

ONTARIO LABOUR RELATIONS BOARD INFORMATION BULLETIN NO. 11

Duty of Fair Representation Applications

This Information Bulletin describes how the Board handles applications by employees who complain that they have not been properly represented by their union. Please refer to Information Bulletin No. 12 – “The Duty of Fair Representation – What Does It Mean?” for answers to commonly asked questions about the duty of fair representation.

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*.

FILLING OUT AN APPLICATION

Applications alleging a violation of the union's duty of fair representation must be made on Form A-29. The application must describe fully and in an organized way all of the facts that are being relied on to support the allegation that the union has acted in a manner that was arbitrary, discriminatory or in bad faith.

FILING THE APPLICATION

Before filing the application with the Board, the applicant must deliver an Application Package to the other parties involved in the case. Those other parties are: 1) the senior union official responsible for the bargaining unit (this person may be a paid staff representative of the union, a senior elected member of the bargaining unit, or some other individual exercising official responsibility for the bargaining unit on behalf of the union), and 2) the employer.

The Application Package consists of: 1) a copy of the completed application, and 2) a Notice of the application (Form C-14). The applicant must fill in his or her name and the union's name on page 1 and the date on page 2 of the Notice before making the delivery.

Other material, including blank Response forms and Information Bulletins 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.

The package may be delivered by hand, courier, facsimile transmission, regular mail, or any other way agreed upon by the parties.

No later than five days (not including weekends, statutory holidays or any other day the Board is closed) after delivering the Application Package to the union and employer, the applicant must file one copy of the application with the Board. The application may be filed in any way other than facsimile transmission, e-mail or registered mail. If the application is not filed with the Board within five days after delivering the package to the union and employer, the matter will be terminated.

FILING A RESPONSE

The union and the employer, if it wants to participate in the case, have ten days (not including weekends, statutory holidays and any other day the Board is closed) after receiving the Application Package to respond. They must first deliver a copy of the response to the applicant and each other in accordance with Rule 6.4 of the Board's Rules of Procedure. They must then file one copy of their response with the Board, using any method other than facsimile transmission, e-mail or registered mail.

HOW THE APPLICATION IS PROCESSED

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 an Mediator meets with the 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 settlement 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.

ROLE OF THE MEDIATOR

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 Mediator 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 or panel 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 panel that 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 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.

CONSULTATIONS

If no settlement is reached, a consultation (or, in some cases, a hearing) will be held with a Vice-Chair. At the consultation (or hearing), the employee must establish that the union violated the legislation by showing the Board that the union acted in a manner that was arbitrary, discriminatory or in bad faith.

A consultation is different from a hearing. 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.

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.

Because the opportunity to call witnesses and present evidence is limited, the Board relies heavily on the information that is provided in the application and response. As such, the employee and union (and employer and any other affected party that participates) are required to provide in their application and response all of the material facts that they intend to rely on. Parties who fail to do so may not be allowed to present any evidence or make any representations about these facts at the consultation.

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.

THE DECISION

A consultation normally lasts no longer than one day, and a decision with brief reasons is made at the consultation or is issued afterwards. The decision will have one of four results: 1) the Board may exercise its discretion not to inquire further into the application, 2) it may dismiss the application on its merits, 3) it may grant the application, or 4) 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.

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.