

The Duty of Fair Representation

What is it?

The duty of fair representation (DFR) is a union's obligation to represent all members of the bargaining unit in a fair and good-faith manner. This obligation occurs:

- In exchange for the sole and exclusive authority conferred by law
- As a means of preventing individuals from acting in their own *personal* interests
- In functions, such as negotiations and grievances, performed on behalf of workers

How did DFR originate?

Though never expressed in the original National Labor Relations Act (NLRA), the DFR originated from a 1944 court case and derives from Section 301 the Taft-Hartley Act, an amendment to the NLRA. The U.S. Supreme Court created the doctrine to redress union action found to be inconsistent with a union's statutory obligation as the exclusive representative of all bargaining unit employees.

Over the years, DFR has evolved into a detailed set of principles governing a union's relationship with the individual member. In *Vaca v. Sipes* (1967), the Court stipulated that a union violates the duty when its conduct in representing employees is "arbitrary, discriminatory or in bad faith."

DFR violations

Most DFR violations occur during the grievance process. Unions may be found guilty for wrongfully:

- Failing to file a timely grievance
- Failing to thoroughly investigate a grievance
- Withdrawing a grievance
- Settling a grievance without a full remedy
- Failing to take a legitimate grievance to arbitration
- Failing to prepare for arbitration
- Mishandling an arbitration

The National Labor Relations Board (NLRB) will regard a breach of the duty as an unfair labor practice. In general, however, a dissatisfied employee must prove more than poor performance or mistakes by the union. According to the NLRB, "mere negligence, poor judgment or ineptitude in grievance handling is insufficient to establish a breach of the duty

of fair representation." On the other hand, even slight evidence of racial or sexual discrimination is likely to induce the Board to issue a DFR complaint.

Union liability

Another important dimension of the DFR doctrine involves allocation of damages. Although the NLRB might rule its violation to be an unfair labor practice, courts remain the primary forum for vindication of DFR claims. While few DFR charges against unions are successful, if the union violates its responsibility in a discharge case, financial exposure can be enormous. In *Vaca*, the Supreme Court suggested that unions might be liable for some share of the back pay awarded to employees in DFR suits. That principle was clarified in 1983, in *Bowen v. United States Postal Service*, in which the Court made the union liable for the lion's share of back pay.

Precautions

It is obviously important to avoid conduct that could subject the union to a DFR charge. Here are some guidelines:

- When a grievance is brought to your attention, **conduct a full investigation**. Interview the grievant and all witnesses. Request files, documents and other relevant information. Keep detailed records. Unions have been found guilty of DFR violations when stewards or officers accepted company allegations at face value of conducted "perfunctory" (minimal) investigations.
- **Do not refuse to file or process** a grievance because of a worker's sex, race, nationality, age, religion, politics, personality or dues-paying status. Diligently represent all employees in the bargaining unit - even if you consider the employee to be a destructive force within the union. Adhere to contractual time limits.
- **Keep the employee informed** of the progress of the grievance. Maintain a good relationship. Allow the grievant to be involved, such as by presenting his or her request for arbitration to the union executive board or the union membership. If the union chooses not to arbitrate, explain the reasons to the grievance and record the date of this conversation.
- **Prepare thoroughly for all arbitrations**. If a union business agent or attorney is handling the case, make sure he or she meets with the grievant well in advance of the hearing.
- Work hard to **prevent all forms of racial and sexual harassment** at the workplace, and all sorts of ethnic or sexual jokes.

DFR: Some FAQs:

1. Must a union grieve every employee complaint?

No. Not if the union has good-faith belief that it is unfounded, unwinnable, or without any basis in the contract.

2. We are grieving a three-day suspension and the grievant wants the union to take it to arbitration, which could cost the union \$2,000 in legal expenses. Must we arbitrate?

Not necessarily. Unions are entitled to consider the financial costs of arbitration. However, cost considerations carry less weight as the importance of the grievance increases. Discharge cases are the most important. Unless the case is hopeless, a union will be hard-pressed to justify a decision not to arbitrate a discharge solely because of the expense.

3. A worker received a two-week suspension for absenteeism. At the third step of the grievance procedure, the company offered one week's back pay. We think this is a reasonable settlement, but the employee wants us to go to arbitration and get full two weeks of pay. If we accept the company's offer, can the employee sue the union?

Not successfully. A union is allowed to compromise a grievance without the grievant's approval, so long as it has good reasons and is not settling because of hostility toward the grievant.

4. Must a union represent workers during a probationary period?

Yes. Probationary employees are part of the bargaining unit. They may not be able to use the just-cause-for-discharge clause, but they are usually covered by other contractual provisions such as prohibition against race or sex discrimination.

5. Two workers with equal skills bid for a posted job. The company picks one with less seniority. The union wants to grieve, but the worker who got the promotion says he will file DFR charges against the union. Can he succeed?

Doubtful. The union has the right to make a good-faith effort to protect the interests of the bargaining unit as a whole, so long as it is not acting out of hostility to one worker or because of a special relationship with the other.

6. Two workers were suspended one week for serious insubordination. At the first grievance step, the company offered to reinstate one employee with back pay if we dropped the grievance of the second worker. Do we run a risk if we accept the deal?

Yes. Swapping grievances is dangerous. The union would need to provide clear reason why one case was more winnable than the other.

- 7. Last week, a worker was suspended for failing to go to a training class. I had mistakenly told her that she did not have to go to the class. Can she win a DFR case against the union because of my error?**

Probably not. Poor judgment or bad advice, without evidence of bad faith, does not constitute a DFR violation. (Some federal courts do say that *arbitrary negligence* by a union representative violates the duty.)

- 8. Can the union keep a grievance alive if the grievant wants it withdrawn?**

Yes, if the union feels it is in the interests of the bargaining unit as a whole to continue the grievance.

- 9. We lost arbitration over a discharge. The worker wants us to appeal the arbitrator's decision to court. Our lawyer says this would be fruitless, but the employee is threatening to sue the union if we don't do it. Should we file the appeal?**

No. A union's obligation under DFR generally extends only to contract procedures such as filing grievances and going to arbitration. Unions do not have to file court appeals when they lose at arbitration.

- 10. Does a worker filing a DFR suit sue the steward along with the union?**

No. DFR suits may be brought only against unions. Stewards and union officers cannot be held personally liable.