

# ***THE DUTY OF FAIR REPRESENTATION***

Since it speaks for all employees, the association is obliged to fairly represent all employees in the bargaining unit. This obligation is imposed by the public-sector collective bargaining law.

It is a prohibited practice under the law for an association to refuse to fairly represent a bargaining unit member in a matter involving the contract.

An association breaches its duty of fair representation where the association's conduct would be judged to be arbitrary or discriminatory toward a member of the collective bargaining unit. Subject to these criteria, an association is afforded substantial discretion in negotiations and in the processing of grievances. The association must protect the interests of the group as a whole, as well as individual interests, and must reconcile conflicts fairly. An association does not breach its duty of fair representation merely because it is wrong or because it fails to satisfy everyone it represents.

## **This “duty of fair representation” exists:**

1. During collective bargaining for initial and successor agreements.
2. During the life of the contract, including the resolution of disputes and the processing of grievances.
3. When deciding whether or not to arbitrate and while conducting the arbitration.

The association has no duty of fair representation in matters that are unrelated to the collective bargaining context. For instance, an association is not obligated to provide advice or services regarding disputes involving the law other than the contract. An example of this might be a member who comes to the association believing he/she has been the victim of sex discrimination at work. The issue is whether this is simply a statutory claim or whether there is any claim based on the contract. The association does not have an obligation to process statutory issues.

Any association representative confronting this complexity should consult with the assigned field representative.

An association has considerable latitude in the processing of grievances and other aspects of contract administration. However, an association must consider and weigh, in good faith, all of the following criteria in deciding whether to proceed to arbitration on a grievance:

1. The effect of the breach on the employee.
2. The effect of the breach on the contract.
3. The likelihood of success in arbitration.
  - Failure to make a considered decision in these situations may give rise to a claim that the association has breached its duty of fair representation.
  - A decision not to arbitrate based solely on cost to the association without regard to the merits of the grievance, for example, might be arbitrary and, therefore, a breach of the association's duty of fair representation.
  - Before reaching a decision not to arbitrate, the association must review and weigh all of the circumstances. It would be advisable to keep a sufficient record of the decision-making process (e.g., the record in the minutes of the executive committee) in the event that the association's decision is challenged.
  - Loss of pay (suspension, non-renewal, discharge): If the member proves that the association violated the duty of fair representation by refusing to arbitrate and if the Massachusetts Labor Relations Commission examiner also concludes that the member would have prevailed on the merits of the grievance, the association may be responsible for any back pay.

However, the duty to fairly represent is based on common sense — the association is given wide latitude to conduct its business as long as all employees in the unit are fairly treated.

**Depending on the facts, examples of arbitrary or perfunctory association conduct might include:**

1. Deliberate lying.
2. Ignoring a clearly meritorious grievance.
3. Failure to investigate or consider the merits of the grievance.
4. Failure to gather favorable evidence once an association decides to process a grievance.
5. Having a decision made by people who have a conflict of interest.
6. Making an inadequate attempt at gathering evidence on behalf of the grievant or at rebutting the employer's arguments.
7. Extreme negligence in investigating, extreme passivity in presenting the case.
8. Perfunctory handling of an arbitration case which omits any factual proof of the grievant's position.
9. Inexcusable failure to make a decision whether or not to advance a grievance to arbitration in accordance with contractual time limits.
10. Inexcusable failure to notify the grievant of a decision not to arbitrate in time for the grievant to advocate a different approach or to pursue other remedies if any are available.
11. Decisions based simply on race, gender, sexual preference or age, rather than on the merits.
12. Refusal to process the grievances of agency fee employees or non-members simply because they are not members.
13. Refusal to process grievances of members for the sole reason that they have criticized the association or filed charges against the association.

**Factors that can legitimately enter into decision-making might include:**

1. Effect on other members of the unit — monetary or otherwise.
2. Relative importance of the principle (what may be of great import to one member may be less important in the unit's "big picture").
3. Trade-off at bargaining table or in settling grievances.
4. Merits of grievance.