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I. Introduction

Public sector labor law is still in an early stage of evolutionary development, influenced and limited by state or local statutes, executive orders, and attorney general opinions that vary from one state to another.[1] Although state courts and legislatures are still grappling with basic aspects of unionization—recognition, certification, scope of bargaining, and impasse resolution—attention is also being focused on the relationship between employee and union; namely, the duty of fair representation.

The union's duty to fairly represent employees is an aspect of the union's power to act on behalf of and in the interest of employees regarding terms and conditions of employment.[2] This article exam-

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1. At least forty-five states provide some form of collective bargaining for either all or a portion of their public employees. 51 GOV'T EMPL. REL. REP. (BNA) 501 *et seq.* 1978)

2. This subject has been popular among legal writers. *See* THE DUTY OF FAIR REPRESENTATION 1 (McKelvey ed. 1977); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973); Fowks, *The Duty of Fair Representation: Arbitrary or Perfunctory Handling of Employee Grievances*, 15 WASHBURN L.J. 1 (1976); Levy, *The Collective Bargaining Agreement as a Limitation on Union Control of Employee Grievances*, 118 U. PA. L. REV. 1036 (1970); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CT. REV. 81 (1967); Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962); Tobias, *A Plea for the Wrongful Discharged Employee Abandoned by His Union*, 41 U. CINN. L. REV. 55 (1972); Comment, *Refusal to Process a Grievance, the NLRB, and the Duty of Fair Representation: A Plea for Pre-emption*, 26 U. PITT. L. REV. 593 (1965); Comment, *Employee Challenges to Arbitral Awards: A Model for Protecting Individual Rights Under the Collective Bargaining Agreement*, 125 U. PA. L. REV. 1310 (1977); Note, *Statute of Limitations Governing Fair Representation Action Against Union When Brought with Section 301 Action Against Employer*, 44 GEO. WASH. L. REV. 418 (1976).

ines the public sector union's duty to fairly represent employees under Pennsylvania's public employee bargaining statutes.

The fair representation duty will be examined from varying perspectives. Because of the relatively undeveloped Pennsylvania authority in this area, standards developed by the federal courts and the National Labor Relations Board (NLRB) will be considered. The well-defined federal private sector labor law provides a useful starting point for analysis.[3] Nevertheless, the unique nature of the public sector must be borne in mind.[4] Although an examination of the duty of fair representation in the private sector is necessary before considering the representation standard to which public sector unions may be held accountable, private sector labor law does not and cannot provide a "monolithic model"[5] for Pennsylvania's public sector.

II. The Duty of Fair Representation in the Private Sector

A. The Jurisdictional Basis of the Duty

Section 159(a) of the National Labor Relations Act[6] establishes that the union is the exclusive representative for all employees within the bargaining unit, not just those voting for that particular labor organization.[7] Collective bargaining is based on subordinating individual employee interests to the collective interests of all bargaining unit members. For example, federal labor law vests the union with broad authority to negotiate and administer collective bargaining

3. Private sector precedents provide analogous authority to public sector tribunals when the statutory language in the state statute parallels a federal statute. *See, e.g.*, Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974); Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974); Kerrigan v. City of Boston, 361 Mass. 24, 278 N.E.2d 387 (1972); Drachman & Ambash, *Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations?—A Management Perspective*, 6 J.L. & EDUC. 209 (1977); Kahn, *Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations?—The Perspective of a Neutral*, 6 J.L. & EDUC. 221 (1977).

The California Agricultural Labor Relations Act, for example, provides that the Agricultural Labor Relations Board "shall follow applicable precedents of the National Labor Relations Act as amended." 44 CAL. STAT. ANN. § 1148 (West Supp. 1978).

4. PLRB v. State College Area School Dist., 461 Pa. 494, 499, 337 A.2d 262, 264 (1975). The Pennsylvania Supreme Court has stated,

> We emphasize that we are not suggesting that the experience gained in the private sector is of no value here, rather we are stressing that analogies have limited application and the experience gained in the private employment sector will not necessarily provide an infallible basis for a monolithic model for public employment.

Id. at 500, 337 A.2d at 264-65. *See also* Borough of Wilkinsburg v. Sanitation Dep't, 463 Pa. 521, 345 A.2d 641 (1975); PLRB v. AFSCME, 22 Pa. Commw. Ct. 376, 348 A.2d 921 (1975).

5. PLRB v. State College Area School Dist., 461 Pa. 494, 500, 337 A.2d 262, 264 (1975).

6. 29 U.S.C. §§ 151-68 (1976).

7. 29 U.S.C. § 159(a) (1976) provides in pertinent part,

> 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 . . . .

agreements while prohibiting individual employee bargaining.[8] This broad and pervasive statutory authority favoring unions is not explicitly countered by any statutory protections for individual employee rights. The courts recognized that these statutes left the employee without recourse against unfair union representation and filled the void by interpreting them to imply a fair representation duty.

The jurisdictional basis for fair representation litigation derives primarily from Section 301 of the Labor Management Relations Act of 1947 (LMRA).[9] It permits suits against employers for breaches of collective bargaining agreements without regard to diversity of citizenship. Additionally, an employee's union can be joined when it breaches a fair representation duty in processing a grievance.[10]

A parallel administrative remedy was recognized by the NLRB in *Miranda Fuel Co.*[11] The Board ruled that unfair representation falls within the prohibitions of Section 157 of the NLRA.[12] According to the Board, Section 157 "gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment."[13] Because Section 158(b)(1)(a) of the NLRA makes a Section 157 violation an

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8. *Id.* Vaca v. Sipes, 386 U.S. 171, 182 (1967).

9. 29 U.S.C. § 185 (1976). This section provides in pertinent part,

Venue, amount, and citizenship.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

10. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Humphrey v. Moore, 375 U.S. 335 (1964); Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

11. 140 N.L.R.B. 181 (1962), *enforcement denied on other grounds*, 326 F.2d 172 (2d Cir. 1963). The Second Circuit denied enforcement without a majority opinion regarding whether a violation of the duty constituted an unfair labor practice.

12. 29 U.S.C. § 157 (1976) provides,

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

13. Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962), *enforcement denied on other grounds*, 326 F.2d 172 (2d Cir. 1963).

unfair labor practice, *Miranda* made unfair representation by the union an unfair labor practice.[14] The Board also held that a Section 158(b)(2)[15] violation occurred and stated that employer acquiescence in the union's conduct could violate Sections 158(a)(1) and 158(a)(3).[16] Subsequently, in *Independent Metal Workers Union Local 1 (Hughes Tool Co.)*[17] the Board ruled that a union's failure to process an employee's grievance because of race violated Sections 158(b)(1)(a), 158(b)(2), and 158(b)(3).[18]

Consequently, an aggrieved employee may seek a remedy for unfair representation through an administrative proceeding before the NLRB, or through a suit in state or federal court. In either situation, the source of the remedy is not protective legislation, but rather judicial recognition of the need for some protection of individual rights within the collective bargaining system.

B. The Source of the Duty

The fair representation duty was first established by the Supreme Court in a series of cases arising under the Railway Labor Act (RLA).[19] Subsequently, the duty was also applied to the National Labor Relations Act (NLRA).[20] The leading case was *Steele v.*

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14. *Id.* Section 158(b)(1)(A) provides it shall be an unfair labor practice for a labor organization or its agents "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." 29 U.S.C. § 158(b)) (1)(a) (1976).

15. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied on other grounds*, 326 F.2d 172 (2d Cir. 1963). Section 158(b)(2) provides it shall be an unfair labor practice for a labor organization or its agents

> to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

29 U.S.C. § 158(b)(2) (1976).

16. Sections 158(a)(1) and (3) provide in pertinent part that it shall be an unfair labor practice for an employer:

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . . [§ 157]:
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a)(1), (3) (1976).

17. 147 N.L.R.B. 1573 (1964).

18. *Id.* Section 158 (b)(3) provides it shall be an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a). . . ." 29 U.S.C. § 158(b)(3) (1976).

19. 45 U.S.C. §§ 151-88 (1976). Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). *See also* Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952); Graham v. Brotherhood of Loco. Firemen, 338 U.S.232 (1949); Tunstall v. Locomotive Firemen, 323 U.S. 210 (1944).

20. 29 U.S.C. §§ 151-69 (1976). Syres v. Oil Workers Int'l Local No. 23, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

Louisville & Nashville Railroad,[21] a suit by a Black railroad fireman to set aside a seniority agreement negotiated by the union that discriminated against Blacks. The Court approached the problem by indicating that if the RLA conferred exclusive bargaining authority on a union "without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations . . . ."[22] The Court avoided these constitutional difficulties by finding that the Act implicitly "expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[23]

Steele represents the initial attempt in labor law to reconcile the conflict between the individual and the group. The *Steele* decision was based on the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf . . . ."[24] This decision affected unions in two ways. First, unions were required to recognize the individual employee's interests. Before *Steele*, unions could deny or ignore an employee request for any or no reason. *Steele* required fair consideration for all employee interests by unions. Second, the fair representation duty placed judicial restraints on unions—dissatisfied employees could now seek judicial regulation of the manner in which unions represented employees. Prior to *Steele*, only political pressure restrained unions. If the union alienated the membership, it could be ousted and replaced by a majority vote of the employees.

After *Steele* the Court extended the scope of the duty beyond a concern for fairness for a racial minority in a bargaining unit to a general recognition that federal labor policy cannot sanction discrimination against any employee. This principle, on the basis of the reasoning developed in the RLA cases, was deemed implicit in the NLRA in *Ford Motor Co. v. Huffman*.[25] The Court restated the fair representation duty as one of "complete loyalty to the interests of all whom [the union] represents."[26] Nonetheless, *Huffman* imposed a far-reaching limitation on the duty. The Court required "[a] wide range of reasonableness . . . in serving the unit [the union] represents, subject always to complete good faith and honesty of purpose

21. 323 U.S. 192 (1944).
22. *Id.* at 198.
23. *Id.* at 202-03.
24. *Id.* at 202.
25. 345 U.S. 330 (1953); *see* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEXAS L. REV. 1119, 1120 (1973) [hereinafter cited as Clark].
26. 345 U.S. at 338.

in the exercise of its discretion."[27] In later years this limitation reappeared providing a counterbalance to the expanding fair representation duty.[28]

In *Conley v. Gibson*[29] the Court rejected a contention that the duty of fair representation extended only to the negotiation of the collective bargaining agreement. The Court found that the duty of fair representation applied to both the negotiation and administration of a collective bargaining agreement, stating that "[t]he bargaining representative can no more unfairly discriminate in carrying out [the grievance process] than it can in negotiating a collective agreement."[30] As a result of *Conley*, the duty extends to all phases of labor relations.[31]

Conley also introduced a due process analogy by finding that "[a] contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit."[32] This parallels constitutional due process analysis applied to criminal statutes, which requires that the language of the statute as well as its enforcement be nondiscriminatory.[33] In a labor context this requires examining actual enforcement and impact to ensure fair representation in substance as well as form.

In *Humphrey v. Moore*,[34] however, the Court qualified the duty by emphasizing the importance of giving the union discretion in the grievance process. Just as a union must be able to refrain from processing frivolous grievances clogging the process, it must also be free to take a position on not so frivolous disputes.[35] In 1967 the Supreme Court handed down the landmark decision of *Vaca v.*

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27. *Id.* In determining whether this duty has been breached, the factfinder must keep the following in mind:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. . . . The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Id. at 337-38.

28. *See* Humphrey v. Moore, 375 U.S. 335 (1964).
29. 355 U.S. 41 (1957).
30. *Id.* at 46.
31. Clark, *supra* note 25, at 1120.
32. Conley v. Gibson, 355 U.S. 41, 46 (1957).
33. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).
34. 375 U.S. 335 (1964).
35. *Id.* at 349.

Sipes,[36] which qualified union discretion. The union in *Vaca* refused to arbitrate an employee's discharge. In its holding, the Court first restated that an employee does not have "an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement."[37] It then ruled that a union can neither ignore an employee's meritorious grievance nor process it perfunctorily.[38]

Vaca recognized the necessity for union flexibility by balancing this against the employee's need for a remedy from union power abuse. The Court created a remedy with substance by establishing a "standard" for measuring union conduct. It ruled, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[39] This standard broadened the fair representation duty that had originally been limited to discriminatory and bad faith conduct.

In 1976, the Supreme Court, in *Hines v. Anchor Motor Freight*,[40] clarified the *Vaca* standard. It ruled that the finality of an arbitrator's award is conditioned upon the union satisfying its statutory duty fairly to represent the employee in arbitration proceedings.[41] The Court emphasized *Vaca*'s broad language and partially clarified the *Vaca* standard. Although the Court specifically allowed "mere errors in judgment," unions are not permitted to leave employees "without jobs and without a fair opportunity to secure an adequate remedy."[42]

Hines requires less deference for the collective bargaining process and more concern for individual employee protection than previ-

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36. 386 U.S. 171 (1967).
37. *Id.* at 191.
38. *Id.*
39. *Id.* at 190.
40. 424 U.S. 554 (1976).
41. *Id.* at 571.
42. *Id.* In *Hines*, the Court went on to say,

> [Employees] are not entitled to relitigate . . . [claims] . . . merely because they offer newly discovered evidence that the charges against them were false . . . . The grievance processes cannot be expected to be error-free. The finality provision has sufficient force to surmount occasional instances of mistake. But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory; for in that event error and injustice of the grossest sort would multiply. The contractual system would then cease to qualify as an adequate mechanism to secure individual redress for damaging failure of the employer to abide by the contract. Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated . . . that the contractual machinery would operate within some minimum levels of integrity. In our view, enforcement of the finality provision where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings. [Wronged] . . . employees would be left without . . . a fair opportunity to secure an adequate remedy.

Id.

ous cases.[43] The Court again applied a due process type analysis.[44] Procedural due process requires notice and an opportunity for an appropriate hearing.[45] Similarly, in *Hines*, the Court found that redress beyond the grievance arbitration procedures was appropriate, and mandated "an adequate mechanism to secure individual redress for damaging failure of the employer to abide by the contract."[46] Following the "fundamental fairness" due process concept, the Court fashioned its rule to prevent "error and injustice of the grossest sort."[47] *Hines* cast aside the finality of arbitration awards by establishing a policy of encouraging employee challenges founded on a failure to be properly represented.[48]

Although the Court's opinions in the above cases do not precisely define the union's fair representation duty in the private sector, they do reject extremes and mark some outer boundaries. These limits are further narrowed, and the standard is given substantive content, by four principles that appear in the Court's opinions from *Humphrey* to *Hines*.[49] First, the legally enforceable contractual rights that individual employees acquire under collective bargaining agreements are valuable personal rights, and the union's ability to prevent employees from enforcing those rights should be limited.[50] Second, arbitration should not be overburdened with frivolous grievances by allowing an individual employee unilaterally to invoke arbitration or to compel the union to take grievances to arbitration regardless of their merit.[51] Third, the union, as statutory agent and co-author of the collective bargaining agreement, should be able to isolate and resolve major problem areas in interpreting the agreement.[52] Last, there should be assurance that in settling disputes under collective bargaining agreements similar matters will be

43. Comment, *The Union's Duty of Fair Representation—Fact or Fiction*, 60 MARQ. L. REV. 1116, 1126 (1977).

44. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976). *See also* Conley v. Gibson, 355 U.S. 41 (1957).

45. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

46. Hines v. Anchor Motor Freight, 424 U.S. 554, 571 (1976).

47. *Id.*

48. *Id.* at 574.

49. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 262 (1977) [hereinafter cited as Summers].

50. *Id.* In the words of the Court in *Vaca*, "We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract." Vaca v. Sipes, 386 U.S. 171, 186 (1967).

51. Summers, *supra* note 49, at 262. The union must be free to sift out frivolous grievances that clog the grievance process and must have the power to settle the majority of grievances short of the costlier and more time-consuming steps of arbitration. *Id.*

52. *Id.* Where bargaining has left ambiguities or gaps in the collective bargaining agreement, the union must be able to resolve those ambiguities or fill those gaps by settlement of grievances with the employer. *Id.*

treated consistently.[53]

C. *The Nature of the Duty*

Whatever forum is utilized in the private sector to enforce the fair representation duty, the problem of defining the scope and nature of the duty is essentially similar. From the decisions, it is now clear that the duty applies to all collective bargaining phases—both the negotiation of collective bargaining agreements and the processing of grievances.[54]

The question whether a union has fairly represented an employee frequently arises in the context of a union's duty to process grievances. A union is not required to pursue every grievance to arbitration.[55] For example, a union may refuse to process further the grievance of an uncooperative employee who steadfastly neglects, fails, or refuses to provide either the union or the employer information material to a grievance.[56] A union may refuse to process a grievance or handle it in a particular manner for various reasons, but it may not do so without reason, merely at the whim of someone exercising union authority.[57] It may not refuse to process a grievance because of lack of union membership by the employee.[58] The union is not, however, required to investigate thoroughly and exhaustively the merits of a grievance when its initial investigation shows sufficient justification for the employer's actions.[59] Moreover, a union may withdraw or refuse to arbitrate a grievance after the grievant rejects a negotiated settlement without breaching a fair representation duty.[60] It need not process an employee's grievance if

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53. *Id.* A problem of interpretation, once settled or determined in one case, should finalize the problem in all other cases. Individual grievants should not be subject to "the vagaries of independent and unsystematic negotiation." Vaca v. Sipes, 386 U.S. 171, 191 (1967).

54. Conley v. Gibson, 355 U.S. 41 (1957). The Court stated,

> The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end . . . with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.

Id. at 46.

55. Crawford v. Pittsburgh-Des Moines Steel Co., 386 F. Supp. 290 (D. Wyo. 1974); Lacour v. A.A. Rabalais, Inc., 90 L.R.R.M. 2046, 2048 (E.D. La. 1975).

56. Hicks v. J.H. Routh Packing Co., 95 L.R.R.M. 2814 (N.D. Ohio 1977).

57. International Bhd. of Boilermakers Local 132, 220 N.L.R.B. 119 (1975).

58. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied on other grounds*, 326 F.2d 172 (2d Cir. 1963).

59. Hughes v. International Bhd. of Teamsters Local 683, 554 F.2d 365 (9th Cir. 1977); Hershman v. Sierra Pacific Power Co., 434 F. Supp. 46 (D. Nev. 1977).

60. Douillette v. Rumford Press, 95 L.R.R.M. 2555 (D. N.H. 1977); Powell v. Globe Indus., 431 F. Supp. 1096 (N.D. Ohio 1977).

the chances for success in arbitration are minimal.[61] A union is only obligated to carry a meritorious grievance to the point at which further action would be fruitless.[62] The financial impact of the arbitration cost on the union's treasury may also be considered, although there is some doubt whether a decision not to arbitrate based solely on economic considerations would constitute a breach of the duty.[63]

The duty of fair representation extends even beyond the negotiation of a collective bargaining agreement and the handling of grievances. In *International Association of Ironworkers Local 433 (Associated General Contractors)*,[64] the Board found that the union's administration of its exclusive hiring hall, including dispatching job applicants in violation of the agreement and threatening acts of violence against those who protested, was arbitrary and capricious, and therefore, a breach of the duty. On the other hand, a union's good faith refusal to file an unfair labor practice for a discharged employee, after it unsuccessfully arbitrated his claim, was held not to violate the duty.[65] Finally, as a general rule, mere errors in judgment are insufficient to support a claim for breach of the duty,[66] and a union's good faith representation at an arbitration hearing moots any earlier alleged unfair representation in the grievance procedure.[67]

The content of the fair representation duty lies within these very general guidelines. Whether the duty is breached depends on the context in which the union's action occurred, analyzed in light of the court and Board standards held applicable to similar circumstances.

D. Negotiation Versus Administration of the Collective Bargaining Agreement

Section 159(a) of the NLRA distinguishes between the union's role in negotiating and administering an agreement.[68] Although it

61. *See* Encina v. Tony Lama Boot Co., 448 F.2d 1264 (5th Cir. 1971); General Box Co., 189 N.L.R.B. 269 (1971).

62. Stanley v. General Foods Corp., 508 F.2d 274 (5th Cir. 1975).

63. *See* Curth v. Faraday, Inc., 401 F. Supp. 678 (E.D. Mich. 1975).

64. 228 N.L.R.B. 1420 (1977).

65. Lewis v. Greyhound Lines-East, 555 F.2d 1053 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 997 (1977).

66. Russom v. Sears, Roebuck & Co., 558 F.2d 439 (8th Cir. 1977), *cert. denied*, 434 U.S. 955 (1977); *see also* note 42, *supra*.

67. Crenshaw v. Allied Chemical Corp., 387 F. Supp. 594 (E.D. Va. 1975).

68. 29 U.S.C. § 159(a) (1976). Section 159(a) provides,

> 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

vests the majority union with exclusive authority to negotiate an agreement,[69] it does not grant the union exclusive authority in presenting and settling grievances.[70] Thus, the employer must deal exclusively with the union in making an agreement, but may adjust grievances with individual employees if that adjustment is not "inconsistent with the terms" of the collective bargaining agreement, and the union is given an "opportunity to be present at such adjustment."[71]

Typically unions assert the exclusive power to process, settle, and take grievances to arbitration, which removes the effect of Section 159(a).[72] Hence, employers grant by contract what Congress refused to give unions by statute.[73] When, however, the union obtains exclusive control over the grievance procedure through collective bargaining, a special responsibility to exercise control on behalf of the individual grievant's interest is imposed. The union, having deprived individual employees of the ability to enforce their rights under the collective bargaining agreement, becomes subject to suits for breach of the duty of fair representation in processing grievances.

A distinction must be drawn regarding the nature of the duty of fair representation depending upon whether negotiation or administration of the collective bargaining agreement is involved. The union's need for flexibility in negotiating collective bargaining agreements is of a different dimension than its need for flexibility in interpreting and applying the agreement. In negotiating an agreement, the union must accommodate the overlapping and competing demands of varied interest groups, surrendering or compromising some demands to achieve others.[74] The final agreement represents not only a bilateral compromise between the union and employer, but also a multilateral compromise among interest groups within the

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bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

69. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). For a historical study of the majority rule principle in law and practice, see Schreiber, *The Origins of Majority Rule and Simultaneous Development of Institutions to Protect the Minority: A Chapter in Early American Labor Law*, 25 RUTGERS L. REV. 237 (1971); Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556 (1945).

70. Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945). For the legislative development of this proviso, see Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731 (1950); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1972).

71. 29 U.S.C. § 159(a) (1976).

72. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973) [hereinafter cited as Feller].

73. Summers, *supra* note 49, at 256. Professor Cox has argued that Congress did not intend that the individual should have a "right" to present grievances, but only that the employer should have a "privilege" to listen. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956). He argued that the individual's right was to fair representation in the grievance procedure, the position adopted by the Court in Vaca v. Sipes, 386 U.S. 171 (1967).

74. Summers, *supra* note 49, at 257.

union.[75] To negotiate such an agreement, the union needs a "wide range of reasonableness."[76]

In contrast, dispute settlement regarding the meaning and application of the collective bargaining agreement requires a much narrower range of union flexibility. If the meaning is clear, all that is required is to carry out the compromise.[77] Nevertheless, if the agreement is ambiguous, the parties need flexibility to complete the compromise.[78]

These differences between negotiation and administration require different standards for measuring the fair representation duty.[79] When a union negotiates it is acting like a legislature establishing rules. Like a legislature, the union is allowed a wide range of reasonableness. On the other hand, when a union administers an agreement it acts similar to an administrative agency enforcing and applying legislation. Here it must act within the boundaries of established rules. The fair representation duty in the administration of the agreement requires enforcement and application or observance and protection of rights already created by the agreement.[80]

The general principles outlined above provide analogs and bench marks for evaluating fair representation problems under Pennsylvania's public sector bargaining statutes. An examination of Pennsylvania's public sector labor relations reveals that the substance of the fair representation duty is substantially the same, though some differences exist.

III. The Duty of Fair Representation in Pennsylvania's Public Sector

In 1968, the Pennsylvania legislature afforded policemen and firemen the right to organize and bargain collectively in Act 111.[81] Act 195,[82] passed in 1970, permitted comprehensive collective bargaining by all other public employees.

It would be anomalous to suggest that the private sector's rationale for the fair representation duty is inappropriate for the public sector. Public sector employees, however, are not governed by the provisions of the NLRA that provide a foundation for the duty.[83]

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75. *Id.*
76. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1952).
77. Summers, *supra* note 49, at 257.
78. *Id.*
79. *Id.*
80. *Id.*
81. The Act of June 24, 1968, Pub. L. 237, No. 111 (Act 111), PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Purdon Supp. 1979).
82. The Act of July 23, 1970, Pub. L. 563, No. 195 (Act 195), PA. STAT. ANN. tit. 43, §§ 1101.101-.2304 (Purdon Supp. 1979).
83. *See* 29 U.S.C. § 152(2) (1976) (term "employer" as used in the statute does not include a state or political subdivision thereof); Pennsylvania Labor Relations Act, PA. STAT.

Nevertheless, Pennsylvania's labor relations statutes are sufficiently similar to the NLRA to guarantee public employees the right to fair representation from their unions, and the Pennsylvania courts and Pennsylvania Labor Relations Board (PLRB) decisions recognize a duty of fair representation in Pennsylvania's public sector labor relations.[84]

A. The Statutory Basis for a Fair Representation Duty

1. The Public Employe Relations Act (Act 195).—Because Act 195[85] is patterned after the NLRA, much of its language is similar, and hence, private sector precedent provides some guidance in construing Act 195. Yet, significant differences exist between the two, and private sector precedent is not controlling.[86]

The most significant distinction for purposes of enforcing the duty of fair representation arises out of the different jurisdictional bases in the NLRA and Act 195. In the private sector, fair representation claims can be litigated in either the courts or before the NLRB. Under Act 195, the duty of fair representation arises solely from the unfair labor practice sections of the Act, and, therefore, is within the exclusive jurisdiction of the Pennsylvania Labor Relations Board.[87]

Act 195 contains no provision paralleling section 301 of the LMRA. The NLRB was not granted exclusive jurisdiction over fair representation claims because the NLRB's General Counsel has unreviewable discretion in choosing to institute an unfair labor practice complaint[88] and there was no assurance that aggrieved employees would obtain review of their complaints.[89] In contrast to the private sector law, Section 1101.1502 of Act 195 provides for judicial review

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ANN. tit. 43, § 211.3(c) (Purdon 1964) (term "employer" as used in the statute does not include the Commonwealth of Pennsylvania or a political subdivision thereof).

84. McCluskey v. Commonwealth, Dept. of Transp., 37 Pa. Commw. Ct. 598, 391 A.2d 45 (1978) (dictum); Robinson v. Abington Educ. Ass'n, 32 Pa. Commw. Ct. 563, 379 A.2d 1371 (1977); Shannon v. PLRB, 7 P.P.E.R. 246 (Allegheny C.P. 1975); Eastern Lancaster County School Dist., 9 P.P.E.R. ¶ 9192 (PLRB 1978); Commonwealth of Pennsylvania (Dept. of Transp.), 9 P.P.E.R. ¶ 9088 (PLRB 1978); Phoenixville Area School Dist., 8 P.P.E.R. 351 (PLRB 1977); Clairton School Dist., 8 P.P.E.R. 243 (PLRB 1977); Hershey Educ. Ass'n, 8 P.P.E.R. 202 (PLRB 1977); Reading School Dist., 7 P.P.E.R. 174 (PLRB 1976); Southeastern Pa. Transp. Auth., 7 P.P.E.R. 38 (PLRB 1976); Teamsters Local 161, 6 P.P.E.R. 257 (PLRB 1975); Philadelphia Community College, 5 P.P.E.R. 105 (PLRB 1974); Scranton School Bd., 3 P.P.E.R. 241 (PLRB 1973), *rev'd*, 4 P.P.E.R. 61 (PLRB 1974); Philadelphia Fed'n of Teachers, 3 P.P.E.R. 226 (PLRB 1973); City of Easton, 3 P.P.E.R. 3 (PLRB 1973); Southeastern Pa. Transp. Auth., 1 P.P.E.R. 71 (PLRB 1971).

85. PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Purdon Supp. 1979).

86. *See* note 4 and accompanying text *supra*.

87. *See, e.g.*, Robinson v. Abington Educ. Ass'n, 32 Pa. Commw. Ct. 563, 379 A.2d 1371 (1977).

88. *See, e.g.*, Comment, *Unreviewability of General Counsel's Discretion: Proposed Amendments for a Private Cause of Action for Unfair Labor Practice Cases*, 82 DICK. L. REV. 409 (1978).

89. Vaca v. Sipes, 386 U.S. 171, 182-83 (1967).

of all final PLRB orders, including orders refusing to issue a complaint.[90]

Like private sector labor law in which the unfair labor practices of the NLRA are given meaning concerning the duty of fair representation by section 159(a),[91] the unfair labor practices provisions of Act 195 derive their content from section 1101.606.[92] Because the unfair labor practice section of Act 195 closely parallels the statutory content of the NLRA, Act 195 implicitly guarantees Pennsylvania's public sector employees the right to be free from unfair and invidious treatment by their collective bargaining representative in matters affecting employment.[93] The foundation for a duty of fair representation in Pennsylvania's public sector labor relations is firmly grounded in Act 195.

2. Judicial and PLRB Authority Supporting the Existence of the Duty.—The courts and the PLRB have clearly acknowledged the existence of the fair representation duty in the public sector.[94] Nevertheless, the perimeters of the duty are not yet fully developed by sufficient court or PLRB case law. Judicially, the duty was first recognized in *Robinson v. Abington Education Association*,[95] an appeal by a group of employees alleging that the union unfairly bargained away various salary premiums. The Commonwealth Court determined that public sector unions are obliged in bargaining to represent all employees in good faith without discriminating. Failure to perform this duty constitutes bad faith bargaining and an unfair labor practice within the PLRB's, not a court's, exclusive jurisdiction. *Robinson* thus acknowledges the PLRB's exclusive jurisdiction to remedy breaches of a union's fair representation duty through the unfair labor practices section of Act 195.[96]

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90. PA. STAT. ANN. tit. 43, § 1101.1502 (Purdon 1970). This specific statute was repealed in 1978 and is now codified at 42 PA. CONS. STAT. ANN. §§ 763, 933, 1722(a)(1), 5105, & 5571 (Purdon 1978). Nevertheless, the general proposition—the availibility of judicial review—is still true, although the different types of review, depending on what is being appealed, are codified at various places. *See also* Pennsylvania Social Services Union, Local 668 v. PLRB, 27 Pa. Commw. Ct. 552, 367 A.2d 778 (1976).

91. *See* notes 11-18, 68-73, and accompanying text *supra*.

92. *Id.* § 1101.606. This Section provides,

> Representatives selected by public employes in a unit appropriate for collective bargaining purposes shall be the exclusive representative of all the employes in such unit to bargain on wages, hours, terms and conditions of employment: Provided, That any individual employe or a group of employes shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective bargaining contract then in effect. And, provided further, That the bargaining representative has been given an opportunity to be present at such adjustment.

93. *See* Teamsters Local 161, 6 P.P.E.R. 257 (PLRB 1975).

94. *See* note 84 *supra*.

95. 32 Pa. Commw. Ct. 563, 379 A.2d 1371 (1977). *See also* Shannon v. PLRB, 7 P.P.E.R. 246 (C.P. Allegheny 1975).

96. 32 Pa. Commw. Ct. 563, 379 A.2d 1371 (1977). In Hollinger v. Department of Pub.

The PLRB first alluded to the existence of the fair representation duty in *Southeastern Pennsylvania Transportation Authority*.[97] Here the union failed to process a grievance to arbitration after internal review by a union committee. In that case, the complaint charged only the employer and not the union with an unfair labor practice. The PLRB dismissed the charge, finding that a union's failure to arbitrate a grievance does not make an employer guilty of an unfair labor practice when the employer, in good faith, denied the grievance.[98] Nevertheless, the PLRB indicated that a union's reasons or lack of reasons for not arbitrating a grievance might constitute an unfair labor practice.[99]

In *Teamsters Local 161*,[100] a case involving a union's failure to arbitrate a grievance, the PLRB explicitly mentioned the existence of a duty of fair representation under Act 195. The PLRB held that a union could exercise discretion in handling grievances,[101] but nonetheless, had an obligation fairly to represent all employees in the bargaining unit. Restated, the bargaining unit members had the right to be free from unfair or invidious treatment by their bargaining representative.[102]

Viewed in the abstract, the union's duty, among other things, involves the following: (1) a broad discretion in negotiating collective bargaining agreements;[103] (2) informing an employee of his contractual right of appeal from an employer's decision;[104] (3) representing nonunion members in the grievance arbitration process;[105] and (4) not charging nonunion members for processing or arbitrating grievances.[106] Nevertheless, a union is not required to (1) provide assistance in matters not covered by the collective bargaining agreement,[107] (2) process a grievance if not requested,[108] or (3) arbitrate when an arbitration award exists precluding the claim.[109]

The area in which a union is most likely to breach its duty of fair representation is in refusing to process or arbitrate an individual

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Welfare, 469 Pa. 358, 366, 365 A.2d 1245, 1249 (1976) the Pennsylvania Supreme Court stated that "if a party directly seeks redress of conduct which *arguably* constitutes [an] unfair labor practice . . . , jurisdiction to determine whether an unfair labor practice has indeed occurred . . . is in the PLRB, and nowhere else." (citations omitted) (emphasis added).

97. 1 P.P.E.R. 71 (PLRB 1971).

98. *Id.*

99. *Id. See also* City of Easton, 3 P.P.E.R. 3 (PLRB 1973), in which the union inquired into the reasons for a personnel action.

100. 6 P.P.E.R. 257 (PLRB 1975).

101. *Id.* at 258. The PLRB cited Vaca v. Sipes, 386 U.S. 171 (1967), with approval. *Id.*

102. *See* note 84 *supra*.

103. Philadelphia Fed'n of Teachers, 3 P.P.E.R. 226 (PLRB 1973).

104. Shannon v. PLRB, 7 P.P.E.R. 246 (C.P. Allegheny 1975).

105. Philadelphia Community College, 5 P.P.E.R. 105 (PLRB 1974).

106. Phoenixville Area School Dist., 8 P.P.E.R. 351 (PLRB 1977).

107. Hershey Educ. Ass'n, 8 P.P.E.R. 202 (PLRB 1977).

108. Scranton School Bd., 3 P.P.E.R. 241 (PLRB 1973), *rev'd*, 4 P.P.E.R. 61 (PLRB 1974).

109. Commonwealth of Pennsylvania (Dept. of Trans.), 9 P.P.E.R. ¶ 9088 (PLRB 1978).

employee's grievance. In refusing to process or arbitrate a grievance, a union must utilize various safeguards to insure fair representation. Among these safeguards a union should do the following: (1) investigate the grievance before making a decision regarding its merits;[110] (2) consult with their attorney for a review of the record and evidence;[111] and (3) review the decision not to pursue a grievance before an internal union staff committee.[112] It should be noted, however, that any one of the above precautions may not be sufficient to satisfy the union's duty. A combination may be necessary depending upon the facts of the particular case.

Within Pennsylvania's public sector, the ratification of a collective bargaining agreement and nonunion members' rights pose interesting questions for the union's fair representation duty. Nonunion members are not permitted to vote on ratification if disallowed by the union's constitution.[113] A union may statutorily limit voting to union members without violating Act 195.[114] The PLRB construes this as meaning that unions can and should restrict ratification of a collective bargaining agreement to union members.[115] Therefore, a union does not breach its fair representation duty by restricting ratification to union members. Other types of votes, however, may require the participation of nonunion members, and nonunion members may still be entitled to vote on other matters directly affecting working conditions. For example, after ratification of the collective bargaining agreement, the employees may retain the right to vote on the bargaining unit's days-off schedule.[116]

Generally speaking, it can be asserted that the Pennsylvania courts and the PLRB apply the substantive content of the fair representation duty developed in the private sector, and a public sector union is obliged to represent employees in a manner that is not arbitrary, unreasonable, discriminatory, fraudulent, or lacking good

110. City of Easton, 3 P.P.E.R. 3 (PLRB 1973).

111. Teamsters Local 61, 6 P.P.E.R. 257 (PLRB 1975).

112. Southeastern Pa. Transp. Auth., 7 P.P.E.R. 38 (PLRB 1976); Southeastern Pa. Transp. Auth., 1 P.P.E.R. 71 (PLRB 1971).

113. Eastern Lancaster County School Dist., 9 P.P.E.R. ¶ 9192 (PLRB 1978); Clairton School Dist., 8 P.P.E.R. 243 (PLRB 1977); Reading School Dist., 7 P.P.E.R. 174 (PLRB 1976).

114. PA. STAT. ANN. tit. 43, § 1101.902 (Purdon Supp. 1979). Section 1101.902 expressly permits this:

> If the provisions of the constitution or bylaws of an employe organization requires ratification of a collective bargaining agreement by its membership, only those members who belong to the bargaining unit involved shall be entitled to vote on such ratification notwithstanding such provisions.

115. Reading School Dist., 7 P.P.E.R. 174, 176 (PLRB 1976). In Eastern Lancaster County School Dist., 9 P.P.E.R. ¶ 9192 at 390 (PLRB 1978), the PLRB found support for this rationale within the private sector. The NLRB has ruled that ratification of a collective bargaining agreement is an integral part of the union's representation process, and, thus, an internal union matter properly determinable by union members alone. Branch 6000, Nat'l Ass'n of Letter Carriers, 232 N.L.R.B. 263 (1977).

116. *See* authorities cited in note 115 *supra*.

faith.[117]

3. Collective Bargaining by Policemen and Firemen's Act (Act 111).—In sharp contrast to Act 195,[118] the Collective Bargaining by Policemen and Firemen's Act (Act 111)[119] lacks many features of a viable labor relations statute. It fails to provide procedures for conducting representation elections[120] or processing unfair labor practices. Moreover, Act 111 contains little, if any, language paralleling the NLRA or Act 195.[121] Nevertheless, Act 111 is not completely devoid of statutory support for the union's fair representation duty. Section 217.1 states that policemen or firemen "shall, through labor organizations or other representatives . . . have the right to bargain collectively . . . and shall have the right to an adjustment or settlement of their grievances . . . ."[122] This language partially approximates that contained in Section 159(a)[123] of the NLRA and Section 1101.606 of Act 195,[124] which has been found appropriate under both the NLRA[125] and Act 195[126] to support the existence of a duty of fair representation. Problems arise, however, concerning the duty's enforcement; namely, whether the courts or the PLRB are to exercise jurisdiction. Act 111 does not give the courts explicit jurisdiction to hear such claims through a provision similar to Section 301 of the LMRA.[127] Although it lacks a provision explicitly providing PLRB jurisdiction or an unfair labor practices section through which the PLRB could enforce the duty, the Pennsylvania Supreme Court's recent decision in *Philadelphia Fire Officers Association v. PLRB*[128] may provide a basis for PLRB jurisdiction over breach of fair representation claims.

Philadelphia Fire Officers Association determined that Act 111 must be read *in pari materia*[129] with the Pennsylvania Labor Rela-

117. McCluskey v. Commonwealth, Dept. of Transp., 37 Pa. Commw. Ct. 598, 391 A.2d 45 (1978); Robinson v. Abington Educ. Ass'n, 32 Pa. Commw. Ct. 563, 379 A.2d 1371 (1977); Shannon v. PLRB, 7 P.P.E.R. 246 (1975) (C.P. Allegheny 1975); Phoenixville Area School Dist., 8 P.P.E.R. 351 (PLRB 1977); Teamsters Local 161, 6 P.P.E.R. 257 (PLRB 1975).

118. PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Purdon Supp. 1979).

119. PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Purdon Supp. 1979).

120. *See* Philadelphia Fire Officers Ass'n v. PLRB, 470 Pa. 550, 369 A.2d 259 (1977) (Supreme Court noted deficiency of Act 111 in the representation area).

121. Act 111 contains no language paralleling §§ 157-159 of the NLRA. 29 U.S.C. §§ 157-59 (1976). It also contains no language paralleling §§ 1101.401, 1101.606, or 1101.1201 of Act 195. PA. STAT. ANN. tit. 43, §§ 1101.401, 1101.606, 1101.1201 (Purdon Supp. 1979).

122. PA. STAT. ANN. tit. 43 § 217.1 (Purdon Supp. 1979).

123. 29 U.S.C. § 159(a) (1976).

124. PA. STAT. ANN. tit. 43, § 1101.606 (Purdon Supp. 1979).

125. *See* notes 6-18 and accompanying text *supra*.

126. *See* notes 91-93 and accompanying text *supra*.

127. 29 U.S.C. § 185 (1976).

128. 470 Pa. 550, 369 A.2d 259 (1977).

129. *In pari materia* is a technique of statutory interpretation meaning that ambiguous legislative intent may sometimes be gathered from other statutes dealing with the same subject

tions Act of 1937 (PLRA)[130] regarding the PLRB's jurisdiction over police and firemen representation elections. The court, however, did not address the extent of the PLRB's jurisdiction in other matters, and how much of the PLRA is to be considered *in pari materia* with Act 111[131] remains unresolved. Depending upon the extent of this jurisdiction, a fair representation duty may be founded on an Act 111 and PLRA *in pari materia* interpretation.

The PLRB found that the unfair labor practices provisions of the PLRA could be read *in pari materia* with Act 111 in *City of Easton*.[132] Consequently, the union's fair representation duty may exist if Section 217.1 of Act 111[133] can be read *in pari materia* with Sections 211.5, 211.6 and 211.7(a) of the PLRA.[134] These PLRA sections are similar to Sections 157, 158, and 159 of the NLRA[135] and Sections 1101.401, 1101.606, and 1101.1201 of Act 195.[136] The

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matter. *See* generally 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 51.01-.08 (4th ed. 1973).

130. PA. STAT. ANN. tit. 43, §§ 211.1-.39 (Purdon 1964 & Purdon Supp. 1979). This Act provided private sector employees with collective bargaining rights and created the Pennsylvania Labor Relations Board (PLRB). *See id.* at § 211.4.

131. *See* Decker, *The PLRB's New Jurisdiction for Police and Firemen*, 16 DUQ. L. REV. 185 (1978).

132. City of Easton, 9 P.P.E.R. ¶ 9109 (PLRB 1978).

133. PA. STAT. ANN. tit. 43, § 217.1 (Purdon Supp. 1979). This Section provides in pertinent part that policemen or firemen "shall, through labor organizations or other representatives . . . , have the right to bargain collectively . . . and shall have the right to an adjustment or settlement of their grievances. . . ." *See* notes 122-26 and accompanying text *supra*.

134. *Id.* at §§ 211.5, 211.6, 211.7(a). Section 211.5 provides that

> Employes shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Id. Section 211.6(1) provides in pertinent part that it shall be an unfair labor practice for an employer:

> (a) To interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act.
> * * *
> (c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Section 211.6(2)(a) provides in pertinent part that it shall be an unfair labor practice for a labor organization, or any officer or officers of a labor organization, or any agent or agents of a labor organization, or any one acting in the interest of a labor organization, or for an employee or for employees acting in concert:

> (a) To intimidate, restrain, or coerce an employe for the purpose and with the intent of compelling such employe to join or to refrain from joining any labor organization, or for the purpose or with the intent of influencing or affecting his selection of representatives for the purposes of collective bargaining.

In turn, Section 211.7(a) provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employes in a unit appropriate for such purposes, shall be the exclusive representatives of all the employes 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 employe or a group of employes shall have the right at any time to present grievances to their employer.

135. 29 U.S.C. §§ 157, 158, 159(a) (1976).

136. PA. STAT. ANN. tit. 43, §§ 1101.401, 1101.606, 1101.1201 (Purdon Supp. 1979).

PLRA,[137] however, lacks the detailed listing of "union" or "employee organization" unfair labor practices found in the NLRA[138] and Act 195.[139] This may weaken the existence of a fair representation duty under Act 111 since only Section 211.6(2)(a) conceivably applies.[140]

As yet, neither the court nor the PLRB have applied a fair representation duty under Act 111. Notwithstanding the absence of persuasive court or PLRB authority, the duty may nevertheless be justified for police and firemen by Act 111 alone or through reading it *in pari materia* with the PLRA. If the duty exists, its standard should be similar to that applied under Act 195 because there is no rational basis for distinguishing between policemen and firemen on one hand, and all other public employees on the other regarding the right to be free from arbitrary, unreasonable, or discriminatory conduct by a collective bargaining representative.

B. Some Emerging Principles

As public sector labor law continues to mature, more attention necessarily will be focused on relationships between public employees and their unions. Clearly, arbitrary conduct by the union can deprive an employee of statutorily granted and collectively bargained rights as effectively as conduct by the public employer. It is thus useful to outline and discuss some of the areas that will confront public employers, employees, and unions as current case law principles expand to deal with new situations.

1. Quality of Union Representation.—Essentially, the fair representation duty is based on the proposition that unions exercise power on employees' behalf and owe a fiduciary duty to the employees in protecting their interests.[141] The union, as fiduciary, is entrusted with enforcing employee rights under the collective bargaining agreement. It cannot arbitrarily ignore a meritorious grievance or process it in a perfunctory manner.[142]

The quality of a union's representation may depend, among other things, upon the adequacy of the investigation or presentation of grievances. Unions owe a duty to use "reasonable care" in investigating and processing grievances. To settle, withdraw, fail to file, or process a grievance to arbitration without making reasonable efforts to investigate it constitutes perfunctory handling. Requiring

137. *See id.* at § 211.6(2).
138. *See* 29 U.S.C. § 158(b) (1976).
139. PA. STAT. ANN. tit. 43, § 1101.1201(b) (Purdon Supp. 1979).
140. *Id.* at § 211.6(2)(a). *See* note 134 *supra* for text of this section.
141. *See, e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).
142. *See* Vaca v. Sipes, 386 U.S. 171, 191 (1967).

unions to use "reasonable care" in filing, investigating, and processing grievances thus involves substantial responsibility on their part. Because of the special relationship between the union and employees, however, the duty of reasonable care that a fiduciary owes to individuals should be imposed.[143]

A union's failure to exercise reasonable care in grievance processing should be considered a violation of the fair representation duty[144] for two reasons. First, the union has voluntarily assumed, if not aggressively sought, the authority to represent the employees.[145] It expands its statutory representative authority by negotiating contractual provisions providing it with exclusive control over grievances, which bars employees from processing their own grievances. Having established control over the employee's contractual rights, unions should exercise the duty of reasonable care in enforcing those rights.[146] Second, the public employer, by giving the union exclusive control over grievances, becomes insulated from employee suits unless the union violates the fair representation duty. A public employer who wrongfully discharges an employee, however, should not escape liability because of the union's negligence. This would leave the employee a victim of two wrongs without a remedy for either.[147]

At a minimum, unions should be required to properly explain and justify refusals to process or arbitrate grievances. This "proper justification" might include finding a grievance petty or frivolous, too costly, not contractual in nature or likely to result in an unfavorable contract interpretation if arbitrated. If unions agree to process grievances, they should be required to represent employees fairly. They should not be permitted to go through the motions when the real objective is to "throw" grievances.

Finally, the quality of fair representation can be greatly improved by training union representatives in techniques of investigating and preparing grievances, which training may eliminate errors involving carelessness or lack of diligence. In addition to training its representatives, unions can satisfy a reasonable care duty by investigating grievances before making a decision regarding their merits,[148] consulting with their attorney for a review of the record and evi-

143. "Reasonable care" varies according to the relationships, if any, existing between the parties. The traditional reasonable care tort duty is essentially negative in character because it is breached only through affirmative misconduct—"misfeasance." W. PROSSER, THE LAW OF TORTS § 56 (4th ed. 1971). The fiduciary nature of the union/employee relationship imposes an affirmative duty of reasonable care in the investigation and processing of grievances; and nonfeasance, such as failure adequately to investigate a grievance, may constitute a breach of this duty.

144. Summers, *supra* note 49, at 278.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See* City of Easton, 3 P.P.E.R. 3 (PLRB 1973).

dence,[149] and reviewing the decision not to pursue a grievance before an internal union staff committee.[150] Of course, any of the above may not alone satisfy this duty. A combination may be required to meet a reasonable care duty depending upon the facts associated with the alleged fair representation breach.

2. Public Employer Liability.—Public employers may and probably should be joined with unions in fair representation cases if the public employer caused arbitrary, discriminatory, or bad faith conduct by the union. Similarly, when the public employer is implicated in the union's alleged discriminatory action, joinder should occur.[151] If the employer is liable, damages should be apportioned between the employer and union according to their respective fault.[152]

A problem arises in calculating who caused what damages.[153] The public employer may attempt to protect itself from liability by ignoring union representatives and dealing with employees directly when it suspects arbitrary, discriminatory, or bad faith union conduct. Such action, however, would have a detrimental effect on labor relations and result in the public employer committing unfair labor practices to protect against liability,[154] a clearly undesirable result. Nevertheless, damages attributable to the public employer should not be charged to the union and damages caused by the union should not be assessed against the public employer. Each must only be accountable for their proportion of the damages, if any.

Consequently, if employees can sustain an unfair labor practice charge against a public employer and a breach of the union's fair representation duty tainting an arbitrator's award, recovery should be permitted against both the employer and the union.[155] If the union breaches its duty, the employee should be entitled to a rehearing by the same or another arbitrator, or if there is no rehearing, the union should be liable for damages from the date of the original action to the current date. If a rehearing is granted and the arbitrator reverses the original award, damages against the employer should be measured to the date of the original award, and the union

149. *See* Teamsters Local 161, 6 P.P.E.R. 257 (PLRB 1975).

150. *See* Southeastern Pa. Transp. Auth., 7 P.P.E.R. 38 (PLRB 1976); Southeastern Pa. Transp. Auth., 1 P.P.E.R. 71 (PLRB 1971).

151. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171 (1967) (private sector employers). *See also* Czosek v. O'Mara, 397 U.S. 25 (1970).

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

153. *See* St. Clair v. Local 515, Int'l Bhd. Teamsters, 422 F.2d 128 (6th Cir. 1969). The PLRB never addressed the problem in Phoenixville Area School Dist., 8 P.P.E.R. 351 (PLRB 1977), and apparently, it was left to the arbitrator to apportion damages.

154. For a discussion of this concern in a private sector case, see Carroll v. Brotherhood of R.R. Trainmen, 417 F.2d 1025, 1028 (1st Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

155. *See* note 151 *supra*.

should be responsible for damages from the date of the original award to the implementation date of the new award.

If the public employer is solely liable, the employee should receive a rehearing by the same or another arbitrator. And if the arbitrator reverses the original award, the employee should receive damages from the date of the original action to the implementation date of the new award. If, however, no rehearing is granted, the public employer should be liable for damages from the date of the original action to the current date.

Finally, if both the public employer and union are liable, the employee again should be entitled to a rehearing by the same or another arbitrator. If no rehearing is granted, damages should be divided equally between the parties from the date of the original action to the current date. If a rehearing is granted and the arbitrator reverses the original award, the employee should receive damages divided equally between the parties from the date of the original action to the implementation date of the new award.

The foregoing suggestions will not undermine the finality accorded arbitration awards and the collective bargaining process. To prevail against either the public employer or union, the employee must not only show that the employer's action violated the labor agreement, but must also carry the burden of demonstrating the union's breach of a duty owed the employee. This involves more than demonstrating mere errors in judgment. The grievance process cannot be expected to be errorless, and the finality provision has sufficient force to surmount occasional instances of mistake.[156] It is another matter, however, to suggest that erroneous arbitration decisions must stand even though the union's representation has been arbitrary, discriminatory, or in bad faith. If they were allowed to stand, the contractual and statutory arbitration system would cease to be an adequate mechanism securing individual redress for failure of public employers and unions to adhere to the collective bargaining agreement. Although the Pennsylvania legislature favors private dispute settlement arrangements in collective bargaining agreements in the public sector,[157] the legislature anticipated that the contractual and statutorily mandated grievance arbitration machinery would operate with a minimum level of integrity.[158]

Proof of the union's breaching its fair representation duty

156. Hines v. Anchor Motor Freight, 424 U.S. 554, 572 (1976). *See* note 42 *supra*.

157. Act 195 statutorily requires a contractual arbitration provision to be included in a public sector collective bargaining agreement. PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1979).

158. *See* Donnellan v. Mt. Lebanon School Dist., 32 Pa. Commw. Ct. 33, 377 A.2d 1054 (1977).

removes the finality bar from an arbitration award.[159] Nevertheless, this does not automatically render the public employer liable. If a public employer relies in good faith on a favorable arbitration award, then failure to comply with employees' requests cannot be objectionable until a contrary determination occurs.[160] Public employers can be held liable only if the employees can sustain a cause of action, which may be separate from or in combination with an action against the union.

3. Horsetrading Grievances.—"Grievance horsetrading" involves trading or exchanging one grievance for another by the union and the employer, usually to remove an overload on the grievance resolution mechanism or to avoid the expense of arbitration. This practice is premised upon an assumption that the union owns the grievance. Under the collective bargaining agreement, however, an employee acquires legal rights, and the union is merely the employee's agent for enforcing those rights.[161] If the union evaluates each withdrawn grievance and determines they lacked sufficient merit, then no serious fairness problem occurs because the union's action serves to "sift out wholly frivolous grievances which would only clog the grievance process,"[162] and hence, serves a legitimate purpose. Employees whose grievances are disposed of in this manner have no cause of action because the union is trading grievances it would not have processed further.[163] Often, however, grievance trading is done in bulk, without sufficiently investigating or evaluating the merits of the individual grievances.[164] Grievance settlements are discriminatory when individual employee's grievances are treated differently than others when there is no rational basis for the distinction, and when certain employees' rights are abandoned to benefit others. The union should not escape its responsibility to investigate and evaluate grievances, or seek settlements, on the merits or lack of merit of the grievances. At the same time, the public em-

159. *See* Vaca v. Sipes, 386 U.S. 171, 194 (1967); Humphrey v. Moore, 375 U.S. 335, 348-51 (1964).

160. A public employer's noncompliance with an arbitration award would constitute an unfair labor practice under Act 195. *See* PA. STAT. ANN. tit. 43, § 1101.1201(a)(8) (Purdon Supp. 1979). An analogous problem arises when the union breaches its duty of fair representation by refusing to process an employee's grievance. The PLRB, without articulating its rationale, held a public employer guilty of a section 1101.1201(a)(5) unfair labor practice for refusing to arbitrate the grievance, even though under the collective bargaining agreement the grievance was untimely because of the union's delay. *See* Phoenixville Area School Dist., 8 P.P.E.R. 351 (PLRB 1977). In that case, the public employer was merely asserting a good faith contractual defense to the grievance, and was not aware of the union's breach.

161. Summers, *supra* note 49, at 270.

162. Humphrey v. Moore, 375 U.S. 335, 349 (1964).

163. Summers, *supra* note 49, at 271.

164. *Id.*

ployer should not escape liability in agreeing to grievance settlements when the union breaches its duty of fair representation.

4. The Union's Right to Control Arbitration Access.—In Act 195, the Legislature drew a definite line between the negotiation and administration of collective bargaining agreements. The Legislature explicitly decided that unions needed exclusive power to negotiate agreements but did not need exclusive power to settle grievances. Indeed, Section 1101.606 indicates a legislative policy that unions should not have exclusive control over grievances: "any individual employe or a group of employes shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative . . . ."[165]

Despite this proviso of section 1101.606, under most collective bargaining agreements, unions assert the exclusive power to process, settle, and arbitrate grievances.[166] This power, however, does not derive from Act 195 but from the collective bargaining agreement. Act 195 mandates the inclusion of a grievance arbitration procedure in a collective bargaining agreement but leaves its content, scope, and specifics to the parties' negotiations.[167] Consequently, the union's exclusive control over the grievance arbitration procedure in the agreement is granted by the public employer, not by the Legislature; i.e., public employers, by contract, have given unions the status the Legislature refused to grant by statute. By virtue of this contractually derived status as exclusive enforcers of the grievance arbitration process, unions assume a heavy responsibility to exercise control on behalf of, rather than against, employees.

5. The Right to Union Representation and the Union's Fair Representation Duty.—Because the right to union representation exists in Pennsylvania's public sector, unions must be cognizant of their responsibility to provide representation when requested by an employee.[168] The right involves union representation at investigatory interviews when an employee may be disciplined by the employer.[169] If the employee requests representation, the union cannot act arbi-

165. PA. STAT. ANN. tit. 43, § 1101.606 (Purdon Supp. 1979). Once a grievance is arbitrated, only the union has standing to appeal the arbitrator's decision to the courts. McCluskey v. Commonwealth, Dept. of Transp., 37 Pa. Commw. Ct. 598, 391 A.2d 45 (1978).

166. *See, e.g., id. See also* 2 COLL. BARG. NEGOTIATIONS & CONTRACTS (BNA) 55:1-21 (1978). Professor Feller argues that this exclusive control is an essential aspect of the collective bargaining agreement. Feller, *supra* note 72, at 663. *See also* notes 68-69 and accompanying text *supra*.

167. PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1979).

168. For a discussion of this right in Pennsylvania's public sector see Decker, *Public Sector Union Representation Rights at Investigatory Interviews in Pennsylvania*, 82 DICK. L. REV. 655 (1978). *See also* Conneaut School Dist., 10 P.P.E.R. ¶ 10092 (PLRB 1979).

169. *Id. See also* NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

trarily, discriminatorily, or in bad faith in providing or refusing to provide representation at the investigatory interview. This representation applies to both nonmembers and union members. A blanket refusal to accompany or assist an employee at an investigatory interview breaches the union's duty.

6. Exhausting Internal Union Mechanisms.—Prior to charging a union with a breach of its fair representation duty, the employee should be required to exhaust internal union remedies.[170] Unions should be required to have within their constitutions a mechanism by which nonmembers and members can redress fair representation complaints. This might be similar to a grievance arbitration procedure whereby the complaint is finally resolved by an impartial arbitrator. Such a device provides an effective alternative forum for employees who desire to assert fair representation claims.

Indeed, within the private sector, when internal union redress procedures exist, employees must exhaust those procedures before suing in other forums.[171] Failure to exhaust union procedures is considered a valid union defense to a fair representation claim. On the other hand, even courts recognizing the defense have held it abrogated when there are no such internal union procedures to exhaust, or attempts to exhaust available procedures would be futile because of the union's actions.[172]

Another possible recourse is for the parties to provide for arbitration of fair representation claims in their collective bargaining agreement. Under this procedure, claims could be asserted against the union, the public employer, or both. Exhaustion would be required before an employee could file a claim in another forum. Of course, this arbitration would be limited to the employee's fair representation claim, and would not be a relitigation of the merits of the employee's grievance against the public employer. Moreover, the employee should still bear the burden of proving bad faith or arbitrary conduct in the union's handling of the grievance, or collusion between the union and the employer in violation of the employee's rights.

IV. Conclusion

The duty of fair representation is well established in the private

170. For a discussion of these internal union procedures in the private sector see Klein, *Enforcement of the Right to Fair Representation: Alternative Forums*, in THE DUTY OF FAIR REPRESENTATION 97 (McKelvey ed. 1977).

171. *See, e.g.*, Ditzler v. International Ass'n of Machinists Local 1984, 453 F. Supp. 50 (E.D. Pa. 1978); Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir. 1973).

172. Chambers v. Local 639, Int'l Bhd. of Teamsters, 578 F.2d 375 (D.C. Cir. 1978); Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972).

sector. Under Pennsylvania's public sector collective bargaining laws, the duty, although recognized, is still in an embryonic stage of development. Significant issues will arise regarding the proper method of apportioning liability between the public employer and the union when the duty is breached. Some fundamental principles, however, have already emerged. Foremost among these are the following:

1. Individuals acquire legally enforceable rights under a collective bargaining agreement, and the union's power to prevent enforcement of those rights should be limited;
2. Arbitration should not be overburdened with frivolous grievances by allowing employees unilaterally to invoke arbitration or by compelling unions to arbitrate meritless grievances; and
3. In settling disputes under the collective bargaining agreement similar complaints should be treated consistently.

Further litigation will refine the application of these principles as the courts and PLRB seek to accommodate the employee's right to fairness of representation with the union's need for flexibility and substantial freedom in negotiating and administering a collective bargaining agreement.

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