

## **Multiple Labor Unions and the Duty of Fair Representation**

### **I. Introduction**

Article 33 Paragraph 1 of the Constitution stipulates that workers have the right to organize independently, bargain collectively, and to act collectively in order to improve working conditions. Workers are guaranteed improvement of working conditions through the exercise of these three rights as fundamental under the Constitution. To realize this, the Labor Union Act was enacted to protect these basic rights. However, the exercise of these rights was restricted because only one labor union was recognized in any one singular workplace. To improve this, multiple unions were allowed in individual workplaces as of July 2011, and this multiple union system stipulates the duty of fair representation of the multiple unions, along with a procedure for determining the representative union channel for bargaining (Articles 29-2 and 29-4 of the LUA). The purpose of this system of a representative union bargaining channel is to deal with practical problems that can arise when multiple unions engage in collective bargaining with employers, such as antagonism between unions and labor management on issues that arise from having to negotiate the same content numerous times. The intent is to prevent problems such as difficulties and differing working conditions based on union membership.<sup>1</sup> If the majority union takes the initiative in collective bargaining through the bargaining channel system, this in fact means that minority unions are limited in their bargaining rights or in the exercise of their union rights, which may make it difficult for them to survive as unions. To compensate for this, the concept of the duty of fair representation on the part of the bargaining representative union was introduced, and through this, minority unions were able to exercise their roles and maintain their power as unions.<sup>2</sup>

As of July 2011, as multiple unions were permitted, majority unions were established in the workplaces of several metal unions, under the leadership of the employer, as a result of which there were cases in which the existing unions, which lost their collective bargaining status, were incapacitated. In fact, it can be said that this was a case of failure to understand the duty of fair representation in conjunction with the purpose of the bargaining channel unification system. Over the past 10 years, a lot of precedents on the duty of fair representation have accumulated. In this article I would like to review the criteria for judging the duty of fair representation and the effectiveness of remedies.

### **II. Subject, Scope, and Burden of Proof for Duty of Fair Representation**

#### **1. Subject**

The bargaining representative union and the employer shall not discriminate between the unions participating in the procedure of determining the representative union channel for bargaining, or its members, without

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<sup>1</sup> Constitutional Court Decision on April 24, 2012: 2011 Hunma 338.

<sup>2</sup> Seoul High Court ruling on April 24, 2014: 2013 Nu 53105.

reasonable grounds (Article 29-4 of the LUA). It is the bargaining representative union and the employer who bear the duty of fair representation. Here, in principle, the bargaining representative union bears the duty of fair representation, but depending on the case, the employer may also bear such duty (duty of non-discrimination) together with the bargaining representative union.<sup>3</sup> However, the employer alone does not assume the duty of fair representation. A minority union removed from the procedure of determining the representative union channel for bargaining has the right to ask the duty of fair representation to the bargaining representative union. Applicants who can claim the duty of fair representation are minority unions that have participated in the representative union channel for bargaining, while unions that did not participate are excluded.

## 2. Scope

The purpose of the fair representation duty is to prohibit discrimination between labor unions participating in the process of determining the representative union channel for bargaining. The duty of fair representation must be observed not only in the articles of the collective agreement, which is the result of collective bargaining, but also in the process of collective bargaining.<sup>4</sup> In order for the bargaining representative union to treat the minority union equally in the process of collective bargaining and to fulfill the duty of fair representation procedurally and appropriately, it is necessary to provide information about the collective bargaining and the conclusion of a collective agreement to the minority union. However, since the discretion of the majority union is allowed in the collective bargaining process, if a minority union is discriminated against without reasonable cause by deviating or abusing the discretion of the bargaining representative union, the duty of fair representation is violated.<sup>5</sup>

The issues related to the duty of fair representation are ① the scope of union members, the subject of membership, and qualifications, ② the limit of paid time-off and treatment of paid full-time employees, and ③ the union shop issue in the content of the collective agreement. In the course of union activities, ① union fee deduction, ② requirements for recognition of paid union activities, ③ selection of labor-management council members, ④ union office, ⑤ union bulletin board, etc. are provided for. In the process of collective bargaining, ① gathering opinions on the proposal for negotiations, ② explaining the progress and results of negotiations, and ③ selecting the bargaining agenda are stipulated.<sup>6</sup>

## 3. Burden of proof

Responsibility in lawsuits is apportioned according to who has the duty to verify the burden of proof. In general, the burden of proof rests with the party making the claim. However, regarding the burden of proving the duty of fair representation, the Supreme Court has ruled, “If it is recognized that the bargaining representative labor union

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<sup>3</sup> Park, Jisoon, “The Concepts and Contents of the Duty of Fair Representation”, Labor Review, Korea Labor Institute, June 2011, p. 14.

<sup>4</sup> Supreme Court ruling on August 30, 2018: 2017 Da 218642.

<sup>5</sup> Supreme Court ruling on September 13, 2018: 2017 Doo 40655.

<sup>6</sup> Lee, Kyungwoo, “Objects of Fair Representation and Judgment Criteria”, Labor Law, December 2018, Joong-Ang Kyungjae.

or the employer discriminated against another union or its members participating in the procedure for determining the representative union channel for bargaining, the fact that such discrimination has reasonable grounds should be verified by the bargaining representative union or the employer with the burden of proof for the claim.”<sup>7</sup> It was determined that the burden of proof rests with the bargaining representative union and the employer, because the legal provisions specify the duty of fair representation which the bargaining representative union and the employer have to a minority union in accordance with Article 29-4 of the Labor Union Act.<sup>8</sup>

### **III. Judgment Criteria in Each Instance of Duty of Fair Representation**

The judgment of the Labor Relations Commission and the courts on whether the duty of fair representation was violated has mainly consisted of the provision of union offices, the issue of allotment of paid time-off, discrimination toward minority unions, and applications for remedy for discrimination in the process of concluding collective bargaining.

#### **1. Provision of a union office**

While an employer is not obligated to provide a specific office where the union may perform its daily work, if there is an office available at all times to the bargaining representative union (unless there are special circumstances), space available to other unions should be provided to minority unions, with a proportional principle generally applicable to the size of the office provided for the minority union.<sup>9</sup>

The most common item in remedies for violation of the duty of fair representation in the Labor Commission is this issue of a union office. While the majority union was quite often provided with an office, this was not always the case for minority unions,<sup>10</sup> or else the office was located far away from the workplace, thereby being disruptive to union activities.<sup>11</sup> Even in cases where the minority union was assigned a significantly smaller office, it has been considered to be a violation of the duty of fair representation.<sup>12</sup>

#### **2. Allocation of paid time-off**

In principle, the idea of proportionality according to the number of union members is applied in relation to the distribution of paid time-off. However, given that the bargaining representative union is engaged in activities related to collective bargaining and participation in the labor-management council, it is justifiable to grant a little more in the distribution of paid time-off, within a reasonable range according to social norms.<sup>13</sup> However, not allocating any paid time-off to minority unions or granting too little to minority unions is a violation of the duty

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<sup>7</sup> Supreme Court ruling on August 30, 2018: 2017 da 218642.

<sup>8</sup> Administrative Court ruling on September 29, 2016: 2015 Guhap 8459.

<sup>9</sup> Supreme Court ruling on September 13, 2018: 2017 Doo 40655.

<sup>10</sup> Seoul High Court ruling June 17, 2016: 2015 doo 57064; Administrative Court ruling on November 24, 2017: 2017 Kuhap 60642.

<sup>11</sup> Deajon Regional Court ruling on August 28, 2019: 2018 Kuhap 104220.

<sup>12</sup> Administrative Court ruling on September 29, 2016: 2015 Kuhap 8459.

<sup>13</sup> Seoul High Court ruling on April 24, 2014: 2013 Nu 53105.

of fair representation.

The paid time-off system is stipulated in a collective agreement, within the legal limits, in consideration of the number of union members who are employees of the workplace, or if the employer consents. Designated union members can consult with the employer, negotiate, handle grievances, and engage in industrial safety activities without loss of wages by using paid time-off, or can dedicate their full time to union activities and union management tasks (Article 24 of the LUA). Based on 2000 hours, one full-time employee can use an individual's entire working hours for union activities, and the number of paid time-off employees is determined based on this.

In terms of guaranteeing time-off for union activities, a measure (for example) that allocates 50 minutes of new employee training time to the bargaining representative union and 10 minutes to the minority union is a violation of the duty of fair representation.<sup>14</sup> This is because the 10 minutes allocated to the minority union is too short to promote and enroll in the union, making normal union activities impossible.

### 3. Discrimination of minority unions regarding working conditions

In addition to the provision of a union office and the allocation of paid time-off, there may be various discriminations in the interpretation or implementation of the collective agreement. For example, if the collective agreement explicitly stipulates that certain labor conditions apply only to the bargaining representative union, or if there is a provision that excludes application to members of a minority union. Other examples would include: ① An instance in which only the anniversary of the foundation of the bargaining representative union is recognized in the collective agreement, while the anniversary of a minority union is not.<sup>15</sup> ② The act of providing a bulletin board to a minority union which differs from that of the bargaining representative union. This would be considered discriminatory, which is a violation of the duty of fair representation. For example, if the bargaining representative union was provided with an electronic bulletin board and the minority union was provided with a general bulletin board.<sup>16</sup> ③ The payment of welfare funds, overseas training expenses, and student subsidies to only the bargaining representative labor union would also be a violation of the duty of fair representation.<sup>17</sup>

### 4. Discrimination in the bargaining process

Collective bargaining takes place in the following order: preparation of the negotiation request, the negotiation process, an agreement through negotiation, an internal approval procedure through a general meeting of union members regarding the provisional agreement, and finally, the conclusion of the collective agreement. In this process, the bargaining representative union must provide all necessary information to minority unions and receive their opinions when preparing a draft for a bargaining request.<sup>18</sup> Information on the progress of the collective

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<sup>14</sup> Administrative Court ruling on April 4, 2014: 2013 Kuhap 4590.

<sup>15</sup> Supreme Court ruling on August 30, 2018: 2017 Da 218642.

<sup>16</sup> Administrative Court ruling on May 3, 2018: 2017 Kuhap 77626.

<sup>17</sup> National Labor Relations Commission decision on May 12, 2015: 2014 Kongjung 34.

<sup>18</sup> Choi, Chang-Gwi, "National Commission Judgment Cases and Some Legal Issues on Fair Representation Obligation" Kangwon Law, 41, December 12, 2014, page 1101.

bargaining process must be provided. When a provisional agreement is drawn up, an opportunity to vote for or against the agreement must be provided. Here, the bargaining representative union's discretion regarding the collective bargaining and conclusion is recognized, but violations of the duty of fair representation may be acknowledged for any parts where information to the minority union was not provided or the process of collecting opinions was not implemented when preparing the bargaining request.<sup>19</sup>

#### **IV. Corrective Procedure in Case of Violation of the Duty of Fair Representation**

##### 1. The party to the request for relief

The applicant for relief from the violation of the fair representation duty would be a minority labor union participating in the process of determining the representative union channel for bargaining. A labor union that does not participate in the bargaining unification process cannot be an applicant. Since the application targets the bargaining representative union channel for bargaining, it cannot concern the employer only, but both the bargaining representative union and the employer at the same time, or the bargaining representative union only can be the target.

##### 2. Exclusion period

In the case of discrimination between the bargaining representative labor union and the employer in violation of the duty of fair representation, a minority union may request the Labor Relations Commission to correct the violation within three months from the date of the violation (the date of conclusion of the collective agreement) (Article 29-4 (2) of the LUA). For the discriminatory content stated in the collective agreement, a claim for relief must be filed within three months from the date of conclusion of the contract; after this three-month period, a request for relief cannot be made because it has gone beyond the exclusion period.

##### 3. Remedy Procedures and Effectiveness Measures

When the Labor Relations Commission receives an application for remedy for violation of the fair representation duty by a minority union, it hears the claims of the applicant and the respondent within 60 days, and then holds a judgment hearing to determine whether unreasonable discrimination has occurred and issues either a remedy order or a decision to dismiss. If either party is dissatisfied with the relief order, it can apply for reconsideration with the National Labor Relations Commission within 10 days, or file for a lawsuit to the administrative court within 15 days. If no retrial or administrative litigation is filed, the order or decision becomes final. If the bargaining representative union and the employer do not comply with the confirmed corrective order, they shall be punished by imprisonment for not more than three years or by a fine not exceeding KRW 30 million (Articles 89 and 29-4 (4) of the LUA).

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<sup>19</sup> Supreme Court ruling on October 29, 2020: 2019 Da 262582.

## **VI. Conclusion**

The duty of fair representation is a system in which minority unions relinquish their bargaining rights through the process of determining a representative union channel for bargaining, but these minority unions still represent the rights and interests of their members and maintain their substance as unions. A bargaining representative union that violates the duty of fair representation will be ordered to correct or be liable for damages. Through this provision of the duty of fair representation, minority unions can survive, promote the rights and interests of minority union members, and continue their union activities. In this era of plural unions, minority unions should be fully aware of the duty of fair representation by the majority-represented union and the employer, and protect the rights and interests of their unions and members by securing the rights of their minority unions.