

**ONTARIO LABOUR RELATIONS BOARD
INFORMATION BULLETIN NO. 12**

THE DUTY OF FAIR REPRESENTATION - WHAT DOES IT MEAN?

The purpose of this Information Bulletin is to answer questions commonly raised by employees who wish to complain that they have not been properly represented by their union. Please refer to Information Bulletin No. 11 - "Duty of Fair Representation Applications" for information on how to file an application and for a description of how the Board processes applications.

This Information Bulletin applies to applications regarding a union's duty of fair representation under either the *Labour Relations Act, 1995*, the *Colleges Collective Bargaining Act, 2008* or the *Fire Protection and Prevention Act, 1997*.

GENERAL EXPLANATION

The "duty of fair representation" says that a trade union shall not act in a manner that is arbitrary, discriminatory or in bad faith in representing employees. These words have been interpreted in a number of cases by the Ontario Labour Relations Board. This Bulletin provides some questions and answers that will help you to understand what the terms "arbitrary", "discriminatory" and "bad faith" mean in the context of a union's role in representing employees. It will also help you to understand the way an application against a union is dealt with at the Labour Relations Board.

QUESTIONS AND ANSWERS

- Q: What kinds of applications can be made under the duty of fair representation?
- A: The duty of fair representation only applies to a union's representation of an employee in connection with his or her employer. Examples include union decisions in processing grievances, including those involving *Employment Standards Act* entitlements, and in conducting negotiations.
- Q: What about the union's responsibilities beyond the representation of employees in relation to the employer?
- A: The duty of fair representation does not apply to these matters. For example, while many unions help employees in claims with the Workplace Safety and Insurance Board, the *LRA*, *CCBA* and the *FPPA* do not require them to do so. The duty of fair representation generally does not govern them when they do.

Q: Is the handling of my grievance the exclusive responsibility of the union?

A: Yes. If a union decides to accept your grievance, it has the responsibility of processing it through the steps in the grievance procedure that are set out in your collective agreement.

Q: What rights do I have with respect to my grievance?

A: You have the right to have the matter honestly considered by the union.

Q: What if they will not talk to me?

A: The union is expected to discuss the merits of the grievance with you to ensure that it takes into account the relevant considerations.

Q: Can I insist that my grievance be processed on to arbitration?

A: No. The final decision on how far a grievance should be processed, and whether or not a grievance should go to arbitration, is made by the union and not a grievor. The legislation does not require a trade union to carry a grievance to arbitration simply because an employee wishes that this be done.

Q: Can the Labour Relations Board require the union to take my grievance to arbitration?

A: Yes, but only if the Board is satisfied that the union has violated its duty of fair representation under the relevant legislation.

Q: What does the term "arbitrary" mean?

A: A union acts arbitrarily when handling a grievance if its conduct is superficial, capricious, indifferent, or in reckless disregard of an employee's interests. For example, if a union met with the employer and received a different version of the grievance than the grievor's and then dropped the grievance, without having given the grievor an opportunity to answer the employer's version, it might be found to have acted arbitrarily.

Q: What factors can the union consider when handling a grievance?

A: A union can consider any legitimate factors other than the grievor's interests. One factor can be the union's promise to the employer that it would not advance a particular interpretation of the contract. Another factor may be the possibility of a negative effect of a victory on the other employees in the unit. Or the issue may not be significant enough to warrant the necessary time and money for the resolution the grievor seeks. The union must weigh these factors fairly against the wishes of the grievor.

Sometimes a conflict between the interests of the grievor and the bargaining unit as a whole arises after the union has decided a grievance has merit. This often occurs during negotiations for a new collective agreement. The union and employer may wish to settle grievances in exchange for concessions in the agreement. The union is not prohibited from entering into such arrangements.

Q: Does the Board view careless or negligent mistakes by a union in the handling of a grievance to be arbitrary conduct?

A: Inadvertent errors or poor judgment are not usually seen to be arbitrary, but flagrant errors or gross negligence may be found to be arbitrary.

Q: Must the union be correct in its assessment of a grievance?

A: Not always. Union officials can make honest mistakes or exercise poor judgment, without necessarily violating the legislation.

Q: What is "discriminatory" conduct?

A: Factors such as race, religion, sex, sexual orientation, age, or physical or mental disability should not influence the way a union handles an application or grievance. A union must not distinguish among employees in a bargaining unit unless there are good reasons for doing so.

Q: What is "bad faith"?

A: A union must not make decisions that are motivated by ill-will. If an employee can prove that a decision is influenced by personal hostility, revenge, or dishonesty the union will be found to have violated the legislation.

Q: How can I file an application alleging a violation of the duty of fair representation?

A: Duty of fair representation applications must be made on a form supplied by the Labour Relations Board (Form A-29). Before filing your application with the Board, you must first deliver a copy of it and a Notice of Application (Form C-14) to the senior union official responsible for your bargaining unit and to your employer. Only after you have made these deliveries can you file your application with the Board. You must file one signed original of your completed application with the Board. No signature is required when e-filing.

Please refer to Information Bulletin No. 11 - "Duty of Fair Representation Applications" for detailed information on how to file an application.

Application, Response and Notice forms, the Board's Rules of Procedure, and Information Bulletin No. 11 are available from the Board (505 University Avenue, 2nd Floor, Toronto, Ontario, M5G 2P1 - Tel. no. [416] 326-7500) or downloaded from the Board's website at www.olrb.gov.on.ca.

Q. What kind of information do I put in my application?

A: You must describe fully and in an organized way all of the facts that you rely on to support your allegation that your union acted in a manner that was arbitrary, discriminatory or in bad faith in representing you. You must include all of the circumstances, including what happened, where and when it happened, and the names of the people who you say acted improperly. You must also say what it is you want the Board to order. If you fail to provide this information, you may not be allowed to present any evidence or make any representations about these facts at the consultation.

Q: Is there a time limit for filing a duty of fair representation application?

A: While there is no statutory time limit for filing an application, excessive delay without a good explanation may cause an application to be dismissed.

Q: How does the Board handle a duty of fair representation application?

A: After an application is filed, a Mediator will normally be assigned by the Board to meet with the employee and the union (and possibly the employer), and try to help them reach an agreement that will settle the application. The Mediator may meet with the union, employee and employer separately, or at the same time.

Before or after a Mediator meets with parties, the Board may be asked to dismiss the application because it does not make out an arguable case. If it does not, the application may be dismissed by the Board without a consultation or hearing. If this happens, all of the parties will be sent a Decision of the Board that sets out why the application was dismissed.

Please note that, concurrent with a Mediator's mediation efforts with the parties, one side or the other may raise certain other objections such as: the content of materials filed with the Board, the absence of filings or particulars as required by the Board's Rules, or undue delay. Mediators do not deal with these objections, or those described in the preceding paragraph—a Vice-Chair of the Board will rule on them as necessary. Such rulings may take place prior to a settlement meeting with the Mediator, or after.

If the objection is not dealt with prior to the mediation meeting, the parties should still attend the mediation to try to settle the merits of the complaint. In the event parties do resolve their dispute, the objection previously raised

with the Board is then usually not dealt with as the parties have reached agreement on the substantive dispute between them.

Q: What does the Mediator do?

A: Mediators do not decide the case. The role of the Mediator is to help the parties reach a settlement of the application. In order to encourage frank and open discussion between the parties and the Mediators and increase the likelihood of settlement, Mediators do not communicate the contents of the settlement discussions or their perceptions of the strength of the parties' positions to the Vice-Chair who will be hearing and deciding the case. All communication between the Mediator and the parties remains confidential. This includes documents that are given to a Mediator. If a party wants a document to be considered by the Vice-Chair who hears the case, the party must submit it themselves -- the Mediator will not do so on behalf of the party.

During the settlement discussions, the Mediator may explain the Board's case law. These comments are directed at helping parties realistically assess their chances of success at a consultation and evaluate the settlement proposals, and are not to be taken as legal advice.

Only settlements that have been reduced to writing can be enforced at the Board.

Q: What happens if the case doesn't settle?

A: If no settlement is reached, a consultation (or, in some cases, a hearing) with a Vice-Chair of the Board is held. At the consultation, the employee must establish that the union violated the *Labour Relations Act* by showing the Board that the union acted in a manner that was arbitrary, discriminatory or in bad faith.

Q: Is a consultation different than a hearing?

A: Yes. A consultation is meant to be more informal and less costly to the parties than a hearing, and the Vice-Chair plays a much more active role in a consultation than in a hearing. The goal of a consultation is to allow the Vice-Chair to expeditiously focus in on the issues in dispute and determine whether an employee's statutory rights have been violated.

Q: How does a consultation work?

A: While the precise format of a consultation varies depending on the nature of the case and the approach of the individual adjudicators, there are some universal features. To draw out the facts and arguments necessary to decide whether the statutory duty of fair representation has been violated, the Vice-Chair may: 1) question the parties and their representatives, 2)

express views, 3) define or re-define the issues, and 4) make determinations as to what matters are agreed to or are in dispute. The giving of evidence under oath and the cross-examination of witnesses are normally not part of a consultation, and when they are, it is only with respect to those matters that are defined by the Board.

Board hearings are open to the public unless the panel decides that matters involving public security may be disclosed or if it believes that disclosure of financial or personal matters would be damaging to any of the parties. Hearings are not recorded and no transcripts are produced.

Q: What happens at the end of the consultation?

A: A consultation normally lasts no longer than one day, and a decision containing brief reasons is made at the consultation or is issued afterwards. The decision will have one of four results. The Board may exercise its discretion not to inquire further into your application; it may dismiss your application on its merits; it may grant your application; or, in limited circumstances, it may schedule it for a full hearing before the Board.

The Board issues written decisions, which may include the name and personal information about persons appearing before it. Decisions are available to the public from a variety of sources including the Ontario Workplace Tribunals Library, and over the internet at www.canlii.org, a free legal information data base. Some summaries and decisions may be found on the Board's website under *Highlights* and *Recent Decisions of Interest* at www.olrb.gov.on.ca.

Q: If a consultation or hearing is held, do I have to get a lawyer?

A: You are not required to have a lawyer act for you. The choice is yours. However, since a consultation or hearing is a legal proceeding that affects your legal rights, you may want to discuss the matter with a lawyer. Your lawyer would be in the best position to advise you on an appropriate course of action.

Q: If I hire a lawyer, who pays?

A: You are responsible for your own legal costs.

Q: What about other costs?

A: The Board does not charge any service fees for a consultation. However, other costs associated with the consultation (for example, the cost of photocopying documents that you want the Board to read) are your responsibility. The other parties are responsible for their own costs. It is not the Board's practice to have the "loser" pay the "winner's" costs.

Q: If the Board finds in my favour, what will happen to my application?

A: The Board **may** order the union to take your grievance to arbitration, or may issue another appropriate remedy.

Q: Will the Board investigate my actual grievance?

A: No. The purpose of these provisions in the legislation is to determine if the union acted in a manner that was arbitrary, discriminatory or in bad faith in representing you. The Board will not rule on the merits of your grievance.

Q: Can I appeal if the Board dismisses my application?

A: The Board's decisions are not subject to appeal, and are subject to judicial review only on very narrow grounds. The Board has the power to reconsider any of its decisions but will generally only do so if one of the parties presents it with new and relevant information that could not reasonably have been presented earlier.

Q: What if I have other questions?

A: In order to maintain its impartiality and in order to ensure that it is seen by the parties as impartial, the Board is unable to provide advice as to the rights or obligations under the *Labour Relations Act*, the *Colleges Collective Bargaining Act* or the *Fire Protection and Prevention Act*.

IMPORTANT NOTE

IN ACCORDANCE WITH THE *ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT, 2005*, THE BOARD MAKES EVERY EFFORT TO ENSURE THAT ITS SERVICES ARE PROVIDED IN A MANNER THAT RESPECTS THE DIGNITY AND INDEPENDENCE OF PERSONS WITH DISABILITIES. PLEASE TELL THE BOARD IF YOU REQUIRE ANY ACCOMMODATION TO MEET YOUR INDIVIDUAL NEEDS.