California Public Employees and the Developing Duty of Fair Representation

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As traced by the author, a union's duty of fair representation in California public sector labor law has statutory and common law origins, and arises in a variety of representational contexts, including grievance handling, contract negotiations and internal union affairs. Jurisdictional and procedural issues involving the proper forum, exhaustion of remedies, and statutes of limitations add complex considerations for this developing area of the law. Further problems are presented by attempts to fashion appropriate remedies for a union's violation of its duty. While many fair representation issues have been resolved by administrative and judicial decisions, often drawing upon federal precedent, significant questions remain. Many of these questions are related to the unique due process and civil service rights that distinguish public employees from those in the private sector. The existence of such rights suggests that individual public employees may benefit from heightened scrutiny of union decisionmaking, and that unions, as well as employees, may benefit from the survival of alternative forums and remedies.

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INTRODUCTION

Conflicts between a union and bargaining unit employees present difficult practical and theoretical issues in both the public and private sectors. For experienced hands, several questions come immediately to mind. When may a union be excused from taking a meritorious grievance to final, binding arbitration? What is the union's liability for a ministerial error, such as missing a grievance deadline, that might eliminate an employee's right to contest a discharge? Under what circumstances can a union favor one group over another in negotiations? These and related problems are brought together under the rubric of the duty of fair representation.

For more than two decades, substantial scholarly analysis and debate has marked the development of the duty of fair representation, with many astute labor relations observers striving to define both employee rights and the responsibilities of a union serving as an exclusive bargaining representative.1 This debate has tracked judicial recognition of the duty of fair representation, from the earliest cases involving racial dis-

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crimination by railroad unions,\(^2\) to later decisions determining the discretion of exclusive representatives under the National Labor Relations Act ("NLRA") and the Labor Management Relations Act ("LMRA").\(^3\) Public sector labor relations have been included in this broad debate, although throughout the literature one can find constitutional and civil service issues unique to a setting in which the government is the employer.\(^4\)

This review traces the development of the duty of fair representation in California's public sector. While no attempt is made to elaborate upon the deeper analyses noted previously, crucial public sector issues and trends are identified. After examining the source of the duty in statutory and common law, this Article will describe the nature of the duty in the public sector, focusing upon grievance handling, negotiations and internal union affairs. The next section considers jurisdictional and procedural issues raised by an allegation of breach of the duty, including the proper forum, exhaustion requirements, and applicable statutes of limitation.

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The dramatic increase in the volume of fair representation litigation, especially in the 1970's and early 1980's, is demonstrated in THE CHANGING LAW, supra note 1, at 269-71. For example, in 1965, there were 21 reported fair representation cases in all federal and state courts. Seventeen years later, in 1982, the total was 245. Id. at 269. These figures do not include NLRB decisions, which totaled 169 for the 1965-1982 period. Id. at 270. While a large majority of fair representation cases in federal district court, the forum used most frequently, have not been successful, employee claims that have survived the NLRB's initial investigation stage have fared quite well, winning in nearly half the reported cases. Id. at 270-71. A breakdown of civil litigation, including settlements, is provided in Goldberg, supra note 1, at 136-40.


tions. The final section reviews appropriate remedies for violations of the duty of fair representation.

As will be seen in the following discussion, public sector fair representation issues in California have been substantially resolved, but intriguing questions remain to be settled. In particular, beyond the state's labor relations statutes are constitutional law and civil service statutes which may influence decisions about the nature of a union's duty, and the standard by which union conduct shall be measured. Thus, in defining duties and standards, public sector unions may have to contend with a greater degree of protection for individual personnel rights than do their union counterparts in the private labor arena. Special public sector procedural questions also will be highlighted, again with reference to established constitutional and civil service remedies. In this area, however, unions as well as employees may benefit from the survival of forums and remedies in addition to those provided by the state's labor relations statutes.

I
SOURCE OF THE DUTY

A. Statutory

The California labor relations laws described below are the primary statutory sources of the duty of fair representation in California's public sector. These laws supplement common law experience. Three of these laws explicitly establish a fair representation requirement. In others, the duty can be implied on the basis of statutory design and language. Common law precedent also may influence statutory interpretations of the duty.

The three labor laws administered by the Public Employment Relations Board ("PERB" or "Board") expressly set forth a duty of fair representation.\(^5\) The first of these to be enacted, the Educational Employment Relations Act ("EERA"),\(^6\) states:

The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.\(^7\)

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5. Through 1985, covering the first 10 years of the PERB, there have been nearly three dozen reported fair representation cases. (This does not include nonprecedential hearing officer decisions from which no exceptions have been taken.) Many of these cases arose not from hearings, but on review of precomplaint dismissals of unfair practice charges.


7. Id. § 3544.9. The PERB has held, in accord with the statute, that the fair representation obligation extends only to unit employees, rejecting the unfair practice charge of a nonunit substitute teacher who claimed she was improperly denied access to the contractual grievance procedure to contest her poor evaluations and dismissal. United Teachers of Los Angeles (Wadsworth), P.E.R.B. Dec. No. 599 (1986).
An express duty of fair representation was similarly adopted as part of the Higher Education Employer-Employee Relations Act ("HEERA"), which provides:

The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.9

The final statute within PERB's jurisdiction, the State Employer-Employee Relations Act ("SEERA"), did not include an express duty of fair representation when it was passed in 1977.10 However, in 1982, when language allowing organizational security fees was enacted,11 the California legislature included an explicit fair representation requirement for employees paying "fair share" fees:

An employee who pays a fair share fee shall be entitled to fair and impartial representation by the recognized employee organization. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.12

Other California public sector labor laws outside of the PERB's jurisdiction do not contain express language describing a duty of fair representation.13 Courts are split on whether a duty nevertheless exists. In Logan v. Southern California Rapid Transit District,14 the court dis-


9. Id. § 3578.


12. Id. at (g). Curiously, in a 1984 case challenging a union affiliation decision, the PERB overlooked this subsection and stated that there was no express duty of fair representation in the SEERA. California State Employees' Ass'n (Norgard), P.E.R.B. Dec. No. 451-S, at 1 n.1 (1984). Nonetheless, citing federal precedent, a duty was implied "as a quid pro quo for the granting of exclusive representational rights..." Id. The question remains, however, whether the legislature's fair share fee payer distinction has practical significance if a generalized duty exists for all unit employees.


missed a fair representation claim because of insufficient facts, concluding, however, that the duty could be implied from the statutory design permitting exclusive representation.\textsuperscript{15} The court's finding of an implied duty followed the reasoning of a 1978 California decision, \textit{Lerma v. D'Arrigo Brothers},\textsuperscript{16} which had applied the duty for private agricultural employees excluded from federal labor law coverage.\textsuperscript{17}

In contrast, a 1982 appellate court opinion, \textit{Andrews v. Board of Supervisors},\textsuperscript{18} stated that a duty of fair representation could not be implied under the MMBA because of express language that employees retain the right "to represent themselves individually in their employment relations with the public agency."\textsuperscript{19} The court reasoned that "absent exclusive representation, the rationale for the reciprocal duty of fair representation does not exist,"\textsuperscript{20} apparently construing the MMBA and the local enabling regulation as creating something other than a system of exclusivity. This construction, however, arguably was incorrect. As the same court noted, in other respects, the county's representational scheme authorized under section 3507 of the MMBA allowed unit-wide negotiations binding on all unit members while also prohibiting inconsistent individual relationships with the employer.\textsuperscript{21} Thus, the exclusive authority the court found lacking as a necessary element for implying a fair representation duty was, by its own analysis, obviously present as a restraint on the employer's dealings with individual employees.\textsuperscript{22}

Nonetheless, \textit{Andrews} remains the only appellate decision regarding fair representation under the MMBA. Other courts might prefer the approach used in \textit{Logan} and \textit{Lerma}, which implied a fair representation requirement as a quid pro quo for a union's status as an exclusive bargaining agent, yet feel bound by the \textit{Andrews} interpretation of the MMBA's reference to individual representational rights. For this reason,

\textsuperscript{15} \textit{Id.} at 127-29, 185 Cal. Rptr. at 885-86.
\textsuperscript{17} Drawing on the federal parallel, the \textit{Lerma} court reasoned that \textsc{Cal. Lab. Code} § 923 (West 1971) establishes a permissive system of exclusive bargaining agents with a corollary fair representation duty. Under federal law, as Prof. Feller has explained, the employee's right and the union's duty flow from the principle of exclusivity under § 9(a) of the NLRA, 29 U.S.C. § 159(a) (1982), not from union and management's negotiated agreement per se. Feller, \textit{supra} note 1, at 807-08.
\textsuperscript{18} 134 Cal. App. 3d 274, 184 Cal. Rptr. 542 (1982).
\textsuperscript{19} \textit{Id.} at 283, 184 Cal. Rptr. at 547 (quoting \textsc{Cal. Gov't Code} § 3502 (West 1980)). The employee was protesting a change in shift differential payments in a contract that superseded previous county salary regulations.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} at 281, 184 Cal. Rptr. at 546 (citing Contra Costa County ordinances as authority).
\textsuperscript{22} See also \textit{Golden v. Local 55, Int'l Ass'n of Firefighters}, 633 F.2d 817, 823-24 (9th Cir. 1980) (implied duty under MMBA although dismissing race discrimination case). Prof. Grodin expressed the same view implying the duty in his major article on the early years of the MMBA. Grodin, \textit{Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts}, 23 \textsc{Hastings L.J.} 719, 747 (1972).
absent a state supreme court resolution, legislation expressly establishing a fair representation requirement, as set forth in the PERB-administered statutes, could be the only means of clarifying the law in MMBA jurisdictions.

B. Common Law Origins

California's statutory duty of fair representation was foreshadowed by court precedent. A landmark decision in 1944 marked an extension of the common law that provided a partial basis for the later state labor laws. In *James v. Marinship Corp.*, the California Supreme Court upheld an injunction against a union's industry-wide practice of placing black shipyard workers in an auxiliary local that deprived them of full membership and employment opportunities. The court wrote:

Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.24

Two years after *Marinship*, the court made it clear that a labor union's exclusivity alone was sufficient to impose a fair representation duty to protect minority employees, even if there was a closed shop agreement with but a single employer.25 Again, the court relied on federal labor precedent for guidance.26

Reliance upon federal precedent continues in California common law. State courts have concurrent jurisdiction with federal courts to ap-

24. *Id.* at 731, 155 P.2d at 335. In reaching its conclusion, the court recognized constitutional overtones in the union's auxiliary structure, *id.* at 739, 155 P.2d at 339, and cited, *id.*, the then recent Supreme Court decision in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), which struck down racially discriminatory railway labor union practices. *Steele* was a pathbreaking case for developing a theory of the duty of fair representation. See *Jones, The Origins of the Concept of the Duty of Fair Representation*, in *The Duty*, supra note 1, at 25. *Steele* interpreted the Railway Labor Act, 45 U.S.C. §§ 151-163 (1982), and avoided an explicit constitutional ruling on the union's exclusion of black members, concluding that the statute, "did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it the duty to protect the minority." *Steele*, 323 U.S. at 198-99. Elsewhere in *Steele*, the Court referred to basic principles of trust law to underscore a union's duty, stating, "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. . . ." *Id.* at 202.
ply federal private sector labor law standards in fair representation disputes, thus providing another source of law for public sector practitioners.\(^{27}\)

Although the common law sources of the duty of fair representation have now largely been superseded by the public sector labor relations statutes that expressly and impliedly establish the duty, the earlier sources and later decisions remain relevant. Not only do they provide a constitutional backdrop for analyzing discriminatory union conduct, but they also offer a continuing link to federal labor law, allowing private sector experience to shed light on public sector disputes.

II

NATURE OF THE DUTY

A. General Standards and Prohibitions

The statutory text of the SEERA and the HEERA prohibits union representation that is "arbitrary, discriminatory, or in bad faith."\(^{28}\) This language is identical to the three-part standard adopted by the United States Supreme Court in *Vaca v. Sipes.*\(^{29}\) Although section 3544.9 of the EERA states only that a union shall "fairly represent" unit employees, the earliest PERB decisions interpreting that statute also used the *Vaca* formula to define the concept of fair representation under section 3544.9.\(^{30}\)

By limiting analysis to the three-part *Vaca* test, the California legislature and the PERB have sidestepped a definitional problem that has marked the development of federal law. This problem prompted one commentator to describe the Supreme Court's fair representation decisions as speaking with "impenetrable ambiguity."\(^{31}\) But, as will be evi-


\(^{28}\) *CAL. GOV’T CODE* §§ 3515.7(g) (SEERA), 3578 (HEERA) (West 1980 & Supp. 1987).

\(^{29}\) 386 U.S. 171, 190 (1967). The Court also declared that a union can not "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Id.* at 191.

\(^{30}\) See, e.g., Rocklin Teachers Professional Ass’n (Romero), P.E.R.B. Dec. No. 124, at 6 (1980) (applying the standard disjunctively); Redlands Teachers Ass’n (Faeth), P.E.R.B. Dec. No. 72, at 3 (1978) (summary affirmance of hearing officer decision). Given the difference in the EERA’s language, the question still remains whether fair representation can be judged by a standard that varies from the text of the SEERA and the HEERA.

\(^{31}\) Aaron, *The Duty of Fair Representation: An Overview*, in *THE DUTY*, supra note 1, at 18-
dent in the subsections that follow, even a limitation to the arbitrary, discriminatory, or bad faith standard does not render fair representation analysis an easy task. This is because these terms are sufficiently broad to engender debate about their applicability to many types of organizational conduct.

The PERB has held that a breach of the fair representation requirement, once found, constitutes an unfair practice by the offending employee organization, in violation of section 3543.6(b), the EERA's general prohibition against interference, discrimination, restraint and coercion by organizations.\textsuperscript{32} Identical language proscribing organizational conduct is contained in the SEERA and HEERA.\textsuperscript{33} The PERB's interpretation of its unfair practice jurisdiction corresponds to the view of the National Labor Relations Board ("NLRB") regarding its own such jurisdiction. The NLRB concluded, after holding to the contrary for a number of years, that a breach of the duty of fair representation violates the NLRA's prohibition against restraint or coercion of employees.\textsuperscript{34} The PERB will liberally construe the unfair practice charge to determine whether a fair representation breach has been alleged.\textsuperscript{35} However, a charging party also must plead some harm or injury as an element of the case.\textsuperscript{36}

\textbf{B. Grievances and Contract Administration}

\textit{1. Honest and Reasonable Judgments}

A major objective of many unions is to negotiate bargaining agreements. However, as noted by the Supreme Court, making a contract

\textsuperscript{19} Prof. Aaron considered the ambiguity to result from judicial use of such phrases as "hostile discrimination," "deceitful action or dishonest conduct," "invidious discrimination" and "fraud." The ambiguity arose, in particular, from a series of Supreme Court decisions emphasizing the element of bad faith, a threshold eventually lowered in \textit{Vaca v. Sipes}. See \textit{Feller}, \textit{supra} note 1, at 809. Another review has noted that the fair representation doctrine "has been applied in haphazard directions . . . drawn willy-nilly from doctrines of tort, contract, fiduciary relations and constitutional law." Harper & Lupu, \textit{supra} note 1, at 1214-15.

\textsuperscript{32} Service Employees Int'l Union (Kimmett), P.E.R.B. Dec. No. 106, at 13-14 (1979). CAL. \textsc{Gov't Code} § 3543.6(b) (West 1980 & Supp. 1987) states that it shall be unlawful for an employee organization to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter."

\textsuperscript{33} See CAL. \textsc{Gov't Code} §§ 3519.5(b) (SEERA), 3571.1(b) (HEERA) (West 1980 & Supp. 1987). The HEERA also expressly states that it is an unlawful practice for an employee organization to "[f]ail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative." CAL. \textsc{Gov't Code} § 3571.1(e) (West 1980).

\textsuperscript{34} Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962), \textit{enforcement denied}, 326 F.2d 172 (2d Cir. 1963). The \textit{Miranda} rationale was affirmed in Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), \textit{cert. denied}, 389 U.S. 839 (1967).


\textsuperscript{36} California School Employees Ass'n (Tornetta), P.E.R.B. Dec. No. 508 (1985).
with an employer does not end the day-to-day obligations of an exclusive representative:

Collective bargaining is a continuous 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.37

A large number of PERB cases concerning the duty of fair representation involve grievance handling or related issues of contract administration. As a general rule, the PERB will dismiss charges that the duty has been breached if a union has made an honest, reasonable determination that a grievance lacks merit.38

In the PERB's view, use of an "honest judgment" test is consistent with the standard set by the Supreme Court in *Vaca v. Sipes*.39 In that seminal case, an employee charged that his union unfairly refused to take his case to arbitration, alleging that medical evidence supported the employee's claim that he was fit to work and should not have been discharged. The medical evidence, however, was not definitive: it included a medical report adverse to the employee. The report, solicited by the union as part of its consideration of the grievance, provided a reason for the union's unwillingness to arbitrate. In reversing a state court damage award in favor of the employee, the Supreme Court declared:

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration. . . .

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined. . . . Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle griev-


This approach was applied by the PERB in Fanning, as one example, in which a union refused to arbitrate a pay discrepancy affecting adult education teachers. In the union’s view, the relevant contract language unambiguously set two pay scales, and success at arbitration might have jeopardized a school program and jobs. The teachers’ internal union appeal of the arbitration refusal was rejected by the organization’s directors. The PERB reasoned: “Whether or not this judgment by the Association was correct is not at issue. Our inquiry focuses on whether the Association’s judgment had a rational basis, or was reached for reasons that were arbitrary or based upon invidious discrimination.”

Even a grievance or an arbitration with arguable merit can be rejected if the grievant’s victory would damage terms and conditions for the bargaining unit as a whole. This was the conclusion reached in Castro Valley Teachers Association (McElwain), in which two teachers charged that the employer denied transfers based on seniority after negotiating a new transfer policy to implement a school reorganization plan. A PERB hearing officer found in favor of the grievants on the ground that the organization had not considered the merits of their individual cases when it declined to pursue grievances. The PERB reversed. The Board found that the union had effectively considered the merits in a nonarbitrary, rational fashion by placing the claims in an overall, unit-wide context, concluding that success at arbitration would disrupt existing assignments and spark divisiveness among employees.

The PERB’s approach in McElwain, analyzing the union’s balancing of individual and collective interests, can be justified as long as some judgment or discretion is exercised by the bargaining agent and a choice is made after fair consideration. Would a legal justification exist, however, if a union acted on behalf of a favored grievant with a meritorious protest without adequately investigating another grievant’s competing transfer claim? There also is the danger, in the view of one scholar, that employees will be deprived of contractual benefits that are personal (or minority group) rights, because a later midterm contractual reassess-
ment by a union favors a majoritarian viewpoint. Presumably, if the contractual rights at issue are unambiguous, the union will have less leeway to favor a competing view.

2. Constitutional Considerations

Serious constitutional questions are raised by an "honest judgment" test as used by the PERB in the cases described above. These questions arise from union case-handling discretion that may bar relief for an individual grievant if the bargaining agent controls access to arbitration but refuses to proceed, perhaps precluding other avenues of relief in the process.

It cannot be disputed that public employees with expectations of continued employment have a property right that is subject to due process safeguards, including a hearing, before it can be definitively taken away. In this setting, a union's refusal to take a case to arbitration may constitute the type of "state action" that would expose the union's determination to constitutional scrutiny. This argument is strengthened by

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46. Summers, supra note 1, at 266-68. This issue is presented in contract negotiations as well. See infra notes 105-06, 111-14 and accompanying text.

47. The cases on this point are legion, establishing due process protections for an employee's job related property rights as well as for an employee's "liberty" interest in maintaining an employment reputation free from unfair stigmatization. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Skelly v. State Personnel Bd., 15 Cal. 3d 194, 539 P.2d 794, 124 Cal. Rptr. 14 (1975). The constitutional issues described in this portion of the text are discussed in several articles on fair representation in the public sector. See, e.g., Aaron, supra note 4; Note, supra note 4; Finkin, supra note 1; Koretz & Rabin, supra note 4.

The prohibition on impairment of contractual obligations may be a distinct constitutional check on management and union actions. See Finkin, supra note 1, at 263-68. Recent judicial interpretations of the relevant federal and state provisions include United States Trust Co. v. New Jersey, 431 U.S. 1 (1977); Sonoma County Org. of Pub. Employees v. County of Sonoma, 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979). These decisions have rejected the traditional deference to the reasonableness of a legislative contractual modification, with impairment permitted only if less drastic modifications or alternatives are unavailable to meet unforeseen circumstances. United States Trust, 431 U.S. at 29-32; Sonoma County, 23 Cal. 3d at 305-06, 591 P.2d at 4-5, 152 Cal. Rptr. at 906-07.

Both due process and contract impairment factors underscore Prof. Summers' comment: The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer. The employer is government; the ones who act on behalf of the employer are public officials; and the ones to whom those officials are answerable are citizens and voters. Summers, Public Sector Bargaining: Problems of Governmental Decisionmaking, 44 U. CIN. L. REV. 669, 670 (1975).

the realization that public sector collective bargaining results from legislative delegation of authority that permits negotiated control over matters that previously were the unilateral prerogative of management. 49

There are, however, countervailing considerations that could be invoked to excuse a union decision declining arbitration, even if an employee would be deprived of a hearing that would otherwise be a matter of constitutional right. Decisions upholding public employee due process rights recognize that they must be balanced against the government’s interest “in expeditious removal of an unsatisfactory employee.” 50 The government also has a strong interest, as do unions, in a system of exclusive representation in which individual rights are subordinated to those of the group, binding the members of a negotiating unit. 51 Among other benefits, bargaining by an exclusive agent limits competition and dissen- sion in the workplace, and promotes the stability of agreements and labor-management relationships. 52

In this context, some courts have decided that an individual’s consti-


51. See, e.g., NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967). The policy, bluntly stated: “extinguishes the individual employee’s power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.” Id. at 180. See also J.I. Case Co. v. Labor Bd., 321 U.S. 332 (1944).


52. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220-21 (1977). The preference for exclusive representation has prevailed over constitutionally based claims that all compulsory union fees coerce individual employees, id., that minority unions are denied access to a public employer’s mail system, Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983), or that nonincumbents are excluded from discussing professional concerns, even though the concerns are not within the scope of negotiations. Minnesota State Bd. v. Knight, 465 U.S. 271 (1984). Moreover, it is likely that individual free speech at a public meeting may be restrained if the speaker attempts to bypass negoti-
tutional right to a hearing has been waived as a result of a bargaining agreement providing for exclusive union control of the arbitration procedure.53 The central premise of the waiver theory in these cases is that a union’s bargaining authority, to be effective, necessarily predominates over individual interests.54

The subordination or waiver of individual interests, however, is not compelled in every instance. For example, there may be statutory communication rights that protect the right to choose a bargaining agent, which an incumbent union cannot bargain away.55 Significant decisions also have concluded that there are nonwaivable statutory or constitutional rights, in addition to due process,56 that benefit individuals by prohibiting discriminatory practices,57 or that require the maintenance of fair and equitable working conditions.58 Other waiver prohibitions may be present in the context of contract negotiations.59

Some courts have used a different and perhaps sounder approach to reconcile exclusive union control with individual due process entitlements, concluding that union decisions about arbitration are an adequate alternative if the procedures used provide for protection of employee interests and a fair hearing when appropriate.60 This view permits survival
of an individual claim if a union's internal decisionmaking procedures unfairly deprive an employee of adequate consideration or a hearing.\footnote{Winston, 585 F.2d at 198; McCollum, 794 F.2d at 602; cf. Stritzl v. United States Postal Serv., 602 F.2d 249, 252 (10th Cir. 1979) (supporting view that bargaining agreement procedure supersedes statutory fair hearing requirement). In one private sector model, survival of an individual's claim could result in renewal of the arbitration option, rather than judicial resolution of the merits of the grievance, thereby causing less damage to the bargaining relationship. Feller, supra note 1, at 813-17.}

The "fair process" approach is similar to the Supreme Court's recognition in Steele that constitutional problems would arise if exclusive representatives were not obliged by statute to fairly protect minority interests.\footnote{Steele, 323 U.S. at 198-99. The notion of administratively fair procedures to provide minimum constitutional protections also was key to the Supreme Court decision in Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) (hearing required in fair employment dispute).} At the same time, this approach has the benefit of limiting the use of new or alternative remedies where an existing, comprehensive civil service or contractual grievance procedure provides an adequate opportunity to redress wrongdoing.\footnote{McCollum precluded constitutional and fair representation claims on the ground that the contractual procedure provided adequate relief. 794 F.2d at 606-07 (relying on Bush v. Lucas, 462 U.S. 367, 380-90 (1983), which rejected private cause of action for constitutional violation where effective administrative remedy existed). See also Gaj v. United States Postal Serv., 800 F.2d 64 (3d Cir. 1986) (citing Bush v. Lucas to bar alternate civil remedy for antiunion discrimination claim).}

The fair process standard, however, has been criticized because it makes vindication of the constitutional right to a hearing dependent on a separate fair representation challenge.\footnote{Finkin, supra note 1, at 260.} One critic has proposed that in discharge cases, where constitutional significance is clear, an employee's success in a court proceeding on the merits of the termination justifies a \textit{per se} unfair representation finding against the union, including damages flowing from the refusal to proceed to arbitration.\footnote{Id. at 261-62. The author suggests that not all contractual rights require full-blown constitutional protection. Id. at 259-63.}

This approach, it is urged, has the value of entitling an employee to a decision on the merits at some point, without subjecting internal union casehandling decisions to an unwieldy constitutional analysis.\footnote{Id. at 258.} But, under this perspective, the reconciliation of constitutional rights with a bargaining system is accomplished by putting unions in a perilous state, and by potentially denying labor and management the finality of their arbitration agreement.

Given these difficulties, in keeping with constitutional concerns, employee rights need not be subject to an "all or nothing" representational design. Bargaining agreements or statutes may provide for the utilization

(E.D. Wis. 1985). A similar conclusion can be drawn from Lubey v. City and County of San Francisco, 98 Cal. App. 3d 340, 348, 159 Cal. Rptr. 440, 444-45 (1979), in which employees were entitled to due process as required by the city charter and incorporated in the bargaining agreement.

61. Winston, 585 F.2d at 198; McCollum, 794 F.2d at 602; cf. Stritzl v. United States Postal Serv., 602 F.2d 249, 252 (10th Cir. 1979) (supporting view that bargaining agreement procedure supersedes statutory fair hearing requirement). In one private sector model, survival of an individual's claim could result in renewal of the arbitration option, rather than judicial resolution of the merits of the grievance, thereby causing less damage to the bargaining relationship. Feller, supra note 1, at 813-17.

62. Steele, 323 U.S. at 198-99. The notion of administratively fair procedures to provide minimum constitutional protections also was key to the Supreme Court decision in Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) (hearing required in fair employment dispute).

63. McCollum precluded constitutional and fair representation claims on the ground that the contractual procedure provided adequate relief. 794 F.2d at 606-07 (relying on Bush v. Lucas, 462 U.S. 367, 380-90 (1983), which rejected private cause of action for constitutional violation where effective administrative remedy existed). See also Gaj v. United States Postal Serv., 800 F.2d 64 (3d Cir. 1986) (citing Bush v. Lucas to bar alternate civil remedy for antiunion discrimination claim).

64. Finkin, supra note 1, at 260.

65. Id. at 261-62. The author suggests that not all contractual rights require full-blown constitutional protection. Id. at 259-63.

66. Id. at 258.
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or election of alternative remedies. Further, if an employee is allowed direct access to arbitration, especially in discharge cases, constitutional problems would be considerably reduced, if not eliminated entirely.

In sum, the unique constitutional issues that confront the assessment of public sector fair representation claims provide reason to pause in doctrinal development, to ensure the proper accommodation of individual, collective and governmental interests. However, while these problems are unique to the public sector, they are not so substantial that they justify discarding contractual dispute resolution systems in favor of more traditional civil service adjudicatory approaches.

3. Casehandling Errors

But what if the employee organization mishandles a case after making an honest judgment to push forward with a grievance? The PERB's often stated perspective is that mere negligence by a union will not constitute a breach of the duty of fair representation. For example, in one case the Board affirmed dismissal of a charge alleging that a union attorney misinformed employees about their share of a settlement. Nothing more than the attorney's possible negligence was claimed.

A violation might be found, however, based upon cumulative case-handling errors, inaction and faulty explanations. Such an assessment of


68. See, e.g., Malone v. United States Postal Serv., 526 F.2d 1099 (6th Cir. 1975) (election of voluntary remedy avoids due process violation). See also Finkin, supra note 1, at 262-63; Aaron, supra note 4, at 185 (individual election also could be nonprecedential); Note, Developments in the Law—Public Employment, 97 HARV. L. REV. 1611, 1725 (1984). As the Harvard authors point out, however, an individual pursuing a case without a union might lack resources, and a different rule of decisional finality might apply in a nonarbitration civil service forum. Id. at 1725-26. For practical, nonconstitutional reasons, public sector unions may not oppose individual access to the arbitration machinery. Some unions may be concerned with the organizational expense of representing employees, while also believing that an arbitrator's decision (even if nonprecedential) would be preferable to civil service adjudication when contractual issues are at stake.


71. Although a union staff attorney will generally not be held personally liable for grievance related conduct that constitutes a breach of the duty, the union may initiate a malpractice action against its counsel if the union is charged with liability for its agent's error. See Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), cert. denied, 106 S. Ct. 1642 (1986) (relying on Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962)). In cases where a union has retained counsel to personally represent a grievant, the employee could successfully initiate a malpractice action in conjunction with fair representation litigation. Aragon v. Federated Dep't Stores, Inc., 750 F.2d 1447 (9th Cir. 1985).
the total circumstances was made in San Francisco Classroom Teachers Association (Bramell), when the Board reversed the dismissal of a charge and found that a prima facie case had been stated.

In Bramell, an employee alleged that he sought union help in grieving his termination as an athletic coach, but that the organization not only missed the filing deadline for the second step of the procedure, but also failed to seek an extension, as the employee initially was told would be done. Later, the union informed the employee that the grievance lacked merit. When the employee again explained his claim, the union sought reinstatement but did not file a grievance objecting to the replacement employee.

Reviewing the unfair practice allegations, the PERB looked first to the union's failure to file a timely appeal: "Although the Association took no action in response to that request, no breach of the duty of fair representation is described merely by declining to proceed or by negligently forgetting to file a timely appeal." The Board concluded, however, that later alleged events compounded the union's earlier error, including the failure to seek an extension as promised, the eventual and possibly pretextual claim that the employee's grievance lacked merit, and the failure to file a grievance over the replacement hiring. The PERB concluded that "any one of these actions, by itself, would not breach the Association's duty, [but] in their totality, the Association's actions present a pattern demonstrating, at a minimum, an arbitrary failure to fairly represent Bramell."

Despite these PERB cases apparently rejecting a negligence standard for fair representation cases, there is a measure of doubt about the finality of this view. In the Board's reconsideration of an earlier decision, California School Employees Association (Dyer), adoption or rejection of a negligence standard for assessing arbitrary conduct was expressly reserved. Instead, the Board concluded that the employee was alleging a judgment error, not a ministerial failing, when the union declined to appeal a lawsuit. For this reason, the union's exercise of discretion was affirmed.

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73. Id. at 7.
74. Id. at 9. Within a month of the Bramell decision, another case also suggested that a union's explanation of events, or lack of one, would be reviewed. In Oakland Educ. Ass'n (Mingo), P.E.R.B. Dec. No. 447 (1984), the Board upheld dismissal of a charge as time-barred. Regarding the underlying claim that the union's grievance refusals constituted a breach of the union's representational duty, the PERB stated: "We note that the exclusive representative has an obligation to explain its actions in refusing to process a grievance and there is some conflict about whether an adequate explanation was made in this case." Id. at 1-2. The issue remains unresolved in Mingo because the charge was untimely.
76. Id. at 3 n.2 (discussing Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983), which involved a breach for an unexplained, unexcused failure to act).
The cases cited above, largely disapproving a negligence standard without fully resolving the issue, are perhaps a reflection of the significant tension between opposing concerns that exists regarding fair representation analysis in grievance case handling circumstances. On the one hand, excessive and strict scrutiny of a union's conduct could endanger a dispute resolution system that is geared to speedy problem solving and the use of nonlawyer representatives, contribute to the weakening of the union's decisionmaking authority in its relationship with an employer, and add to the strains of an overworked grievance machinery by prompting fearful unions to take frivolous or weak cases to arbitration. One result of such scrutiny, according to a critic of strict oversight, is that a built-in severance pay system has developed because both management and labor want to buy off later troubles with settlement payments.

On the other hand, using a negligence standard of reasonable care to review union actions recognizes that employee expectations have been raised by union representation. Bargaining agents have voluntarily assumed representational responsibility, often benefit from union security payments, and frequently have exclusive control over access to grievance and arbitration procedures. Stated simply, "The union can scarcely assert that it has fulfilled the duty to represent fairly when, by its negligence, it has failed to represent at all." Nonetheless, even proponents of a negligence standard concede that a union's duty of reasonable care must be assessed and perhaps limited by reference to customary practices and competing demands on organizational resources. In keeping with these considerations, a distinction

77. Feller, supra note 1, at 810-12.
81. Newman, supra note 4, at 88; Summers, supra note 1, at 278. For a critical view of standards and procedures that limit relief for employees, see Tobias, The Plaintiff's Perception of Litigation, in THE CHANGING LAW, supra note 1, at 128.
82. Summers, supra note 1, at 276. This argument is strengthened in the public sector given the constitutional employee rights at stake, discussed herein. See supra notes 47-68 and accompanying text. See also Note, supra note 4, at 785, 788.
83. Summers, supra note 1, at 273, 278; VanderVelde, supra note 1, at 1114-19, 1145-47. One analysis considering these points suggests:
[A] union would not be restricted from establishing as low a set of standards as it wishes for the investigation, presentation, or other processing of grievances. For instance, unions would not be required to take all grievances of a certain degree of merit to arbitration as long as they have a principled reason, such as inadequate resources, to set a lower standard.
Harper & Lupu, supra note 1, at 1278. These authors believe that an equal protection approach, as distinguished from both a majoritarian and a role or rights based model, requires a type of "principled democracy" that sufficiently respects individual concerns without sacrificing the union's interest
could be drawn between a union's discretionary, tactical decisions that should be free from judicial second-guessing and "a host of mechanical, nondiscretionary issues" that emerge once a union has found merit in a grievance.84

Federal private sector experience on this issue has not been particularly instructive. Some circuit courts of appeals have required a showing of bad faith, in addition to a demonstration of inadequate representation,85 while others have found a breach for inept and unexplained case-handling errors.86 The conflicts in federal labor relations law prompted the NLRB's General Counsel to describe the situation as it existed in 1979 as one of a "vast and confusing array of word-tests."87 The General Counsel proposed that mere negligence not constitute unfair representation, but that a complaint could issue for gross negligence, to be examined on a case-by-case basis.88 In the public sector, with constitutional employee rights looming in the background, the gross negligence standard might be compelled as a minimum, with a more demanding standard possibly required when substantial and permanent employee interests are at stake.

4. Contractual Scope of the Duty

There is greater clarity on the definition of the scope of the representational duty, a distinct and separate issue. PERB cases have held that the scope of the duty is limited to contractually based remedies under the union's exclusive control. In three decisions applying private sector precedent, the Board has dismissed charges based on alleged union failures in collective wellbeing. Id. at 1216, 1224, 1232, 1253. Thus, assuming the union's standards are fixed, employees would be equally protected against discriminatory or bad faith treatment. Id. at 1280-81.

84. T. BOYCE & R. TURNER, supra note 1, at 70-71. The authors mention, as examples of nondiscretionary matters, the meeting of filing deadlines and notice to employees. Id. at 71. Naturally, in some instances, the issue of customary practices might affect a determination that a union was negligent in handling a nondiscretionary function. In any event, as noted above, supra note 61, if a union declines to pursue a case, it has been argued that employees be given an individual right to grieve in order to have a decision, perhaps nonprecedential, on the merits of a contractual claim. See also Summers, supra note 1, at 275; VanderVelde, supra note 1, at 1145-47. In the public sector, an individual option might be compelled for constitutional reasons, assuming no other noncontractual remedy is available.

85. See, e.g., Cannon v. Consolidated Freightways Corp., 524 F.2d 290 (7th Cir. 1975); cases cited in C. MORRIS, supra note 1, at 1325.

86. See, e.g., Milstead v. Teamsters Local 957, 580 F.2d 232 (6th Cir. 1978); cases cited in C. MORRIS, supra note 1, at 1325.


88. Id. at 344 (citing Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082 (9th Cir. 1978) (union failure to inform employee of decision not to arbitrate resulted in employee's mistaken rejection of settlement); Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975), cert. denied, 464 U.S. 982 (1983) (unexplained union failure to process grievance to next step or seek further deadline extension despite earlier extensions having been granted)). Ruzicka was favorably cited by the PERB in San Francisco Classroom Teachers Ass'n (Bramell), P.E.R.B. Dec. No. 430, at 6 (1984).
to pursue noncontractual administrative or judicial relief. 89

These decisions are particularly significant because, unlike employees in the private sector, public sector employees often continue to benefit from traditional civil service remedies that predated enactment of collective bargaining laws. In Chestangue, a teacher charged that the association did not represent her in a mental illness proceeding under the Education Code. 90 The Lemmons case involved out-of-class work claims presented to the State Personnel Board and the Board of Control. 91 Similarly, in Darzins, no breach was alleged regarding the union's failure to appeal a State Personnel Board decision to the courts after the employee's probationary status had been terminated. 92

While the existence of supplementary or alternative extracontractual remedies might mitigate the potential harshness of a union's exclusive authority under a contract, a number of troubling issues can arise from rigid application of a rule barring fair representation claims in noncontractual settings. For example, what if the contract explicitly incorporates the remedy, or allows the employee to elect one procedure over another? In the former instance, the union has bargained for a specific type of relief and the duty of fair representation arguably should be applied. In the latter situation, an election-of-remedy option could be used by a union as a smokescreen to shun disfavored cases or employees, thereby discriminating in the allocation of organizational resources. An employee's case would be strengthened if evidence of past practice demonstrates that some employees were represented by the union in the noncontract forum. The key question then is the basis for a distinction, rather than simply the forum to be utilized. If the union's justification is arbitrary, discriminatory, or in bad faith, an employee's claim might survive a union defense based on the noncontractual setting of the dispute. 93


92. The dismissal, affirmed by the Board, also reasoned that the employee could have retained private counsel to contest the personnel board ruling, and that the union's refusal did not bar the individual from seeking redress on his own. California State Employees Ass'n (Darzins), P.E.R.B. Dec. No. 546-S (1985).

93. Although the PERB has apparently limited the scope of fair representation claims, employees perhaps may utilize alternative civil remedies in the event a union's action constitutes a tort, a breach of promise, or should be estopped because of employee reliance. Such claims may be cognizable, even if the alleged fair representation violation is not. Litigation of civil claims, however, may be
5. Corollaries and Conditions Affecting Representation

When the union’s representational duty is clear, several PERB decisions consider corollaries and conditions to the union’s performance of its obligation.

First, the union must be sensitive to discrimination against nonmembers when providing organizational services. In San Francisco Federation of Teachers (Hagopian), the PERB concluded that it was unlawful to impose a special arbitration fee on teachers who did not join the union and pay dues. Unlike full members, the organization required the nonpaying teachers who wanted binding arbitration of their grievances to pay either a pro rata share of the actual arbitration cost, or the equivalent of annual dues, whichever was less. This restriction, ruled the Board, interfered with an employee’s right to refrain from union membership, as permitted by section 3543, and also deprived the nonpaying unit members of fair representation under section 3544.9. In requiring the union to arbitrate for nonmembers, the Board apparently rejected the argument that the payment conditions were legitimate in the absence of a negotiated agency fee. The Board also noted that the union had exclusive control over access to the arbitration step of the grievance.

Delayed or precluded because of preemption considerations. See infra notes 154-67 and accompanying text. Several cases, for example, involve preemption objections to negligence actions against unions arising out of the safety or training provisions of a contract, with unions contending that fair representation should be the applicable theory. See, e.g., Hechler v. IBEW, 772 F.2d 788 (11th Cir. 1985), cert. granted, 106 S. Ct. 1967 (1986). Rawson v. Steelworkers, 726 P.2d 742 (Idaho 1986). In another situation in which state law contract and tort claims were alleged, preemption based on a fair representation objection precluded the other causes of action. Sarro v. Retail Store Employees Union, 155 Cal. App. 3d 206, 202 Cal. Rptr. 102 (1984). Employees thus may need to distinguish such cases to pursue independent state law claims. But see Baskin v. Hawley, 124 L.R.R.M. (BNA) 2152 (2d Cir. 1986) (emotional distress cause of action for damages coupled with fair representation suit).

Also unresolved is the status of fair representation charges premised on union action (or inaction) in legislative or quasi-legislative administrative forums. Arguably, unions should be permitted to represent employees generally before such bodies in order to seek statutory or regulatory changes without incurring fair representation liability absent a showing of specific misconduct affecting particular unit employees. See King City High School Dist. Ass’n (Cumero), P.E.R.B. Dec. No. 197, at 14-17 (1982), petition hearing granted sub nom. Cumero v. PERB, 167 Cal. App. 3d 131, 213 Cal. Rptr. 326, reprinted for tracking, 183 Cal. App. 3d 581, review petition granted, No. SF 24905 (Cal. July 11, 1985).

95. On a related issue, a recent federal decision would permit discrimination against nonmembers in a noncontractual setting by allowing the union to exclusively represent members before the federal personnel board. National Treasury Employees Union v. Federal Labor Relations Auth., 800 F.2d 1165 (D.C. Cir. 1986).
96. Hagopian, P.E.R.B. Dec. No. 222, at 3, 6. Under the HEERA, in contrast to the EERA, there is no current provision for compulsory agency fees, perhaps providing a distinction between the representational duty under the two statutes. But see National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d 1402 (D.C. Cir. 1983) (discriminatory denial of attorney for nonmember on contract related dispute even though no agency fee under statute).
machinery.97

Second, although an organization must be fairminded in its treatment of different groups of employees, a wide range of conditions still may attach to representation. For example, direct contact with the employer may be barred if the employee wishes continuing union assistance.98 The union can decline to handle a grievance if the employee misses a processing deadline,99 or if the employee ignores a request that the grievance be put in writing.100

A series of PERB cases also upholds limitations on employee self-representation or the use of nonexclusive representatives or agents. Hence, it does not violate the EERA for a union to reserve representation to the bargaining agent, and to deny an employee the right to have an individual grievance adjusted under section 3543.101 Consistent with the prerogatives of an exclusive bargaining agent, a union may object to grievance representation by the employee alone, an outside counsel, an agent of the employee's choice, or a different, nonexclusive organization.102 Finally, a union need not have individual consent to pursue a grievance if preservation of a unit-wide interest is at stake, such as enforcement of a strike settlement agreement that was allegedly breached by disciplinary action in the individual's case.103 In the King decision, the Board reasoned, in part, that even if the grievance interfered with the employee's right to refrain from organizational activity, the association's

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97. Hagopian, P.E.R.B. Dec. No. 222, at 8. The distinction between provision of a nondiscriminatory service or benefit, and permissible union control over representational decisionmaking, was illustrated in Rio Hondo College Faculty Ass'n (Furriel), P.E.R.B. Dec. No. 583 (1986). In that case, the teachers union and management agreed in their contract to create a sabbatical leave committee to make recommendations for leaves. The PERB rejected the fair representation claim of a nonmember who wanted to serve on the committee. While underscoring the requirement that the ultimate decisions by employee members of the committee must be made on a nondiscriminatory basis, id. at 6, the Board treated the committee's employee composition as an internal union matter similar to the composition of a bargaining team. Id. at 5.


101. Chaffey Joint Union High School Dist., P.E.R.B. Dec. No. 202 (1982). In relevant part, CAL. GOV'T CODE § 3543 (West 1980) states: "Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration . . . and the adjustment is not inconsistent with the terms of a written agreement then in effect . . . ." Construing this language, the Board held that an employer could refuse to entertain an individual grievance, pursuant to a contract, but that if, absent a contractual bar, the employer heard the grievance, § 3543 would provide a defense to an unfair practice charge filed by the exclusive representative. Chaffey, P.E.R.B. Dec. No. 202, at 6.


action was permissible because of the unit-wide benefit.\textsuperscript{104}

\textbf{C. Contract Negotiations}

Two of the earliest PERB cases affirmed the wide range of bargaining discretion enjoyed by the exclusive representative, thereby diminishing the prospects of successful fair representation challenges to negotiations. In \textit{Redlands Teachers Association (Faeth)},\textsuperscript{105} the Board summarily approved a hearing officer's dismissal of a charge alleging that the organization had failed to correct salary inequities within the bargaining unit. The employees claimed that the association had accepted their proposal for improved benefits, and had negotiated a partial improvement with the employer, although not to the extent desired by the complaining workers. In this context, absent any further allegation of arbitrary, discriminatory or bad faith conduct, the case was dismissed with leave to amend. The hearing officer's decision adopted by the Board relied on a leading Supreme Court decision assessing the negotiating leeway of bargaining agents:

\begin{quote}
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.\textsuperscript{106}
\end{quote}

The second major PERB decision considering a challenge to a union's negotiating conduct, \textit{Rocklin Teachers Professional Association (Romero)},\textsuperscript{107} also dismissed the claim. The charging party had alleged that the organization failed to bargain over benefits despite a contract provision for an annual midterm reopener, an expression of interest by the employer, and the availability of funds in the employer's budget. In \textit{Romero}, the first step in the Board's analysis was rejection of the hearing officer's reasoning that only bad faith or discriminatory union action

\textsuperscript{104} \textit{Id.} at 7. The extent to which a union can engage in bulk grievance settlements without employee consent, even if a rational choice was made by the organization in choosing an outcome that would be beneficial to other employees in the bargaining unit, is left unresolved by the \textit{King} case. One author has criticized such bulk settlements as depriving employees of the right to have their personal contractual rights fairly decided. \textit{See} Summers, \textit{supra} note 1, at 271; \textit{see also} Local 13, Int'l Longshoremen's Union v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir. 1971), \textit{cert. denied}, 404 U.S. 1016 (1972).


\textsuperscript{106} \textit{Id.} at 5 (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953), in which the Court upheld a contract provision that gave pre-employment seniority credit to veterans for the time spent in military service after 1941, rejecting employee objections that the contract exceeded the union's authority).

could form the basis of a fair representation finding. The nature of the
duty was found to be broader:

Arbitrary conduct by an exclusive representative may itself constitute a
violation of a duty of fair representation because the Board believes that,
without reliance on an arbitrary standard, employee organizations would
be permitted to make unreasonable decisions as long as there were no
evidence of deliberate wrongdoing or disparate treatment.\footnote{108}

But applying this standard still required dismissal of the charge, with
leave to amend:

A union's duty to fairly represent employees during negotiations does not
encompass an obligation to negotiate any particular item and, in this
case, the Charging Party has failed to demonstrate that the Association's
failure to negotiate benefits violated any affirmative duty it owed to the
unit members. A prima facie case alleging arbitrary conduct . . . must at
a minimum include an assertion of sufficient facts from which it becomes
apparent how or in what manner the exclusive representative's action or
inaction was without a rational basis or devoid of honest judgment.\footnote{109}

The PERB stated that this test was needed "to insure that the bargaining
agent, faced with the impossible task of pleasing all of the people all of
the time, is afforded a broad range of discretion and latitude."\footnote{110}

A later PERB decision suggests that the standard of "without a ra-
tional basis or devoid of honest judgment" poses a difficult and perhaps
insurmountable barrier for those criticizing representational conduct in
negotiations. Thus, the Board has concluded that even if it is alleged that
a union decision adversely affects a small group and promotes a politi-
cally stronger majority, the union's decision is protected from attack as
long as there is evidence of a rational explanation beyond mere
favoritism.\footnote{111}

In \textit{DeFrates}, the Board dismissed a charge that the union had
breached its representation duty by negotiating a new contractual senior-
ity provision for transfers, thereby eliminating a prior practice that bene-
fited a small number of unit employees in favor of a new practice that
benefited a larger number of employees. While the PERB stated it would
not permit a union decision "made solely for the benefit of a stronger,
more politically favored group,"\footnote{112} it reasoned that the existence of a
rational basis would permit the negotiated seniority modification.\footnote{113} A
rational basis was found in \textit{DeFrates} because the employer's earlier prac-

\footnote{108} Id. at 8 (citing Beriault v. Local 40, Int'l Longshoremen's Union, 501 F.2d 258 (9th Cir.
1974). \textit{See also} id. at 7 (citing Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972)).

\footnote{109} Id. at 9 (citing DeArroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st
Cir.), cert. denied, 400 U.S. 877 (1970)).

\footnote{110} Id. at 9-10.


\footnote{112} Id. at 7 (quoting Barton Brands, Ltd. v. NLRB, 529 F.2d 793, 798-99 (7th Cir. 1976)
(emphasis in original)).

\footnote{113} Id. (citing Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir. 1962)).
tice of applying seniority dates on the basis of both original and rehire dates of employment had led to inconsistent and unfair results, and had caused morale problems and confusion among teachers.\footnote{114}{Id. at 8. Other bargaining cases involving disputes within units include: California School Employees Ass'n (Tornetta), P.E.R.B. Dec. No. 508 (1985) (partial classification upgrading in negotiations demonstrated no harm to charging party); Sacramento City Teachers Ass'n (Fanning), P.E.R.B. Dec. No. 428 (1984) (dual salary levels permitted as transitional means of reducing adverse impact on special group of employees); San Francisco Classroom Teachers Ass'n (Linn), P.E.R.B. Dec. No. 444 (1984) (grievance settlement clarifying involuntary transfer provision narrowed employer's authority even though adverse to particular grievant). Another PERB decision explicitly recognizing prevailing majority interests was Fremont Unified Dist. Teachers Ass'n (King), P.E.R.B. Dec. No. 125 (1980) (compelling interest of unit in enforcement of agreement predominates over competing individual right to refrain).}

As may be surmised from the Board's strong language favoring a bargaining agent's negotiating discretion, and as explicitly acknowledged in \textit{Romero},\footnote{115}{Rocklin Professional Teachers Ass'n (Romero), P.E.R.B. Dec. No. 124, at 10 n.9 (citing Price v. International Bhd. of Teamsters, 457 F.2d 605 (3d Cir. 1972)).} the PERB has distinguished fair representation cases that challenge grievance handling from those that question negotiating conduct, suggesting possibly greater scrutiny in the former circumstance. Other commentators have drawn a similar conclusion, observing, in particular, that protection of clear and unambiguous contract language through grievances warrants a higher level of attentiveness by union representatives and poses less of a threat to the negotiating process itself.\footnote{116}{See, e.g., Summers, supra note 1, at 257; T. \textsc{Boyce} \& R. \textsc{Turner}, supra note 1, at 19-20. Not all commentators agree with this distinction, nor with the justification for restraining union decisions in the grievance resolution process. See Harper \& Lupu, supra note 1, at 1263, 1274. Major questions also linger over the extent to which unions can negotiate provisions that supersede statutory terms which benefit employees. Compare Judson Steel Corp. v. Workers Compensation Appeals Bd., 22 Cal. 3d 658, 665 n.5, 586 P.2d 564, 568 n.5, 150 Cal. Rptr. 250, 254 n.5 (1978); Phillips v. State Personnel Bd., 184 Cal. App. 3d 651, 659-60, 229 Cal. Rptr. 502, 508 (1986); California Teachers' Ass'n v. Parlier Unified School Dist., 157 Cal. App. 3d 174, 183, 204 Cal. Rptr. 20, 25 (1984); Grier v. Alameda-Contra Costa Transit Dist., 55 Cal. App. 3d 325, 127 Cal. Rptr. 525 (1976) (limiting bargaining discretion) with Porter v. Quillin, 123 Cal. App. 3d 869, 177 Cal. Rptr. 45 (1981) (allowing bargaining waiver of individual's statutory protection). Similarly, statutory civil service remedies with constitutional dimensions present difficult waiver issues for bargaining as they do in the context of contract and grievance administration. See supra notes 47-68 and accompanying text.}}

\textbf{D. Internal Union Affairs}

One of the first PERB cases involving the duty of fair representation, \textit{Service Employees International Union (Kimmett)},\footnote{117}{P.E.R.B. Dec. No. 106 (1979).} largely immunized union affairs from the Board's administrative scrutiny, stating, "Section 3544.9 contains no language indicating that the Legislature intended that section to apply to internal union activities that do not have a substantial impact on the relationships of unit members to their employers."\footnote{118}{See cases cited id. at 10 & n.9.} The employee in \textit{Kimmett} alleged that the union held meetings
at inconvenient times for its night shift members, failed to conduct onsite meetings to discuss negotiations, and selected negotiators without significant night shift participation. The Board affirmed the dismissal of the charge after a hearing, reasoning that there was no union duty to include night shift employees since meeting times were geared to the convenience of the larger number of employees. The Board also ruled that there was no requirement of onsite meetings for the employee’s shift as long as the employee’s interests were represented and treated in a nondiscriminatory fashion, and that the duty “does not entail selection of negotiators in any particular manner.”

Kimmett has been cited to support the dismissal of a case challenging a union decision to exclude nonmembers from contract ratification votes. In Willis, the Board summarily affirmed a hearing officer who had concluded that the organization had not breached its representation duty by changing its policy of allowing nonmembers to vote on negotiating proposals and ratifications. The hearing officer had stated: “Since the Association was not required to provide such procedures, deleting those procedures does not breach the duty of fair representation provided some consideration of the views of various groups of employees and some access for communication of those views is still provided.” Reviewing the evidence, the hearing officer found that there had been ample opportunity for the nonmember employees to attend meetings and offer their views, even if formal voting involvement was prohibited, thus precluding a finding under Kimmett of a “substantial impact” on the employment relationship.
A substantial impact on employment terms could be present, however, as a result of a union’s misrepresentation about contractual intent. In *California State Employees Association (O’Connell)*,\(^{125}\) an employee alleged that the union promised that a grievant’s travel expenses would be covered when contractual disputes were pursued by the union. The Board reversed dismissal of the charge, concluding that a prima facie case was stated based on the allegation that the union “knowingly misrepresented a fact in order to secure from its constituents their ratification of a contract.”\(^{126}\)

A problematic area of PERB review has been internal union discipline and removal of officers or agents. *Kimmett*’s seeming bar to Board intervention was lowered considerably in *California School Employees Association (Parisot)*.\(^{127}\) In that decision, the Board reviewed the dismissed claim of an association member and past president that he had been disciplined unreasonably by being suspended for protected participatory conduct within the union.\(^{128}\) The employee had been charged by the union with four types of misconduct: circulation of a decertification petition, false statements about union activities, conduct contrary to the bargaining agreement, and failure to provide information to members. After a union hearing far from his locality, which the employee did not attend, he was suspended from membership for four years and barred from holding office for twelve. The Board affirmed in part and reversed in part.

In support of the union’s position, the Board concluded that an organization could punish a member for disloyal support of a decertification discussion open to all in unit); Fontana Teachers Ass’n (Alexander), P.E.R.B. Dec. No. 416 (1984) (nonmember views communicated through surveys and representative council).

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126. *Id.* at 4. The PERB distinguished a federal standard requiring evidence that the voting employees relied on the misrepresentation, and that the employer would have accepted the union’s demands if the vote were different. See, e.g., *Acri v. International Ass’n of Machinists, Dist. Lodge 115*, 781 F.2d 1393 (9th Cir. 1986); *Anderson v. United Paperworkers Int’l Union*, 641 F.2d 574 (8th Cir. 1981). In *O’Connell*, the charging party did not claim that the misrepresentation involved explicit contract language, unlike the federal precedent, but rather was an inducement by the union conveyed at an informational session.

Fair representation violations also can arise from a union’s failure to warn of adverse consequences known to negotiators but not to employees voting on ratification. *International Bhd. of Teamsters, Local 860 v. NLRB*, 652 F.2d 1022 (D.C. Cir. 1981) (nondisclosure of employer threat to close clerical operations).

128. The issue of reasonableness was based on *Cal. Gov’t Code § 3543.1(a)* (West 1980) (EERA) which provides in relevant part: “Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals for membership.”

To a limited extent, therefore, the punishment in Parisot was deemed reasonable: "The right to represent employees as an exclusive representative is an essential objective and purpose of a labor organization. . . . An act by its own members which is directed against this purpose threatens the very existence of the organization and is of sufficient seriousness to justify a self-protective response."130 Nevertheless, Parisot's "inherent obligation to his organization to be loyal"131 did not prevent the PERB from finding that the other charges against him formed the basis of a prima facie violation, requiring that the case be remanded for hearing. Two of the union charges were considered "unreasonably vague and ambiguous."132 Further, the organization's failure to specify the instances of wrongdoing, as well as the circumstances of the hearing, raised doubts about the reasonableness of the procedures and the degree to which the vague and ambiguous charges affected the overall discipline imposed.133

In a concluding passage, the PERB suggested that Kimmett should not be construed too strictly in applying its "substantial impact" test:

This does not require a demonstrable impact on the employees' wages, hours, or terms and conditions of employment. The relationship of employees to their employer can be manifested through and conditioned by the selection or rejection of a bargaining representative. In Kimmett, we did not intend to abdicate our jurisdictional power to determine whether an employee organization has exceeded its authority under subsection 3543.1(a) to dismiss or otherwise discipline its members.134

A subsequent decision, unfortunately, has not made any clearer the cloudy reference in Parisot to excessive organizational authority. In California School Employees Association (Harmening),135 the Board summarily affirmed the dismissal of a charge that challenged the recall of a local chapter president who, before his term, had been involved once in a

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130. *Id.* at 9 (citing *Tawas Tube Prods., Inc.*, 151 N.L.R.B. 46 (1965); *Price v. NLRB*, 373 F.2d 443 (9th Cir. 1967)).
131. *Id.* at 10.
132. *Id.*
133. *Id.* at 11.
134. *Id.* The cited portion of *CAL. GOV'T CODE § 3543.1(a)* is set forth *supra* note 128. *Parisot* was analyzed as a case presenting alleged violations of *CAL. GOV'T CODE § 3543.6(b)* (West 1980), without regard to any breach of the duty of fair representation. Later cases, however, have treated internal affairs disputes as alleged fair representation breaches. *See infra* notes 135-36 and accompanying text.

PERB's willingness to review internal union affairs in *Parisot* appears to be contrary to federal authority. *Cf. NLRB v. Operating Eng'rs, Local 138*, 796 F.2d 985 (7th Cir. 1986) (applying NLRB *v. Boeing Co.*, 412 U.S. 67, 74 (1973), which barred administrative oversight unless union penalty impaired member's employment status).

decertification drive. The recall action, which allegedly violated the organization's procedures for notice and voter eligibility, was deemed an internal affair, beyond PERB's jurisdiction under Parisot, because neither the employee's union membership nor his qualifications for office were impaired, and the recall action itself was not disciplinary.\footnote{136}

Other areas of PERB decisionmaking encompass issues of internal union affairs and representational responsibilities but are beyond the scope of this review of fair representation. For example, one major subject concerns agency fee expenditures and procedures which allegedly interfere with employee rights to refrain from organizational activity.\footnote{137}

Fair representation questions also arise in the context of election and representation cases. A case in point is the Board's declaration that the duty does not attach prior to an organization's certification as the exclusive representative.\footnote{138} Once certified, however, the duty survives, even after a decertification election while a new incumbent is awaiting its certification.\footnote{139} Fair representation issues may arise as well if a new union affiliation involves a new certification, although a mere affiliation change, without altering the certified representative, is not a violation, even if undertaken without a membership vote.\footnote{140}

Several sources of law regarding internal union affairs should be kept in mind when reviewing fair representation cases, particularly because internal affairs are largely beyond PERB's scope. These sources of law may provide insight or standards for rulings in PERB cases,\footnote{141} and...
they also may provide alternative remedies.\(^{142}\)

One major area involves California's long established common law doctrines governing organizational rights and procedures. Union members, for example, may enforce the terms of a union's constitution and bylaws on the theory that they have a contractual relationship with the organization.\(^{143}\) Other cases have considered membership standards or disciplinary procedures in light of the union's role as an organization involved in matters of public interest.\(^{144}\)

California statutory developments in private sector labor relations provide another area for comparison and possible application in the public sector. Thus, where unions are improperly dominated or assisted by employers, injunctive relief against a competing union may be precluded,\(^{145}\) contract validity and enforcement may be impaired,\(^{146}\) or damages may be recoverable for an unlawful withdrawal of recognition.\(^{147}\) Other state laws should be considered as well, including the Agricultural Labor Relations Act ("ALRA"),\(^{148}\) or those establishing fiduciary duties for the handling of union finances.\(^{149}\)

Internal affairs litigation may, in addition, present causes of action under the federal Labor Management Reporting and Disclosure Act ("LMRDA").\(^{150}\) Although the LMRDA is expressly inapplicable to unions representing employees of state and local public employers,\(^{151}\) there is precedent utilizing the LMRDA's internal union standards when the parent or affiliated union involved is "mixed," representing both public and private sector employees.\(^{152}\) If a union is covered by the LMRDA, state court interpretations, as well as federal experience, may be

\(^{142}\) See, e.g., Kimmet, P.E.R.B. Dec. No. 106, at 17 n.17 (non-PERB remedial options described).

\(^{143}\) See, e.g., International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618 (1958) (expulsion violating union constitution not preempted by federal labor law); Otto v. Tailors' Union, 75 Cal. 308, 314, 17 P. 217, 219 (1888) (strikebreaking member improperly expelled since fine was only punishment permitted).


\(^{145}\) Englund v. Chavez, 8 Cal. 3d 572, 504 P.2d 457, 105 Cal. Rptr. 521 (1972).


\(^{152}\) Kennedy v. Metropolitan Bus Auth., 102 L.R.R.M. (BNA) 2088, 2091 (E.D.N.Y. 1979)
relevant.\textsuperscript{153}

III
JURISDICTION AND PROCEDURES

This section shall consider three issues: the proper forum for fair representation cases, exhaustion of internal and administrative remedies, and the statute of limitations.

A. The Proper Forum

Duty of fair representation cases arising under the MMBA presumably may be filed in state court because there is no administrative agency such as the PERB with statutory jurisdiction.\textsuperscript{154} Cases arising under PERB-administered statutes present different and more complex questions.

An early case establishing PERB's preemptive jurisdiction is \textit{Council of School Nurses v. Los Angeles Unified School District}.\textsuperscript{155} In that case nurses, librarians and psychologists attacked a bargaining agreement that required them to work longer hours than teachers, contending that the disparity violated the state law mandating uniform conditions for certificated staff.\textsuperscript{156} The court affirmed dismissal of class actions alleging that the contract breached the union's duty of fair representation, concluding that section 3541.5\textsuperscript{157} granted exclusive unfair practice jurisdiction to the Board to resolve fair representation disputes. In so holding the court relied on \textit{San Diego Teachers Association v. Superior Court},\textsuperscript{158} the state court decision that annulled strike related civil contempt orders and established PERB's preemptive jurisdictional reach.

\textit{Council of School Nurses} provides a straightforward but deceptively simple answer to difficult jurisdictional questions that remain to be resolved in later cases. First, if the PERB General Counsel declines to

\textsuperscript{153} See also Brock v. Civil Serv. Employees Ass'n, 808 F.2d 228 (2d Cir. 1987) (no violation absent parent control over local fund distribution).


\textsuperscript{155} See, e.g., American Fed'n of State, County and Municipal Employees, Local 119, 50 CAL. PUB. EMPLOYEE REL. at 36 (L.A. County Employee Rel. Comm'n 1981).

\textsuperscript{156} Id. at 666, 169 Cal. Rptr. 893 (1980).

\textsuperscript{157} CAL. GOV'T CODE § 3541.5 (West 1980 & Supp. 1987) states, in relevant part: "The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board." Identical provisions are contained in the SEERA, CAL. GOV'T CODE § 3514.5 (West 1980), and the HEERA, CAL. GOV'T CODE § 3563.2 (West 1980).

\textsuperscript{158} 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).
issue an unfair practice complaint, is PERB's jurisdiction fully exclusive or only initially preemptive? In San Diego Teachers Association, this question was expressly left open by the court.159 Federal private sector precedent has limited applicability in determining the proper judicial response. Under the NLRA, the NLRB General Counsel's refusal to issue a complaint is not res judicata in subsequent fair representation and contract enforcement actions.160 But this federal precedent may be distinguished from the PERB-administered statutes. In the federal private sector, courts are deemed to have concurrent jurisdiction with the NLRB in fair representation cases which can be coupled with breach of contract actions.161 This possibility appears to be precluded by the terms of the public sector laws expressly recognizing the PERB's initial exclusive jurisdiction, and by the Council of School Nurses interpretation. Under these different circumstances, should res judicata principles prevail, barring similar factual claims in other forums?162

Second, even if there is a presumption of exclusive Board jurisdiction, should an abstention doctrine be applied, thereby permitting later court action if the PERB declines? There is abstention precedent in California labor relations cases involving the PERB163 and the Agricultural Labor Relations Board.164 An abstention accommodation permits protection of an employee's underlying contractual, constitutional, or statutory rights by preventing the effective loss of those rights if the General Counsel refuses to issue a complaint, a decision that is not judicially reviewable.165

159. Id. at 13-14, 593 P.2d at 846, 154 Cal. Rptr. at 901-02.
160. See cases cited in T. Boyce & R. Turner, supra note 1, at 128.
162. Prof. Aaron has discussed a related issue involving the narrow substantial evidence standard of review normally accorded an arbitration award. Aaron, supra note 4, at 190. In comparison, an administrative body's adjudicatory findings that form the basis for a public employee's discharge are subject to review based on the "independent judgment" test. Valenzuela v. Board of Civ. Serv. Comm'rs, 40 Cal. App. 3d 557, 115 Cal. Rptr. 103 (1974). Prof. Aaron asks whether, "in reviewing arbitration decisions in the public sector involving 'fundamental vested rights,' the California courts will adopt the policy of limited review applicable to the private sector or the more expansive role suggested by Valenzuela." Aaron, supra note 4, at 190. Prof. Aaron believes that a state court due process decision "strongly points" toward the latter, expansive direction. Id. (citing Skelly v. State Personnel Bd., 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975)).

This issue becomes more complicated, however, if a fair representation breach also is alleged by an employee. If the union has sole access to the arbitration machinery, is PERB, or a court, compelled to heighten its scrutiny of a union's conduct, perhaps to insure that ministerial failings have not caused the loss of a vested right?

165. In Fresno Unified School Dist. v. National Educ. Ass'n, 125 Cal. App. 3d 259, 177 Cal. Rptr. 888 (1981), which involved an allegedly unlawful teacher strike, the court affirmed dismissal of tort causes of action because of the PERB's preemptive reach. The court, however, directed the trial
Third, might a different balance between administrative and judicial proceedings be struck in those fair representation cases that raise issues about internal union affairs, including the removal of officers and disciplinary proceedings? Since the PERB has expressed reluctance to become involved in internal organizational matters, absent a showing of a substantial impact on the employment relationship, a different and negative preemption presumption could be used. The argument in favor of this preemption exception could point to the well established body of California common law and statutory interpretation regarding internal union affairs.

**B. Exhaustion of Internal Remedies**

Before pursuing a fair representation action against a union, an employee might first be required to exhaust the internal organizational procedure for resolving complaints, assuming the procedure can afford the relief needed. Although not cited in Spiegelman, the federal authority court, pending PERB action, to stay proceedings on the breach of contract claim under CAL. LAB. CODE § 1126 (West 1971), a state law that applies to violations of bargaining agreements and that is analogous to LMRA § 301(a), 29 U.S.C. § 185(a) (1982). Fresno, 125 Cal. App. 3d at 264-67, 272-74, 177 Cal. Rptr. at 893-96, 901-03. Abstention that permits the PERB’s exercise of its initial jurisdiction also was followed in Link v. Antioch Unified School Dist., 142 Cal. App. 3d 765, 769, 191 Cal. Rptr. 264, 268 (1983), and Leek v. Washington Unified School Dist., 124 Cal. App. 3d 43, 52-53, 177 Cal. Rptr. 196, 205-06 (1981), which considered claims that union security fees were unconstitutional.

While an abstention approach preserves the PERB’s statutory jurisdiction, it also reconciles the protection of individual employee rights with the doctrine that a general counsel’s refusal to issue an unfair practice complaint is judicially nonreviewable. CAL. GOV’T CODE §§ 3520(b) (SEERA), 3542(b) (EERA), 3564(b) (HEERA) (West 1980 & Supp. 1987); cf. Beldridge Farms v. Agricultural Labor Relations Bd., 21 Cal. 3d 551, 580 P.2d 665, 147 Cal. Rptr. 165 (1978). Once the PERB has declined to issue a complaint, the employee would have exhausted the available administrative remedy and could pursue in the courts a combined action alleging tortious breach of the duty of fair representation, and a violation of a bargaining agreement under CAL. LAB. CODE § 1126 (West 1971).


Doubt about an exhaustion requirement exists, however, because the PERB rejected a union defense on that ground in a case raising tangential fair representation issues. See King City High School Dist. Ass’n (Cumero), P.E.R.B. Dec. No. 197 (1982), petition hearing granted sub nom.
on point is *Clayton v. ITT Gilfillan*, in which an employee challenged a union decision not to arbitrate his grievance, but without first contesting the decision through internal union appeals. The Supreme Court refused to require exhaustion, however, unless the internal appeal procedure could result "in reactivation of the employee’s grievance or an award of the complete relief sought."^170

A requirement that internal union remedies be exhausted, at least by union members, is consistent with other California precedent. A recent appellate decision under the ALRA, *Pasillas v. Agricultural Labor Relations Board*,^171 expressly affirmed earlier state common law decisions imposing such a requirement, while also recognizing exceptions to the rule.^172

A separate exhaustion issue, not considered in any PERB decision, was recognized in *Logan v. Southern California Rapid Transit District*.^173 The issue is whether utilization of the administrative mandamus remedy is required before (or instead of) a suit against a union.^174 While the *Logan* court observed that administrative mandamus can apply to organizations and entities other than government agencies,^175 it concluded that the union’s procedure did not fall within the narrow statutory authority that limits review to factfinding hearings compelled by law.^176

What about exhaustion of remedies prior to legal proceedings against an employer? Typically, employers have not been joined as respondents in PERB fair representation cases because any underlying con-

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Cumero v. PERB, 167 Cal. App. 3d 131, 213 Cal. Rptr. 326, reprinted for tracking, 183 Cal. App. 3d 581, review petition granted, No. SF 24905 (Cal. July 11, 1985). In Cumero, the PERB held that, absent a statute or regulation imposing an exhaustion requirement, an employee objecting to agency fee expenditures need not utilize the union’s internal rebate procedure before pursuing an unfair practice charge with the Board. *Id.* at 33.


170. *Id.* at 685. Elsewhere, the Court set forth a three-part overall standard to be used by courts when reviewing exhaustion claims: (1) Does the hostility of union officials prevent a fair hearing? (2) Will the available remedies provide either grievance reactivation or full relief? and, (3) Would exhaustion unreasonably delay a hearing on the merits? *Id.* at 689 (citing NLRB v. Marine Workers, 391 U.S. 418, 426 n.8 (1968)).


173. This remedy is set forth in CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1987). If the remedy is required instead of a lawsuit, the issue is not really a matter of exhaustion, but one of exclusivity.

174. *Id.* at 128, 185 Cal. Rptr. at 886.
tract enforcement cause of action would not be within the Board's jurisdiction.\textsuperscript{177} In this respect, Board proceedings that involve the union as a sole respondent are similar to NLRB fair representation cases in which the employer is not joined.\textsuperscript{178} These PERB and NLRB administrative proceedings should be distinguished from private sector federal or state court fair representation disputes, in which unions and employers are joined in hybrid actions to enforce both the fair representation requirement and the contract itself. In such cases, exhaustion of contract based remedies, such as grievance and arbitration procedures, is required unless an exception is shown.\textsuperscript{179}

There is, in addition, a possible public sector complication concerning exhaustion of remedies. If it is alleged, for example, that the union and management acted collusively to discharge a dissident employee who tried to organize a decertification campaign, a separate issue would arise in those local charter based jurisdictions that provide for an administrative "board of rights" disciplinary review. Two appellate courts have held that local charters and the MMBA may be harmonized by requiring exhaustion of the local remedy prior to invoking the contractual arbitration remedy.\textsuperscript{180} Hence, in these circumstances, employees who otherwise might benefit from having "two bites at the apple," also may need to challenge two levels of union representation—as well as, perhaps, internal union appeals—before reaching the central issue of cause for discharge.\textsuperscript{181}

C. Statute of Limitations

The labor relations laws administered by the PERB prohibit the issuance of a complaint based upon conduct occurring more than six

\textsuperscript{177} See, e.g., CAL. GOV'T CODE § 3541.5(b) (West Supp. 1987) of the EERA: "The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter." These prohibitions are also contained in CAL. GOV'T CODE §§ 3514.5(b) (SEERA), 3563.2(b) (HEERA) (West 1980).

\textsuperscript{178} See T. Boyce & R. Turner, supra note 1, at 129. The authors also note that an employer may be a party if labor-management collusion is alleged.

\textsuperscript{179} The leading decision on this issue is Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).


\textsuperscript{181} Moreover, the claim of labor union and management action interfering with protected labor relations activity will not necessarily remove the dispute from the arbitration deferral principles applied by the PERB. See CAL. GOV'T CODE §§ 3514(a)(2), 3541.5(a)(2) (West 1980 & Supp. 1987); PERB Regulation § 32620(5) (codified in 8 CAL. ADMIN. CODE § 32620(5) (1982)); Dry Creek Joint Elementary School Dist., P.E.R.B. Order No. Ad-81A (1980). In two cases, individual employees have been required to show that union hostility precluded adequate arbitration representation before the deferral requirement could be lifted. See State of Cal. Dep't of Corrections, P.E.R.B. Dec. No. 561-S (1986); State of Cal. Dep't of Developmental Servs., P.E.R.B. Order No. Ad-145-S (1985).
months prior to the filing of an unfair practice charge.\textsuperscript{182} The Board has applied the six-month bar to cases alleging a breach of the duty of fair representation.\textsuperscript{183} To resolve this issue, the PERB usually measures the time that has elapsed between a specific event or conduct and the filing of a charge.\textsuperscript{184} Where a protracted course of conduct is involved, the statute begins to run from the point that dissatisfaction with the union became fixed.\textsuperscript{185} Yet the PERB also has held that the point of dissatisfaction cannot be based on the favorable outcome of a case which initially had been discouraged by the union and then was handled by the employee's own counsel.\textsuperscript{186}

Will repeated union refusals to process a grievance over a recurring issue constitute a continuing violation, thereby extending the six-month limitations period? The PERB has indicated that subsequent recurrences will not start the limitations period anew.\textsuperscript{187} However, the statute of limitations will be tolled while the contractual grievance procedure is being utilized, including a reasonable period of time needed for actual preparation.\textsuperscript{188} Presumably, exhaustion of internal union appeals also would toll the six-month bar, assuming the employee's grievance could be reactivated or full relief provided.\textsuperscript{189}

Statute of limitations issues may be more complex in civil proceedings to enforce the MMBA and other California labor laws, as opposed to the PERB-administered statutes just discussed. State court fair representation cases in the late 1970's utilized the four-year statute of limitations applicable to contract actions, rejecting the statutory one hundred-days limit for reviewing arbitration cases.\textsuperscript{190} But the Supreme Court in 1983 established a new rule for determining the appropriate limitations

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\item[184.] See cases cited supra note 183.
\item[185.] California School Employees Ass'n (Spiegelman), P.E.R.B. Dec. No. 400 (1984).
\item[188.] United Teachers of Los Angeles (Siamis), P.E.R.B. Dec. No. 311 (1983).
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bar in fair representation disputes. Hence, where a union and management are defendants, the six-month statutory period set forth under the NLRA\textsuperscript{191} is applied by analogy in federal court proceedings to ensure uniform administration of federal labor relations.\textsuperscript{192} Will the same six-month analogy now be used in California, extending the limitations bar under the PERB-administered statutes to the MMBA and other statutes? While construction of a six-month bar could be criticized by some as judicial legislation, a court might conclude that the failure to apply a common standard in labor relations disputes would permit an unjustifiable disparity in the treatment of similarly situated employees and unions in the public sector.

IV
REMEDIES
A. Administrative Relief

Cases finding a breach of the duty of fair representation must address "the slippery and entangling problems of remedies."\textsuperscript{193} In addition to cease and desist orders and make whole monetary awards typically found in unfair practice litigation between labor and management,\textsuperscript{194} fair representation errors may require a sensitive balancing of interests because of the direct involvement of the aggrieved employees. Sensitivity also is required because the employer usually is not joined as a respondent in administrative fair representation proceedings, but may be affected by the remedy, particularly if a previously resolved grievance is at issue.\textsuperscript{195}

With the exception of one decision, however, the PERB has not yet had an opportunity to fashion remedies reflecting the altered alignment of parties in fair representation cases. In \textit{San Francisco Federation of Teachers (Hagopian)},\textsuperscript{196} the Board concluded that the union had unfairly discriminated by charging nonmember unit employees a fee in order to take a case to binding arbitration.\textsuperscript{197} The PERB took official notice that the union was no longer the exclusive bargaining agent, and therefore

\textsuperscript{191} 29 U.S.C. § 160(b) (1982).
\textsuperscript{192} DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983). This decision was also applied in a state court fair representation case filed against a union alone, with the six-month period tolled while internal union appeals were exhausted. Rodriguez v. Southern Cal. Dist. Council of Laborers, 160 Cal. App. 3d 956, 207 Cal. Rptr. 75 (1984).
\textsuperscript{193} Summers, \textit{supra} note 1, at 275.
\textsuperscript{195} T. BOYCE & R. TURNER, \textit{supra} note 1, at 129.
\textsuperscript{197} See \textit{supra} text accompanying notes 94-97.
ordered only a limited posting and notice remedy.\textsuperscript{198} However, the Board referred to federal precedent and indicated that an additional remedy might have been required had the union still been the exclusive representative, noting that "[u]nder the NLRB the traditional remedy for this kind of violation is to order the labor organization to fairly process the grievance."\textsuperscript{199}

Further examination of the remedial experience under the NLRA suggests a number of complex issues that may arise. While the NLRB has ordered the processing of a grievance and arbitration to correct a previous wrongful refusal,\textsuperscript{200} the absence of an employer respondent could preclude a decree requiring reinstatement.\textsuperscript{201} In order to compel union efforts to resolve the employee's grievance, the NLRB has, in at least one instance, utilized a limited make whole remedy to cover losses for the period between the employee's request for representation and either union fulfillment of its duty, or the employee's gaining substantially equivalent employment.\textsuperscript{202} In other cases, the NLRB has ordered the union to ask for the employee's reinstatement or the waiver of time limits,\textsuperscript{203} and also has required some backpay if the grievance cannot be arbitrated, presuming, absent a union defense, that the grievance was meritorious.\textsuperscript{204} Where the grievance can be pursued to arbitration, the NLRB has recognized not only the right of individual employee representation, but also has ordered payment of attorney fees to independently retained counsel to carry the case forward.\textsuperscript{205} Given the extensive federal

\textsuperscript{198} Hagopian, P.E.R.B. Dec. No. 222, at 10-11.

\textsuperscript{199} Id. at 10 (citing Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964), aff'd, 368 F.2d 12 (5th Cir. 1966).

\textsuperscript{200} See C. Morris, supra note 1, at 1343-44.

\textsuperscript{201} Id.

\textsuperscript{202} Id. (discussing Electrical Workers (IUE) Local 485, 170 N.L.R.B. 1234 (1968), supplemented by 183 N.L.R.B. 1286 (1970), enforced in part, 454 F.2d 17 (2d Cir. 1972)).

\textsuperscript{203} Id. at 1345.

\textsuperscript{204} Id. \textit{See also} Rubber Workers Local 250, 279 N.L.R.B. No. 165, 122 L.R.R.M. (BNA) 1147 (1986) (union bears burden of showing lack of merit to employee's claim in order to prove representation breach harmless and bar make whole relief). \textit{But see} San Francisco Web Pressmen Union v. NLRB, 794 F.2d 420 (9th Cir. 1986) (no backpay absent proof of meritorious employee claim).

\textsuperscript{205} NLRB v. International Bhd. of Teamsters Local 396, 509 F.2d 1075 (9th Cir. 1975). Under these circumstances, should the result of the arbitration proceeding be treated as nonbinding in future contract disputes, particularly if the relevant language in the agreement was ambiguous regarding the employee's rights? One author suggests this approach. Summers, supra note 1, at 275. There also are potential issues of inherent unfairness to the employee by opening up the procedure created by labor and management. Not only does independent counsel mitigate this problem, but the employee could participate in the selection of the arbitrator. Feller, supra note 1, at 816. At the very least, assuming a fair representation breach has been found, the aggrieved employee, following a proposed private sector civil litigation model, would have a cause of action against the employer to enforce the arbitration machinery of the agreement. Id. at 818-19; accord Aaron, supra note 4 at 194.
experience in this area, it is likely that the PERB and the state courts will rely heavily on NLRB and other established labor law precedent.

B. Damages

Presumably the courts, if not the PERB, can award damages to employees for losses resulting from a combined fair representation and contractual breach. Two important federal law issues have yet to be determined in the California public sector setting: how damages should be apportioned, and whether punitive damages are available.

On the first issue, apportionment, the Supreme Court decision in *Bowen v. United States Postal Service*206 ruled that liability between the union and the employer flowing from an improper discharge should be apportioned based on the comparative fault of each.207 The union’s liability at trial was measured by the amount lost following the point in time when a favorable arbitration decision would have been rendered, a calculation method that was not expressly resolved by the Supreme Court.208

*Bowen*’s applicability in the public sector may be limited, however, to the extent civil service remedies or individual grievance options are preserved. This follows from an argument made by the *Bowen* majority when it distinguished an earlier Supreme Court decision, *Czosek v. O’Mara*.209 In that case, a union’s failure to pursue discharge grievances constituted a breach of the duty of fair representation, but “damages against the union for loss of employment are unreasonable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer.”210 *Bowen* reconciled *Czosek* by observing that in the earlier case the employees had an independent administrative remedy available to pursue their claims against the employer, thereby justifying a limit on the damages recoverable for the union’s misconduct.211 A similar damages limitation may be available in the context of public sector labor relations, in which alternative dispute resolution mechanisms may result from accommodating contractual remedies and administrative civil service proceedings.212

207. Id. at 223. *Bowen* was a 5-4 decision interpreting *Vaca v. Sipes*, 385 U.S. 895 (1967). The dissent argued that the employer’s wrongdoing in terminating the employee in violation of the contract should not be charged to the union. *Bowen*, 459 U.S. at 242 (White, J., dissenting in part). Ten years before *Bowen*, one comprehensive review of the duty of fair representation also proposed a damages apportionment, in conjunction, however, with a judicial reopening of the arbitration process. See Feller, supra note 1, at 818-24.
210. Id. at 29.
212. See, e.g., cases cited supra notes 67-68 & 180. Damages also may be limited under the
A second, unresolved remedial issue concerns punitive damages. In *IBEW v. Foust*, the Supreme Court held that punitive damages are not recoverable against a union for its breach of the duty in failing to pursue a grievance. To conclude otherwise, reasoned the majority, could destabilize unions and disrupt responsible, nonfrivolous grievance handling, thus undermining important goals of the collective bargaining system. Would the same reasoning apply in California's public sector? Although there is no PERB case squarely on point, the assessment of punitive damages traditionally has been rejected in unfair practice litigation under the NLRA on the ground that such awards exceed the statutory remedial powers. The civil courts, however, are not so limited, and may award punitive ("exemplary") damages "where the defendant has been guilty of oppression, fraud or malice." 

Recent decisions involving the California Fair Employment and Housing Commission also suggest that state law may vary from federal precedent, allowing punitive damages in employment discrimination cases to be awarded either by the administrative agency, or by the courts following successful litigation of a private cause of action. Although there are grounds to distinguish the fair employment cases, particularly the comprehensive labor relations design inherent in California's collective bargaining laws, these decisions indicate that the issue of punitive damages cannot be resolved by the unquestioned application of *Foust*.

*Bowen* rationale if labor and management have agreed that grievance reinstatement is available upon request by the union after an employee has utilized an internal union appeal to object to a prior grievance refusal. See Klein, *Enforcement of the Right to Fair Representation: Alternative Forums*, in *THE DUTY*, supra note 1, at 97, 104 (referring to autoworker contracts). It is also significant that the availability and use of an internal union appeal may be a factor weighing in favor of the union on the merits of a fair representation claim. United Teachers of Los Angeles (Buller), P.E.R.B. Dec. No. 438 (1984).


214. *Id.* at 50-52.


CONCLUSION

Ten years after the creation of an administrative agency to oversee public sector labor relations, it is (or should be) clear that California public employees are entitled to fair representation by unions acting as exclusive representatives. Where this requirement has not been expressly spelled out by the legislature, it may be fairly implied in a statutory design granting unions exclusive representational authority. The developing body of fair representation law also has drawn extensively upon federal precedent. This is evident in the drafting of statutory terms that adopt the traditional private sector prohibition against arbitrary, discriminatory or bad faith conduct, as well as in administrative and judicial reliance upon federal labor law decisions defining those terms.

Several important questions remain unanswered, however, regarding the ultimate direction of California's public sector duty of fair representation. Many of these questions are related to protection of the constitutional due process entitlements of public employees. Both the nature of the duty and the standard of care for union conduct could be affected by constitutional factors. Other questions concern reconciliation of collective bargaining and civil service regimes, and the effect of that reconciliation on individual personnel rights, many of which have been established by statute and appear to be protected against collective waivers.

Additional questions flow from the procedural tangles involving administrative preemption and exhaustion of remedies, and affect the availability of monetary awards, especially if employees can seek relief in more than one forum. Resolution of these issues will impact the speed and nature of the relief available, and accommodate the desire of all parties for a final and just solution of public sector labor disputes.