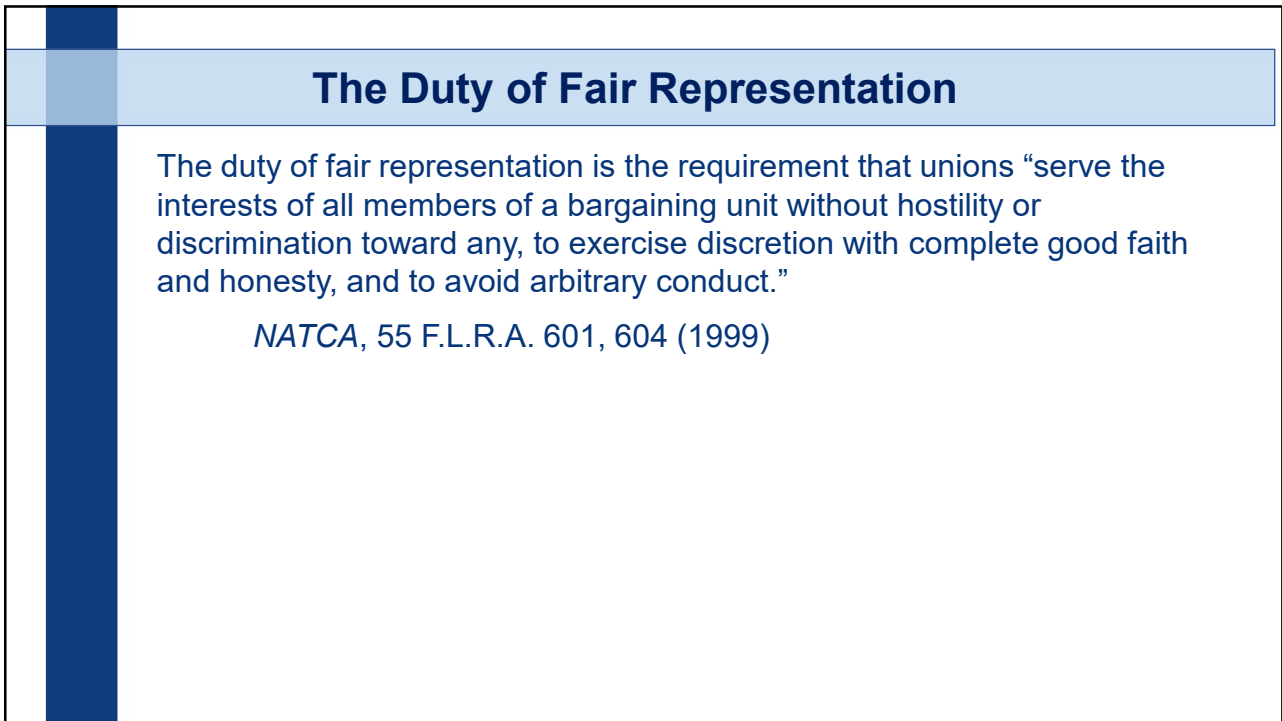
(1) interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; ...

(4) discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;  
...

(8) otherwise fail or refuse to comply with any provision of this chapter.



# Defining the Duty



## The Duty of Fair Representation

The duty of fair representation is the requirement that unions “serve the interests of all members of a bargaining unit without hostility or discrimination toward any, to exercise discretion with complete good faith and honesty, and to avoid arbitrary conduct.”

*NATCA, 55 F.L.R.A. 601, 604 (1999)*

## The Duty of Fair Representation

The duty applies only to representational activities “grounded in the union’s status as exclusive representative.”

*NFFE Local 1827*, 49 F.L.R.A. 736, 746 (1994)

This means it applies to acts that only the union can do, such as:

- Collective bargaining
- Filing and processing grievances
- Distributing grievance settlements

## The Duty of Fair Representation

The duty of fair representation does not apply to actions the union takes non-exclusively, such as:

- Filing a lawsuit
- Representing individual employees in an agency proceeding, like OCWR’s Administrative Dispute Resolution process

The duty of fair representation also does not apply to internal union elections, which are governed by Department of Labor regulations.

## The Duty of Fair Representation

Therefore, under the statute, unions can:

- Decide which grievances the union thinks it can win, whether an employee deserves a punishment or remedy, and what and whether to negotiate
- Allocate the union's time based on which employees need or deserve it
- Allocate the union's money in accordance with the union's goals

Unions cannot:

- Make those decisions discriminatorily, arbitrarily, or in bad faith

## Discriminatory Conduct

## Discriminatory Conduct

To determine whether a union discriminated against an employee in its representation, the FLRA uses the same burden shifting framework applied to management discrimination claims:

- The prima facie case:
  - Union acted in its role as exclusive representative
  - In doing so, the union treated the bargaining unit employee differently because of the employee's [union membership/race/sex/religion etc.]
- Burden shifts to the union to prove:
  - It had a legitimate justification for the action
  - It would have taken the same action regardless of the employee's protected class membership

## Discriminatory Conduct

In *AFGE Local 3354*, 58 F.L.R.A. 184 (2002), the union and agency settled a grievance over overtime compensation with the agency sending the union a lump sum for the union to divide.

- The union advertised that it would pay employees out on a “first come, first served” basis, but then administered it unfairly.
- The union allowed some union members on the list before it opened and prohibited some non-members from being on the list at all.
- The union required non-members to answer a question in writing — “will you become a union member?” — to keep their place in line.

## Discriminatory Conduct

*AFGE Local 3354*, cont'd

- Rejecting the union's claims of "mere negligence," the FLRA found that the union unlawfully discriminated against non-members in its handling of the payout.
- The FLRA also relied on the survey the union conducted of non-members, including that non-members who answered "no" were not permitted on the list.
- The union was required to pay the non-member employees who signed up before union members who got paid.

## Discriminatory Conduct

In *AFGE Local 916 v. FLRA*, 812 F.2d 1326 (10th Cir. 1987), the union did not violate its duty when it advertised that it only represented members in MSPB appeals.

- "Fair representation means that when a union uses a power which it alone can wield, it must do so for the benefit of all employees in the bargaining unit."
- Because it does not have the exclusive right to represent employees in MSPB appeals, the union was permitted to discriminate against non-members.

## Discriminatory Conduct

Elected union representatives can make decisions that alter conditions of employment for the entire bargaining unit. However, delegating that authority to union members can be discriminatory.

- Not permitted: giving only union members the right to vote on a change to a single condition of employment
- Permitted:
  - Polling union members before CBA negotiations to determine priorities or posture
  - Ratification vote of entire CBA by only union members after representatives negotiate

*Branch 6000, NALC v. NLRB*, 595 F.2d 808 (D.C. Cir. 1979)

## Arbitrary or Bad Faith Conduct

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Findings that a union's actions were so out of the ordinary as to constitute arbitrary or bad faith conduct are rare. Missing a deadline or other acts of "mere negligence" are not enough. *AFGE Local 3529*, 31 F.L.R.A. 1208 (1988).

- In *IAM Local 39*, 24 F.L.R.A. 352 (1986), the union promised an employee that it would file a grievance on his behalf but did not. The record showed that the union representative knew about the deadline and intentionally missed it – more than forgetfulness. Because the employee relied on the promise, and the misconduct caused him to lose his right to file, the FLRA found a violation.

## Arbitrary or Bad Faith Conduct

In *NATCA*, 66 F.L.R.A. 467 (2012), the FAA and the union agreed to a collective bargaining agreement which granted the union the right to calculate seniority. For many years, the constitution counted time in the bargaining unit cumulatively – if an employee left and returned, all time counted.

- The union changed its constitution so that employees who left, became a supervisor, and then returned would lose seniority for the earlier time. The change applied retroactively. The FAA recalculated seniority and began applying the changes.
- Employees filed charges against the FAA and the union, arguing that the union violated the duty of fair representation and the FAA was complicit.

## Arbitrary or Bad Faith Conduct

*NATCA*, cont'd

- The FLRA found that the union violated the statute. The union admitted that its intent was to punish employees who left to join management. The FLRA found that the union's conduct amounted to bad faith: acting with "personal animosity" to "deliberately and unjustifiably treat" some bargaining unit members differently.
- The FLRA dismissed the charge against the FAA. There was no evidence that the FAA knew of the union's unlawful motivation. The FAA complied with the union's request, but did not ask why or have any dialogue about it.
- The FLRA ordered compliance proceedings to determine what relief was owed to which employees.

## Remedies

## Remedies

- “The appropriate remedy for a breach of a union’s duty of fair representation must vary with the circumstances of the particular breach.”
- “The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each.”

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

## Remedies

In *SEIU Local 556*, 17 F.L.R.A. 862 (1985), the union told four non-member employees who were being laid off that one of them would need to join the union for the union to file a grievance over any of the layoffs. They refused and the union did not file the grievance.

- Evidence did not show that the agency acted improperly in conducting the RIF.
- The FLRA GC asked for an order that the union pay employees’ backpay due to egregious conduct, but the FLRA rejected this request.

## Remedies

### *Local 556, cont'd*

- Without proof of an underlying agency violation, any damages paid by the union risked unjustly enriching the employees.
- The union was ordered to “provide them whatever services the Union would have provided in this matter had it not acted discriminatorily.”

## Remedies

In *AFGE Local 916*, 28 F.L.R.A. 988 (1987), the union unlawfully pressured an employee into joining the union in exchange for filing a grievance.

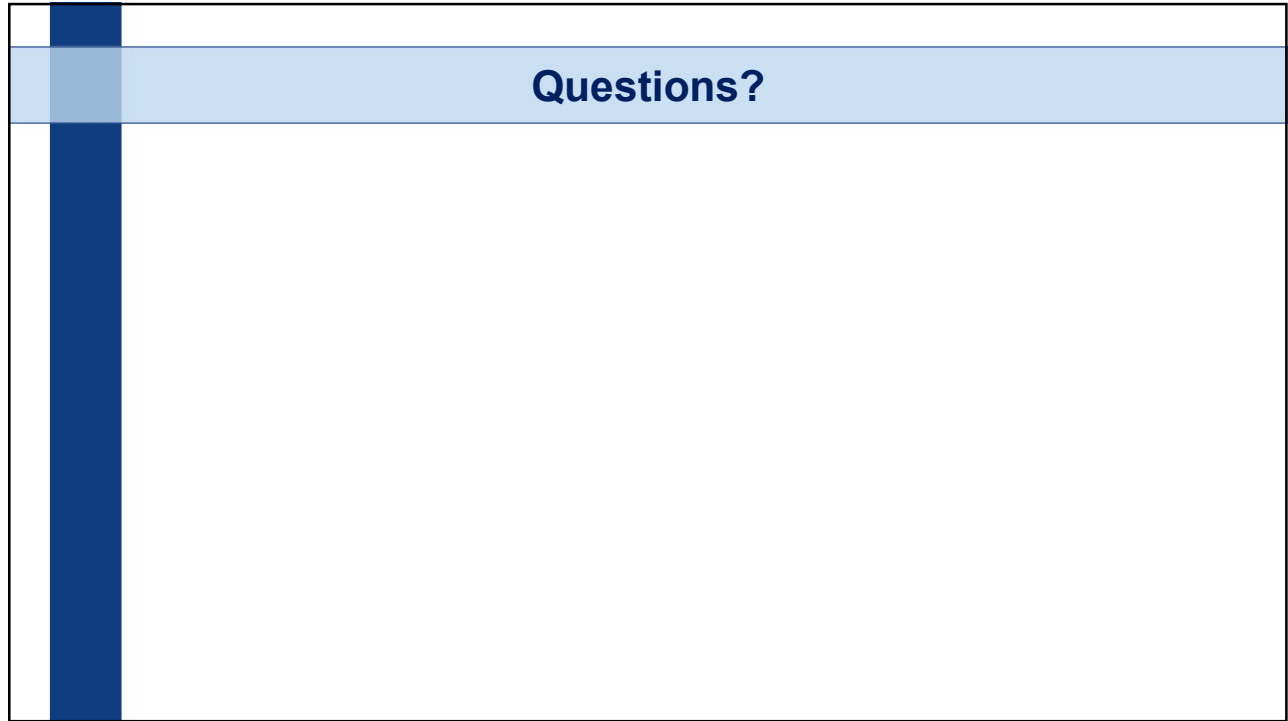
- The union was ordered to give the employee the opportunity to resign and, if she chose resignation, to have all her union dues refunded.

In *AFGE Local 987*, 35 F.L.R.A. 720 (1990), the union unlawfully stated in an article that “non-dues paying persons wishing to file grievances on the recently publicized overtime pay issue should join the union to assure prompt representation.”

- The Union was ordered to publish a clarification of its policy of non-discrimination in the same publication.

# Final Thoughts

- ## Resources
- FLRA Materials
    - ULP Case Law Outline
      - [flra.gov](https://www.flra.gov) → Resources & Training → Guides & Manuals → “ULP Case Law Outline”
  - Peter Broida, *A Guide to Federal Labor Relations Authority Law and Practice* (2022)



**Questions?**