

The Duty of Fair Representation

What is “The Duty of Fair Representation”?

The duty of fair representation is a term that is hard to define precisely. There is no universal standard which tells the union how they must process grievances. Whether a union has breached its duty of fair representation depends on the facts of each case. Despite the fact that the laws are not specific, many standards have been established by the courts. The Union holds itself to these standards which require that an employee must be treated in a fashion that is not arbitrary, discriminatory or in bad faith.

The courts have determined that the Union holding exclusive recognition must represent all workers in the bargaining unit, whether they are members or non members, in an impartial manner. It is the responsibility of each steward to fully investigate all grievances and to process meritorious grievances in strict compliance with the step identified by the contract grievance procedure.

What kind of standard is used to determine if a steward has violated the Union’s duty of fair representation?

The Union has failed in its duty if it deliberately or unjustifiably refuses to represent the worker. On the other hand, negligence or mistakes are not enough to be deemed a violation if it can be shown that the steward properly investigated the grievance, that an evaluation was made and a good faith effort was made to seek a resolution of the grievance.

The State Employment Relations Board (SERB) has jurisdiction to review claims of a Union’s breach of the duty of fair representation. SERB requires that the Union provide a legitimate and rational explanation of its conduct. This explanation must not be arbitrary or without reason.

Is the Union required to take every grievance to arbitration even if it is considered non-meritorious?

NO. The courts realize that only a small percentage of grievances should be arbitrated and that federal labor policy promotes the settlement of grievances short of costly and time consuming arbitration. Therefore, the Union clearly has a right to settle a grievance or decide that a particular grievance lack sufficient merit to justify arbitration.

Experts agree that it is not good labor relations practice to move a significant number of grievances to arbitration. It is clearly in the best interests of both parties to resolve grievances at the lowest step possible. Work place disputes are often best resolved by mutual agreement decided rather than a third-party arbitrator.

Does the Steward violate the duty of fair representation when he/she chooses not to appeal a grievance to the next step in the grievance procedure?

If the Steward makes an inquiry into the facts and his or her interpretation of the contract has some basis in reason, the Union’s refusal to process the grievance will not be considered arbitrary and will not be considered a breach of duty of fair representation.

When the Steward drops a grievance at some point in the grievance process, he or she needs to provide an explanation to the grievant(s) as to why the grievance lacks merit, at the time the decision

is made not to move the grievance forward to the next step.

It is essential that the Steward review the definition of a grievance in the contract. Applicable provisions of the contract should be reviewed. The steward should also obtain the assistance of a Steward's Committee established by the chapter. Questions of the contract interpretation should be referred to your assigned OCSEA Staff Representative.

If I settle a grievance don't I deprive the employee of their right to go to arbitration?

An employee who files a grievance does not have an automatic right to go to arbitration. Arbitration is a last resort. A reasonable settlement offer by the employer is a very acceptable reason for not approving a grievance for arbitration. A good Steward will emphasize a wish to reach a fair and reasonable resolution at any step in the grievance procedure before they recommend that the dispute be given to an arbitrator.

How far should I take a non-meritorious grievance before it should be dropped?

The facts you have to support your decision are much more significant than how far a grievance is advanced. Your investigation that uncovers the facts necessary to determine that the grievance lacks merit is most important.

In some instances the grievance must proceed through the grievance procedure because management needs to provide required information or you want to assure that your facts are confirmed. Time should be made available to secure a possible settlement. Under the State Contract the Step 3 meetings with the agency should, in most cases, provide ample time to investigate a grievance and fully discuss it with management. A decision to drop a non-meritorious grievance should be made when the Step 3 written decision is received and evaluated. If the necessary facts are already available, the grievance should be dropped before the Step 3 meeting.

What is meant by arbitrary?

If a steward dismisses a complaint without investigating it, his or her decision is arbitrary. If a Steward fails to process a grievance because it is filed by a non-member, it is arbitrary.

Basically, you as a Steward have the responsibility to do three (3) things: (1) Investigate a complaint when brought to your attention. (2) Review the facts against the contract to determine if it is or is not a good grievance. (3) Avoid any consideration based on the person's race, sex, religion or union membership.

If you do these three things you will fulfill your duty of fair representation.

What if I think a person is being treated unjustly, but I know the contract is not violated?

It is unfair to let a person believe they have a good grievance when they do not. Honesty is the best policy. If you have a bad situation which is not a grievance, you may want to talk to your staff representative to explore other remedies. A short list of other remedies is EEOC, OCRRC, Worker's Comp, disability, labor-management meetings and future contract negotiations.

Isn't it better to process every grievance to arbitration just to play it safe?

No. The Union should investigate all alleged violations of the contract or the employee rights. The Union has no obligation to pursue a grievance that lacks merit or has no chance of success. If the Steward files frivolous grievances it will affect their credibility and their ability to settle meritorious grievances. Under the state contract, a steward who files all grievances to Step 4 does not discriminate between good and bad grievances and does not give management an idea of what is most important. Generally the courts recognize that mistakes will be made. The courts are interested in good faith effort, done without hostility or discrimination.

What guidelines can Stewards follow if they want to insure they will not face a charge of breaching the Union's duty of fair representation?

The most effective prevention is common sense. There is no such thing as a guarantee that will prevent anyone from making a charge or accusing you of violating your basic responsibilities. There are several things you can do to successfully defend against such a charge.

You need to have a reason to reject a grievance and your judgment should be free from arbitrary or discriminatory intent.

Every complaint, no matter how farfetched it first appears, should be investigated. This does not mean that a grievance needs to be filed. Enough facts should be known to make a reasonable judgment if the contract is violated.

The Union must show that it did investigate the complaint. Keep a clear record of your investigation by using one of the pre-printed fact sheets about each complaint. The Steward should know the 5 w's (who, what, when, where, and why). A clear record of each grievance must also be kept. Use the pre-printed grievance form to show what was done and the final disposition of the complaint or grievance. A chapter should maintain a file on all grievances it has handled.

Every effort should be made to convince the grievant that the grievance or complaint is not legitimate when that is the case. If you have doubt of the legitimacy of a grievance you should continue with your investigation until you are satisfied that all relevant facts are known. If a question exists about the legitimacy of a grievance, the Steward should contact the OCSEA staff representative before action is taken to drop a grievance.

The grievant should be given in writing the terms of the settlement. An explanation should be made personally to the grievant if a decision is made to withdraw a grievance.

The Steward should know their contract. The Steward has an obligation to attend training sessions concerning the contract and the grievance procedure.