

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.*