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## *May a federal employee sue a union in federal court for breach of the duty of fair representation?*

by Jay E. Grenig

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**Efthimios A. Karahalios v.  
Defense Language Institute/Foreign Language Center,  
Presidio of Monterey, and Local 1263, National  
Federation of Federal Employees**  
(Docket No. 87-636)

*Argument Date Jan. 17, 1989*

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The Federal Civil Service Reform Act provides that a labor organization that becomes the exclusive representative of the employees in the bargaining unit it represents must represent the interests of all employees in the unit without discrimination and without regard to labor organization membership. This duty of fair representation is enforceable by the Federal Labor Relations Authority and its general counsel through the Act's unfair labor practice provisions.

In this case the Supreme Court is called upon to determine whether the Act's duty of fair representation is also enforceable by a federal employee in a federal court action for money damages and other relief.

### **ISSUE**

This case presents the question of whether a federal employee whose exclusive bargaining representative has allegedly violated its duty of fair representation may bring a claim for damages in federal district court, or whether the employee's exclusive remedy is the filing of an unfair labor practice charge with the Federal Labor Relations Authority.

### **FACTS**

Efthimios Karahalios was employed by the Defense Language Institute/Foreign Language Center (DLI), Presidio of Monterey, as a Greek language instructor. In 1976 he applied for promotion to a newly created "course developer" position. Based on his test score and other qualifications, Karahalios was selected to fill the course developer position.

The National Federation of Federal Employees, Local 1263 (Federation) represented the bargaining unit of which Karahalios was a non-union member. The Federation filed a grievance protesting the selection process the DLI used in selecting Karahalios for the course developer position.

Karahalios learned of the Federation's actions only after

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an arbitrator ordered the DLI to reconstitute its course developer selection process and to reconsider its promotion of Karahalios.

As a result of the arbitrator's ruling, DLI demoted Karahalios and promoted another employee to the course developer position. Karahalios objected to his demotion and filed two grievances with DLI, arguing that the DLI had used improper testing procedures.

The Federation represented Karahalios throughout the grievance process, but refused to take Karahalios' grievances to arbitration.

Karahalios responded by filing unfair labor practice charges with the Federal Labor Relations Authority (FLRA). Karahalios charged that the DLI had breached the collective bargaining agreement and that the Federation had breached its duty of fair representation by not seeking arbitration on his behalf. The FLRA's regional director disagreed with both of Karahalios' charges.

On appeal, the FLRA general counsel overturned the regional director's ruling on the charge against the Union. The general counsel found that the Federation had denied arbitration for reasons unrelated to the merits of Karahalios' grievances, and had thus breached its obligation to represent Karahalios fairly. The general counsel ordered the case returned to the regional director for issuance of a complaint.

However, after the Federation agreed to post a notice to all bargaining unit employees stating that in the future the Federation would not inform employees that it is unable to represent more than one employee competing for a position, the regional director settled the complaint without consulting Karahalios.

After unsuccessfully appealing the settlement to the FLRA's general counsel, Karahalios filed suit against DLI and the Federation in federal district court, alleging that DLI had breached the collective bargaining agreement and that the Federation had breached its duty of fair representation. The district court held that the Civil Service Reform Act imposed on a federal employee union an "implied duty of fair representation," and that this implied duty is privately enforceable in federal court.

The U.S. Court of Appeals for the 9th Circuit reversed the trial court, holding that federal employees could not bring a private action in federal court to enforce the duty of fair representation.

### **BACKGROUND AND SIGNIFICANCE**

When a union becomes the exclusive bargaining agent

for a bargaining unit, employees within that unit lose the power to bargain individually with their employer. The duty of fair representation protects employees in the bargaining unit from arbitrary union conduct. A breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory or in bad faith.

Section 7114(a)(1) of the Civil Service Reform Act provides that "[a]n exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership."

This provision appears to codify a duty of fair representation for federal sector unions that is similar to the duty of fair representation that courts have found implicit in the exclusive bargaining power granted to private sector unions by the National Labor Relations Act and the Railway Labor Act.

A union's decision on whether to take an employee's grievance must be inclusive of a fair and impartial consideration of the interests of all employees. The union must consider not only the interests of the grievant but also those of the employees who would suffer should the union successfully take the grievance to arbitration.

Accordingly, when the handling of a grievance deeply implicates the interests of more than one employee, the union should investigate and assess each affected employee's side of the dispute.

The duty of fair representation not only requires unions to investigate employee grievances adequately, it also demands that, under certain circumstances, unions impart information to an employee or employees. Failure to notify an employee of another person's grievance may be a breach of the duty of fair representation if the arbitration could substantially affect the employee's interests and if the employee's position is not adequately represented.

Although a union is not required to take every grievance to arbitration, a union's rejection of an arbitration request must be based on an informed, reasoned judgment regarding the merits of the claim in terms of the language of the collective bargaining agreement.

Private sector employees may sue their unions for breach of the duty of fair representation, but it is unclear whether federal sector employees may file suit in federal court for breach of the duty of fair representation. Although the Civil Service Reform Act expressly provides that the federal sector unions' duty of fair representation is enforceable by the Federal Labor Relations Authority and its general counsel through the Act's unfair labor practice provisions and procedures, it is silent with respect to the right of federal employees to enforce the duty in a federal court action.

Claiming that no valid reason exists for the Supreme Court to create an exception to the long-held principle of federal court jurisdiction over duty of fair representation claims, Karahalios asserts that denial of a judicial forum to federal employees would frustrate the basic purpose underlying the duty of fair representation. The union maintains

that implying a judicial fair representation remedy under the Civil Service Reform Act would undercut the Act's carefully developed enforcement scheme.

#### ARGUMENTS

*For Efthymios A. Karahalios (Counsel of Record, Thomas R. Duffy, 243 Eldorado, Suite 201, Monterey, CA 93940; telephone (408) 649-5100):*

1. The unique nature of the duty of fair representation and its enforcement over the past 40 years mandate that federal courts remain open to federal employees injured by the arbitrary or discriminatory conduct of unions clothed with exclusive representation powers.
2. There is no intimation in the legislative history of the Civil Service Reform Act that Congress intended in any way to depart from the well-recognized district court jurisdiction over duty of fair representation claims.
3. There are no policy considerations in the federal sector that would justify eliminating a judicial remedy for employees injured by invidious union conduct solely because a federal sector employer is involved.

*For Local 1263, National Federation of Federal Employees (Counsel of Record, H. Stephen Gordon, 1016 16th St., N.W., Washington, DC 20036; telephone (202) 862-4400):*

1. The Civil Service Reform Act does not give rise to a judicial remedy for breach of the duty of fair representation.
2. While the Civil Service Reform Act imposed a duty of fair representation on federal sector unions, the Act creates an express administrative cause of action to enforce that duty.
3. Where Congress has expressly created certain remedies to enforce a statutory duty, the logical conclusion—absent strong contrary evidence—is that Congress provided all the remedies it considered appropriate and did not intend other remedies not set forth in the statute.

#### AMICUS ARGUMENTS

*In Support of Defense Language Institute/Foreign Language Center, and Local 1263, National Federation of Federal Employees*

The National Treasury Employees Union and the solicitor general of the United States filed amicus briefs in support of the respondents. The solicitor general contends the statutory language that imposes the duty of fair representation merely bans certain conduct. He asserts that the language does not speak of liability on the part of the union, let alone of a right of employees to sue for damages.

The National Treasury Employees Union argues that the reasons underlying recognition of a judicial right of action for the private sector duty of fair representation claims do not apply to the federal sector. According to the National Treasury Employees Union, it is practical to vest the Federal Labor Relations Authority with exclusive jurisdiction over duty of fair representation cases.