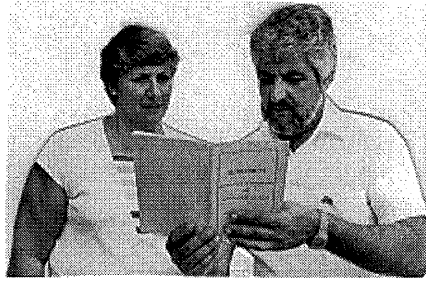


Understanding the Duty of Fair Representation



Experienced stewards will tell you that there are countless categories of both grievants and grievances. There is the habitual grievant who always seems to have a bone to pick with the boss; the timid grievant who wants to grieve, but is afraid of what the boss will say; aggressive grievants who not only want to pursue their grievances to the hilt, but will add any details necessary to strengthen their case, proven or not. Then there is the contrast between the loyal union member who grieves to protect his or her livelihood and family after being suddenly laid-off, and the non-union "fair-share" employee who wants to file a grievance "just to see what the union will *do* about it.!" The list can go on and on. Just ask any longtime AFSCME steward for a "war story" or two and you'll hear the remarkable variety, first-hand.

Whether your grievant or grievance fits into any particular category or not, there is one important thing to remember: *Your course of action in any grievance case will be determined by the merits of the grievance, and not by the merits of the grievant.* It is when the latter becomes a determining factor in grievance handling that a breach of the duty of fair representation (DFR) suit can occur.

Determining the Merits

When we speak of the *merits* of a grievance, we are actually referring to two things: First, whether a violation of workers' rights has occurred; and second, whether there is sufficient proof that the violation did occur. It is the duty of the steward, staff representative, grievance committee, or any other union body involved in grievance handling to determine whether these two things exist, and to take appropriate action either to pursue the grievance, or to drop it. In this lies the key to the duty of fair representation as described by the courts: That a grievance must be taken through the grievance process by the union representative based on the merits of the case, and must not be denied the process through any discrimination, obvious negligence, or by any arbitrary or capricious decision to drop the case. There is, however, no obligation to pursue grievances which are totally lacking in merit or where the prospects of success are remote.

Errors and Responsibility

This does not mean that union representatives cannot make mistakes. The courts leave room for our human failings, even when they sometimes adversely affect our members. What the courts have determined is that we cannot be selected in good faith as the representative of the workers, and then disregard our responsibilities for no real reason. Nonetheless, members do become dissatisfied with union representation, and sometimes take their dissatisfaction to the courts in the form of a breach of the duty of fair representation (DFR) suit.

Although there is no foolproof way to avoid a lawsuit, particularly in the "sue now, pay later" kind of atmosphere being advocated in America today, there are a few basic things that can significantly protect stewards and other union representatives against successful DFR suits. Please note that these are merely guidelines and suggested approaches. Each local or council must, of course, develop and utilize a program which is best suited to its own internal structure and the provisions of the various collective bargaining agreements which it must negotiate and administer.

Basics for Grievance Handling

1 Follow closely the procedures outlined in the AFSCME Steward Manual concerning grievance handling, and read carefully the *AFSCME Steward* magazine.

The time-tested suggestions given in the Steward Manual are an effective guide for any AFSCME steward in the investigation, documentation, preparation and presentation of grievances. Carefully following the Manual, even the inexperienced steward can be an effective grievance representative for his co-workers.

The *AFSCME Steward* magazine is a constant source of information concerning the latest problems and issues facing stewards throughout the country, and recounts their answers and strategies in dealing with them. It is the "professional journal" of AFSCME stewards, assisting them continually to upgrade their skills, knowledge, and competence.

2 Follow and enforce the contract in all provisions regarding grievances:

Time limits which are clearly stated in the contract, as well as the steps involved in the grievance procedure must be followed strictly. If any agreement is made by the parties to alter, extend, or otherwise affect the provisions of the contract, it should be put in writing, and the grievant informed. Although many stewards and union representatives enjoy a casual relationship with the employer regarding meeting time limits of the grievance procedure, this can be risky for both, even if it is advantageous in resolving grievances.

3 Always keep the worker informed about the status of his or her grievance.

The grievance representative should always keep a written record of the progress of a grievance, noting dates, contacts, decisions regarding the grievance and reasons for the decisions. A good practice is to ask the grievant to sign or initial the record or grievance form at each significant stage of the process. This practice will insure that the appropriate contact is maintained with the grievant and will confirm the contact in writing.

If the union decides to drop a grievance for lack of merit, or any other reason, the grievant should be notified of this in writing, be informed of the reasons for the decision, and told the procedure for appealing this decision. Some unions use certified mail for this purpose in order to guarantee that the grievant acknowledges receiving the notice. In all cases, documentation of the notice to the grievant should be made.

4 Some locals or councils have established an internal appeals process.

The appeals process serves the grievant by providing a forum in which to be heard if she or he challenges a union decision to drop her/his grievance. A grievance committee, a special session of the executive board, a committee on appeals, or any like structure can become a permanent part of the union's grievance procedure. This forum would allow the grievant to present her/his side of the case, at the same time giving the union representative the chance to explain the union's decision, and answer questions about it. This not only enhances the democratic nature of the union, but also creates more trust and good will among members toward their union. The feasibility of such a process is, of course, dependent upon the size and structure of the local or council, in addition to other practical considerations. Of course, at the local level, a grievant may appeal any decision to the body of the membership at the local union membership meeting.

5 The agreement with the employer should contain enough flexibility in the grievance process to allow for the union's internal appeals process.

Although the union's internal appeals body can be a vital tool in assuring the grievant of the union's intent to fulfill its duty of fair representation, it can hardly be effective unless time is allowed by the contract agreement for it to function.

Allowing time for this appeals process can be of significant benefit to the employer as well as the union. Not only can the employer avoid the expense of defending many more grievances in arbitration, where decisions often seem to be unpredictable, but it can also more easily avoid very costly involvement in civil suits over unsettled grievances, particularly when a question of liability is raised. The recent US Supreme Court decision, *Bowen vs. USPS and APWU* is a good example of where the internal appeals process might have benefited both union and employer.

6 The union should always allow a worker the opportunity to submit additional evidence or further arguments in support of his/her grievance at any stage in the grievance procedure.

Affording this opportunity to the grievant demonstrates the willingness of the union to investigate the grievance fully as to its merit. At the same time, by listening to the grievant and considering those aspects of the case which are important to him/her, the union representative can offer the grievant a measure of satisfaction and a feeling of being part of the process. It may also make the investigation process easier and more accurate for the union representative.

D.F.R. Checklist

For stewards and union representatives, the close attention of the courts to the matter of the duty of fair representation should not be a source of anxiety or doubt about their ability to help workers with grievances.

There is no secret method for processing grievances known only to "competent professionals" to fulfill the duty of fair representation. Nor is there a legal trap ready to be sprung for the unwary grievance representative who steps over an imaginary line in a maze drawn by the courts. By following these recommendations, a steward, staff representative, grievance committee, or anyone who works with grievances on behalf of the union can be confident that they will fulfill the duty of fair representation:

- ✓ 1. Follow the Steward Manual for the investigation, documentation, preparation, and presentation of grievances.
- ✓ 2. Observe the contract provisions for grievance processing.
- ✓ 3. Keep the worker informed about the progress of the grievance.
- ✓ 4. Utilize the internal appeals process within the union where feasible and practical.
- ✓ 5. Negotiate flexible time limits to allow for appeals or additional investigation.
- ✓ 6. Always allow the grievant to submit more evidence or arguments for the grievance.

Remember that an informed and conscientious steward or grievance representative provides the most effective union representation and at the same time, reduces the likelihood of DFR litigation.

*The Education Department also has available a video entitled **The Duty of Fair Representation**. For information about obtaining a copy, call the Education Department at (202) 429-1250.*



DFR CHECK LIST

When a union member wants to file or files a grievance be sure to inform him/her:

1. Grievances can only be filed if the employer has violated the collective bargaining agreement (CBA) in some way.
2. If an employee has a workers compensation claim, advise him/her to seek outside counsel to handle the claim as it will not fall within the purview of the CBA. (Be sure, however, to investigate independently of the employer to see whether the claim is a workers compensation claim or a disability claim. Under the recent case law, in order that the union avoid liability under the Americans with Disabilities Act (ADA) that is not acquiesce in the employer's determination).
3. If an employee has a discrimination claim, advise him/her to file a charge with either the EEOC or Minnesota Department of Human Rights (MHRA) or to seek outside counsel to handle the claim.
4. If the relevant CBA contains an anti-discrimination clause and no election of remedies clause, the employee has the right to grieve the issue as well as seek redress for his/her claim through other channels.
5. If the individual is discharged or "removed" from his/her position for misconduct and if there is no election of remedies clause in the CBA, the employee has the right to challenge his/her removal through either the grievance procedure in the CBA or to file for a hearing under the Veterans Preference Act (VPA). The union will represent the grievant through the grievance procedure. In contrast, the individual will have to retain counsel to represent him/her at the VPA hearing. But, if the individual elects to have a VPA hearing, he/she will be continued to be paid until he/she has been discharged according to the VPA, i.e., after the hearing officer has made his/her decision.
6. The union's duty of fair representation does not include representing individuals in any private cause of action, e.g., a discrimination suit or a workers compensation claim. In addition, the union's duty of fair representation does not include providing a lawyer to represent an individual in these claims.
7. The union's duty of fair representation does not include providing an individual with an attorney to represent him/her through any part of the grievance process, including arbitration.
8. If a case proceeds to arbitration, the union is not required to let a grievant, at his/her own expense, have his/her attorney attend the hearing let alone participate in the hearing.

9. The union's duty of fair representation does not include proceeding to arbitration on every grievance.
10. The union has the right to settle any grievances with management if, based on the union's experience and as a result of the union's investigation, it has reached an agreement with the employer that is in the best interests of the union. Factors to consider in settling are: 1) the grievant's prior disciplinary record; 2) the strength of the case; 3) the union's past experience with other grievances of a similar nature.
11. The union will fully investigate any grievance or potential grievance that is brought forth by one of its members. At the conclusion of its investigation, the union may decide either to proceed with the grievance or to dismiss it. The union will inform the grievant of its decision as soon as practicable.
12. If the union decides to dismiss a grievance, it shall promptly tell the individual of any and all internal processes by which the individual can appeal the union's decision.
13. A grievant should be informed that unless he/she appeals the dismissal of the grievance through the internal union process, the decision is final. The individual has no individual right to proceed with the grievance. The grievance belongs to the union, not the individual.
14. If a grievance proceeds through arbitration and the grievance is denied, the union does not have a duty to appeal the arbitration award. It is the practice of most unions not to appeal arbitration awards. The grievance belongs to the union.

In addition, inform the individual:

1. He/she must cooperate by responding to the union's request for information and by supplying such information in a timely fashion.
2. He/she must keep the union informed of his/her address, telephone number etc. in order that the union can reach him/her in processing the grievance.
3. Failure to cooperate with the union in the handling of the grievance may result in the union dismissing the grievance.

The union representative should keep a detailed file on any grievance or potential grievance. It is especially important to document dates. A DFR claim has a six month statute of limitations. Many court claims for a DFR can be dismissed on this basis provided that the union can supply the necessary documentations.