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Incomplete Exclusivity and Fair Representation: Inevitable Tensions in Florida's Public Sector Labor Law

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Incomplete Exclusivity and Fair Representation: Inevitable Tensions in Florida's Public Sector Labor Law

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An amendment to Florida's Public Employee Relations Act (PERA) allows a union to refuse to process a nonmember's grievance to arbitraion. If a certified union elects this option, the nonmember may proceed with the representative of his choice, including a rival union, thereby undermining the certified union's exclusive representative status. If the certified union refuses on grounds other than the employee's nonmembership, the individual has no statutory right to proceed unless the union breached its duty of fair representation. The author explores Florida's Public Employee Relations Commission's (PERC)decisions illustrating the balance between individual and collective rights under the concepts of exclusive representation, fair representation, and due process. The author concludes that PERC needs to implement procedures to reflect more fairly individual employees' interests.

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I. INTRODUCTION

Collective bargaining is traditionally conceptualized as a system of self-government designed to rationalize the process of determining work rules, wages, and benefits.[1] Two collective entities control this governing process—the union and the employer. Through collective agreements the union and the employer set the parameters of the law of the workplace. The specific meanings of general contract clauses subsequently are developed on a case-by-case basis through grievance procedures and arbitration.[2]

The doctrine of exclusive representation protects the union's control over both the initial formulation of the contractual framework and the development of a common law of the workplace.[3] The union's governing power is not, however, absolute. Competing interests of individual employees may diverge from the concerns of the collective.[4] In choosing among these competing interests, a union must not make invidious, discriminatory, or arbitrary distinctions among employees.[5] The union must fairly represent all employees, even those in a right-to-work state who have exercised their option of refusing to join the union or to pay their share of

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1. In the language of the Supreme Court, a collective agreement "calls into being a new common law." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 (1960); *see* Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 718-24 (1973); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962).

For the view that this analogy distorts rather than clarifies the reality of the industrial world because it obscures the unequal power of management and labor, see Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

2. Vaca v. Sipes, 386 U.S. 171, 191 (1967); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 (1960); *see* Cox, *supra* note 1, at 1499-500; Feller, *supra* note 1, at 718-24.

3. Vaca v. Sipes, 386 U.S. at 191-93.

4. *See, e.g.*, Humphrey v. Moore, 375 U.S. 335 (1964); Gregg v. Teamsters Local 150, 699 F.2d 1015 (9th Cir. 1983); Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976); Truck Drivers Local Union 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967).

5. Humphrey v. Moore, 375 U.S. 335 (1964); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

the cost of bargaining and administering a collective agreement.[6]

One of the most persistent and difficult issues of labor law has been how to maintain the discretion unions need to fulfill their governing obligations while protecting minority interests from discriminatory or arbitrary decisions in the name of the majority.[7] The problem is magnified in those situations where there are inherent tensions between the union and a subgroup of employees, such as "free-riding" nonmembers.[8]

The tension between a bargaining agent and nonmembers of the union is not normally given formal recognition in labor doctrine on exclusive and fair representation, but the Florida legislature has changed this by amending the Public Employee Relations Act (PERA) to allow a certified bargaining agent to refuse to process a nonmember's individual contract grievance.[9] This amend-

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6. Vaca v. Sipes, 386 U.S. 171 (1967); International Union of the United Ass'n of Journeymen Local 141 v. NLRB, 675 F.2d 1257 (D.C. Cir. 1982); International Ass'n of Machinists Local 697, 223 N.L.R.B. 832 (1976).

7. There is an extensive body of scholarly commentary on these issues. *See, e.g.*, Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435 (1963); Feller, *supra* note 1; Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980); Freed, Polsby & Spitzer, *Unions, Fairness and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461 (1983); Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. ILL. L.F. 35; Levy, *The Collective Agreement as a Limitation on Union Control of Employee Grievances*, 118 U. PA. L. REV. 1036 (1970); Summers, *The Individual Employee's Right Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977).

8. *See* International Union of the United Ass'n of Journeymen Local 141 v. NLRB, 675 F.2d at 1262-82 (Mivke, J., dissenting).

9. 1977 Fla. Laws ch. 77-343, § 14 (codified at FLA. STAT. § 447.401 (1983)).

> Grievance procedures.—Each public employer and bargaining agent shall negotiate a grievance procedure to be used for the settlement of disputes between employer and employee, or group of employees, involving the interpretation or application of a collective bargaining agreement. Such grievance procedure shall have as its terminal step a final and binding disposition by an impartial neutral, mutually selected by the parties. However, an arbiter or other neutral shall not have the power to add to, subtract from, modify, or alter the terms of a collective bargaining agreement. If an employee organization is certified as the bargaining agent of a unit, the grievance procedure then in existence may be the subject of collective bargaining, and any agreement which is reached shall supersede the previously existing procedure. All public employees shall have the right to a fair and equitable grievance procedure, administered without regard to membership or nonmembership in any organization, except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization. A career service employee shall have the option of utilizing the civil service appeal procedure or a grievance procedure established under this section, but such employee cannot use both a civil service appeal and a grievance procedure.

FLA. STAT § 447.401 (1983).

ment relieves unions of the burden and cost of grieving for nonmembers; it also creates an incentive for public employees to join unions. At the same time, the amendment has a potential negative impact on bargaining agents because the option to refuse representation undermines exclusive representation. When a union refuses to grieve for a nonmember, the employee has the option of pursuing the grievance individually, thereby influencing the common law of the workplace.[10]

The inconsistency between this amendment and traditional doctrines of fair and exclusive representation has spawned an intriguing series of unfair labor practice decisions by Florida's Public Employee Relations Commission (PERC).[11] Non-union employees have filed unfair labor practice charges against public employers. The employees claim that the amendment, combined with other statutory provisions, grants nonmembers a statutory option of taking an individual grievance to arbitration without going through the union.[12] PERC has rejected this argument, relying on private sector precedent concerning the significance of exclusive representation in a collective bargaining system to justify leaving control over grievances with bargaining agents.[13]

While PERC adopts the policies underlying the rationale that justifies the balance between collective and individual rights in the private sector, the Commission does not address the fundamental issues raised by the application of these policies in the public sector.[14] There may be substantial differences between private and public sector collective bargaining that would result in different

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10. *See In re* School Bd. of Leon County, [1981] 7 FLA. PUB. EMPLOYEE REP. (LAB. REL. PRESS) ¶ 12,286 (June 26, 1981); Heath v. School Bd., [1979] 5 FLA. PUB. EMPLOYEE REP. (LAB. RE. PRESS) ¶ 10,074 (Mar. 20, 1979). The Florida Public Employee Reporter will hereinafter be cited as "F.P.E.R."

11. Leon County Classroom Teachers' Ass'n v. School Bd., 363 So. 2d 353 (Fla. 1st DCA 1978); Florida PBA v. State, [1982] 8 F.P.E.R. ¶ 13,059 (Jan. 13, 1982); Galbreath v. Broward County Classroom Teachers' Ass'n, [1981] 7 F.P.E.R. ¶ 12,288 (June 26, 1981); Galbreath v. School Bd., [1981] 7 F.P.E.R. ¶ 12,287 (June 26, 1981), *aff'd*, 424 So. 2d 837 (Fla. 4th DCA 1982), *aff'd*, 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984); *In re* School Bd. of Leon County, [1981] 7 F.P.E.R. ¶ 12,286 (June 26, 1982); Heath v. School Bd., [1979] 5 F.P.E.R. ¶ 10,074 (Mar. 20, 1979).

12. *See* Galbreath v. School Bd., [1981] 7 F.P.E.R. ¶ 12,286; Heath v. School Bd., [1979] 5 F.P.E.R. ¶ 10,074.

13. *In re* School Bd. of Leon County, [1981] 7 F.P.E.R. ¶ 12,287; Heath v. School Bd., [1979] 5 F.P.E.R. ¶ 10,074.

14. For a discussion of the claim that individual employees in the public sector should have access, as individuals, to grievance procedures, arbitration, and the courts to protect rights growing out of collective agreements, see H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 162-64 (1971).

balances between union and employee interests. In addition, there are other sources of law outside of labor doctrine that could be used by individual public sector employees to challenge the traditional private sector balance. State action is involved in public sector collective agreements; therefore, due process arguably requires that fair representation doctrine be more sensitive to the concerns of individual employees.[15] For example, there is an inherent tension between a certified bargaining agent and a nonmember employee who does not contribute to the costs of grievance processing. Questions arise about the unbiased judgment of a union that assumes control of a nonmember's grievance and that then refuses to take the grievance to arbitration on the grounds that the grievance lacks merit.[16] Indeed, it can be argued that it is a violation of due process for a union ever to deny any employee a hearing by a neutral arbitrator on the employee's right to benefits under a collective agreement.[17]

Although courts have rarely faced the due process issue directly, the general understanding is that fair representation satisfies due process.[18] Federal courts have avoided subjecting fair representation doctrine to traditional due process analysis by reading into labor statutes affirmative obligations rather than finding state action in the certification of an exclusive bargaining agent.[19] In the

15. For a challenge to exclusive union control over grievances based on such an argument, see Winston v. United States Postal Serv., 585 F.2d 198 (7th Cir. 1978).

16. The union arguably has a pecuniary interest in the treatment of nonmember grievances because the union receives more dues if concern over the processing of grievances results in increased membership. An adjudicator with a pecuniary interest in the outcome of a dispute is not "impartial" under due process doctrine. Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). For a discussion of the due process issues raised by the union's interest in the outcome of a nonmember's grievance, see *infra* text accompanying notes 144-168.

17. *See* Note, *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation*, 89 HARV. L. REV. 752 (1976). *See also infra* text accompanying notes 222-227.

18. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Winston v. United States Postal Serv., 585 F.2d. 198 (7th Cir. 1978).

19. The issue of whether the certification of a union as an exclusive bargaining agent constitutes state action has emerged in a number of different contexts. The Constitution could have provided such a basis for the holding of the Supreme Court in *Steele, v. Louisville & Nashville Railroad.* Instead of directly facing the state action issue, the Court interpreted the Railway Labor Act as creating a statutory obligation of a union not to discriminate. 323 U.S. 192 (1944). The Supreme Court next held that the National Labor Relations Act (NLRA) incorporated a similar statutory duty. Syres v. Oil Workers Int'l Union Local 23, 350 U.S. 892 (1955). Similarly, the Supreme Court read into the Railway Labor Act a statutory duty of a union not to spend employee dues for political causes that the individual employee opposes. International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

The state action issue has also arisen in the context of whether National Labor Rela-

public sector, however, it is impossible to avoid the confrontation between the two concepts.[20]

This article uses the PERC decisions concerned with the conflict between certified bargaining agents and nonmember employees to explore the relationship between due process and fair representation; it will also identify differences between the policies underlying public and private sector bargaining that might be used to justify a distinct balance between collective and individual interests in the public sector. The first section describes how PERC has dealt with the contradiction between the union's option to refuse representation to a nonmember and the doctrine of exclusive representation; the last section deals with fair representation and due process.

Throughout the section on public sector fair representation doctrine there are two basic concerns. First is the issue of the appropriate standard of procedural fairness to which a union should be held in making judgments about employee grievances.[21] The second concern is whether a procedurally fair decision could still violate the duty of fair representation because the union's substantive reasons for favoring the interests of one group of employees over another are unjust.[22] The article concludes that there is currently no theory of distributive justice to measure the substantive fairness of a union's decision, so long as the union's reasons are

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tions Board (NLRB) certification of a union that discriminates in membership along lines of race or national origin would be tantamount to unconstitutional governmental discrimination. At first the Board held that the certification of a union would be unconstitutional if the employer could demonstrate the union discriminated. Bekins Moving and Storage Co., 211 NLRB 138 (1974). Three years later the Board reversed its position, finding that control over discrimination through unfair labor practice proceedings subsequent to certification provided an adequate remedy. Handy Andy, Inc., 228 NLRB 447 (1977). The Court of Appeals for the District of Columbia has endorsed this latter view by regarding certification as imposing an affirmative obligation on private associations not to discriminate. Bell & Howell Co. v. NLRB, 598 F.2d 136 (D.C. Cir.), *cert. denied*, 442 U.S. 942 (1979). Two other courts of appeals, however, have ruled that the Constitution does require the NLRB to deny certification to a union that discriminates on the basis of race in its membership or contract negotiations. NLRB v. Mansion House Center Management Corp., 473 F.2d 471 (8th Cir. 1973); NLRB v. Heavy Lift Serv., Inc., 607 F.2d 1121 (5th Cir. 1979), *cert. denied*, 449 U.S. 822 (1980).

20. *See* Winston v. United States Postal Serv., 585 F.2d at 207-09 (an employee has a property interest in expectancies based on a just-cause-for-discharge clause of a collective agreement with the United States Postal Service).

21. *See, e.g.*, Smith v. Hussman Refrigerator Co., 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980); Saginario v. Attorney General, 87 N.J. 480, 435 A.2d 1134 (1981).

22. *See, e.g.*, Gregg v. Teamsters Local 150, 699 F.2d 1015 (9th Cir. 1983) (union lacked substantial reasons for sacrificing the grievances of one group of employees in order to improve the likelihood of succeeding on the grievances of other employees).

consistent with its statutory obligations.[23] Bargaining agents should, however, be required to articulate their reasons for a substantive decision not to grieve whenever there is a basis for questioning the union's impartiality. Requiring the union to explain its reasons would contribute to the legitimacy of the union's exclusive control and will provide information that the membership needs to alter similar decisions in the future if a majority disagrees with the union's rationale.

II. Union Control Over Individual Grievances Under PERA

In *Heath v. School Board*,[24] PERC first faced the tension between the doctrine of exclusive representation and the amendment allowing the certified bargaining agent to refuse to grieve for a nonmember. The facts of *Heath* illustrate the practical problems that the amendment fostered. Brian Heath filed an individual grievance with the school board without seeking representation by, or the participation of, the Orange County Classroom Teachers Association (OCCTA), the certified bargaining agent.[25] Instead the FEA/United, a rival union, assisted Heath.[26]

The school board denied Heath's request for arbitration on the ground that the grievance was not arbitrable under the collective agreement because the certified bargaining agent, OCCTA, had not submitted the request. Heath filed unfair labor practice charges claiming that the contract provision, which gave the union a monopoly over the submission of grievances to arbitration, violated his statutory right to arbitrate an individual grievance.[27] OCCTA intervened to protect its interests as the certified bargaining agent.

In support of his statutory argument, Heath distinguished the language and organization of PERA from that of the National Labor Relations Act (NLRA). He argued that, although the Florida legislature relied heavily on the NLRA in drafting PERA, the legislature diverged significantly from the NLRA in drafting the sections on exclusive representation and grievance procedures.[28] Heath argued that these differences reflected the legislature's intent to strike a distinct balance between collective and individual

23. *See* Freed, Polsby & Spitzer, *supra* note 7.
24. [1979] 5 F.P.E.R. ¶ 10,074, at 90 (Mar. 20, 1979).
25. *Id.*
26. *Id.* at 96 n.1.
27. *Id.* at 90.
28. *Id.* at 91.

interests. He argued that sections 447.301(4), 447.401 and 447.501(1)(f) of PERA, read together, preserve the employee's right to select his own representative and to control his grievance over individual job interests.[29]

The facts of *Heath* cast in the worst possible light the statutory argument in favor of an employee's being allowed to grieve on his own. The minority union in *Heath* was attempting to use contract grievance procedures to gain support for its struggle to displace the certified bargaining agent. PERC's response to this threat to exclusive representation was predictable. PERC rejected Heath's statutory argument using little analysis; it relied heavily on United States Supreme Court precedent to emphasize the critical role that exclusive representation plays in a system of collective bargaining.[30] The narrow holding of *Heath* is that it is not an unfair labor practice for a public employer to refuse to arbitrate a non-union employee's grievance where the employee has not asked the certified bargaining agent to represent him, and where the collective bargaining agreement provides that only the certified bargaining agent may submit a grievance to arbitration.[31]

Beyond this narrow holding, a host of practical questions remained unanswered. Could the school board have arbitrated without committing an unfair labor practice? If the union does refuse to grieve for a nonmember, what are the rights of that individual under the collective agreement? May the nonmember then grieve individually? How will the arbitrator be selected? Can a rival union represent the nonmember? Will the bargaining agent still be allowed to participate? These are just a few examples of the type of questions PERC has faced in the four years since *Heath*.

The central question posed by the aggrieved employee in *Heath* was one of statutory interpretation. As the dissenting Commissioner pointed out,[32] the majority did not confront the differences in language and structure between PERA and the NLRA. PERC simply assumed that the appropriate balance between collective and individual rights in public sector bargaining is the same as in private sector bargaining.

A third set of issues arises from the implications of the *Heath*

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29. For an analysis of the statutory interpretation issues, see *infra* text accompanying notes 91-143.

30. [1979] [5] F.P.E.R. at 91. (relying on Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Vaca v. Sipes, 386 U.S. 171 (1967)).

31. *Id.* at 93.

32. *Id.* at 93-96.

decision for the duty of fair representation. A nonmember with a grievance must first ask the certified bargaining agent to represent him. The Commission's opinion in *Heath* suggests, and subsequent decisions have confirmed, that if the union declines to grieve on grounds other than the individual's nonmembership, the nonmember's only recourse is to charge the union with breach of its duty of fair representation.[33] Although there is tension inherent in the relationship between the nonmember and the bargaining agent. Nonetheless, the nonmember employee cannot obtain a hearing on the merits of his grievance unless he proves that the bargaining agent acted arbitrarily or in bad faith in refusing to process the grievance. To the extent that the grievance involves an expectation such as job security, which could be characterized as a property right, the failure to consider the merits of the grievance beyond the union's own investigation raises due process problems.[34]

The practical considerations, the statutory issues, and the relationship between fair representation doctrine and due process all merit careful analysis. Before addressing the latter two sets of issues, it is important to provide a more complete picture of the way PERC has balanced, on a case-by-case basis, the doctrine of exclusive representation and the situation of the nonmember. The way PERC has resolved the practical considerations provides a context for examining the issues of statutory interpretation raised in *Heath*.

A. *Exclusive Representation and Nonmember Grievances: PERC's View*

1. UNION CONTROL OVER ALL GRIEVANCES

The first issue to emerge after *Heath* concerned the discretion of a public employer in a similar situation to arbitrate an individual employee's grievance without committing an unfair labor practice.[35] PERC consolidated the control of exclusive bargaining

33. *See* Galbreath v. Broward County Classroom Teachers' Ass'n., [1981] 7 F.P.E.R. ¶ 12,288 (June 26, 1981); Galbreath v. School Bd. [1981] 7 F.P.E.R. ¶ 12,287 (June 26, 1981), *aff'd*, 424 So. 2d. 837 (Fla. 4th DCA 1982). These decisions were recently affirmed by the Florida Supreme Court. *See* Galbreath v. School Bd., 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984).

34. *See* Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); *cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (adjudicatory procedures must survive due process and equal protection considerations).

35. Leon County Classroom Teachers' Ass'n v. School Bd., [1980] 6 F.P.E.R. ¶ 11,001

agents by ruling that the employer could not arbitrate the grievance unless the employee had first asked the certified agent to represent him.[36] Otherwise, the employer would be refusing to discuss the grievance in good faith and engaging in a unilateral breach of the terms and conditions of employment by using a noncontractual method to resolve a grievance.[37]

A second concern involved the bargaining agent's power to grieve with or without the cooperation of the grievant. PERC held that a certified agent has the power "to initiate and process grievances without obtaining the consent of the employer, employee or group of employees."[38] PERC was responding to a request for a declaratory opinion on a certified bargaining agent's authority to process a grievance in its own name without a petition by the affected employee. The Commission's reasoning in that case is consistent with the predominant private sector theory that collective agreements vest rights in the collective and not in the individual employee. The outer limits of that theory, however, are problematic when applied in the public sector.[39]

Many of the job security guarantees in collective agreements overlap with existing individual statutory rights protected by civil service appeal procedures[40] or with other statutory guarantees.[41] There is a potential for conflict between an individual employee's right to pursue a grievance with representation of his choice through such statutory procedures and a bargaining agent's power to proceed through contract grievance procedures.

In a case where such an overlap of forums exists, the individual employee, rather than the union, should control the initial choice of forum. The Florida legislature preserved in PERA section 447.401 the option of career civil service employees to use the civil service appeal system instead of contract grievance procedures.[42]

(Dec. 3, 1979).

36. *Id.* at 3-4.

37. *Id.* at 4.

38. *In re* Duval Teachers United Local 3326, [1979] 5 F.P.E.R. 10,353 (Oct. 10, 1979), *aff'd*, 393 So. 2d 1151 (Fla. 1st DCA 1981).

39. For an excellent exposition of the private sector theory of collectively held rights, see Feller, *supra* note 1.

40. Article III, section 14 of the Florida Constitution mandates a civil service system for state employees and allows counties and municipalities to establish their own civil service systems. Most of these systems establish a civil service commission, which has the power to "hear appeals arising out of any suspension, reduction in pay, transfer, layoff, demotion, or dismissal of any permanent employee." FLA. STAT. § 110.305(3) (1983).

41. *See, e.g.*, FLA. STAT. § 231.36(6) (1983) (teachers' appeal procedure).

42. "A career service employee shall have the option of utilizing the civil service appeal

This provision would be rendered meaningless if the union could either force the employee to grieve under contract procedures or bargain away the employee's option. A Florida appellate court confirmed this view in dicta in a case in which a public employer resisted arbitration on the ground that contract grievance procedures could not be used to resolve a grievance if statutory appeal procedures existed.[43] The court went on to observe that section 447.401 preserved any procedural or substantive employee safeguards in excess of those provided by contract grievance procedures: "[T]he legislature did not intend to permit a public employer to negotiate a collective bargaining agreement in which it relinquishes a statutory duty or in which its employees relinquish statutory rights. The agreement may add to statutory rights and duties, but may not diminish them."[44]

An employee's decision to pursue a remedy through a statutory procedure normally will not concern the certified bargaining agent unless a rival union is in the picture.[45] A minority union will have some incentive to help employees pursue noncontractual appeals in order to gain their support. Even in this situation, the bargaining agent has no real basis on which to object so long as no issues of contract interpretation are involved and the appeal does not establish statutory case law that would later operate as precedent in the resolution of contract disputes by arbitrators.

The question of representation becomes more complex if the public employer convinces the union to incorporate the statutory appeal procedure into the collective agreement. This situation arose in *Broward County Classroom Teachers Association, Inc. v. School Board.*[46] School board policy, established by a regulation, required that all employees be allowed to appeal certain personnel matters to the full board for a final determination. The bargaining agent agreed to incorporate that appeal procedure into the collective agreement as an alternative to contract grievance procedures that result in final and binding arbitration. The agreement gave the individual employee the option of following either procedure so

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procedure or a grievance procedure established under this section, but such employee cannot use both a civil service appeal and a grievance procedure." FLA. STAT. § 447.401 (1981).

43. PERC v. District School Bd., 374 So. 2d 1005, 1008 (Fla. 2d DCA 1979).

44. *Id.* at 1015.

45. The two major PERC decisions, *Heath* and *In re Leon County*, grew out of situations where rival unions were attempting to represent bargaining unit employees in grievances. *See* Heath v. School Bd., [1979] 5 F.P.E.R. ¶ 10,074 at 96 n.1 (Mar. 20, 1979); *In re* School Bd. of Leon County, [1981] 7 F.P.E.R. ¶ 12,286 at 578 (June 26, 1981).

46. [1982] 8 F.P.E.R. ¶ 13,283 (June 30, 1982).

long as the grievance did not raise issues of contract interpretation.[47] A rival union organization then began representing employees who opted for the alternative procedure. The certified bargaining agent objected and filed unfair labor practice charges against the school board and the rival union.[48]

The hearing examiner ruled that the board policy, which allowed the employee to select his own representative, governed the alternative procedure.[49] PERC reversed, finding that it was permissible for a union to agree to a procedure as an alternative to final and binding arbitration, but that any waiver of exclusive representation in any grievance procedure incorporated into a collective agreement would have to be "clear and unmistakable."[50] The contract clause in question did not constitute such a waiver.

2. RIGHTS OF A NONMEMBER WHO IS REFUSED REPRESENTATION

The *Heath* majority suggested in dicta that, if a bargaining agent refuses to grieve for an employee on the ground of the employee's nonmembership in the union, the employee has a statutory right to proceed individually.[51] The statute mandates equal access by all bargaining unit employees to a fair and equitable grievance procedure.[52] The most obvious issue arising out of the nonmember employee's right to proceed individually, is whether the grievance procedure can be "fair" if the nonmember is not free to choose his own representative, even if the representative is a rival union.

PERC ruled in *Florida PBA v. State*[53] that a rival union may represent the nonmember grievant. In that case, the certified bargaining agent declined to grieve for a nonmember. With the assistance of a rival union, the nonmember grievant filed a request for arbitration. The public employer refused to process the request, and the rival union filed an unfair labor practice charge.[54] PERC

47. *Id.* at 507-08.

48. The ground for the unfair labor practice charge against the school board was that the board was recognizing a minority union and maintaining grievance procedures that violated section 447.401 of the Florida Statutes. The unfair labor practice charge against the union was for seeking recognition in a unit where another union was already certified as the exclusive bargaining agent. *Id.* at 507.

49. *Id.* at 516.

50. *Id.* at 509.

51. *Heath*, [1979] 5 F.P.E.R. at 92-93.

52. FLA. STAT. § 447.401 (1983).

53. [1982] 8 F.P.E.R. ¶ 13,059 (Jan. 13, 1982).

54. *Id.* at 107.

upheld the charge, finding that the logic of *Heath* did not extend to a nonmember's choice of representative.[55]

PERC reasoned that the certified union, by refusing to represent the nonmember employee, had waived any claim to exclusive representative status. The employer's interest in the affiliation of the personnel representative was insufficient to overcome the individual's right to select his own representative. PERC held that free choice of a personnel representative, after the bargaining agent has refused representation of an employee on the basis of nonmembership in the union, was an integral part of the statutory right to a "fair and equitable grievance procedure."[56]

The decision in that case could have gone either way. Allowing the nonmember complete freedom to choose a representative opens the door for a rival union to use grievance procedures as a means of gaining support. The ability of the bargaining agent and employer to control issues of contract interpretation may be undermined, resulting in a negative impact on the stability of labor relations. On the other hand, the *PBA* decision exerts pressure on the bargaining agent to grieve for nonmembers, a preferred result from the perspective of stable labor relations. If a bargaining agent decides to run the risk of refusing to represent nonmembers in order to encourage membership or save union funds, the competition engendered by a rival union may be beneficial to bargaining unit employees.

The *PBA* decision presents a practical response to a problem that has no obviously preferable solution. There is simply an inherent contradiction between the principle of exclusive representation and the PERA provision for nonmember grievances. *Heath* gives the bargaining agent the option to protect its position by representing nonmember employees in contract grievance proceedings. If the agent does not exercise that option, then the statute requires that the grievance process still be as fair as possible for the individual employee.

A more complicated issue is whether the refusal to grieve for the nonmember constitutes a waiver by the bargaining agent of its right to participate in any grievance proceedings initiated individually by the nonmember. A union that anticipates this problem is likely to request a contract clause guaranteeing it the right to be present at any meeting, including arbitration hearings, called for

55. *Id.* at 109.
56. *Id.* at 108.

the purpose of resolving an employee's grievance.[57] It is arguable that the union enjoys a similar statutory guarantee under PERA section 447.301(4).[58]

This statutory provision is subject to several possible interpretations, however, including one that would give all employees, members and nonmembers, the right to adjust grievances directly with the employer all the way through arbitration. Whether PERC correctly resolved this issue in *Heath* is addressed in the next section of this article.[59] Assuming, however, that the *Heath* interpretation is correct and that an employee does not have a right to arbitrate individually, unless the certified bargaining agent has first denied the employee representation, the meaning of PERA section 447.301(4) is still open to question.

Arguably, the provision simply gives the employer discretion to adjust an individual's grievance so long as the employer has not bargained away that discretion in the collective agreement.[60] Under this interpretation, section 447.301(4) protects employers from unfair labor practice charges based on the doctrine of exclusive representation.[61] An employer can bargain away this protection, but in those circumstances in which the union allows the employee to proceed individually, the provision would guarantee the bargaining agent the right to be present even during arbitration.

The plaintiff in *Heath* argued that section 447.301(4) goes beyond simply protecting employers by actually guaranteeing individual employees the right to grieve and arbitrate.[62] PERC rejected this argument, analogizing the PERA provision to section 9(a) of

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57. Such a clause was included in the collective agreement between AFSCME and the State in the *PBA* case. *Id.* at 110 n.10.

58. Section 447.301(4) of the Florida Statutes states in pertinent part:

> Nothing in this part shall be construed to prevent any public employee from presenting, at any time, his own grievances, in person or by legal counsel, to his public employer and having such grievances adjusted without the intervention of the bargaining agent, if the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and if the bargaining agent has been given reasonable opportunity to be present at any meeting called for the resolution of such grievances.

59. *See infra* text accompanying notes 91-143.

60. This interpretation is based on an analogy between section 447.301(4) of the Florida Statutes and the proviso to section 9(a) of the National Labor Relations Act. *See* Galbreath v. School Bd., 9 FLA. L. WEEKLY 33, 34 (Sup. Ct. Jan. 26, 1984); *Heath*, [1979] 5 F.P.E.R. at 91-93; *In re* School Bd. of Leon County, [1981] 7 F.P.E.R. at 579.

61. *Cf.* Black-Clawson Co. v. International Ass'n of Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962) (the employee is not given an indefeasible right, mirrored in a duty on the part of the employer, to have his grievances adjusted).

62. *Heath*, [1979] 5 F.P.E.R. at 90-92.

the NLRA.[63] In subsequent decisions, PERC has taken the position that PERA section 447.301(4) applies only where employer and employee attempt to adjust a grievance short of arbitration.[64] Under the latter interpretation, there is no specific provision that defines the right of a certified bargaining agent to participate in a nonmember's arbitration if it has declined representation of the nonmember.

The balancing of the respective rights of the union and the grievant in this situation requires consideration of the policies underlying exclusive representation by the certified bargaining agent and "fair and equitable" arbitration for a nonmember. The question of what is "fair" to the grievant will arise when the bargaining agent is more in agreement with the employer than with the individual employee on an issue of contract interpretation. The arbitrator occupies a difficult position when the union and the employer agree. Under most collective bargaining agreements, the union and the employer normally select arbitrators to settle disputes arising under the collective agreement. While the individual employee will participate in the selection of the arbitrator for the grievance in question, the employee probably will not be in a position to pick an arbitrator in the future. The arbitrator's incentives are to please the union and the employer, who negotiated and drafted the contract, and not to please the individual employee. This structural characteristic of arbitration raises doubts about the fairness of arbitration to the individual employee when all three parties participate in the hearing.[65]

On the other hand, the certified bargaining agent should be allowed to fulfill its obligation to advocate the interests of all employees in disputes over the meaning of specific contract clauses.[66] The traditional solution to this dilemma is to require the union to represent all employees and to deal with any issues of fairness raised by the tension between the union and a nonmember later, if

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63. *Id.* at 91-93.

64. Florida PBA v. State, [1982] 8 F.P.E.R. ¶ 13,059, at 109 (Jan. 13, 1982); *see also* Answer Brief of Appellee at 34, Galbreath v. School Bd., 424 So. 2d 837 (Fla. 4th DCA 1982).

65. *See* Schatzki, *Majority Rule, Exclusive Representation and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897, 908 n.28 (1975); Summers, *supra* note 1, at 402. It is also arguable that the procedures violate due process, because an adjudicator with a pecuniary interest in the outcome of a case is constitutionally unacceptable. *See* cases cited *supra* note 16. For a discussion of the due process issues, see *infra* text accompanying notes 185-93.

66. Summers, *supra* note 1, at 395-97.

and when the employee files fair representation charges.[67] This solution is not available, however, in situations where the union is allowed to deny representation to a nonmember. The most practical course is to maintain confidence in the integrity of arbitrators and to presume that an arbitrator will decide every grievance on its merits and will disregard how a decision will influence the arbitrator's chances of being selected in the future.[68] If the individual nonmember seeks judicial review of the arbitrator's award, however, the court should be sensitive to any indication of bias or unfairness in the proceedings.[69]

The *PBA* decision creates an incentive for certified bargaining agents to assume control of all grievances, irrespective of the grievant's union membership, when a rival union is engaged in a campaign to challenge the certified agent. Nevertheless, there may be some tendency for the certified agent to turn down any questionable nonmember grievance on the ground that it lacks merit. Then, the employee's only recourse is to file a duty of fair representation action against the union.[70] It will be very difficult for an employee to carry the burden of proving bad faith by the union, even if the employee's nonmembership was the reason for the union's denial of representation, unless the union is required at least to provide reasons for its refusal. The section on fair representation discusses this issue in detail.[71]

A second alternative is for the bargaining agent to assume an intermediate position. The certified bargaining agent might establish a fee schedule for the handling of nonmember grievances and require the nonmember to grieve through the union and to pay the costs instead of going forward individually.[72] The union can claim

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

68. Due process doctrine presumes the impartiality of an adjudicator; the party alleging bias carries the burden of showing that the adjudicator has sufficient interest in the final decision to overcome the presumption of impartiality. *See* Schweiker v. McClure, 456 U.S. 188 (1982); *cf.* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) (when arbitrators fail to disclose dealings that might create a bias, any award may be vacated).

69. A second alternative is for PERC to use its rulemaking power to standardize procedures for the selection of arbitrators in the case of a nonmember grieving individually. These procedures could remove the taint of a structural bias against the nonmember. *See infra* text accompanying notes 191-95.

70. Heath v. School Bd., [1979] 5 F.P.E.R. at 92-93; Galbreath v. Broward County CTA, [1981] 7 F.P.E.R. ¶ 12,288 (June 26, 1981), *aff'd*, 424 So. 2d 837 (Fla. 4th DCA 1982), *aff'd*, 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984).

71. *See infra* text accompanying notes 259-80.

72. Neither PERC nor the Florida courts have squarely faced the question whether a certified agent can agree to process a grievance only if the nonmember pays costs, and if the

that as a matter of labor policy it is preferable for the union to fulfill its role as exclusive representative and to handle all employee grievances. To minimize the free-rider problem and maintain fairness to dues-paying members, however, the nonmember should be required to reimburse the union for the costs of processing his grievance.

The NLRB has rejected a similar line of reasoning, holding that a requirement that an employee pay costs is a violation of the union's duty of fair representation to the nonmember.[73] These cases are distinguishable, however, since a Florida public employee who is not a union member is not entitled to representation by the union as a matter of right.[74] The real obstacle to the reimbursement requirement is the right-to-work provision of the Florida Constitution.[75] A contract clause compelling non-union employees to pay a pro rata share of the costs and expenses incurred by the bargaining agent in establishing and administering the collective bargaining agreement has been held violative of the right-to-work provision.[76] Yet payment of a fee for grievance processing can be distinguished from the payment of the costs of collective bargaining. The former is only a condition of the nonmember's access to grievance procedures; it is not a condition of the employee's right to employment. In addition, if the nonmember's grievance is sufficiently serious to involve job security, an alternative statutory ap-

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individual refuses, then preclude the nonmember from proceeding individually. The closest case to this situation was Sherry v. United Teachers, 368 So. 2d 445 (Fla. 3d DCA 1979). Marylou Sherry claimed the Dade County School Board violated the collective agreement by failing to give her a job for which she was the best qualified candidate. She requested the union to file a grievance. United Teachers of Dade agreed to proceed if she paid costs in accordance with a "Service Fee Schedule" for nonmembers. *Id.* at 446-47. In response, Sherry filed a court action, arguing that PERA section 447.401 is unconstitutional because it allows a union to discriminate based on nonunion membership in violation of article I, section 6 of the Florida Constitution. The Third District Court of Appeal dismissed the action for lack of standing on the ground that Sherry's only complaint was that the union "would not process her grievance free of charge." *Id.* at 447. The court concluded that because Sherry could pay the fee or process the grievance herself, she lacked standing to challenge section 447.401. *Id.* The court did not indicate whether its conclusion that she could proceed on her own was based on the contract or on section 447.401 of PERA.

73. International Ass'n of Machinists Local 697, 223 NLRB 832 (1976); *see also* International Union of the United Ass'n of Journeymen, Local 141 v. NLRB, 675 F.2d 1257 (D.C. Cir. 1982) (Such a requirement was not a mandatory subject for bargaining).

74. FLA. STAT. § 447.401 (1983).

75. Article I, section 6 of the Florida Constitution provides: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization."

76. Florida Educ. Ass'n/United v. PERC, 346 So. 2d 551 (Fla. 1st DCA 1977); *see also* Schermerhorn v. Retail Clerks Int'l Ass'n Local 1625, 141 So. 2d 269 (Fla. 1962).

peal procedure normally is available.[77]

Florida's right-to-work cases reflect two responses to this argument. First, employment interests that fall short of those protected by civil service statutes, but that are subject to contract grievance procedures, are cognizable under article III, section 6 of the Florida Constitution.[78] Conditioning the protection of these interests on a payment to the union is an abridgment of an employment right on the basis of non-union membership. Second, to deny nonmembers the same choice of procedures as is available to members, unless the nonmember makes a payment to the union, is also an abridgment of the right to work. Conditioning access to contract grievance procedures on the payment of a fee to the bargaining agent would therefore be a violation of the Florida Constitution under existing precedent.[79]

Florida's right-to-work decisions may also be used to argue that the PERA amendment is itself unconstitutional.[80] The amendment distinguishes among employees on the basis of union membership; it arguably operates to coerce employees into joining the union to protect their job security through contract grievance procedures. The best response to this argument is that the amendment guarantees all employees equal access to arbitration, whether or not they are represented by a certified bargaining agent.[81] There is no section 6 violation if the equal access requirement is met. Bargaining agents and employers, or PERC through its rulemaking powers, should establish fair contract grievance procedures to enable nonmembers to proceed on their own if their certified bargaining agents refuse to represent them.[82] The employee should have an opportunity to select his own representative, to follow normal grievance processing steps, to participate in the selection of an arbitrator, and to pay no more than the normal union's share of

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77. *See* FLA. CONST. art. III, § 14 (mandating a civil service system for state employees and allowing counties and municipalities to establish their own systems).

78. FLA. CONST. art. I, § 6.

79. *See* cases cited *supra* note 76.

80. Two distinct lines of cases interpreting article I, section 6 of the Florida Constitution are relevant. The first is concerned with discrimination based on membership or nonmembership, which abridges a job interest. *See* cases cited *supra* note 76. The second line of cases has interpreted the right-to-work provision as a guarantee that public employees must enjoy the same rights to bargain as do private sector employees under the NLRA except for the right to strike. *See* City of Tallahassee v. PERC, 410 So. 2d 487 (Fla. 1981); Dade County Classroom Teachers Ass'n v. Ryan, 225 So. 2d 903 (Fla. 1969).

81. FLA. STAT. § 447.401 (1983).

82. For a discussion of PERC's rulemaking powers, which could be used to avoid due process problems, see *infra* text accompanying notes 191-95.

the arbitration costs. The grievance will cost more for the nonmember than for a member whom the union represents without charge. This difference, however, reflects the members' payments of dues, which spread the costs of grieving among all union members. Employees will be encouraged to join unions to participate in sharing grievance costs, but this incentive is inherent in a system of collective bargaining. It is not an abridgment of the right to work.

Another challenge to the the PERA amendment under the Florida Constitution is based on those cases that have interpreted section 6 as giving public employees the same rights to bargain collectively as private sector employees enjoy, except for the right to strike.[83] Private employees have a statutory right to representation by a certified bargaining agent both in bargaining and in contract administration, without regard to membership or nonmembership in the union.[84] The PERA amendment eliminates nonmembers' right to union representation in contract administration, thereby creating a distinction between private and public sector employees unrelated to the right to strike.

Two major cases have focused on the different treatment of private and public sector employees. The Florida Supreme Court held in *Dade County Classroom Teachers' Association, Inc. v. Ryan*[85] that public employees have a constitutional right to bargain collectively because section 6 guarantees public employees the same rights as those enjoyed by private sector employees, with the exception of the right to strike. The Florida First District Court of Appeal recently relied on *Ryan* in striking down as unconstitutional a statutory prohibition on collective bargaining over retirement benefits.[86] In affirming the district court of appeal, the Florida Supreme Court distinguished between rigid legislative prohibitions on the subject matter of bargaining and legislative efforts to regulate the system of collective bargaining to reflect the special needs of the public sector.[87]

In applying the court's reasoning to the PERA amendment governing nonmember grievances, the issue becomes whether a cer-

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83. *See* cases cited *supra* note 80.

84. Vaca v. Sipes, 386 U.S. 171 (1967); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

85. 225 So. 2d 903 (Fla. 1969).

86. City of Tallahassee v. PERC, 393 So. 2d 1147 (Fla. 1st DCA), *aff'd*, 410 So. 2d 487 (Fla. 1981).

87. City of Tallahassee v. PERC, 410 So. 2d 487, 490-91 (1981).

tified union's right to refuse to grieve for a nonmember constitutes a reasonable effort by the Florida legislature to structure grievance procedures that reflect the special needs of the public sector. The tendency of public sector employees to decide against union membership is greater than that of private sector employees. Civil service laws and similar statutes provide a substantial degree of job security for public employees. Public sector bargaining units are often very large, so there is less sense of group solidarity. Moreover, public employees cannot strike. Grieving for nonmembers can be a substantial drain on the resources of a union with a lower percentage of dues-paying members. The bargaining agent's option whether to represent nonmembers in grievances relieves it of some financial pressure; at the same time it leaves the agent in a position to control grievances that are important to the collective. The practical problems that unions face in representing public sector employees in a right-to-work state explain the distinction between the statutory duties of public and private sector bargaining agents. So long as the statute's interpretation gives non-union members equal access to grievance arbitration, albeit at their own expense, it does not violate employee rights guaranteed by section 6.

3. DENIAL OF A NONMEMBER'S GRIEVANCE ON THE MERITS

Heath involved a non-union member who never asked the bargaining agent to represent him in processing his grievance. That case left unresolved the situation in which a nonmember asks the union to proceed to arbitration, and the union declines to proceed on the ground that the grievance lacks merit.

PERC addressed this issue in *In re School Board of Leon County*.[88] In a school district with two unions locked in a struggle over representation, the school board asked for clarification of this issue when the certified bargaining agent denied a nonmember's grievance because it lacked merit. PERC, citing *Heath* and *Leon County CTA*, declared that the public employer could refuse to arbitrate. PERC emphasized (a) the increased costs public employers and taxpayers would face if individual employees could take their own grievances to arbitration; (b) the destructive impact on collective bargaining of a public employer dealing directly with an individual employee; (c) the danger of a disgruntled employee us-

88. [1981] 7 F.P.E.R. at ¶ 12,286 (June 26, 1981). PERC's opinion in this case provided the basis for the Florida Supreme Court's opinion in Galbreath v. School Bd., 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984).

ing grievances to harass the union and the employer; and (d) the potential for a rival union to use the grievance process to upset collective bargaining with the certified agent.[89] Under this decision, if the nonmember suspects that the real reason for the union's denial of the grievance is the nonmember's refusal to join the certified union or his support for a rival union, the employee's only remedy is to file an unfair representation charge against the certified union.[90]

B. *Exclusive Representation and PERA: An Issue of Statutory Interpretation*

1. A COMPARISON OF PERA AND THE NLRA

There is a solid statutory argument that PERC was wrong in *Heath* to rely on private sector precedent in interpreting PERA. In fact, the first Florida court to discuss the issue commented in dicta that it was more in agreement with the dissenting commissioner in *Heath* than with the majority.[91] More recently, the Florida Supreme Court upheld the reasoning of PERC on this issue in *Galbreath v. School Bd.*[92]

The heart of the dissenting commissioner's argument is that PERA should be interpreted consistently with its own language and structure and not simply as a mirror image of the NLRA.[93] There are significant differences between the two statutes. First, the amendment to section 447.401 can be seen as a legislative rejection of the principle of exclusive representation in the area of grievance arbitration.[94] Second, PERA statutorily mandates arbi-

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89. *In re* School Bd. of Leon County, [1981] 7 F.P.E.R. at 580.

90. *Id., see* Galbreath v. Broward County Classroom Teacher's Ass'n, [1981] 7 F.P.E.R. ¶ 12,288 (June 26, 1981), *aff'd*, 424 So. 2d 837 (Fla. 4th DCA 1982) *aff'd*, 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984).

91. Duval County School Bd. v. Duval Teachers United Local 3326, 393 So. 2d 1151, 1152 (Fla. 1st DCA 1981).

92. The exact issue certified was as follows:

> Where the certified bargaining agent retains contractual control over the arbitral step of the grievance procedure and it declines to process a grievance to arbitration because it believes the grievance to be without merit, is the public employer still obligated to arbitrate the dispute if the grievant submits it to arbitration because the certified bargaining agent has declined to "represent the grievant?"

The Florida Supreme Court affirmed, adopting as its opinion PERC's reasoning in In re Leon County School Board, 7 F.P.E.R. ¶ 12,286 (1981). Galbreath v. School Bd., 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984). For a discussion of the opinion see *infra* note 260.

93. Heath v. School Bd., [1979] 5 F.P.E.R. ¶ 10,074, at 94-96 (Mar. 20, 1979) (Parish, Comm'r, dissenting).

94. *See* 1977 Fla. Laws ch. 77-343, § 14 (codified at FLA. STAT § 447.401 (1983)).

tration. Under the NLRA the procedure exists by mutual consent of the parties.[95] Third, section 447.301(4), which deals with the public employee's access to his employer to present a grievance, is part of a section enumerating fundamental employee rights.[96] The language of section 447.301(4) is similar to that of the proviso to section 9(a) of the NLRA, but the purpose of the NLRA proviso is to clarify exclusive representation; it is not a part of NLRA section 7 on fundamental employee rights.[97] Fourth, the NLRA does not specifically provide that it is an unfair labor practice for an employer to violate the employee's right to present an individual grievance.[98] By contrast, PERA section 447.501(f) makes it an unfair labor practice for a public employer to refuse to discuss a

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95. Federal labor law favors the resolution of contract grievances through final and binding arbitration, but the doctrine developed through court cases to enforce arbitration clauses in collective agreements rather than by statutory mandate. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). In contrast, section 447.401 of PERA does mandate arbitration in all Florida public sector collective agreements as follows:

> All public employees shall have the right to a fair and equitable grievance procedure, administered without regard to membership or nonmembership in any organization, except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization. A career service employee shall have the option of utilizing the civil service appeal procedures or a grievance procedure established under this section, but such employee cannot use both a civil service appeal and a grievance procedure.

FLA. STAT. § 447.401 (1983).

96. For the text of section 447.301(4), see *supra* note 58.

97. National Labor Relations Act, Pub. L. No. 198, §§ 7, 9(a), 49 Stat. 449, 452-53 (1935) (codified as amended at 29 U.S.C. §§ 157, 159(a) (1976)). The text of section 9(a), as amended, is as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (1976).

For the view that the proviso simply protects an employer who voluntarily discusses a grievance with an employee from a charge of bypassing the bargaining agent, see Black-Clawson Co. v. International Ass'n of Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962).

98. In an influential article on the rights of employees under the NLRA, Professor Cox relies on the lack of such an enforcement provision to justify his statutory argument that the proviso to section 9(a) does not create affirmative rights. *See* Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 624 (1956).

grievance with "either the certified bargaining agent for the public employee or the employee involved."[99]

The enactment of the two laws also occurred within the context of distinct legal environments for individual employee rights. Prior to the NLRA, the "employment at will" doctrine governed employment relations in the private sector.[100] An employer had no obligation to listen to the grievance of any employee. NLRA section 8(a)(5), combined with section 9(a), created a statutory obligation of the employer to listen and respond in good faith to grievances presented by the union.[101] The proviso to section 9(a) simply retained the employer's discretion to listen to an individual employee's grievance in situations not involving the union. This is an exception to the employer's normal obligation to deal only with the union; it is therefore a proviso to the exclusive representation principle. This proviso did not obligate the employer to listen to an individual employee, and the employer remained free to bargain away this discretion.[102]

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99. FLA. STAT. § 447.501(1)(f) (1983).

100. For an interesting historical perspective on the employment at will doctrine, see Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

101. National Labor Relations Act, Pub. L. No. 1981 §§ 8(a)(5), 9(a), 49 Stat. 453, 453 (1935) (codified as amended at 29 U.S.C. §§ 158(c)(5), 159(a) (1976)).

102. There were initially two contrary views as to the proviso's meaning. *Compare* Cox, *supra* note 98 *with* Summers, *supra* note 1. Several early decisions interpreted the proviso as creating a statutory right of an employee to utilize contract grievance procedures through arbitration even if the union did not support the employee's claim and had refused to take the grievance to arbitration. The union had the right to be present throughout the procedures to protect collective interests, but as long as the employee was willing to bear his share of the arbitration cost, he could go forward. *See* Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963); Pattenge v. Wagner Iron Works, 275 Wis. 495, 82 N.W.2d 172 (1957); *see also* Summers, *supra* note 1, at 366-67. The alternative view was that the purpose of the proviso was only to modify exclusive representation from the perspective of the employer and not of individual employees. If an individual employee wished to present a grievance to his employer without going through the union, the proviso enabled an employer, at his option, to hear and adjust the grievance without being charged with an unfair labor practice for violating the doctrine of exclusive representation. Under this interpretation, the employer could bargain away this option by a clause in the collective agreement and could refuse to deal with any employee not represented by the union. *See* Black-Clawson Co. v. International Ass'n of Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962); *see also* Cox, *supra* note 98, at 624. Eventually the interpretation advocated by Professor Cox became the accepted interpretation of the proviso. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61 n.12 (1975); Black-Clawson Co. v. International Ass'n of Machinists Lodge 355, 313 F.2d 179, 184-85 (2d Cir. 1962). Professor Cox's principal points in the interpretation of section 9(a) were as follows:

First, interpretation of a proviso is in the light of the basic policy it modifies, in this case exclusive representation. Since exclusive representation is a constraint on the employer, in the sense of forcing the employer to deal with the union rather than with individual

By contrast, the enactment of PERA occurred in the context of a highly developed body of constitutional and statutory law recognizing in individual public employees a limited property right in their jobs.[103] State civil service laws have created individual employee expectancies about job security. The individual employee may not be deprived of these expectancies without due process of law.[104] In this context, the recognition of an individual employee's right to grieve under section 447.301(4) is more consistent with the prior legal doctrine governing public employee rights than with the private sector doctrine that individual employees have no right to grieve.

The majority opinion in Heath does not really confront these issues of statutory interpretation.[105] PERC simply pointed to the similarity in language between PERA section 447.301(4) and NLRA section 9(a), and concluded that the Florida legislature would not have adopted that language had they not intended the Florida statute to have the same meaning as the NLRA proviso.[106] PERC emphasized the critical role played by exclusive representation in the private sector model of collective bargaining and the need to preserve the same principle in the public sector. And although PERC relied heavily on *Vaca v. Sipes*, it did not discuss the relevancy of the policies underlying *Vaca* to public sector

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employees, the proviso simply modifies the employer's obligation.

Second, employees never had a right to take a grievance to an employer. The basic common law doctrine governing employment relations was employment at will. An employer could always refuse to listen to the grievance of an individual employee without any fear of legal action outside of the collective bargaining context. Congress, therefore, was assuming that this basic legal principle would continue to govern, except for the employer's statutory obligation to bargain in good faith, which includes an obligation to respond to grievances presented by the union.

Third, Congress would not have created an individual statutory right of such significance without including a provision in the statute for its enforcement. When amending section 9(a) by the Taft-Hartley Act, Congress did not add any language to emphasize the right of an individual employee to grieve. Cox, *supra* note 98, at 624.

103. *See* Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

104. Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); *cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (grievance procedures must survive due process and equal protection considerations).

105. *See* Heath v. School Bd., [1979] 5 F.P.E.R. ¶ 10,074, at 94-96 (Mar. 20, 1979) (Parish, Comm'r, dissenting).

106. *Id.* at 92; *see also In re* School Bd. of Leon County, [1981] 7 F.P.E.R. ¶ 12,286, at 580 (June 26, 1981), *quoted in* Galbreath v. School Bd., 9 FLA. L. WEEKLY 33, 34 (Sup. Ct. Jan. 26, 1984).

bargaining.[107]

Perhaps the most significant difference between the two statutes is in the underlying reasons for their enactment. The Wagner Act reflected the economic policies of the Roosevelt administration; public sector collective bargaining statutes were primarily a response to the first amendment rights of public employees to associate freely and to petition the government.[108] While constitutional doctrine does not compel the government to bargain with an association of employees,[109] it is unrealistic and disruptive of labor relations for a public employer to ignore a union's existence. Public

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107. *See* Vaca v. Sipes, 386 U.S. 171 (1967). The Court in *Vaca* relied heavily on concepts of collective bargaining set forth by Professor Cox. *See* Cox, *supra* note 1; Cox, *supra* note 98. Subsequent to *Vaca* Professor Feller more fully elaborated these concepts into a general theory of collective bargaining. *See* Feller, *supra* note 1.

Professor Cox draws on an analogy between collective bargaining and self-rule through local government. He regards the collective agreement as a basic statute that establishes a set of rules to govern the work place. Private arbitration is a neutral dispute resolution process to resolve questions about the meaning of the rules in particular cases. Over time, arbitration creates a common law of the shop that guides the parties in resolving problems and legitimizes the rules and their application. Cox, *supra* note 1, at 1499-500; *see also* Feller, *supra* note 1. Management participates in the formulation of the rules through the hierarchy of the firm, and employees participate through the union. Exclusive representation maintains the system's stablility by forcing employees to resolve their conflicts within the union. The presumption is that employees speak with a united voice through their exclusive representative. The union is the focal point for institutionalizing group rights and vesting power in an ongoing group representative on whom the employer can rely to help establish and enforce a rational set of work rules. Feller, *supra* note 1, at 718-24. The collective has an interest in the way all disputes are presented to an arbitrator because of the impact of arbitration decisions on the future adjustment of grievances for employees similarly situated. Union control over access to arbitration enables the union to negotiate early settlements when similar disputes have been resolved by arbitration in the past and to eliminate frivolous grievances. Arbitration is not overburdened; the costs of dispute resolution for both the union and the employer are kept at a reasonable level; and solidarity of the union is strengthened. A strong union is more able to control members and to aid the employer in rationalizing the bureaucratic structure of the firm through rules established by the collective agreement. This leads to more stable labor relations and industrial peace. Cox, *supra* note 98, at 625. *See generally* Feller, *supra* note 1.

The analogy to a system of local government assumes all unit employees will participate in the political life of the union by electing the leadership responsible for formulation of union policies. In a right-to-work state, employees who do not join the union present a problem for the model of industrial pluralism. In addition, the bill of rights for union members, enacted as part of the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), does not apply to unions organizing a state entity, so many public sector employees do not enjoy the same formal guarantees of internal union democracy. Pub. L. No. 86-257, §§ 3(i), 101, 73 Stat. 519, 520-22 (codified at 29 U.S.C. §§ 402(i), 411 (1976)).

108. NAACP v. Button, 371 U.S. 415 (1963); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

109. Smith v. Arkansas State Highway Employees, 441 U.S. 463, 465 n.2 (1979) (citing Hanover Township Fed'n of Teachers Local 1954 v. Hanover Community School Corp., 457 F.2d 456, 461 (7th Cir. 1972)).

sector bargaining statutes were a practical accommodation to the fact that public employees could not be prohibited from forming unions.[110] The NLRA, by contrast, was an effort to improve employee working conditions and wages by encouraging unionization.[111]

The history of the Florida statute illustrates this distinction between the two statutes. The right-to-work provision of the Florida Constitution guarantees individual employees the freedom to decide whether to join without fear of losing their jobs.[112] It also prohibits any abridgment of their right to bargain through a union. When Florida's public employees began to organize, the Florida Supreme Court interpreted this latter provision as the source of a constitutional right to bargain.[113] In effect, the state supreme court directed the legislature to enact a statute that would regulate bargaining or risk judicial imposition of an equivalent doctrine on a case-by-case basis.[114]

The legislature responded by enacting PERA, which emphasized the need for "cooperative relationships between government and its employees" in order to assure the uninterrupted operation of government.[115] The preamble explicitly states, "Nothing herein shall be construed either to encourage or discourage organization of public employees."[116] Stable labor relations were a central objective of both the NLRA and PERA, but fostering unionization was not a goal of the latter act.

In summary, PERA and the NLRA are different in many re-

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110. McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Melton v. City of Atlanta, 324 F.Supp. 315 (M.D. Ga. 1971); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

111. Section 1 of the NLRA states in the congressional "Findings and Policies" that inequality of bargaining power created by obstacles to the organization of unions depresses wages, prevents the stabilization of working conditions, and contributes to industrial strife. The purpose of the Act was to eliminate the obstacles "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151 (1976 & Supp. V 1981).

112. FLA. CONST. art I, § 6.

113. *See* Dade County Classroom Teachers' Ass'n v. Ryan, 225 So. 2d 903 (Fla. 1969).

114. Dade County Classroom Teachers' Ass'n v. Legislature, 269 So. 2d 684 (Fla. 1972). The teachers' union filed a petition for a writ of mandamus asking the Florida Supreme Court to compel the legislature to enact guidelines regulating public employee rights to bargain collectively. The court denied the petition, but it did warn the legislature to take action within a reasonable time or the court would develop the guidelines itself.

115. FLA. STAT. § 447.201 (1983).

116. *Id.*

spects: (a) statutory structure and language, (b) prior common law and statutory doctrine governing individual employee rights and job security, and (c) legislative purpose. None of these differences provides a definitive answer to the question whether there should be a distinct balance between individual employee rights and collective control over contract issues under PERA. They do, however, suggest that it is important to understand more fully the interests affected by the policy choice. The basic issue is whether the needs of public sector collective bargaining justify exclusive union control over access by individual employees to an impartial hearing through contract grievance procedures. The resolution of this issue involves striking a balance among the interests of the public employer, the union, the collective employees in a bargaining unit, and the individual employee.

2. POLICY JUSTIFICATIONS FOR EXCLUSIVE UNION CONTROL OVER GRIEVANCES

a. The public employer's interest

Public agencies are concerned with delivering quality public services at reasonable cost to taxpayers. Harmonious labor relations contribute to this goal; a union's status as exclusive representative in both collective bargaining and grievance procedures helps to stabilize labor relations in a number of ways.

PERA normally certifies the largest possible bargaining unit to minimize the cost of bargaining and to enable public employers to establish standardized working conditions for large groups of employees through collective agreements.[117] Large bargaining units entail a geographical dispersion of employees in the same unit and diversity in the types of jobs the bargaining unit employees perform. These differences may cause employees to coalesce into subgroups that share interests not common to the unit as a whole; exclusive representation precludes those subgroups from dealing directly with the employer. Conflicts of interest among employees are internalized within the union, and the employer avoids being

117. Traditionally PERC has favored "wall-to-wall" units as the most appropriate in order to avoid fragmentation. *See* Amalgamated Transit Union v. City of Tallahassee, [1980] 6 F.P.E.R. ¶ 11,124 (May 14, 1980). More recently the Commission has departed somewhat from the insistence on "wall-to-wall" units when the larger unit might disrupt rather than foster efficient public administration and stable labor relations. *See* Amalgamated Transit Union, Local 1579 v. City of Gainesville, [1982] 8 F.P.E.R. ¶ 13,064 (Jan. 14, 1982); Hillsborough County Gov't Employees Ass'n v. Hillsborough County Emergency Medical Servs., [1981] 7 F.P.E.R. ¶ 12,350 (Aug. 24, 1981).

caught in the middle of competing employee demands. Because the union is a political entity controlled by the majority of employees, it faces the task of adjusting competing interests and presenting a united front to the employer.

Exclusive representation also makes it more difficult for a rival union to gain support, challenge the certified agent, and disrupt the existing working relationships between the employer and the certified union. As exclusive representative, the certified union controls most avenues of access to the employer, including grievance procedures to which the employer has agreed by contract.[118] A rival union has almost no means available to demonstrate its representational skills to disenchanted employees. This consequence deters rival campaigns, and certified unions enjoy greater discretion in determining bargaining demands and in deciding whether to press employee grievances to arbitration. The more secure a union's status as exclusive representative, the more politically feasible it will be for the certified union to refuse to process weak grievances.

This discussion demonstrates that exclusive representation contributes to the strength of a certified union, but the issue from the public employer's perspective is whether it is more advantageous to deal with a strong or with a weak union. So long as the union obeys the legal prohibition against strikes, the employer may prefer a strong union. A strong union can contribute to the legitimacy of work rules among employees, aid in administration of work rules by using grievances to help control abuses of discretion by supervisory personnel, and minimize the time employers must devote to frivolous complaints by employees. In addition, the union shares the cost of grieving under a contract, including the cost of arbitration if it is necessary. The public normally would bear the financial burden of adjusting employee complaints through civil service or statutory appeal procedures.

Even more important from a financial perspective is the savings of public funds that result from the union's power to end unmeritorious grievances early and to settle other grievances for less than the full relief an individual employee has demanded. If individual employees had the right to force the employer into arbitration, disgruntled employees or rival unions could exploit this, and

118. The bargaining agent and the employer cannot prohibit individual employees from using any forum that is available to the general public in order to address the public employer on issues that are also the subject of collective bargaining. *See* City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).

the result would be an increase in the cost of administering collective agreements.

A public employer might also prefer a strong union because it is easier for the public employer to maintain consistency on issues of contract interpretation. The employer and the union draft the collective agreement. They may intentionally leave some clauses vague, with the understanding that the specific meaning of these clauses will be determined later through handling concrete grievances. The employer and the union understand each other's positions on the issues and the bargaining history of the wording of the contract. Negotiating settlements of contract grievances is thus intimately related to negotiating the contract itself. The introduction of either an individual employee or a rival union into grievance handling may disrupt this ongoing development of rules to govern the work place.

There are, of course, counter-considerations as well as other ways to protect many concerns of employers, while giving individual employees more control over their individual grievances. Some of these alternatives are described below in the discussion of the interests of the collective and of individual employees.[119]

b. The union's interests

It is important to differentiate between the interests of unions engaged in the business of organizing and representing employees and the collective interests of employees.[120] The union depends on

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119. *See infra* text accompanying notes 129-42.

120. There is an argument that this distinction is false. Labor laws are based on a system of majoritarian principles. A majority of employees in a unit selects a union as their representative. The majority's choice binds them. *See* NLRA § 9, 29 U.S.C. § 159(a) (1976). The leaders of the union must be elected democratically. Landrum-Griffin Act §§ 101(a)1, 401, 29 U.S.C. §§ 411(a)(1), 481 (1976). If these leaders do not act according to the interests of a majority of the employees (the collective), then they can be voted out of office. In this sense, the union leadership is simply a reflection of the collective. *See* Freed, Polsby & Spitzer, *supra* note 7, at 481 n.50.

This approach ignores the reality that international unions, operating on a national scale, also have their own self-interests, which the unions pursue when they engage in the organization of a specific bargaining unit. Considerations that go beyond the interests of a majority of employees in a specific bargaining unit may become an integral part of the goals that the union leadership pursues in its representational capacity. This may mean that the union will act in pursuit of the interests of the majority in order to perpetuate its position as exclusive representative, but the leadership's self-interest as well as the interests of the employees motivates them. *See* Red Ball Motor Freight, Inc., 157 NLRB 1237 (1966), *enforced*, 379 F.2d 137 (D.C. Cir. 1967); Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976). A union will be concerned about the majoritarian interests of employees who they represent in multiple bargaining units. This representation creates a potential conflict between a specific

dues for its economic survival. Since Florida has interpreted its constitutional right-to-work provision as precluding both agency shops and fair-share agreements, employees are free to choose not to join the union.[121] Nonmembers have a free ride as to both bargaining and processing of grievances, unless the certified union exercises its option in Florida of refusing to process the grievances of nonmembers.[122]

Exclusive control over grievances is a major factor in a union's ability to overcome the free-rider problem.[123] As noted earlier, it is unlikely that the Florida courts would allow a union to set a fee schedule for processing nonmembers' grievances or to deny nonmembers access to arbitration unless they use the union and pay the fee.[124] But schedules do exist, and the fee required for handling a grievance normally is considerably greater than the yearly dues.[125] For employees who would not otherwise join the union, union membership is a form of insurance against the possibility of a grievance.

As PERC defined it in *Heath*, exclusive union control creates other incentives to join the union in addition to the lowering of the cost of grieving. The nonmember must ask the union to grieve on his behalf, and the union has the option to proceed or to tell the nonmember to grieve on his own.[126] If the union agrees to grieve for the employee, the nonmember faces representation by a union with whom he is in tension. He is aware that the union has considerable discretion to deny the grievance as unmeritorious, to settle it for less than the relief the employee feels is appropriate, or to devote minimal effort to preparing his case for arbitration. If the union takes any of these approaches, the employee's only recourse

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bargaining unit and the union membership in general. For example, the union may demand better contract terms from an employer who is unable to pay the higher labor costs demanded and still remain in business. Nevertheless, the union may persist in order to protect the area standard wages paid by more capital-intensive employers and thereby put the employer out of business and the employees out of work. *See, e.g.*, United Mine Workers v. Pennington, 381 U.S. 657 (1965).

121. Schermerhorn v. Retail Clerks Int'l Ass'n Local 1625, 141 So. 2d 269 (Fla. 1962); Florida Educ. Ass'n/United v. PERC, 346 So. 2d 551 (Fla. 1st DCA 1977).

122. *See* FLA. STAT. § 447.401 (1983).

123. *See* Mack & Singer, *Florida Public Employees: Is the Solution to the Free Rider Problem Worse than the Problem Itself?*, 6 FLA. ST. U.L. REV. 1347 (1978).

124. *See supra* text accompanying notes 72-78.

125. *Cf.* Sherry v. United Teachers, 368 So. 2d 445 (Fla. 3d DCA 1979) (nonmember declined to pay fee to union to process grievance on her behalf in accordance with a fee schedule).

126. Heath v. School Bd., [1979] 5 F.P.E.R. ¶ 10,074 (Mar. 20, 1979).

is to file a duty of fair representation charge with PERC or to bring a lawsuit based on the same theory.[127] In either proceeding, the employee bears the burden under current law of proving that the union acted in bad faith because of the employee's nonmembership.[128] Because the union's antagonism will normally be implicit rather than explicit, bad faith must be inferred from circumstantial evidence. Either type of legal action has a fairly low probability of success. In addition, instituting legal actions is costly to the employee in terms of attorneys' fees and the personal cost of additional tension with union supporters at work. Unless the employee feels strongly about his right to refuse to join a union, the easiest course when he encounters a problem is to join the union and have the union grieve.

If the nonmember supports a rival union, he has a legitimate concern about the certified agent's handling of his grievance. The certified union has an incentive to control the nonmember's grievance in order to keep the rival union from using the grievance procedures to gain support among bargaining unit employees. At the same time, the certified union's position is antagonistic to that of the individual who supports the rival union. Unless the grievance is one that has implications for a group of employees, the certified bargaining agent has little incentive to do more than a minimally effective job of representing the nonmember grievant. Exclusive control prevents rival unions from using grievances to gain support, undermines the incentive for employees to join a rival organization, and increases membership in the certified union.

c. The collective's interests

The most obvious collective interest in grievance procedures is contract interpretation, or the application of contract clauses to specific situations that may have an impact on the union's and the employer's adjustment of similar grievances in the future. Arbitration decisions create a common law of the workplace that influences the contract rights of all employees.[129]

The collective interest in contract interpretation is the classical justification for union control of individual employees' grievances, but the importance of union control varies with the nature

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127. Galbreath v. Broward County Classroom Teachers' Ass'n, [1981] 7 F.P.E.R. ¶ 12,288 (June 26, 1981), *aff'd* 424 So. 2d 837 (Fla. 4th DCA 1982), *aff'd*, 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984).

128. *Id.* at 583.

129. Cox, *supra* note 1.

of the grievance. To the extent that a grievance involves disputed facts, as discharge cases often do, the grievance is less important in providing precedent under the contract. At the other end of the spectrum are situations involving the application of a contract clause to undisputed facts that are likely to occur more often.

It is obvious that the collective has an interest in any arbitration going beyond the level of a dispute over facts, but it is not clear that control over grievance procedures is necessary to protect that interest. An alternative is to allow the certified agent to participate in all steps of the grievance procedures, including arbitration, while allowing the employee to choose his own representative if he so desires.[130] Giving employees the option of selecting their own representatives would enable the union to avoid being caught in a conflict of interests between the collective and the individual employee. The union could argue in support of the interpretation favorable to most employees and at the same time allow the individual to argue his own case, whether or not it is consistent with the union's position.

This approach may be a sensible compromise between the interests of the collective and those of the individual, but it creates problems for the union and the employer. The individual may choose someone identified with a rival organization as his representative.[131] In addition, this approach allows interest conflicts among subgroups of employees or between the collective and an individual to emerge through grievance procedures, with the employer caught in the middle. It maximizes the free association choices of individuals, which is consistent with the first amendment concerns underlying public sector bargaining, but it undermines harmonious labor relations by encouraging rival unions.[132]

Allowing individual representation also undermines union solidarity by encouraging individuals or dissenting subgroups to use grievance procedures to deal directly with employers. The collective's interest in solidarity, however, is unclear. If public sector unions depended on the threat of a strike to win concessions, then maintaining solidarity would be a central interest of the collective.

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130. *See* Summers, *supra* note 1, at 399-404; Note, *Individual Control Over Personal Grievances Under* Vaca v. Sipes, 77 YALE L.J. 559 (1968).

131. *See, e.g.*, Heath v. School Bd., [1979] 5 F.P.E.R. ¶ 10,074 (Mar. 20, 1979); Florida PBA v. State, [1982] 8 F.P.E.R. ¶ 13,059 (Jan. 13, 1982).

132. *See* Vaca v. Sipes, 386 U.S. 171, 191 (1967). For an argument that the threat of rival unions disrupting the grievance process is not as serious as the Supreme Court assumed in *Vaca*, see Note, *supra* note 130, at 568-70.

Because public sector strikes are illegal, solidarity is a more important factor in maintaining the union as a political force in campaigns for the election or defeat of public officials with whom the union negotiates. The importance of solidarity is not so evident in maintaining union strength for collective bargaining.

The collective does share the union's interests in discouraging free riders and in avoiding the use of union resources to finance frivolous grievances. The certification of a union depends upon receiving the votes of a majority of the employees. Presumably they will become members and pay dues. Policies that encourage membership and discourage unnecessary expenses make more funds available to support bargaining and meritorious grievances.

d. The individual's interests

The interests of the individual grievant are in tension. As a member of the collective, the individual shares with other employees the group's concern over the development of the common law of the contract. As a member of the bargaining unit, he benefits from employee support for the union and the dues used to bargain and administer the contract. On the other hand, he enjoys a first amendment right to associate with any employee group of his choice or to refuse to join any union.[133] Under the Florida Constitution, if he feels that a rival union would be a more effective advocate of his interests and those of his fellow employees, he has a right to join and support that union without adverse consequences to his job security.[134] Similarly, he has the right to refuse to associate with any union and to remain secure in the knowledge that his employment will not be affected by his decision.

An employee expects to enjoy the benefits listed in the contract; he does not expect to be disciplined or discharged without just cause. If he feels that the state has erroneously deprived him of his job security in violation of the contract, he expects to have an opportunity to be heard through the grievance procedures specified in the contract and in PERA section 447.401.[135] The employee

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133. *See* cases cited *supra* note 110. For a discussion of the difference under the first amendment between compelling employees to pay their fair share of union bargaining costs and compelling union membership, see Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

134. FLA. CONST. art. I, § 6.

135. Section 447.401 of the Florida Statutes provides in relevant part:

> Each public employer and bargaining agent shall negotiate a grievance procedure to be used for the settlement of disputes between employer and employee, or group of employees, involving the interpretation or application of a collective

has an interest in being adequately represented throughout the grievance procedures and in avoiding any adverse impact on his representation as a result of his nonmembership in the union. Of course, if he is a nonmember, he knows PERA allows the union to refuse to represent him. In that case, he must grieve through a representative of his own choice and bear his share of the arbitration costs.[136]

In most situations seriously threatening a Florida public employee's job security, the employee has other ways of challenging the state's action. If he is a civil servant, he has a statutory right to choose between civil service appeal procedures and contract grievance procedures.[137] The union may not bargain away this option.[138] Rather than follow contract grievance procedures, school teachers have the option of challenging discharges by pursuing statutory procedures through the administrative hierarchy ending with the state superintendent of schools.[139]

The alternative statutory appeal procedures vary in the type of impartial hearings they provide. Civil service boards are normally independent of the specific government agency whose actions are being appealed, but the employees have no direct voice in the selection of board members.[140] For those employees not covered by civil service, the appeal procedures lead the employee to higher levels in the same agency.[141] There will not be direct conflicts of interest, however, between the employee and the specific officials hearing the statutory appeal.

The statutory appeal procedures reflect concern for political

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bargaining agreement. Such grievance procedure shall have as its terminal step a final and binding disposition by an impartial neutral, mutually selected by the parties.

136. Florida PBA v. State, [1982] 8 F.P.E.R. ¶ 13,059 (Jan. 13, 1982).

137. FLA. STAT. § 447.401 (1983).

138. PERC v. District School Bd. of DeSoto County, 374 So. 2d 1005-15 (Fla. 2d DCA 1979).

139. The court in *DeSoto* held that the employee has "the right to elect between the appeal procedure available to him under Section 231.36(6) and the binding arbitration procedure provided in the collective bargaining agreement. *Id.* at 1015. If the employee elects contract grievance procedures, he runs a risk that the arbitrator's award might not be enforced by a Florida court if a statute gives his public employer final authority to decide on discipline. *See* Lake County Educ. Ass'n v. School Board, 380 So. 2d 1280 (Fla. 2d DCA 1978). For an analysis of judicial enforcement of public sector labor arbitration awards in Florida, see Reed, *Grievance Arbitration Awards in the Public Sector: How Final in Florida?*, 35 U. MIAMI L. REV. 277 (1981).

140. For the process of appointing the State Career Service Commission by the Governor, see FLA. STAT. § 110.301(b) (1983).

141. *See, e.g.*, FLA. STAT. § 231.35(b) (1983) (governing teachers).

patronage, protection of government employees from arbitrary decisions by government supervisors, and the need to satisfy the requirements of due process established by decisions of the United States Supreme Court. The job interests they protect normally are not as broad as those protected by contract grievance procedures. They primarily protect critical job interests that courts have identified as employee "property interests."[142] Where these procedures are available they provide the employee with a choice between the statutory hearing or grievance procedures ending in arbitration.

e. A preferred balance?

This summary of the interests involved in individual versus exclusive union control of the grievance process illustrates the complexity of the issue, but does not reveal any obviously preferable policy. Many of the concerns of public employers and of the collective could be satisfied by interpreting PERA section 447.401 as allowing an individual employee to grieve so long as a representative of the certified union is present at and free to participate in any meeting or arbitration held to adjust the grievance, and the grieving employee is precluded from being represented by a rival union. The cost to the individual of grieving would ameliorate the danger of individuals forcing arbitration over meritless grievances so long as prohibiting the rival union's participation would discourage a rival union from financing grievances.

Allowing individuals to grieve may have an unintended consequence that is more difficult to assess. The union might withdraw from a grievance where it can say to the employee, "We think the arbitrator will rule against you, but proceed on your own and we will reimburse you if you win." This option would reduce the union's current incentives to represent individual employees.[143] It also focuses too closely on arbitration as the central element of grievance procedures. Adjustment of many grievances occurs during the early steps of the grievance process. Pressuring the union to find common ground for a settlement and the employee to accept the outcome may be a critical impetus to the early settlement of most grievances.

This discussion of the policies supporting exclusive union con-

142. The State Career Service Commission has jurisdiction over complaints concerning discharges, suspensions, pay reductions, layoffs, and demotions. FLA. STAT. § 110.305(3) (1983).

143. Levy, *supra* note 7, at 1039.

trol over grievances suggests that PERC overstated the potential harm of allowing individuals to grieve on their own. Intermediate solutions, however, such as allowing employees to grieve while restraining the involvement of rival unions, may be impractical. On the other hand, the justification for exclusive union control must be substantial to overcome the interest of the individual in a hearing by an impartial arbitrator if the employee is willing to pay his share of the costs.

Another approach is to maintain exclusive union control, but to make the concept of fair representation more sensitive to the situations of individual employees, particularly where the interests of the individual employees conflict with those of the union. The remainder of this article focuses on the issue of the appropriate approach to the duty of fair representation in view of exclusive union control over grievances.

III. Fair Representation and Due Process

Both the doctrine of fair representation and the constitutional guarantee of due process protect the job security expectancies of Florida public sector employees working under collective bargaining agreements. State action is present in the combination of PERA section 447.307(3)(b), which makes certified unions exclusive bargaining agents,[144] and PERA section 447.401, which mandates that all collective agreements give bargaining unit employees equal access to a fair grievance procedure ending in final and binding arbitration.[145] State action is also present in the clauses of collective agreements that guarantee employee job security and employment benefits and that give unions exclusive control over the submission to arbitration of grievances growing out of these guarantees.[146] The state has created a regulatory scheme that provides for exclusive union control over procedures for protecting em-

144. Section 447.307(3)(b) of the Florida Statutes provides for the certification of an employee organization selected by a majority of the voting employees as the "exclusive collective bargaining representative of all employees in the unit."

145. Fla. Stat. § 447.401 (1983). For the text of section 447.401, see *supra* note 9.

146. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 252-53 (1977) (Powell, J., concurring). The Supreme Court held in *Abood* that exaction of union dues under a collective agreement did not violate the first amendment so long as the union did not expend funds derived from dues on political or ideological causes unrelated to the union's statutory role in bargaining and administering collective agreements. There is, however, nothing in the majority opinion that suggests the majority disagreed with the characterization of a public sector collective agreement as state action, as set forth in Justice Powell's concurrence. *See also* Winston v. United States Postal Serv., 585 F.2d 198 (7th Cir. 1978).

ployee expectancies growing out of the terms of employment set forth in collective agreements. The union's actions as the representative of individual employee interests therefore are subject to the requirements of due process.[147] Fair representation must satisfy the constitutional standard of adequate representation.[148]

This does not mean that courts should evaluate all internal union decisionmaking procedures in terms of due process. Federal courts have avoided the problem of mixing constitutional law with labor law under the NLRA by finding a statutory obligation of the union to represent all employees fairly.[149] It has been understood implicitly that fair representation satisfies due process.[150] There was never any need to face the issue of state action in a union's processing of grievances or to identify an employee's property or liberty interest within the meaning of the fourteenth amendment. Courts were free to look to the statutory policies underlying the collective bargaining system to create a flexible doctrine balancing the interests of the collective and of the individual employee.[151]

The same approach should be taken in the public sector. PERC and the courts should look to public sector labor policy and to PERA as the sources of fair representation doctrine. Because employee grievances normally can be expressed in terms of the state's acting to deprive an employee of an expectancy under the collective agreement, constitutional law will always be in the background as an alternative body of law governing individual employee rights. If fair representation doctrine is as sensitive to the constitutional values underlying due process as it is to the needs of the collective bargaining system, courts will not be tempted to turn to due process to regulate internal union decisionmaking.

There are different ways to characterize constitutional doctrine in examining the relationships between certified bargaining agents and employees under PERA. The most common approach is to view constitutional rights from the perspective of the individual employee. This view is concerned with the individual's access to a fair procedure for determining whether the state wrongfully de-

147. *See* Hansberry v. Lee, 311 U.S. 32 (1940); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Bernheimer v. Converse, 206 U.S. 516 (1907).

148. *See* Hansberry v. Lee, 311 U.S. 32 (1940).

149. Syres v. Oil Workers Int'l Union Local 23, 350 U.S. 892 (1955); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). For a discussion of the state action issue under federal labor statutes, see *supra* note 19.

150. *See* Winston v. United States Postal Serv., 585 F.2d 198 (7th Cir. 1978).

151. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

prived the individual of an expectancy based on a statute or collective agreement.[152] Because a union may decide that a grievance lacks sufficient merit to justify arbitration, the aggrieved employee may never have a hearing before an impartial adjudicator on the merits of his claim.[153] The union's procedures for investigating and deciding a grievance must minimize the likelihood of a wrongful deprivation of the employee's claim. Obviously there may arise questions as to the impartiality of a union's judgment in this situation if the grieving employee is not a union member.[154]

Another way of characterizing a union's role in terms of constitutional law is to view PERA as setting up a representational structure for the protection of employee rights.[155] Due process does not require individualized hearings in all circumstances.[156] If the state has sound policy reasons for establishing a representational scheme for the protection of individual rights, there is no due process problem so long as the representation is adequate. Conflicts of

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152. To determine whether specific procedures are consistent with due process, the courts weigh the importance of the individual's private interest, the length and finality of the deprivation, the likelihood of government error, and the magnitude of the governmental interest in the procedures. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Logan v. Zimmerman, 455 U.S. 422 (1982). For an interesting critique of this balancing approach to due process, see Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

153. *See* Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

154. *See* Schweiker v. McClure, 456 U.S. 188 (1982); Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). These cases deal primarily with the problem of a biased adjudicator in the context of a statutory procedure based on an adjudication model established for the purpose of protecting individual rights. The state may also establish an administrative model in which the decisions about individual rights are part of the ongoing process of managing a public institution. In such circumstances a flexible balancing approach, which takes account of the individual's stake and the state's interest in following procedures that reflect institutional concerns, is appropriate. *See* Hortonville Joint School District No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 494-96 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972). It is arguable that the role of a union in deciding whether to take a grievance to arbitration is more analogous to that of the school board in *Hortonville* than to that of the judge in *Tumey* because of the state's interest in a union's role as manager of a system of collective bargaining. On the other hand, the most appropriate analogy is to the problem of structural bias inherent in the scheme the state established for regulating the optometry profession in *Gibson*. Structural bias is a central issue when a union is deciding the merits of a nonmember's grievance. *See infra* text accompanying notes 239-80.

155. *See* cases cited *supra* note 147.

156. Hansberry v. Lee, 311 U.S. 32, 43 (1940); Bernheimer v. Converse, 206 U.S. 516, 532 (1907). For an excellent discussion of state regulatory systems and the private right to a hearing on regulatory decisions, see Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1255-316 (1982).

interests between the representative and a subgroup or individual within the class of employees are the analogue to the problem of the biased adjudicator under the first approach.[157]

The latter approach is more consistent with the exclusive representation model of collective bargaining, but the roots of both due process concepts come from similar constitutional values. Both focus on basic fairness of the procedures that the state establishes to protect individuals from wrongful deprivation of their rights. A decision about the validity of an employee's claim should be made on the merits by an impartial adjudicator or by a representative who has access to the best available information. Similarly situated employees should be treated the same. Differences in the representative's treatment of individual members of the class should be rationally related to the state's reasons for establishing a representational system for the protection of individual rights.[158]

Fair representation doctrine reflects these values. Unions may neither discriminate nor act arbitrarily or in bad faith.[159] A union's failure to treat bargaining unit members evenhandedly is evidence of bad faith or arbitrariness.[160] Failure to exercise due diligence in the investigation and handling of an employee's grievance may show that the union's decision not to submit the grievance to arbitration was arbitrary.[161] The most difficult issues arise when a union exercises due diligence, but tension between the union and the employee raises questions as to the unbiased judgment of the union or the adequacy of its representation.[162]

Interest conflicts between unions and minority employee groups have always been one of the most difficult issues in labor law doctrine.[163] As noted in the section on statutory policy, unions

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157. *See Hansberry*, 311 U.S. at 44-45.

158. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 438-42 (1982) (Blackmun, J., separate opinion).

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

160. *See* Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980); Gregg v. Teamsters Local 150, 699 F.2d 1015 (9th Cir. 1983).

161. *See* Foust v. International Bd. of Elec. Workers, 572 F.2d 710 (10th Cir. 1978); Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975).

162. *See* Holodmak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), *aff'd in part and rev'd in part*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975); Clerk v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *reh'g denied*, 8 Wis. 2d 277, 100 N.W.2d 317, *cert. denied*, 362 U.S. 962 (1960).

163. *See, e.g.*, Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976); Humphrey v. Moore, 375 U.S. 335 (1964); Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961), *aff'd on reh'g*, 315 F.2d 548 (6th Cir. 1963), *cert. denied*, 375 U.S. 826 (1964). For a helpful treatment of the tensions between the need for union discretion in making decisions and the interests of minority groups of employees, see Finkin, *supra* note 7; Summers, *supra* note 7.

need to have discretion to make judgments about competing interests among the employees in a bargaining unit.[164] Such discretion is critical to collective bargaining, which is based on the assumption that the position of employees is strongest if they speak with a united voice. Outer boundary constraints are necessary to protect minority employees against abuses of power by the majority, but these constraints should not undermine the basic principle of majority rule within the union.

In this context, individual grievances always pose a problem, because the union must decide whether or not to use collective resources to assist an individual employee. The decision involves consideration of the likelihood of success on the merits and of the implications of the grievance for other employees. The union must weigh these factors against the cost of grieving and other uses to which its resources might be put.[165]

The tension, inherent in all grievances, becomes greater when the grievant is a non-union member. The union naturally will weigh the fact that the grievant is a free-rider who does not contribute to collective resources. The union also has an incentive to use employee concern over the union's handling of nonmember grievances to encourage employees to join the union.

To avoid constitutional problems, fair representation doctrine should become more sensitive to the tension between unions and individual grievants. The doctrine should distinguish among various conflicts between unions and grievants based on the likelihood that the tension will lead to a wrongful deprivation of an employee's expectancy. If there is reason to believe the union's decision not to grieve is based on a hidden motive unrelated to the merits of the grievance, then the union should have the burden of providing a justification for its decision.[166]

Procedural solutions of the type proposed here, which use shifting persuasion and production burdens to deal with situations of mixed or hidden motives, are common in federal statutory employment law.[167] They also have analogues in due process doc-

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164. *See supra* text accompanying note 117.

165. *See infra* text accompanying notes 230-38.

166. For a discussion of the prima facie showing a grievant would have to make to precipitate a shift in the production burden, see *infra* text accompanying notes 261-65.

167. The two principal areas where the court has faced problems of hidden or mixed motive in employment law are Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 20003 (1976 & Supp. V 1981)) and section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1976). Both concern employer motives in decisions to hire, discharge, or discipline employees. In the Title VII area, see Texas

trine.[168] The remainder of this article treats the types of conflicts that should place on the union a burden of producing a justification for its actions. First, it may be helpful to deal briefly with the argument that PERA section 447.401 is unconstitutional on its face because it creates two classes of employees, members and nonmembers, who do not have equal access to a fair procedure to resolve their contract grievances.

A. *Nonmember Grievances: A Constitutional Challenge*

PERA creates two classes of employees with different statutory rights to grievance procedures. PERA guarantees "equal" access to fair grievance proceedings by members and nonmembers, but the union may refuse to represent nonmembers.[169] The nonmember denied representation must use contract procedures established by the union and the employer if he wishes to grieve a contractual right individually.[170] These procedures are designed primarily for situations in which the union is handling a grievance, and not to ensure fairness to an employee proceeding individually. The employee may participate with the employer in the selection of an arbitrator. The union has no control over the choice of arbitrator, but in many cases has the right to be present at all grievance proceedings to protect the interests of bargaining unit employees in issues of contract interpretation.[171]

Grieving nonmembers normally face a series of practical difficulties. Arbitrators may worry that the employee will not pay his share of the arbitration fee, particularly if the ruling goes against the employee. Unions and employees regularly use arbitrators. They have an incentive to pay promptly or else they risk future problems in finding qualified arbitrators. Individual employees are in a totally different situation. Arbitrators may make it their practice to ask individual employees to pay part of the fee in advance.

An arbitrator also has an incentive to please the employer and

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Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For the problem of burden-shifting in section 8(a)(3) discrimination cases under the NLRA, see NLRB v. Transportation Management Corp., 103 S. Ct. 2469 (1983).

168. *See* Addington v. Texas, 441 U.S. 418 (1979); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

169. FLA. STAT. § 447.401 (1983).

170. *See In re* School Bd. of Leon County, [1981] 7 F.P.E.R. ¶ 12,286 (June 26, 1981); Heath v. School Bd., [1979] 5 F.P.E.R. ¶ 10,074 (Mar. 20, 1979).

171. *See supra* text accompanying notes 57-69.

the union by his award.[172] These two parties will select arbitrators in the future, and the individual employee probably will not be in a position to do so again. An arbitrator depends for his living on being selected frequently. A ruling for the employee may make a negative impression on both the employer and the union, but a ruling against the employee clearly would please the employer and normally would not antagonize the union. It would also suggest that union members fare better in arbitration than do nonmembers. These structural characteristics of arbitration make an arbitrator's ruling against a nonmember always somewhat suspect. The appearance of bias raises the question whether an arbitration hearing in these circumstances is "fair" within the meaning of the statute and due process.[173]

These procedures may be challenged on two constitutional grounds: equal protection or due process.[174] The equal protection argument is illustrated by the case of *Logan v. Zimmerman Brush Co.*[175] The plaintiff in *Logan* filed a charge against his employer for unlawful discrimination with the Illinois Fair Employment Practices Commission. A statute gave the Commission 120 days within which to convene a factfinding conference to obtain evidence, determine the parties' positions, and explore settlement possibilities. Through inadvertence the Commission failed to schedule the conference within the 120-day period.[176] The defendant employer moved to dismiss the complaint on the ground that the Commission had failed to comply with the statutory mandate. The Commission denied defendant's motion, but on petition for a writ of prohibition, the Illinois Supreme Court held that the plaintiff was subject to reasonable conditions that the Illinois legislature had placed on causes of action for discrimination.[177] One such condi-

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172. *See* Schatzki, *supra* note 65, at 908 n.28; Summers, *supra* note 1, at 402.

173. *See* Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

174. *See* cases cited *supra* note 173 (cases concerned with biased adjudicators).

175. 455 U.S. 422, 438-42 (1982) (Blackmun, J., separate opinion). Although the Court did not address the equal protection claim in *Logan* because the due process issue was decided in the claimant's favor, Justice Blackmun noted that "the equal protection issue [is] . . . sufficiently important to require comment on my part, particularly inasmuch as a majority of the Members of the Court are favorably inclined toward the claim, although, to be sure, that majority is not the one that constitutes the Court for the controlling opinion." *Id.* at 438 (footnote omitted).

176. Logan v. Zimmerman Brush Co., 455 U.S. at 426.

177. Zimmerman Brush Co. v. Fair Employment Practice Comm'n., 82 Ill. 2d 99, 44 Ill. Rev. 308, 411 N.E. 2d 277 (1980), *rev'd sub nom.* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

tion was that the Commission hold a hearing within 120 days or be deprived of its jurisdiction. The complainant's right to redress through the Commission had terminated.

The United States Supreme Court reversed, with Justice Blackmun writing two opinions and Justice Powell writing a third. The majority opinion focused on the violation of the plaintiff's due process rights by the state's own inaction in denying a hearing on the merits of Logan's claim.[178] The majority opinion is relevant to the issue of a union's power to deny an employee access to arbitration, which is discussed in the next section. The two other opinions provide a basis for a facial challenge to the distinction between member and nonmember employees for the purposes of grievance processing.

A majority of the Court shared the view that the state's scheme in *Logan* set up two classes of employees: those with claims processed within 120 days and those with claims not processed within that period.[179] The first received a hearing on the merits. The second group did not. While this time limit might encourage the Commission to expedite the processing of claims, it also defined an "arbitrary line between otherwise identical claims."[180] In addition, the legislative goal of encouraging timely action by the Commission had only an attenuated connection to the distinction between the two classes of claims. The classification scheme violated equal protection.[181]

Similarly, the distinction between members and nonmembers in PERA section 447.401 is unrelated to the merits of employees' grievances. An employee's membership or nonmembership in a union has the potential to cause identical claims to be treated very differently in terms of the fairness of the hearing they receive. To validate this classification of claims, there must be a rational relationship between a legitimate governmental objective and the government's distinction between members' and nonmembers' claims.

The governmental objective may not be to encourage union membership; such an objective is inconsistent with both the pre-

178. *Logan*, 455 U.S. at 433-38.

179. Three Justices joined in Justice Blackmun's separate opinion, finding that the classification of claims into those that were processed within 120 days and those that were not had no rational basis. *Id.* at 438-42 (Blackmun, J., separate opinion). Justices Powell and Rehnquist also concurred, on the ground that the classification of claims had no rational relationship to the goal of timely disposition of claims. *Id.* at 443-44 (Powell, J., concurring).

180. *Id.* at 442 (Blackmun, J., separate opinion).

181. *Id.*

amble to PERA[182] and the right-to-work provision of the Florida Constitution.[183] The two defensible objectives are protecting certified unions from the financial burden of grieving for substantial numbers of nonmember employees and protecting member employees from having to pay for the grievances of nonmembers.[184] If unions do not have this protection, it may become uneconomical for them to represent employees in large bargaining units with a low percentage of membership. From the perspective of individual union members, it is also unfair to make them pay for the individual grievances of nonmembers.

The justifications for classifying employees into members and nonmembers withstand constitutional scrutiny under a rational basis test, but due process requires fair and unbiased procedures for each group. The characteristics of arbitration that create an inherent bias against the nonmember raise a serious constitutional issue. The usual test for structural bias is whether the procedures "offer a possible temptation to the average man as a judge to forget the burden of proof . . . or which might lead him not to hold the balance nice, clear and true between [the parties] . . . ."[185] The test presumes that the adjudicator himself is unbiased.[186] The burden is on the party challenging the procedure to show that the structure of the dispute resolution process is inherently biased or that the adjudicator has a personal pecuniary interest in the outcome.[187]

Nonmember grievances present a difficult problem under this test. Arbitrators are ethically bound to be impartial.[188] They must disclose to the parties any personal interest or relationship that might create an appearance of bias. Nevertheless, arbitrators always have a pecuniary interest in the outcome of grievances to the extent that an award may make one party or the other decide not

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182. The preamble states, "[N]othing herein shall be construed either to encourage or discourage organization of public employees." FLA. STAT. § 447.201 (1983).

183. FLA. CONST. art. I, § 6.

184. Mack & Singer, *supra* note 123.

185. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

186. Schweiker v. McClure, 466 U.S. 188, 195 (1982); *see also* Withrow v. Larkin, 421 U.S. 35, 47 (1975); United States v. Morgan, 313 U.S. 409, 421 (1941).

187. *Schweiker*, 456 U.S. at 195-96; *see also* Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973).

188. *See* CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATION OF LABOR MANAGEMENT DISPUTES § 2(B)(3) (requiring arbitrators to disclose to the parties any circumstance "which might reasonably raise a question as to the arbitrator's impartiality"); *see also* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 149 (1968) (requirement that arbitrators disclose any bias).

to select the arbitrator again. The relationship between present outcome and subsequent selection is skewed, however, in the nonmember situation. Of the two parties, only the employer will select an arbitrator in the future, and the employer has a pecuniary interest in the outcome of the arbitration.

On the other hand, the state has a strong interest in using arbitration to resolve disputes under collective agreements.[189] The limited structural bias in favor of the employer may not constitute bias under due process, however, given the presumption of the arbitrator's personal impartiality and the possibility of judicial review of the arbitrator's award.[190]

The question is a close one, but it easily could be rendered moot if PERC decides to use its rulemaking power to ensure a fair grievance procedure for nonmembers who are refused representation by their certified bargaining agents.[191] Since bargaining agents inevitably are in tension with nonmembers, it makes little sense to allow the union and the employer to define the procedure that a nonmember must follow to grieve. Once the union denies representation to the nonmember, the union waives its interest in controlling the procedures.[192] At that point, the situation of nonmembers in all bargaining units is essentially the same. PERC should assume its statutory responsibility and use its rulemaking power to assure nonmembers a "fair" arbitration hearing by establishing uniform procedures to be followed by grieving nonmembers.

Giving the individual the choice between selecting an arbitrator with the employer or having PERC appoint an arbitrator could largely eliminate the inherent bias against the nonmember. The option would create an incentive for arbitrators to demonstrate to PERC their fairness in cases involving nonmembers as well as an opportunity for PERC to evaluate arbitrators based on their prior rulings. Individual grievants should have access to this information. PERC might also establish guidelines to assist arbitrators with issues concerning certified bargaining agents' participation in

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189. *See* FLA. STAT. § 447.401 (1983).

190. *See* Schweiker v. McClure, 456 U.S. 188 (1982). The Court found no bias even though the insurance carrier selected the hearing officers charged with determining the validity of the insurance carrier's denial of a claim. There was no further provision for review. The case can be distinguished, however, because the Court found no bias on the part of the carrier selecting the hearing officer and because payments on the claims came from federal funds and not from the carrier's own funds. *Id.* at 195-97. Here, the employer must provide a remedy out of the employer's resources if the arbitrator rules for the grievant.

191. *See* FLA. STAT. § 447.207(1) (1983).

192. *See* Florida PBA v. State, [1982] 8 F.P.E.R. ¶ 13,059 (Jan. 13, 1982).

arbitration hearings of nonmember grievances. Finally, PERC should establish a standarized means of ensuring that the individual grievant pays his share of the arbitrator's fee.[193] Such intervention by PERC would eliminate any appearance of bias in the system of selecting arbitrators and would increase the legitimacy of arbitrators' awards.

An alternative is to argue that there is no constitutional deficiency in section 447.401 because an employee who elects to grieve under a collective agreement waives any due process objection to the contract procedures.[194] Public employees who are included in a bargaining unit normally enjoy limited job security guarantees through civil service or other statutes and regulations. Such statutes provide for some form of individual hearing if the employee is discharged or has his employment status altered significantly.[195] Due process is satisfied if the employee seeks redress through the statutory hearing. The employee's decision to pursue a grievance through contract grievance procedures might be viewed as a waiver of any due process objection to those procedures.

B. *Election of Remedies: A Waiver of Due Process?*

Two major cases deal with the waiver of due process rights by an agreement to follow contract grievance procedures.[196] Those cases consider primarily whether a union, as the representative of bargaining unit employees, waives employees' due process rights when it agrees to contract grievance procedures. Because these cases deal with the question of a collective rather than individual waiver, they are distinguishable from the situation of an individual employee who chooses to follow contract grievance procedures instead of statutory remedies. Nevertheless, they provide a useful starting point to consider the waiver question, since an individual's election to pursue contract grievance procedures is even more knowing and voluntary than is a collective waiver through union action.

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193. The posting of a bond is an obvious option.

194. *See* Fuentes v. Shevin, 407 U.S. 67, 94 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972).

195. *See, e.g.*, FLA. STAT. § 110.305(3) (1983) (governing state civil service employees); *id.* § 231.36(6) (1983) (governing teachers).

196. Antinore v. State, 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976); Di Lorenzo v. Carey, 62 A.D.2d 583, 405 N.Y.S.2d 356, *appeal dismissed*, 45 N.Y.2d 832, 381 N.E.2d 610, 409 N.Y.S.2d 212 (1978), *cert. denied sub nom.* Farrell v. Carey, 440 U.S. 914 (1979).

Both cases arose in New York. Legislation provided that collective agreements that contained grievance procedures for determining whether an employee had been wrongfully discharged would supplant statutory procedures for reviewing dismissal decisions.[197] A certified bargaining agent negotiated an agreement making all disciplinary actions subject to arbitration rather than the statutory system, which provided for a trial-like hearing. A permanent employee working under the collective agreement received notice of charges and a prospective termination of employment. He declined arbitration on the grounds that arbitrators had no duty to provide reasons for their rulings, to follow rules of evidence, or to provide the employee with a transcript of the proceedings unless the employee paid. The employee claimed the contract arbitration procedures violated minimum due process standards. Although the intermediate appellate court expressed doubt whether the arbitration procedures met due process standards, it held that the collective agreement waived the employee's right to due process.[198] The New York Court of Appeals affirmed.[199]

Generally, the waiver of an individual right must be knowing and voluntary.[200] An individual's constitutional right not to be deprived of property without due process of law should not be deemed waived because a majority of the individual's fellow workers prefer contract grievance procedures to statutory hearing procedures. Constitutional rights should not be subject to majority control.[201]

The creation of the expectancy that is the basis of the individual's property right is subject to majority control. The union has discretion to decide in conjunction with the state the content of the collective agreement.[202] The union and the public employer

197. Act of May 15, 1972, ch. 283, § 1, 1972 N.Y. Laws 1432 (codified at N.Y. CIV. SERV. LAW § 76(4) (McKinney 1973)).

198. Antinore v. State, 49 A.D.2d 6, 10, 371 N.Y.S.2d 213, 216 (1975).

199. Antinore v. State, 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976).

200. *See* Fuentes v. Shevin, 407 U.S. 67, 94-95 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-86 (1972).

201. *See* Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 736-37 (1964); *see also* Finkin, *supra* note 7, at 249-53; *cf.* Kewin v. Board of Educ., 65 Mich. App. 472, 237 N.W.2d 514 (1975) (court held impermissible a waiver in a collective agreement of the constitutional right to individual maternity leave as set forth in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974)).

202. *See* Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 346 U.S. 330 (1953); Steele v. Louisville & N.R.R., 323 U.S. 192 (1942). The logic of these private sector cases has been adopted as the basis for the standard of fair representation under PERA. *See* Ritcey v. School Bd., [1982] 8 F.P.E.R. ¶ 13,282 (June 30, 1982).

also have political discretion to decide how employee expectancies will be protected through contract dispute resolution procedures.[203] This means that a majority of employees, acting through the union, may substitute arbitration for statutory hearing procedures.[204] However, the substituted arbitration procedures should still satisfy minimum due process standards.

Statutory guarantees and collective agreements are simply different legal means used by the state to define and protect the job security of public employees. Both create individual expectancies. The former rely on an individually oriented remedial system; the latter establish a representational structure for the protection of the expectancy. To determine whether or not the procedures of each system meet due process, it is necessary to examine the nature of the individual's interest in the benefit, the possibility of an erroneous deprivation of that interest, the relative effectiveness of other safeguards, and the government's interest in the existing remedial system.[205] The needs of the government in creating a functioning system of collective bargaining are different than the problems present in providing guarantees to unorganized employees. The different context of collective bargaining requires a court to take account of other policy considerations that justify a representational scheme, but due process still applies.

When an individual elects to pursue contract grievance procedures rather than a statutory appeal, he does so voluntarily, knowing that the contract requires him to grieve through the union. The issue is not whether the individual has waived due process rights by agreeing to contract grievance procedures; it is whether the election of one of two procedures established by the state implies that the individual waives the right to object on due process grounds to the procedures of the forum he selects.[206]

Such a waiver does not necessarily occur when an individual has a choice between different forums or procedures. For example,

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203. *See* Vaca v. Sipes, 386 U.S. 171 (1967), adopted by PERC in Heath v. School Bd., [1979] 5 F.P.E.R. ¶ 10,074 (Mar. 20, 1979).

204. New York law makes negotiated union contract grievance procedures a replacement for statutory procedures. Act of May 15, 1972, ch. 283, § 1, 1972 N.Y. Laws 1432 (codified at N.Y. CIV. SERV. LAW § 76(4) (McKinney 1973)). In Florida the individual employees preserve the option between contract grievance procedures and statutory procedures. FLA. STAT. § 447.401 (1983).

205. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976).

206. For an excellent analysis of the concept of "waiver," see Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981).

if a plaintiff with a cause of action for employment discrimination chooses either to litigate individually or to proceed as a member of a class action, the individual plaintiff does not give up his due process rights by opting to become a member of the class.[207] He merely agrees to have his substantive rights determined in a particular procedural setting. He does not, however, have the same individual control that he could exercise in an individual action. In a sense, he waives his right to the due process standard that would apply in an individual action, but he has a due process right to procedures that are consistent with the problems of managing group litigation.

In the same sense, an employee may pursue a fair representation claim as an unfair labor practice charge with the NLRB or as a court action. In the former, the procedures defined by Congress are very different from a court action, because of the state's interest in having the General Counsel control the unfair labor practice proceedings. The individual's decision to file a charge with the NLRB does not mean, however, that due process does not apply to NLRB proceedings. Likewise, an employee who elects to grieve under a collective agreement rather than seek a statutory hearing must realize that the grievance procedures reflect the needs of a system of collective bargaining, but the employee does not waive his individual due process rights.

C. *Exclusive Union Control and Due Process: Is the Union an Adequate Representative?*

Constitutional challenges to the doctrines of exclusive and fair representation have been rare.[208] The NLRB and the federal courts generally have avoided finding state action in the certification of exclusive bargaining agents.[209] If certification does not constitute state action, then there is no state action in a collective agreement between a union and a private employer. This changed, however, when Congress made postal workers subject to the NLRB's juris-

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207. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Hansberry v. Lee, 311 U.S. 32 (1940); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973). For an application of the due process standards underlying these decisions to adequacy of representation in a Title VII action, see Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

208. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Winston v. United States Postal Serv., 585 F.2d 198 (7th Cir. 1978).

209. For a discussion of NLRB certification as state action, see *supra* note 19.

diction.[210] In *Winston v. United States Postal Service*, two discharged postal workers challenged, on due process grounds, the union's refusal to arbitrate their grievances. The employees filed suit in federal district court, claiming that their discharges occurred without "an opportunity for a fair hearing, including the right to confront and cross-examine adverse witnesses and to present evidence of their own to rebut the charges against them."[211]

The district court, relying on *Arnett v. Kennedy*,[212] held that the employees were entitled to no more due process than was afforded by the national collective agreement that was the source of their property interest in their jobs.[213] The circuit court affirmed the judgment, but rejected the district court's reasoning. The court of appeals held that the procedures to protect the property interest were subject to constitutional scrutiny, but that the grievance procedures coupled with the union's duty of fair representation satisfied due process.[214] The court pointed to the informal appeals to successively higher levels of management, and to the union's right to obtain information and documents in investigations of employee grievances. The court held that these procedures provided adequate safeguards against the risk of erroneous deprivation of an employee's property interest in his job. The opinion emphasized the vital governmental interests that unions advanced in facilitating the early elimination of frivolous claims. The court concluded that the duty of fair representation action is a sufficient check on arbitrary union decisions to protect individual employees' interests.[215]

The difference between the district and circuit court opinions reflects the problem of characterizing an employee's expectancy under a collective agreement. The union's control over access to grievance procedures can be seen as a condition on the employee's expectancy under the contract defining the scope of the property right.[216] Alternatively, the employee's expectancy that he will not be discharged or disciplined without just cause may be viewed as a substantive right deserving the minimum protections of due process, and the union's control may be analyzed as a part of the pro-

210. Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719, 728 (1970) (codified as amended at 39 U.S.C. §§ 1001-1011, 1201-1209 (1976 & Supp. V 1981)).

211. Winston v. United States Postal Serv., 585 F.2d 198, 201 (7th Cir. 1978).

212. 416 U.S. 134 (1974).

213. Winston v. United States Postal Serv., 432 F. Supp. 1117, 1121 (N.D. Ill. 1977).

214. 585 F.2d at 209-10.

215. *Id.*

216. *See* Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974).

cedure for protecting the employee's interest.[217]

There is support for the latter characterization in the Supreme Court's recent due process opinion in *Logan v. Zimmerman Brush Co.*,[218] but, however the employee's interest is characterized, the central issue is the same. Collective agreements normally guarantee that employees will not be discharged or disciplined without just cause. The employee is entitled to a fair procedure for determining whether or not he has erroneously been deprived of an employment expectancy. The government has an interest in union control over grievances to facilitate the prompt settlement of employee claims, to avoid expenditure of public resources in arbitration of frivolous claims, and to ensure consistency in contract interpretation. The court in *Winston* found that fair representation doctrine struck a constitutionally permissible balance among those interests.[219]

When a union decides not to arbitrate, it makes the threshold decision on the merits of the grievance. If the union is reasonably diligent in its investigation and decides in good faith that the grievance should not be taken to arbitration, then the employee has no right to relief in a subsequent fair representation action.[220] If the union's decision was not arbitrary or made in bad faith, then the court does not reach the question whether the employee was in fact discharged or disciplined without just cause. The employee never receives a formal hearing on the merits of the claim of wrongful deprivation.[221]

One commentator has argued that the union's internal decisionmaking procedures should provide the equivalent of a formal hearing.[222] Another legal scholar has suggested limiting the concept of a property interest arising out of a collective agreement to cases involving discharges or serious threats to individual job security.[223] The scholar concludes that, in such cases, any public employee denied access to arbitration by a union should have a court hearing on the merits of the grievance. The employer might defend on the

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217. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Bishop v. Wood, 426 U.S. 341, 353-54 (1976) (Brennan, J., dissenting); Goldberg v. Kelly, 397 U.S. 254 (1970).

218. 455 U.S. at 428-33.

219. 585 F.2d at 209-10.

220. Vaca v. Sipes, 386 U.S. 171 (1967); Galbreath v. Broward County Classroom Teachers' Ass'n, [1981] 7 F.P.E.R. ¶ 12,288 (June 26, 1981), *aff'd*, 424 So. 2d 837 (Fla. 4th DCA 1982), *aff'd*, 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984).

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

222. *See* Note, *supra* note 17.

223. *See* Finkin, *supra* note 7, at 262-63.

ground that an arbitration hearing would not have altered his decision to discharge or suspend the employee, but the union's refusal to arbitrate would not be a defense. The employee would have a right to damages from the employer, and, to the extent that the union aggravated the deprivation by its decision not to arbitrate, the employer could recover from the union for contribution.[224]

Such solutions obviously would satisfy due process, but they have serious implications for the interests of the state and for the collective concerns of organized employees. If unions had to hold formal hearings in every grievance case, courts would have to use due process doctrine in reviewing the day-to-day decisions of unions administering collective agreements. The other solution, to guarantee a court hearing on the merits of every grievance involving individual job security that a union chose not to arbitrate, would provide an incentive for the union and the employer to arbitrate all discharge and discipline cases. Otherwise, they would face the possibility of lengthy and costly litigation. The cost of litigation would be a deterrent to employees with weak grievances, but because fair representation would not be a defense, early disposition of actions through summary judgment for the employer or union would be rare. Cases might be brought simply for their settlement value.

The proposed solutions assume that an employee is entitled to an individual hearing. The central concern of due process doctrine is providing access to fair procedures to protect the individual from wrongful deprivation of his property rights.[225] As the court pointed out in *Winston*, the preliminary grievance steps under a contract provide an opportunity for the union to investigate the grievance fully, to present to the employer the employee's view of what occurred, and to hear the employer's response.[226] As long as there is no conflict of interests between the union and the employee that would raise questions about the union's evaluation of the employee's grievance, the likelihood of a wrongful deprivation is small. The state has a strong policy interest in maintaining a representational system to protect employee rights. The union's judgment should be respected unless there is some basis in the record for questioning the impartiality of the union.[227]

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224. *Id.* at 262.

225. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Mathews v. Eldridge, 424 U.S. 319 (1976); Goss v. Lopez, 419 U.S. 565 (1975).

226. 585 F.2d at 209-10.

227. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32 (1940). The Court in *Hansberry* was con-

From a due process perspective, a biased adjudicator or an inadequate representative affects only the fairness of the process for making a judgment. Due process does not provide a basis for challenging the merits of a procedurally fair decision. Fair representation doctrine also deals primarily with procedural fairness, but it establishes some outer limits on a union's substantive decision since it is based on a union's statutory obligation.[228] Such constraints on the substance of a union's discretion to make choices among conflicting interests within a bargaining unit can only come from the statute and from labor policies underlying the system of collective bargaining, not from due process. Fair representation doctrine integrates substantive labor policy with concern for procedural fairness. It provides a developed framework for balancing the interests of the individual employee and the collective. The sensible approach, then, is to ask whether current fair representation doctrine is sufficiently sensitive to the constitutional values underlying due process.

The bad faith standard of fair representation reflects the same concern as due process does about the possible bias of adjudicators. The problem lies in determining what types of conflicts between the union's and the individual's interests should lead a court to question the impartiality of the union's decision not to arbitrate. In difficult cases, the union's decision involves choices among competing employee interests. Unions must be free to make those choices without fear of litigation, or else they will be unable to ful-

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cerned with the due process underpinnings of the adequacy of representation doctrine in class actions, but the concerns are similar. A judgment does not bind class members if there is an inherent conflict of interests between the class representative and the class member. If the union is an inadequate representative for the interests of an individual employee because of a conflict of interests with the employee, the results of the grievance procedures should not bind the individual. *See* Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *reh'g denied*, 8 Wis. 2d 264, 100 N.W.2d 317 (1960), *cert. denied sub nom.* Local 1377, Int'l Ass'n of Machinists v. Hein-Werner Corp., 362 U.S. 962 (1960) (where two groups of employees had opposing interests and union espoused cause of one group in arbitration, other group had no fair representation); Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), *aff'd in part, rev'd in part*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975) (union attorney representing employee in arbitration failing to vigorously argue that dismissal violated first amendment rights of employee who had published an article critical of both employer and union held not fair representation).

228. The obligation not to make decisions arbitrarily or in bad faith constitutes an outer boundary constraint on the substance of the decision. Courts, however, often blur the distinction between the issue whether or not a union's decision was "arbitrary" because it was procedurally defective and the issue whether or not the union had any substantive justification to favor one group over another. *See, e.g.*, Gregg v. Teamsters Local 150, 699 F.2d 1015 (9th Cir. 1983); Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980).

fill their role as exclusive bargaining agent. Inherent in all grievances is a tension between the individual's interest in having his grievance heard on the merits by an arbitrator and the union's reluctance to use collective funds to finance arbitration. Another kind of tension exists when the grievant is not a union member and does not contribute to the costs of bargaining and grieving. Both situations are distinguishable from a third situation in which the union disagrees with the merits of an employee's grievance because of its implications for other similarly situated employees or for the employer. In the third situation, the union makes a judgment that the position advocated by the individual employee may force an employer to behave in a way adverse to the long-term interests of the collective. Each situation merits separate consideration to determine whether fair representation doctrine should be altered to be more sensitive to constitutional values.[229]

1. LIKELIHOOD OF SUCCESS ON THE MERITS VERSUS COSTS OF GRIEVING

A union always confronts the question whether an employee's grievance justifies the expenditure of common funds for arbitration. Because the grievance is costless to the individual employee, except for potential problems with a supervisor who may resent the grievant, the union is the only party in a position to weigh the costs of grieving against the probability of a favorable ruling. In *Vaca v. Sipes*,[230] the Supreme Court underscored the importance of the union's role in screening frivolous grievances and settling others short of arbitration. PERC has reiterated the same policies, pointing out how the early elimination of frivolous grievances saves money for the public employer and, in turn, the taxpayer.[231]

Even if a grievance has merit, courts have ruled that the union has discretion to refuse to arbitrate if it feels that the likelihood of success is outweighed by the costs of grieving. In *Carth v. Faraday, Inc.*,[232] a private sector case, a local union determined that a grievance was meritorious. The international union nevertheless advised against grieving, because an arbitrator would probably rule against

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229. For a more systematic treatment of different conflict situations between a union and an employee, and their implications for the fair representation doctrine, see Summers, *supra* note 7.

230. 386 U.S. 171, 191-92 (1967).

231. *In re* School Bd. of Leon County, [1981] 7 F.P.E.R. ¶ 12,286, at 580 (June 26, 1981).

232. 401 F. Supp. 678 (E.D. Mich. 1975).

the employee, and the local was short of funds. The federal district court ruled that, given the condition of its treasury, the local's final decision not to grieve "was based on rational and objective grounds, and therefore it cannot be deemed arbitrary."[233] The court noted that the union had discretion to put the interests of the whole ahead of the interests of a single member.[234]

If saving costs was the only issue in such cases, a balance could be struck between group and individual interests. As Professor Summers has suggested, the exclusive bargaining agent might withdraw from a grievance, and the individual employee could proceed to arbitration using his own funds to obtain representation and pay his share of the costs of arbitration.[235] The employer could protect himself by requiring the employee to post a bond to pay the employer's cost of arbitrating should the employee lose. If the employee wins the arbitration, the union would have to reimburse the employee for his attorneys' fees and arbitration costs.[236]

This solution would place a heavy financial burden on any individual employee who chose to proceed after the union denied his grievance as nonmeritorious. It would, however, be quicker and less costly than a court action based on the union's breach of its duty of fair representation. The financial burden would deter individuals from proceeding unless they were convinced of the merit of their grievances.

Objections to employees grieving individually were discussed earlier, in the context of the interpretation of PERA section 447.301(4).[237] The issue is one of statutory interpretation, but its resolution has obvious implications for the doctrine of fair representation. The most common objection to allowing an individual to grieve is that it takes the grievance process out of the bargaining agent's control. The union and the employer cannot anticipate every situation that will arise under a contract. Contract language is at times left ambiguous to allow the parties to work out their problems through negotiation of specific grievances. All bargaining unit members have an interest in this process. To allow an individual employee to upset a settlement that the employee regards as unfair could undermine the ongoing process of refining the agreement's meaning through grievance negotiation. It also could lead to

233. *Id.* at 681.
234. *Id.*
235. Summers, *supra* note 1, at 399-404.
236. *Id.* at 403.
237. *See supra* text accompanying notes 117-32.

inconsistency in the outcomes of similar grievances, undermine the union's status as exclusive representative, and foster internal divisions within the union.

On the other hand, most grievances that are critical to the interests of individual employees involve factual disputes over the justification for discipline or discharge. The collective's interest in the determination of such factual conflicts is usually minimal. To the extent that general issues of contract interpretation are at stake, the union should be allowed to participate in all adjustment sessions and in the arbitration hearing to advocate the collective's interests.[238]

Individual access to arbitration could make it easier for unions to withdraw from questionable grievances, but it is difficult to predict whether or not this would occur. If the union's withdrawal would not give the employee a fair representation action against the union, then the incentive for the union to represent individual employees would be even weaker. That result would be contrary to the policy of improving the protection accorded individual employee expectancies by the representational system.

Most grievances are settled short of arbitration. Allowing individuals to grieve focuses on arbitration as the central element of grievance proceedings. In fact, arbitration is the exception rather than the rule. Union control over the decision whether or not to use collective funds to arbitrate exerts pressure on the union to identify common grounds for settlement. There is also pressure on the employee to accept the settlement unless he believes he could win a fair representation action against the union. Allowing the union to shift this pressure to the individual employee would have a negative effect on the initial negotiations between the employer and the union. The employer would not know whether the union or the employee would be making the final decision about settlement.

The other fundamental problem with allowing the individual to grieve is that it provides an opportunity for a rival union to use grievance procedures to undermine the position of the bargaining representative. If the individual is free to take a grievance to arbitration, a rival union may volunteer to assist the employee at no cost and without regard to the likelihood of success, in order to attract the attention of all employees. The rival could boast of its willingness to press grievances, in contrast to the certified agent's

238. *See* Summers, *supra* note 1, at 400 (suggesting a form of three-cornered arbitration in such circumstances).

refusal to grieve, and thereby undermine the status of the bargaining agent or force the certified union to overgrieve in order to keep out the rival. Overgrieving is the type of problem that the membership should police through internal union procedures, but the collective's interest differs from the union's interest and it may not be easy for the members to control union officials.

The public employer has the same interest as the bargaining agent in minimizing the threat of a rival union. If the certified union is forced to become more aggressive in handling grievances it will disrupt the working relationship between the certified union and the employer. The bargaining agent's ability to adjust conflicts among employees by internal union procedures and without involving the employer may be weakened. The employer may be caught in the middle between a rival union making demands on behalf of a dissenting minority of employees and the certified bargaining agent representing a majority of employees.

From the viewpoint of the collective, competition among unions may increase the certified agent's sensitivity to the needs of employees, but it also undermines the collective's solidarity. Since public employees do not have the right to strike, the importance of solidarity is questionable. The possibility of an illegal strike, however, is always an unspoken threat in bargaining. In addition, cohesiveness is important to the collective's ability to win benefits through lobbying and electing public officials who favor union interests.

This assessment of the conflicting interests of unions, employers, and employees produces no clear solution. It suggests that union control of grievance procedures is an important factor in the early settlement of grievances, in the union's capacity to adjust conflicts among employees internally, in the employer's costs of grieving, and in stable labor relations generally. The tension between the union and the employee over the costs of grieving is not likely to result in a biased decision. On the contrary, it creates pressures that are critical to the smooth operation of the grievance system. It allows a party who is more objective than the individual employee to make a considered choice between the costs of arbitration and the likelihood of success.

2. DENYING A NONMEMBER'S GRIEVANCE ON THE MERITS

Where the employee whose grievance is denied is not a member of the certified union, the fair representation question is more complicated. The basic issue becomes whether the possibility of

union bias against a nonmember so increases the probability of an erroneous denial of a grievance as to justify requiring the exclusive bargaining agent to give a written explanation of its decision. Companion PERC decisions, *Galbreath v. School Board*[239] and *Galbreath v. Broward County Classroom Teachers' Association* (CTA),[240] illustrate the problem.

In October 1978, Galbreath, a public school teacher, filed a request with his school principal for overtime compensation in the amount of $4,000.[241] The principal replied by memorandum, acknowledging that Galbreath had worked overtime hours, but rejecting the request on the ground that the school board's policy covering overtime pay for teachers was unclear. He suggested Galbreath contact a higher authority to have the policy clarified.[242]

Galbreath wrote to the school superintendent, who instructed the principal to pay Galbreath for authorized overtime.[243] The principal responded that the overtime Galbreath was claiming had not been authorized in advance, but acknowledged that Galbreath might have been negligent had he not taken the initiative to work overtime to protect school property from damage.[244] The superintendent replied that unauthorized overtime could not be compensated.[245]

Galbreath then filed a grievance under the collective agreement between the CTA and the school board, and he consulted an independent attorney. The board denied his grievance, and he advanced to the next stage of the grievance process.[246] The board notified him that he could represent himself or the bargaining agent could represent him; he could not bring in outside counsel to advise him during a second-stage conference.[247] Galbreath objected to the denial of counsel, but he allowed the CTA to represent him.[248]

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239. [1981] 7 F.P.E.R. ¶ 12,287 (June 26, 1981), *aff'd*, 424 So. 2d 837 (Fla. 4th DCA 1982), *aff'd*, 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984).

240. *Id.* at ¶ 12,288, *aff'd*, 424 So. 2d 837 (Fla. 4th DCA 1982), *aff'd*, 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984).

241. Answer Brief of Appellee Public Employees Relations Commission at 3 (citing record at 98), Galbreath v. School Bd., 424 So.2d 837 (Fla. 4th DCA 1982).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. Galbreath v. School Bd., [1981] 7 F.P.E.R. at 582.

247. *Id.*

248. Galbreath v. Broward County Classroom Teachers' Ass'n, No. 81-6403, at 2 (S.D. Fla. Apr. 20, 1982) (order granting defendants' motion to abstain and dismiss this cause without prejudice).

The board again denied his grievance.

Galbreath, who had resigned from the union and quit paying his dues approximately a year before he initiated the grievance, then asked the CTA to submit his grievance to arbitration in accordance with procedures under the collective agreement.[249] The union responded as follows:

> Having reviewed your case referred to above, CTA has decided not to pursue the matter to arbitration since in our judgment it lacks merit. In an effort to preserve your rights, we have requested and received an extension of the timeliness to file for arbitration to October 31, 1980. A letter from Mr. Seigle will confirm. I would recommend that you discuss this letter with your attorney to determine if you and he would want to pursue the matter on your own.[250]

Galbreath then asked the school board to arbitrate and advised the board that his own counsel would represent him.[251] The school board denied the arbitration request, stating that under the collective agreement, only the CTA could submit a case to arbitration.[252]

Galbreath filed unfair labor practice charges against the CTA for breach of the union's statutory duty of fair representation. He also filed charges against the Broward School Board under PERA section 447.501(f) for refusing to discuss his grievance in good faith and for denying him access to grievance arbitration procedures.[253] PERC summarily dismissed both cases. PERC dismissed the first case on the ground that the allegation against the union was insufficient to establish a prima facie violation of the duty of fair representation.[254] Galbreath had submitted no evidence to support the contention that his grievance was denied because he was a nonmember.[255] Citing *Vaca v. Sipes*, PERC held that, as a nonmember, he had the burden of demonstrating that the union acted in an arbitrary or discriminatory manner or in bad faith. Conclusory allegations were insufficient to support the charge.[256]

PERC dismissed the charge against the school board in reli-

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249. Galbreath v. School Bd., [1981] 7 F.P.E.R. at 582.

250. *Id.*

251. *See supra* note 248, at 2.

252. *Id.*

253. Galbreath v. Broward County Classroom Teachers' Ass'n, [1981] 7 F.P.E.R. ¶ 12,288 (June 26, 1981); Galbreath v. School Bd., [1981] 7 F.P.E.R. ¶ 12,287 (June 26, 1981).

254. Galbreath v. Broward County Classroom Teachers' Ass'n, [1981] 7 F.P.E.R. at 584.

255. *Id.* at 583.

256. *Id.*

ance on *In re School Board of Leon County*.[257] In that case, PERC held that a public employer had no obligation to arbitrate a grievance where the collective agreement gave the certified agent exclusive control over access to arbitration and the agent had denied the employee's request to arbitrate because the grievance lacked merit.[258]

On appeal, the Florida Fourth District Court of Appeal affirmed both dismissals, but the court addressed only the issue of statutory interpretation raised by the charge against the school board.[259] The district court of appeal, without discussing the fair representation issues raised in the charge against the union, certified the issue of an individual employee's statutory right to grieve to the Florida Supreme Court. The district court of appeal affirmed without opinion PERC's holding that an allegation that a union had denied a grievance as unmeritorious because of the grievant's nonmember status was insufficient to avoid summary dismissal of the fair representation charge.[260]

In cases such as *Galbreath*, it often is difficult for the employee to provide additional factual support for an allegation of union bias. The issue is essentially one of motive, and the decisionmaker has mixed incentives. The union wants to demonstrate that it will process every grievance competently and fairly. At the same time, employees' membership dues are necessary to the economic survival of a union, and employee concern over the dedica-

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257. [1981] 7 F.P.E.R. ¶ 12,286 (June 26, 1981); Galbreath v. School Bd., [1981] 7 F.P.E.R. at 582.

258. *In re* School Bd. of Leon County, [1981] 7 F.P.E.R. at 579.

259. Galbreath v. School Bd. 424 So. 2d 837 (Fla. 4th DCA 1982).

260. The Florida Supreme Court affirmed, but the question certified to the Supreme Court only related to the public employer's obligation to arbitrate a dispute when the union declines to process a grievance on the ground that it lacks merit. Galbreath v. School Bd., 9 FLA. L. WEEKLY 33 (Sup. Ct. Jan. 26, 1984). The certified question was only concerned with the charges filed against the School Board and not with the issue of whether PERC correctly dismissed the duty of fair representation charge against the union. By limiting its opinion to the certified issue, the court left open the duty of fair representation issues that are the central concern of this article.

Appellant did raise both equal protection and due process issues as a basis for challenging the distinction in section 447.401 between the union's duties to members and nonmembers, but the court dismissed this argument in one sentence as being "without merit." *Id.* at 34. In a motion for rehearing, appellant noted that "[t]he Court did show substantial concern during oral argument about the Union having the final say on the merits of Galbreath's grievance and as to whether he would be allowed access to arbitration. However, no comment was made on that issue in the final opinion." Petitioner's Motion for Rehearing and Reconsideration at 4, *Galbreath*. Given the nature of the certified question and the fact that neither PERC nor the district court directly confronts these issues in their opinions, it is not surprising that the Supreme Court decided not to deal with the issues in its opinion.

tion with which nonmember grievances are processed may encourage membership.

The United States Supreme Court has dealt with a similar problem of determining hidden motive in Title VII cases through the procedural mechanism of shifting the burden of production of evidence to the defendant once the plaintiff has made out a prima facie case of discrimination.[261] To shift the burden to the defendant, plaintiff must show that he is a member of a protected minority, that he applied for a position for which he was qualified, and that the employer rejected his application and continued to consider other applicants for the same position. The burden then shifts to the employer to articulate legitimate and nondiscriminatory reasons for rejecting the employee. If the employer meets this production burden, the employee must then show that the reasons advanced by the employer were simply a pretext for a discriminatory discharge. The employee always has the burden of persuasion on the ultimate issue of motive, and on such subsidiary issues as whether the employer's reasons were a pretext. Only the burden of producing evidence shifts from plaintiff to defendant.[262]

The Supreme Court has taken a somewhat different approach in NLRB cases involving the discharge of employees for engaging in protected concerted activity.[263] The General Counsel must demonstrate by a preponderance of the evidence that the protected activity was a motivating factor in the discharge. Even so, the employer may still avoid the unfair labor practice charge by carrying the burden of persuasion on the affirmative defense that the discharge rested on the employee's unprotected as well as protected conduct, and that the employee would have lost his job anyway.[264] This approach is used in mixed-motive cases, whereas the Title VII approach of shifting only the production burden is intended to determine whether the employer based his decision on legal or illegal hidden motives.[265]

The situation of a non-union member in a fair representation case is closer to the Title VII than to the mixed-motive situation. The plaintiff may make out a prima facie case by showing that he filed a grievance, that the grievance raised factual issues or ques-

261. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

262. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

263. *See* NLRB v. Transportation Management Corp., 103 S. Ct. 2469 (1983).

264. *Id.* at 2473-74.

265. *Id.* at 2473 n.5.

tions of contract interpretation about whether the employer violated the terms of the collective agreement, and that the union refused to process the grievance as unmeritorious under circumstances that suggested an improper motive. The last requirement would be met whenever the employee can point to conflict or tension between his individual interests and the institutional interests of the union. Alleging nonmembership should satisfy this burden, because the union's interest in using the processing of grievances to encourage membership suggests an inherent conflict of interest. In the case of a member, the burden might be met by showing that denial of the grievance enhanced the union's position as exclusive representative because other employees within the unit benefited from the individual employee's grievance being denied. Since the union lawfully may act in good faith to benefit some employees at the expense of other employees' individual interests, the latter situation raises an issue not of hidden motive but of the arbitrariness of the union's decision.[266] In both cases of hidden motive and of arbitrariness, the production burden should shift to the union to demonstrate that it carefully investigated the grievance and that it had substantial reasons for refusing to take the grievance to arbitration.[267]

It is important to distinguish between judicial review of the union's grievance investigation procedures and review of the substantive reasons for the decision. The standard for an adequate investigation should reflect both the nature of the issues raised by

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266. The distinction in the cases is not very clear between whether a union's decision to favor one group over another within a bargaining unit is "arbitrary" because it is procedurally defective in the sense of the union's not investigating all interests, or because the union acted for reasons not included within its statutory obligations. *Compare* Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980), *with* Branch 6000, National Ass'n of Letter Carriers v. NLRB, 595 F.2d 808 (D.C. Cir. 1979); Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976), *and* Truck Drivers Local Union 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967).

267. This recommendation does mean that nonmembers are treated differently from members in duty of fair representation proceedings. The different treatment, however, is only at the procedural level. The burden is placed on the union to provide a justification for its decision to deny the grievance. The substantive standard, in terms of whether the justification is rationally related to the union's statutory obligation, should be the same for both members and nonmembers. There is no reason to question the "adequacy of representation" by the union and to shift the production burden unless the employee can demonstrate a reason to doubt the union's impartiality. As a practical matter, however, this recommendation should encourage unions to provide all employees with a justification beyond simply stating that a grievance lacks merit. A written justification will be necessary to discourage fair representation actions by nonmembers, and the union will want to treat all bargaining unit employees similarly. Articulating the justification will, in turn, be a constraint on arbitrary decisions.

the grievance and the reality of the union's limited resources. The procedures a union follows should embody basic notions of fairness to the employee and should provide sufficient information to allow the union to make an informed decision.[268]

The extent to which a court or PERC should second-guess the union's substantive decision not to grieve is a more difficult issue. Due process concerns relate primarily to whether procedures for making the decision were fair and unbiased. Similarly, fair representation doctrine only asks whether a decision was arbitrary or in bad faith. The suggested approach here goes further. When there are reasons beyond the tension over arbitration costs for questioning the union's impartiality, the union should be required to demonstrate that its reasons for not arbitrating are rationally related to the merits of the grievance and are consistent with the union's statutory responsibility to strive for better working conditions and wages for all employees.[269]

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268. [I]f a union representative makes no effort to communicate with the persons directly affected by its actions and takes action without investigation or adequate notice and opportunity to be heard, these acts and omissions may constitute a breach of the duty of fair representation.

NLRB v. American Postal Workers Union, 618 F.2d 1249, 1255 (1980) (citing Minnis v. International Union, 531 F.2d 850, 853-54 (8th Cir. 1975)); Retana v. Apartment, Motel, Hotel and Elevator Operators Union Local No. 14, 453 F.2d 1018, 1024 (9th Cir. 1972), *see also* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 163 (1957); Comment, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1131 (1973).

269. If there is no basis for questioning a union's impartiality, the burden of producing evidence on this issue remains on the employee. The union is presumed to be an adequate representative unless the employee can produce some evidence to challenge this presumption. One obvious criticism of the rational relationship standard is the lack of a substantive theory of justice by which to measure a union's decision to favor one group of employees over another. Setting a standard to identify when decisionmaking is procedurally unfair is less troubling, because a court can rely on the statutory objectives of keeping channels of communication open and reinforcing the democratic structure of unions. Courts are much less comfortable in holding that the substantive outcome of a procedurally fair process is unfair to a minority of the union or an individual. Such a conclusion is in tension with the underlying principle of majority rule in collective bargaining. It suggests that judges should look to their own basic values about distributive justice and apply these values to the tradeoffs involved in specific union decisions. This leaves no unifying principles, beyond the value structure of individual judges, to make decisions predictable. *See* Freed, Polsby & Spitzer, *supra* note 7.

Professor Ely has responded to a similar dilemma in constitutional law between strict "clause-bound "interpretivism" on the one hand and the search for fundamental values on the other by arguing for a "broad form of interpretivism" deriving general themes from the constitutional document in its entirety. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 12 (1980). In a similar sense, courts can look to the underlying structure of labor legislation in terms of the model of collective bargaining that the legislation encourages and fosters. The model is based on values that are both substantive and procedural in character. *See, e.g.*, Feller, *supra* note 1; Cox, *supra* note 1; Finkin, *supra* note 7; Stone,

If the union is unable to articulate reasons that satisfy these two requirements, this should indicate either that its motives are suspect or that its decision was arbitrary in the sense that it did not reflect the merits of the employee's complaint or the union's statutory responsibility. If the union does provide substantial reasons, then the production burden should shift back to the employee to provide specific evidence demonstrating that the union's reasons are a pretext. For example, the employee might show that when union members have had similar grievances the union processed them to arbitration.[270]

If PERC had taken this approach in *Galbreath*, the commission might have ruled the same way, but the record would have been more complete. Galbreath claimed that the employer violated the collective agreement by refusing to compensate him for overtime necessitated by special circumstances.[271] The school board superintendent refused overtime compensation because the work was not authorized in advance. The pertinent clause of the contract provided for compensation for any "excess assignment at the employee's hourly rate."[272] The issue was one of past practice and contract interpretation in the sense of whether this clause only meant prior authorized assignments or also overtime work growing out of an employee's normal assignment when the overtime was necessary to protect school property.[273] Galbreath claimed (a) that his grievance raised a question of past practice and contract interpretation, (b) that it was denied as unnmeritorious, and (c) that his status as a nonmember prompted the denial. Had the suggested approach been used, Galbreath could have shifted the burden to the union to produce evidence of a thorough investigation of the grievance and of substantive reasons for denying it. Instead, PERC dismissed the grievance in summary proceedings because Galbreath had not alleged specific facts to support a finding of bad faith by the union.[274]

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supra note 1. The underlying structure may be contradictory and therefore not subject to reduction to a unifying set of principles, but this result is simply a reflection of reality. Labor policy is based on values in tension, but the lack of coherence does not mean that courts should avoid the task of mediating these tensions in the context of specific cases.

270. *See, e.g.*, Mosley v. General Dynamics Corp., 112 L.R.R.M. (BNA) 3388 (D. Mass. Feb. 3, 1983).

271. Answer Brief of Appellee at 3-4, Galbreath v. School Bd., 424 So. 2d 837 (Fla. 4th DCA 1982).

272. Answer Brief of Appellee at 5 n.4 (quoting the Collective Agreement, Art. VI, Sec. F).

273. *Id.* at 4.

274. Galbreath v. Broward County Classroom Teachers' Ass'n, [1981] 7 F.P.E.R. ¶

PERC did not require the union to provide any justification for its decision that the grievance lacked merit. If PERC required unions to provide a reasoned explanation in such cases, bargaining agents would be encouraged to provide employees, particularly nonmember employees, with written statements of the reasons for finding grievances unmeritorious. This would constrain the union's discretion, but in a positive way. If a union is unable to articulate its justification for not proceeding, it should take the grievance to arbitration.

The same basic approach may be used where an employer and a bargaining agent settle a grievance, and the employee objects to the settlement. If there is any conflict of interest between the union and the employee suggesting possible bias, the union should be required to demonstrate to PERC that the settlement was reasonable under the circumstances.[275] In reviewing the justification, PERC must keep in mind the policy of encouraging unions and employers to settle grievances early, during the initial steps of grievance procedures. The settlement should be reasonably related to the merits of the grievance and the union's statutory responsibilities.

One objection to shifting the production burden where an employee can show tension between the interests of the employee and those of the union is that it will be more difficult for the union to obtain summary judgment in unfounded fair representation actions by nonmembers.[276] A greater number of weak cases may reach juries if Florida courts accept jurisdiction over public sector fair representation cases. A union may choose to arbitrate an unmeritorious grievance rather than run the risk of an expensive and time-consuming lawsuit. Arbitration may be overused for griev-

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12,288 (June 26, 1981).

275. *See, e.g.*, Gregg v. Teamsters Local 150, 699 F.2d 1015 (9th Cir. 1983) (a union must have substantial reasons to sacrifice one group of employee grievances in order to improve the likelihood of succeeding with the grievances of other employees).

276. Summary judgment is appropriate where there is no genuine issue of material fact. FLA. R. CIV. P. 1.510(c). Cases that involve motivate present particular problems because they turn on the credibility of the witnesses presenting affidavits. *See* Conrad v. Delta Air Lines, Inc., 494 F.2d 914 (7th Cir. 1974). PERC has held, however, that the mere allegation of bad faith motive is insufficient to avoid a summary dismissal, which is analogous to a summary judgment in court. Galbreath v. Broward County Classroom Teachers' Ass'n, [1981] 7 F.P.E.R. ¶ 12,288 (June 26, 1981). Such proof of motive is always difficult to obtain, because the defendant controls all evidence regarding the decision not to arbitrate. Therefore, more cases are likely to end early because of the charging party's inability to obtain evidence on motive than would be the case if the production burden shifted and the court examined the union's justification.

ances that should be settled.

There are two ways to minimize these difficulties. First, unions might adjust their grievance investigation procedures to avoid any claims based on lack of procedural fairness. Also, employees whose grievances are denied as unmeritorious might be provided with an explanation of the union's decision. The explanation may keep employees from feeling that the union acted arbitrarily or without giving full consideration to an employee's situation. A written justification would also make it easier for the union to meet its burden in summary proceedings and to obtain an early dismissal of any fair representation charge.

Second, Florida courts might apply the doctrine of primary jurisdiction and rule that public employees initially must file fair representation claims with PERC as unfair labor practice cases.[277] PERC could dismiss in summary proceedings those cases in which the union provides a reasonable justification for its decision not to arbitrate. If the union acted unfairly to the employee or does not provide substantial reasons for its refusal to arbitrate, then PERC should order an arbitration in which the grievant would participate in the selection of the arbitrator and would have the option of having independent counsel represent him. For the purpose of allocating to the union that portion of any award caused by the union's initial decision not to arbitrate, PERC could retain jurisdiction.[278]

Forcing employees to bring their cases to PERC rather than to the courts reduces the harassment value of fair representation actions by employees hoping for settlement offers. It also avoids the problem of juries that do not understand the need for union control over individual grievances or that have a tendency to award excessive damages because of sympathy for an individual

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277. *See* Odham v. Foremost Dairies, Inc., 128 So. 2d 586 (Fla. 1961); State *ex rel.* Dep't of Gen. Servs. v. Willis, 344 So. 2d 580 (Fla. 1st DCA 1977); PERC v. Fraternal Order of Police, Local Lodge No. 38, 327 So. 2d 43 (Fla. 2d DCA 1976); *cf.* PERC v. District School Bd., 374 So. 2d 1005 (Fla. 2d DCA 1979); Maxwell v. School Bd., 330 So. 2d 177 (Fla. 4th DCA 1976) (PERA only preempts state court jurisdiction over conflicts between employers and employees if the activity in question is arguably an unfair labor practice in violation of PERA).

278. If Florida courts decide to exercise dual jurisdiction in fair representation actions and to follow federal court precedent, which allows a judgment for damages against a union based on the extent to which the union's breach of its duty of fair representation increased the harm suffered by the individual employee, then the financial risks to the union in a fair representation action will increase substantially. *See* Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983). In a case of discharge, the union would run a substantial financial risk in declining to grieve for a nonmember on the ground that the grievance lacked merit if there was any chance a jury would rule to the contrary.

employee.[279]

Arguments in support of concurrent jurisdiction by courts and PERC in fair representation actions normally are based on the way the doctrine has developed in the private sector. The explanation for this concurrent jurisdiction is primarily historical rather than substantive. It makes little sense for Florida courts to follow suit simply because federal courts initially implied a cause of action from the NLRA.[280]

There is still the possibility that a rival union may encourage its members to file fair representation actions against the certified bargaining agent that declines nonmembers' grievances as unmeritorious. The rival union could do this simply to gain support among bargaining unit employees and to disrupt relations between the certified union and the employees. A union faced with this situation would be cautious in denying a nonmember's grievance anyway. The standard suggested here would encourage such caution as well as require the bargaining agent to be prepared to demonstrate to PERC its reasons for denying a nonmember's grievance.

3. GRIEVING FOR THE NONMEMBER AND INDIVIDUAL REPRESENTATION

Bargaining agents will normally opt to grieve for nonmembers and either settle the grievance or take it to arbitration. The agent's incentive to grieve for the nonmember increases if a rival union is challenging the certified union. From the viewpoint of the nonmember, however, the problem of bias persists, particularly if the employee is associated with the rival union. The certified union may be extra careful to avoid creating any basis for a fair represen-

279. *See* Vaca v. Sipes, 386 U.S. 171, 198-203 (1967) (Fortas, J., concurring).

280. Under the NLRA, an employee has the option of filing a fair representation action in court for equitable relief, damages, or both, or of filing an unfair labor practice charge with the NLRB. *See* Vaca v. Sipes, 386 U.S. 171 (1967). As yet, Florida courts have not ruled on the issue whether they will exercise concurrent jurisdiction with PERC over an action for breach of the duty of fair representation under PERA. The Second District Court of Appeal, citing the federal court decisions as precedent, has ruled that Florida courts have concurrent jurisdiction in an action to enforce an agreement to arbitrate under a collective agreement. PERC v. District School Bd., 374 So. 2d 1005 (Fla. 2d DCA 1979). However, a contract enforcement action is distinguishable from a breach of fair representation action. The historical development of the fair representation doctrine, rather than compelling arguments against finding exclusive jurisdiction in the NLRB, justifies the dual jurisdiction of the NLRB and federal courts. *See* Vaca v. Sipes, 386 U.S. 171, 198-203 (1967) (Fortas, J., concurring). Florida could avoid many of the problems inherent in the dual jurisdiction of the courts and the threat of damage remedies against unions by applying the doctrine of primary and exclusive jurisdiction to all unfair labor practices under PERA, including breaches of the duty of fair representation. *See* Bodensock v. AFSCME, Local 587, 81 L.R.R.M. (BNA) 2639 (Wis. Cir. Ct. Oct. 18, 1972).

tation charge. Nevertheless, the employee will naturally suspect the union of doing just enough to avoid any evidence of bad faith while in fact giving union members higher quality representation.

These inherent problems do not mean that a nonmember has any basis for establishing a prima facie fair representation charge against a union once the grievance goes to arbitration. Labor policy strongly favors the finality of arbitration, and unions should be encouraged to arbitrate the grievances of nonmembers without fear of subsequent litigation.[281] Once an arbitrator has decided the employee's grievance on the merits, there is no reason to question the result unless the employee can produce evidence to prove affirmatively that the union failed to represent him adequately.[282]

A sub-issue is whether the individual grievant should be allowed to have his own counsel present to observe or participate in the arbitration.[283] Unless there is a conflict of interests between the grievant and the union that would raise a serious question whether the union will adequately represent the employee, participation by outside counsel is not justified. An analogy may be drawn to the requirement under federal rule 23(a)(4) that a class action be certified only if the named party is an adequate representative of the unnamed parties.[284] If there is tension between the interests of the named representatives and the unnamed class members, final judgment will not bind the latter unless they were given notice and an opportunity to participate in the litigation as a subclass.[285] Courts are sensitive to the unfairness inherent in determining any individual's rights in a proceeding in which he has had no opportunity to be heard or to be adequately represented.[286]

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281. *See* Vaca v. Sipes, 386 U.S. 171 (1967); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); *cf.* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) (If a union does not fairly represent employee grievants because of personal hostility to the employees, an arbitrator's award will not be final and binding as to the grievant's contractual rights.).

282. *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

283. *See* Schatzki, *supra* note 65, at 908. Most courts that have confronted this issue have ruled against an individual employee's request to have his own counsel participate in grievance proceedings when the union is acting as the grievant's representative. *See* Malone v. United States Postal Serv., 526 F.2d 1099 (6th Cir. 1975); Laney v. Ford Motor Co., 95 L.R.R.M. (BNA) 2002 (D. Minn. Mar. 29, 1977); Russell v. Patterson, 55 A.D.2d 619, 389 N.Y.S.2d 411 (1976).

284. FED. R. CIV. P. 23(a)(4).

285. *See* Hansberry v. Lee, 311 U.S. 32 (1940); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

286. *See* Hansberry v. Lee, 311 U.S. 32 (1940); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973). Rule 23 of the Federal Rules of Civil Procedure was designed with sensitivity to the due process requirements to which the rule is subject. *See* FED. R. CIV. P. 23 advisory

In the context of labor policy, courts have tended to allow unions substantial discretion to bind all employees in a bargaining unit to the results of arbitration or litigation, irrespective of conflicts of interest. For example, in *Acuff v. United Papermakers*[287] an employer discharged sixty-three employees because of an unauthorized work stoppage. The union forced arbitration by filing suit under section 301(a) of the Labor-Management Relations Act. The arbitrator ordered reinstatement of all but sixteen of the grievants. The employees whose grievances were denied attempted to intervene in the section 301 suit under rule 24 of the Federal Rules of Civil Procedure to vacate the arbitration award. Both the union and the employer opposed the employees. The court denied intervention, even though the union was unwilling to continue making legal arguments on behalf of the sixteen employees requesting intervention. The court reasoned that for a union to function efficiently, "to some extent the interests of particular individuals are subordinated to the interests of the group both at the contract administration stage and thereafter."[288] Unless the employees could show that animus against the grievants motivated the union, they could not intervene.[289]

In *Acuff*, the employees had made no allegation suggesting bad faith by the union. There was no inherent conflict besides that arising from the union's unwillingness to bear the costs of proceeding with an action to vacate the award. This is unlike the situation of the nonmember, in which the inherent tension created by the fact of nonmembership alone would be sufficient at least to allow the grievant a choice of counsel to represent him.

Only a flexible assessment of the interests on each side can

committee notes. Similar due process issues are implicit in the exclusive representation model of grievance processing under PERA. The union has exclusive control over the selection of the attorney or union official who will represent the grievant. If there is a conflict between the union and the grievant over the merits of the grievance, or because of the grievant's nonmembership in the union, the individual employee may regard the union attorney as having interests that conflict with his concerns, making the union attorney an inadequate representative. Section 447.401 of the Florida Statutes guarantees employees access to a fair and equitable grievance procedure to resolve contract claims. Compelling an employee to be represented by an attorney who is committed to interests either adverse to, or in tension with, the grievant's interests could be viewed as both a statutory violation and a denial of due process. For analogous reasoning in relation to the appointment of counsel for indigent defendants in criminal proceedings, see United States v. Davis, 604 F.2d 474, 479 (7th Cir. 1979); Drumgo v. Superior Court, 8 Cal. 3d 930, 934-35, 506 P.2d 1007, 1010, 106 Cal. Rptr. 631, 634 (1973).

287. 404 F.2d 169 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969).

288. *Id.* at 171.

289. *Id.*

resolve the issues. The Seventh Circuit took such a flexible approach in *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781.*[290] In *Woolworth* the arbitrator ruled in favor of the grievants, but the employer succeeded in an action to have the district court set aside the award. The union did not appeal the district court's ruling, and the employees intervened to appeal. The employees did not allege that the union had breached its duty of fair representation. The circuit court distinguished *Woolworth* from *Acuff* on the ground that the union in *Woolworth* did not oppose intervention, and the employees were attempting to uphold an arbitrator's award rather than to set it aside. To deny the employees their final day in court would create a perception of unfairness.[291]

The court in *Woolworth* weighed the factors favoring intervention against the facts that the union was no longer a participant and that the employer and the courts would be put to the additional cost of the appeal. Because the union was passive, the court assumed no collective interests were being undermined, and the importance of fairness to the employees outweighed the costs to the employer of continuing the litigation.[292]

When the court's reasoning is applied to the issue of the nonmember's right to have his own counsel present in grievance proceedings, the factors in favor of allowing the presence of counsel are (a) the enhanced appearance of fairness in light of the nonmember's natural tension with the bargaining agent, (b) protection of the finality of the award by removing a possible basis for a fair representation action, and (c) the protection of collective interests through the bargaining agent's presence. Unless there is good reason to believe that outside counsel would undermine the union's ability to protect the interests of bargaining unit employees, the arguments against allowing the nonmember to have independent counsel present are not very strong.

If the grievant selects a representative who is affiliated with or retained by a rival union, the balance of interests shifts against the employee, because of the potential disruptive effect of the rival union. If rival unions were allowed to represent bargaining unit employees, nonmember grievances would make contract grievance proceedings an open forum for a rival organization seeking em-

290. 629 F.2d 1204 (7th Cir. 1980).
291. *Id.* at 1211.
292. *Id.* at 1211-12.

ployee support. This would have negative consequences for normal contract administration and for stable labor relations.[293] A rule allowing nonmember representation, conditioned on the representative's having no relationship with a rival union, might cause sufficient practical problems in particular cases to outweigh any gains to an overall sense of fairness.[294]

Most courts that have faced the issue of a grievant's right to have independent counsel participate in grievance proceedings have ruled against the grievant.[295] Courts reason that the duty of fair representation provides adequate protection for a grievant who is unhappy with the quality of the union's representation in grievance proceedings. However, they do not address the problem of the conflict that results when the same attorney is handling the grievance on behalf of both the union and the grievant. Union control over grievances is an important value, but so is fairness to individual grievants. If a grievant has a legitimate reason for having independent counsel present, and if counsel's presence would not undermine the union's ability to represent the collective, then it would be appropriate to allow outside counsel to participate under conditions established by the arbitrator.[296]

At least one court, following a general balancing approach and looking closely at the interests involved in the specific case, found that it would be a violation of the duty of fair representation for a union to refuse to process a grievance unless the employee agreed to stop consulting with an outside attorney.[297] The court indicated that an employee's consulting with an attorney could not compromise the union's position as exclusive representative.

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293. Silverstein, *Union Decisions on Collective Bargaining Goals: a Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485, 1509 (1979).

294. For a negative view by an arbitrator who has recently been involved in a series of arbitrations where grievants requested to have their own counsel present, see Andrews & Andrews, *A Potential Threat to Labor Arbitration: The Case of the Uninvited Guest*, 8 N. KY. L. REV. 315 (1981).

295. *See* Malone v. United States Postal Serv., 526 F.2d 1099 (6th Cir. 1975); Laney v. Ford Motor Co., 95 L.R.R.M. (BNA) 2002 (D. Minn. Mar. 29, 1977); Russell v. Patterson, 55 A.D.2d 619, 389 N.Y.S.2d 411 (1976).

296. The presence of counsel will partially undermine any challenge to an award based on an argument that there was an inherent bias against the nonmember grievant in the arbitration process. *See* Summers, *supra* note 1, at 402; *cf.* Schatzki, *supra* note 65, at 908 n.28.

297. Seymour v. Olin Corp., 666 F.2d 202, 209 (5th Cir. 1982). In dicta the court commented as follows on a union's power to prohibit the mere presence of private counsel at grievance proceedings: "In most instances, a union's power in this regard can only be determined by an analysis of the collective bargaining agreement and the particular facts presented by the individual case." *Id.* at 209 n.5.

The point in the grievance process at which outside counsel should first be allowed to participate also presents a problem. Outside representation may disrupt attempts by the employer and the union to settle grievances during the early stages of grievance proceedings. This is a valid concern. Most grievances are settled before arbitration. The union and employer have experience with similar grievances; they can predict how an arbitrator will rule; and they are under financial pressure to avoid the costs of arbitration. The union and the employer are in the best position to know what is a reasonable settlement. The grievant and his representative should be allowed to be present at the early stages, but the union should have control over the negotiations and should have the authority to settle.[298]

4. UNION VERSUS THE GRIEVANT ON THE MERITS

The last circumstance is where an individual grievant and the union disagree over the merits of the individual's grievance. The certified bargaining agent may refuse to arbitrate either because the union does not support the grievant's interpretation of the contract, or because the union feels it would not be in the best interests of a majority of employees for the grievance to go forward.

During collective bargaining, unions constantly balance conflicting interests among employees. This balancing function is one of the major policy justifications for collective bargaining, and unions play the same role in contract administration. Nevertheless, courts tend to scrutinize union decisions that favor one group over another more closely when the decisions occur in the context of grievance arbitration than when they arise in collective bargaining.[299] Courts assume that, in bargaining, only the views of the union's membership should constrain the union. When a contract is in place, however, the contract creates individual employee expectancies, and the situation changes. Courts may also treat differently situations where a union declines a grievance for reasons consistent with its statutory obligations as compared with situations in which considerations other than working conditions appear to influence the union's judgment.[300]

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298. For a discussion of the standard a court should apply if a grievant attacks the settlement as constituting a breach of the union's duty of fair representation, see *infra* text accompanying notes 302-06.

299. *See* Leffler, *supra* note 7.

300. *See* Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976) (the union may not make seniority decisions solely on the grounds that the favored group is the majority);

There is a considerable body of scholarly commentary on the major cases involving these types of conflicts.[301] While it is beyond the scope of this article to critique this literature, the reader should note the extent to which the approach of the principal private sector cases is subject to due process challenges when public sector labor agreements are the source of employee expectations.

The major Supreme Court case involving a union taking sides in a conflict among employees is *Humphrey v. Moore*.[302] That case involved a trucking company merger, where the two groups of employees disagreed over seniority rights in the surviving company. One union represented both employee groups, and a joint committee adopted its recommendation that the seniority lists be dovetailed.[303] The acquired company was the older of the two businesses, so its employees generally had more seniority when the lists were merged on a date-of-hire basis. Subsequently, layoffs occurred and employees who had been with the acquiring company since its inception were among the first to be laid off. They filed suit, and a state court held that the union breached its duty to represent fairly all employees by taking sides in the dispute.[304] The Supreme Court reversed.

The Court emphasized (a) that dovetailing was a reasonable interpretation of the relevant clause of the collective agreement by the joint committee, (b) that the solution was an equitable way of dealing with the situation, (c) that the union need not be neutral in a conflict among employees and was free to take a good-faith position, and (d) that the disfavored employees had notice of the joint committee hearing and an opportunity to state their position.[305]

Though most authority would disagree, a joint committee de-

Truck Drivers Local Union 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967) (a bargaining agent represents all employees and cannot make distinctions among employees based solely on their political power); Gregg v. Teamsters Local 150, 699 F.2d 1015 (9th Cir. 1983) (a union must have substantial reasons to sacrifice the grievances of one group of employees in order to improve the likelihood of succeeding on the grievances of other employees).

301. *See, e.g.*, Blumrosen, *supra* note 7; Finkin, *supra* note 7; Freed, Polsby & Spitzer, *supra* note 7; Leffler, *supra* note 7; Levy, *supra* note 7; Summers, supra note 7.

302. 375 U.S. 335 (1964).

303. Dovetailing seniority lists means that seniority will be based on date of employment with either of two companies. If the lists had been endtailed, the employees of the absorbed company would have their seniority tacked on below that of the employees of the absorbing company.

304. Moore v. Local 89, Int'l Bd. of Teamsters, 356 S.W.2d 241 (Ky. 1962), *rev'd sub nom.* Humphrey v. Moore, 375 U.S. 335 (1964).

305. Humphrey v. Moore, 375 U.S. 335, 345-50 (1964).

cision in a case such as *Humphrey v. Moore* should be analyzed in the same way as a union decision not to arbitrate.[306] A joint committee is composed of equal numbers of union and management representatives, and a grievance before the committee goes to a neutral arbitrator only if union and management disagree. In a grievance over a matter such as seniority lists, the employer is likely to go along with whatever the union decides is best for its members. The union, therefore, makes the decision, and a neutral arbitrator does not hear the grievance unless the union decides against taking a position.

The Supreme Court did not indicate whether the result would have been different had the union in *Humphrey* advocated merging seniority lists in a manner inconsistent with a specific contract clause. For example, Professor Summers has argued that if the collective agreement called for dovetailing seniority lists in case of a merger, and the union decided instead to slot employees according to relative seniority in each plan, the union's decision should be viewed as arbitrary.[307] A union should act in good faith to seek the most equitable solution for all employees, but its actions must be consistent with the collective agreement.

The legal basis of Professor Summer's position is even firmer in the public sector. A collective retroactive waiver of specific job security guarantees, to benefit one group of employees at the expense of another group, arguably deprives the latter of a property interest without due process.[308] It is true that job security guarantees in an agreement normally are not vested. They may be changed if the union agrees with the employer to amend the agreement prospectively. If the contract is amended, employees must adjust their expectancies just as though the legislature had amended a statute providing for job security. As long as the contract is not amended, however, the union should not be allowed to waive retroactively the contract rights of a minority simply because all employees would be better off. Employees have a right to

306. This view of joint committee awards is shared by various commentators. *See* Feller, *supra* note 1; Rabin, *The Duty of Fair Representation in Arbitration* in THE DUTY OF FAIR REPRESENTATION 84, 87 (J. McKelvey ed. 1977); Comment, *supra* note 268, at 1169. It is not the view of the Supreme Court, which treats joint committee awards as equivalent to a final and binding decision by a neutral arbitrator. *See* General Drivers Local Union No. 89 v. Riss & Co., 372 U.S. 517, 519 (1963); Humphrey v. Moore, 375 U.S. 335 (1964); Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

307. Summers, *supra* note 7, at 266-68.

308. *See* Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

expect their bargaining agent and their public employer to act consistently with the specific terms of the collective agreement, just as they expect them to comply with a statutory guarantee.[309]

Generally, situations of conflict among employees are not so clear-cut. Contract clauses are open to different interpretations. To clarify an ambiguous clause, the union may need to take a position that favors one group of employees over another. The union may be in conflict with a minority of employees, which raises serious questions as to how the minority's interests are to be heard. It makes no sense, however, to require the union to remain neutral if it feels a particular interpretation is in the best interest of the collective.[310]

Whenever a majority of employees gains benefits at the expense of a minority or of an individual, a question arises whether the union favored the majority to solidify its position as the exclusive representative. Union motives in such a situation are almost impossible to discern. There is an inherent conflict between the union, with its need to please the majority, and those employees who are on the minority side of any issue. This observation, however, simply reiterates that the union's actions normally will reflect majority preferences. Fair representation doctrine provides no substantive theory of justice against which these decisions can be measured.[311] Courts, therefore, tend to seek a partial solution in procedural fairness. The burden should be placed on the union to articulate its reasons for sacrificing minority interests. Following the Court's reasoning in *Humphrey*, the union should have to show that (a) the solution it advocates is a reasonable interpretation of the relevant contract clause,[312] (b) the decision is an equitable solution to a conflict among employee interests,[313] (c) the position is consistent with the union's statutory obligation to clarify employee rights,[314] (d) it made a complete investigation of all interests before arriving at its conclusions, and (e) disfavored employees were given notice of the investigation or hearing and had an opportunity to state their position.[315]

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309. Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976).

310. Humphrey v. Moore, 375 U.S. 335 (1964); *See* Summers, *supra* note 7, at 268-69.

311. *See* Freed, Polsby & Spitzer, *supra* note 7.

312. Humphrey v. Moore, 375 U.S. 335, 345 (1964).

313. *Id.* at 347.

314. *Id.* at 349 (a statutory bargaining representative should not be neutralized in a conflict between two groups of employees so long as the union acts in good faith to fulfill its statutory obligations.)

315. *Id.* at 350.

A preferable solution to such a conflict would be for the union to take the issue to a neutral arbitrator and allow the disfavored employees to participate through their own counsel in both the selection of the arbitrator and the arbitration proceedings. If the union chooses, as in *Humphrey*, not to take the case to a neutral arbitrator, it does not thereby violate its duty of fair representation. The union must, however, if it chooses not to arbitrate, be able to articulate reasons for its decision. So long as the union's reasons reflect its statutory obligations, a court should let the decision stand. Any other result would undermine the critical role the union plays in balancing the conflicting interests of employees.

Two cases, one involving private sector employees and the other public employees, exemplify this procedural fairness approach. In *Smith v. Hussmann Refrigerator Co.*,[316] the Eighth Circuit held that a union breached its duty of fair representation by seeking with the employer to modify an arbitration award without giving affected employees notice or opportunity to be heard. Plaintiff employees had obtained their positions after bidding under a clause that provided that seniority should govern promotions when factors of ability and skill were substantially equal among the employees being considered.[317] The union grieved on behalf of four unsuccessful bidders who were senior to the four employees awarded the jobs. The union did not investigate the relative ability of the bidding employees. The successful bidders were not invited to attend the arbitration hearing; their interests were only defended by the employer's foreman.[318] The arbitrator ruled that two of the grievants as well as the four successful bidders were entitled to the job classification in question. The union objected to the award on the grounds that it created six classifications from four posted jobs and that there were other technical errors in the award.[319] The union and employer met to discuss these problems, and then they met with the arbitrator to clarify the award. At this meeting, the union and the employer informed the arbitrator of their agreement that two of the grievants and two of the successful bidders should be granted the four posted classifications. At a second meeting with the arbitrator, he so ruled.[320] The previously successful employees who were deprived of their job classifications

316. 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980).
317. *Id.* at 1233.
318. *Id.*
319. *Id.* at 1234.
320. *Id.*

brought a fair representation action against the union and a claim for breach of the collective agreement against the employer. The jury returned verdicts in favor of the plaintiffs, but the district court granted the defendants' motion for judgment notwithstanding the verdict.[321]

The circuit court of appeals, sitting en banc, reversed. Six judges felt that the union's failure to give the disfavored employees notice of the second meeting with the arbitrator, and its failure to represent these employees' interests, violated the duty of fair representation.[322] In a plurality opinion, three judges suggested that the union also violated its duty by not investigating the relative ability of the grievants and the successful bidders before deciding to grieve, by not inviting the successful bidders to the first arbitration, and by not providing representation for disfavored employees.[323]

The union argued that its decision to grieve without investigating the relative ability of the employees was based on the neutral principle that seniority should govern in bidding for open job classifications. This position of the union implies that the reference in the collective agreement to relative ability of bidding employees was a concession to the employer. Traditionally, if an employer relies on ability as a justification for promoting a less senior employee, and the unsuccessful bidder complains, the union grieves on behalf of the more senior employee.

The plurality opinion challenged the union's judgment on the question of seniority versus ability as a standard for promotion and suggested that the union violated a clear term of the agreement by taking the approach of always favoring seniority. The plurality concludes that the union's action was arbitrary and contrary to the expectations of the employees based on the wording of the collective agreement.[324] The heart of the problem is that the union had made a judgment that following a neutral principle of seniority in promotions serves the best interests of all employees. When the union in bargaining obtained only a modified seniority clause, it nonetheless continued to grieve job assignments that were not consistent with seniority.

It is not the role of the court to second-guess the union on this

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321. *Id.* at 1232.

322. *Id.* at 1241-42; *id.* at 1246 (Lay, J., concurring); *id.* at 1246-47 (Bright and Ross, JJ., concurring).

323. *Id.* at 1240-42.

324. *Id.* at 1238-39.

sort of policy, as did the plurality in *Smith*. The important consideration is the expectancies of the employees. If the past practice of the union is to grieve on behalf of the more senior employee in such situations, and the employees understand this policy, the union's action is not arbitrary. The established policy is similar to the union's decision to favor one group of employees over another in collective bargaining. The burden is on the membership to alter such policies through the union's internal political process. Courts have no theory of substantive justice to provide a basis for a finding that the union made an "unjust" decision, so long as the union was not procedurally unfair to the minority employees and the criteria for the decision were related to the union's role as bargaining agent.

The union should not, however, be able to defeat a fair representation action by the successful bidders simply by pointing to the neutral principle of seniority. As plaintiffs, the successful bidders raised a conflict between their interest in being promoted on the basis of both seniority and ability and the union's interest in seniority alone as the governing criterion. The plaintiffs' interpretation of employee rights was more consistent with the contract itself. To overcome such a prima facie showing of a fair representation breach, the union should have the burden of demonstrating that the employees reasonably should have expected the union to follow the seniority principle. The union might show its past practice of grieving for the more senior employee, or if no past practice exists, that the policy had been sufficiently disseminated among the employees to avoid contrary expectations.[325] The union essentially must demonstrate that it is not retroactively waiving existing employee expectations. If the union cannot carry this burden, it should not settle the grievance short of arbitration without an investigation of the employees' relative ability.

If the case is not settled, and it goes to arbitration, the successful bidders should be given notice, invited to attend the arbitration, and offered an opportunity to defend their interests through their own counsel or through an independent advocate paid by the union. In the private sector, this approach would

325. If the union treats all employees uniformly, the union's position will become a part of industrial practice in conformance with the expectations of the employee community. Employees similarly situated should be treated the same. *See* Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975) (union could not dovetail only the employees of the acquired company who were working at the date of the merger and endtail employees on layoff at that date).

strengthen the legitimacy of private arbitration as a means of resolving labor disputes, including conflicts among groups of employees. The same labor policies are present in the public sector, where they are reinforced by the due process requirement that an employee not be deprived of individual job interests without notice and an opportunity to be heard or adequately represented.

The New Jersey Supreme Court recently relied on similar reasoning to read into the statute governing collective bargaining for public employees a requirement of notice and an opportunity to participate in an arbitration hearing for a disfavored employee.[326] The plaintiff in *Saginario v. Attorney General* was promoted from the rank of State Trooper I to Sergeant, and the bargaining agent filed a grievance asserting that the promotion violated the agreement. The agreement provided that in promotion decisions, a competitive examination was to be weighted at thirty-four percent; the other sixty-six percent was to be based on a combination of seniority, performance, conduct record, medical condition, and job-related experience.[327] The union claimed that the plaintiff's promotional points for experience and conduct were miscalculated. The union asked that the trooper with the next highest overall promotion points receive the promotion instead of the plaintiff. The State Police Division denied the grievance, and the union took it to arbitration. The plaintiff was not notified of either the grievance proceedings or the arbitration hearing.[328]

The arbitration focused on whether the plaintiff had received the correct number of points for his prior experience and conduct record. The only witness was the secretary of the promotion review board. The arbitrator ruled for the union, and the plaintiff was returned to the rank of Trooper I. The plaintiff appealed the demotion, and the Appellate Division vacated the arbitrator's award and ordered another arbitration in which the plaintiff was permitted to participate.[329]

The New Jersey Supreme Court affirmed. The court interpreted a provision in the New Jersey Employer-Employee Relations Act, which provides for binding grievance arbitration, to require the union to give an employee whose rights are affected by a grievance an opportunity to be heard.[330] The union was not repre-

326. *See* Saginario v. Attorney General, 87 N.J. 480, 435 A.2d 1134 (1981).
327. *Id.* at 482, 435 A.2d at 1135.
328. *Id.* at 483, 435 A.2d at 1135.
329. *Id.* at 483-84, 435 A.2d at 1135-36.
330. *See Id.* at 495-97, 435 A.2d at 1142.

senting the employee who had been promoted because its position on criteria for promotions was in conflict with the employee's interests in retaining his promotion. The employer had other concerns, including avoiding backpay, and the employer had no obligation to represent the employee. The court held that the employee had been denied his statutory right to a fair hearing because no one present at the hearing was an adequate representative for him. The court ordered a new arbitration with the employee participating, either through his own personal representative or pro se, and bearing his share of arbitration costs. By reading the notice and hearing requirement into the statute, the court explicitly avoided the issue of whether the plaintiff had such a property interest in the terms of the agreement as to invoke the requirement of due process.[331] The court also did not have to decide whether the union violated its duty of fair representation.[332]

In a separate opinion, Justice Clifford argued that it was a mistake for the court to avoid the question of whether the union had acted arbitrarily, albeit in good faith, in not giving the employee notice that the union was abandoning the employee's interests or inviting him to participate in the proceedings. Justice Clifford argued that, by taking a statutory approach, the majority ran the risk of giving employees an inviolate right to a hearing whenever there is a conflict of interest between an employee and the union. In contrast, fair representation doctrine is a fact-sensitive body of law that developed on a case-by-case basis.[333]

Citing *Smith v. Hussmann* in support of his conclusion, Justice Clifford reasoned that the union had a legitimate interest in grieving to clarify the evaluation standards used by the Division. The union should be encouraged to do this, but the union should also give employees, disfavored by its decision, notice and an opportunity to participate in the proceedings through independent representation. By failing to give the affected employee an opportunity to participate, the union violated its duty of fair representation.[334]

The courts in both *Smith* and *Saginario* were sensitive to the possibility of undermining the union's discretion to deal with conflicts among employees and to take positions that adversely affect

331. *See Id.* at 492 n.3, 435 A.2d at 1140 n.3.

332. *See Id.* at 497-511, 435 A.2d at 1142-50 (Clifford, J., dissenting in part on the ground that the union breached its duty of fair representation).

333. *Id.*

334. *Id.* at 507-09, 435 A.2d at 1148.

some employees to benefit the collective. Those cases combine deference to union discretion with a basic principle of procedural fairness—no individual should be deprived of legitimate job-security expectations without an opportunity to be heard. This procedural solution does not unduly burden the union, but it lessens union control over employee input into contract administration. An employer might use the procedural protections to drive a wedge between minority employees and their bargaining agent, but the danger of this tactic is not great. In the long run, most public employers benefit from a strong union that can control dissident employees, negotiate settlements, and minimize litigation costs by fairly treating all employees affected by union decisions.

The New Jersey Supreme Court's reliance on the employee's statutory right to a fair hearing rather than on fair representation doctrine is troublesome. The majority was sensitive to the lower court's reliance on *Donnelly v. United Fruit Co.*,[335] a 1963 decision of the same court that was essentially overruled by *Vaca*. The New Jersey Supreme Court devoted a substantial part of its opinion to explaining why the court now agrees with *Vaca*. The court obviously was hesitant to confront the difficult issue of reconciling the *Vaca* view of union control over grievances with its own holding that the union had breached its statutory duty when the union's good faith was not an issue.[336] It was a mistake for the *Saginario* court to avoid evaluating its holding in light of fair representation doctrine. Fair representation is a flexible doctrine that is sensitive to conflicting interests. It takes account of policies underlying the system of collective bargaining as it balances the interests of the collective and of individual employees. Also, under fair representation doctrine, courts are not constrained by statutory language or legislative intent.

It is also preferable to deal with these issues under fair representation doctrine rather than under due process. The former concept is rooted in labor policy and forces a court to confront directly tensions between collective and individual interests. By directly confronting this tension in specific factual situations, courts mediate the conflict and help sustain the system of collective bargaining. The policy choices which underlie the facts of each case could be submerged too easily if courts retreat to general principles of due process.

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335. 40 N.J. 61, 190 A.2d 825 (1963).

336. Saginario v. Attorney General, 87 N.J. 480, 484-89, 435 A.2d 1134, 1136-38 (1981).

IV. CONCLUSION

PERC has done a credible job of adjusting exclusive representation doctrine to deal with PERA's unique provision for nonmembers. The union's right to refuse representation is inconsistent with the theoretical assumptions of the exclusive bargaining agent model of collective bargaining, but it does reflect practical realities. There is tension between bargaining agents and nonmember employees in both the public and private sectors. The PERA amendment forced PERC to confront this tension. The commission responded with sensitivity to the need to protect the bargaining agent's control over contract issues, but it has not given sufficient attention to individual employee interests. PERC's view of fair representation should be altered to reflect the conflicts inherent in grievance processing. Some possible changes suggested by the examination of these conflicts follow.

1. If a union refuses to process a nonmember's grievance for reasons other than the employee's nonmembership in the union, the union should carry the burden of explaining its decision. Placing the production burden on the union would encourage bargaining agents to provide employees with written reasons for denying grievances. If the employee files an unfair labor practice charge with PERC, the union can obtain a summary dismissal if its reasons for denying the grievance are reasonably related to its statutory obligation to seek better working conditions for bargaining unit employees.

2. The same procedure should apply where a union declines to grieve for any employee, member or nonmember, in a situation in which the union opposes the contract interpretation advocated by the aggrieved employee in order to protect the interests of the majority. Where the union disagrees with the grievant on the merits of the grievance and refuses to arbitrate to benefit other employees, the union should have to show (a) that it arrived at its decision through fair procedures that provided the grievant with notice and an opportunity to be heard before the decision was made and (b) that the union's substantive reasons for denying the grievance are consistent with its statutory obligations.

3. If the union must choose between the interests of different groups of employees in grievance arbitration, the disfavored employees should receive notice of the arbitration and an opportunity to appear through their own counsel. The right to independent counsel does not, however, include the right to select a representative who is affiliated with or retained by a rival union organization.

The certified union also may find it useful to have the disfavored employees participate in the selection of the neutral arbitrator to minimize the possibility of a subsequent claim that the arbitrator was biased.

4. If the union does decide to proceed with a nonmember's grievance, and the nonmember nonetheless wishes to have his own counsel present at the arbitration, this should be permitted. The role of the grievant's counsel should be limited to observing the arbitration, unless the arbitrator finds that the tension between the union and the nonmember affects the quality of the union's representation of the grievant.

5. If the union declines to grieve for an employee because of the employee's nonmembership in the union, and the employee proceeds individually under the contract, the union has a statutory right to be present at all sessions with the employer and to participate in the arbitration proceedings. The union's participation may be limited by the arbitrator to those issues implicating the rights of other bargaining unit employees.

6. When the certified bargaining agent has refused to represent the employee because of the employee's nonmembership, the nonmember should be allowed to select any representative, including a rival union. This result keeps pressure on the certified bargaining agent to represent all employees, including nonmembers. If the bargaining agent does not fulfill that obligation, then competition among unions may be better for overall employee interests. So long as the bargaining agent is present at all conferences and at the arbitration, maintaining consistency in contract interpretation should not pose a problem. PERC's decision in *PBA* was a practical solution to this problem, but PERC should monitor its consequences carefully.

7. If a union declines to arbitrate for a member on the grounds that the likelihood of success is too small to warrant the costs of arbitrating, and there is no conflict between the grievant and the union over the substantive issues raised by the grievance, the employee should have the burden of showing the union acted in bad faith or arbitrarily. If the grievant is not a union member or if the grievant can show a conflict with the union over the substantive contract issues raised by the grievance, the union should have the burden of explaining its decision not to grieve. In both circumstances the ultimate burden of persuasion on the issue of the arbitrariness of a union decision remains on the employee. Shifting the production burden where a grievant can show conflict with the

union forces the union to articulate a rationale for its decision while protecting the union's discretion to settle or to weed out weak grievances. In the case of a nonmember, a union's refusal to grieve should be treated as based on nonmembership unless the union explicitly informs the grievant that the decision was made because the grievance lacked merit.[337]

These guidelines do not diverge sharply from the course PERC has followed. They are aimed at fostering among employees' the perception that contract grievance procedures are justly administered and at preserving the bargaining agent's control over these procedures.

The guidelines do not confront the central substantive issue of what underlying principles courts should apply in determining when a union's decision to favor one group of employees over another is "not justified" or "is inconsistent with the union's statutory obligation." Neither the cases nor the scholarly literature provides a substantive theory that could be used to address this question. In fact, to search for basic unifying principles may be a conceptual mistake.[338]

Some tensions among values are simply irreconcilable. Law mediates the inherent tensions and allows social institutions to embrace irreconcilable values that persist.

Fair representation fulfills a mediating function between the collective and the individual. The doctrine lacks substantive content; instead it mediates substantive conflicts through procedural fairness. In specific situations, courts have ruled that a union has been substantively unfair to an employee, but these cases yield no unifying principles. This does not mean that the doctrine of fair representation should be abandoned, or that the legislature should impose more particularized rules. On the contrary, fair representation doctrine provides a sensitive framework for courts to confront conflicting values in specific factual contexts while avoiding absolute value choices at a general level.

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337. *See* Ritcey v. School Bd., [1982] 8 F.P.E.R. ¶ 13,282 (June 30, 1982).

338. For a thorough discussion of the "classical" tendency in American legal reasoning, see Gudridge, *The Persistence of Classical Style*, 131 U. PA. L. REV. 663 (1983).