

Effective 19 December 2018

INFORMATION BULLETIN DUTY OF FAIR REPRESENTATION (DFR)

PURPOSE

This bulletin provides general information to employees, unions and employers in order that they may better understand Labour Relations Board procedures. It is for information purposes only; it is not Labour Relations Board policy and it is not legislative interpretation. Further, it does not provide legal advice.

INTRODUCTION

Through the application for certification process, the Labour Relations Board (the Board) may certify trade unions as bargaining agents for defined bargaining units of employees. When a trade union becomes certified, it is given the exclusive authority to bargain collectively with the affected employer on behalf of the employees it represents. The legislation places a statutory duty of fair representation on the trade union when it acts on behalf of the employees it represents.

Trade unions negotiate collective agreements with the employers. They do this on behalf of their members. A union enforces the terms of the collective agreement by filing grievances on behalf of employees if they are of the opinion that the employer has violated a term of the collective agreement. Collective agreements prescribe the steps in a grievance procedure and if a grievance cannot be resolved at one of those steps, a union may choose to take a grievance to arbitration.

If an employee believes that his or her union has acted in a manner that is arbitrary, discriminatory or in bad faith in the handling of a grievance that he or she has filed or attempted to file with the bargaining unit against his or her employer, that person may file a Duty of Fair Representation (DFR) complaint (application) with the Board for a determination. There are certain terms and conditions that are required when filing a complaint. A copy of the DFR complaint form is available on the Board's website, <https://www.gov.nl.ca/lrb>. The Board process for such a complaint is covered in greater detail below.

I. OVERVIEW

If a DFR complaint (application) meets the legislative requirements to be considered by the Board, the DFR complaint will be dealt with in one, two or three stages by the Board. If your complaint fails to meet the applicable legislative requirements at Stage 1 (i.e., Is the complaint timely?) your complaint will be rejected. If your complaint meets the criteria as set out in the legislation for Stage 1, your complaint will move to Stage 2: Preliminary Investigation or Stage 3: Full Investigation, depending on whether there is a preliminary issue requiring a determination by the Board.

Stage 1: Preliminary Review

Upon receipt of your complaint at the Board office, it will undergo a preliminary review. If it is deemed that your complaint is not timely on the face of the application and documents submitted, it will be rejected at that point and **will not** be assigned a Labour Relations Board file number or undergo a formal preliminary investigation. The result of the preliminary review **will not** result in the Board issuing an official Board order. You will only receive a letter from the CEO of the Board advising that the complaint as filed does not meet the requirements for consideration by the Board.

Stage 2: Preliminary Investigation: Is the complaint timely?

If additional information is required in order to determine whether or not your complaint is timely or if the Board has jurisdiction, a Board file number will be assigned and a Preliminary Investigation will be conducted by one of the Board's Investigating Officers.

The legislation (Section 130(2) of the LRA or Section 43(2) of the PSCBA) requires that a complaint **must be made within 90 days** from the date on which the complainant knew or, in the opinion of the Board, ought to have known, of the action or circumstances, giving rise to the complaint. **After that 90 day period has passed, the Board has no jurisdiction to deal with the DFR complaint.** This may mean that a person may have to file a complaint with the Board before there is a final decision in relation to the grievance and/or arbitration. Failure to file a complaint within the time stipulated may result in the complaint not being processed to Stage 3: Full Investigation. If the complaint is rejected at Stage 2, the Board **will** issue an official Board Order.

Stage 3: Full Investigation: Did the bargaining agent act in a manner that is arbitrary, discriminatory or in bad faith in the handling of a grievance that the employee has filed or attempted to file with that bargaining agent?

Please refer to the applicable legislation. Section 130 of the [Labour Relations Act](#) (generally covers employees of private companies) and Section 43 of the [Public Service Collective Bargaining Act](#) (generally covers public employees) provide that an employee in a bargaining unit may make a written complaint (by completing a DFR complaint form contained on the Board's website) to the Labour Relations Board claiming to be aggrieved because his or her bargaining agent has acted in a manner that is arbitrary, discriminatory or in bad faith in the handling of a grievance that the employee has filed or attempted to file with that bargaining agent. The legislation requires unions to fairly represent all employees in a bargaining unit. This is referred to as the union's **duty of fair representation**. The principles that govern the union's duty, which have been adopted by the Labour Relations Board, have been set out by the Supreme Court of Canada, as follows:

- The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent employees comprised in the unit.
- When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
- This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and for the union on the other.
- The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
- The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee. (See *Canadian Merchant Service Guild v. Gagnon* [1984] 1 S.C.R. 509).

A union must not act in an **arbitrary** manner. Arbitrary conduct by the union, depending on the circumstances, could include implausible, reckless, unreasonable, capricious or negligent conduct, or a non-caring attitude. The type of conduct which could fall within the definition of arbitrary could include a failure to adequately investigate an employee's grievance or to give only superficial attention to the facts of a grievance. A union should thoroughly investigate all the facts and evaluate the probable outcome of arbitration before deciding to abandon or settle a grievance. Failure to make a reasonable and objective assessment of the case may amount to arbitrary conduct by the union.

A union must not act in a **discriminatory** manner. This means that a union must not discriminate against an employee on illegal or prohibited grounds, such as age, race, etc. It also means that a union should not distinguish between or treat individuals differently without a cogent reason for doing so or based on unreasonable grounds. It should be noted that not every instance of differential treatment is considered discriminatory.

A union must not act in **bad faith** in the handling of a grievance. Actions or decisions motivated by hostility, ill-will or other improper purpose could be considered bad faith. Actions designed to mislead or deceive others, or the conscious doing of a wrong because of dishonest purpose have also been considered to be bad faith.

A union is entitled to consider factors such as the employee's legitimate interests, the legitimate interests of the other members of the bargaining unit and the chance of success at arbitration, using its knowledge of how similar issues have been decided by arbitrators.

The Board must determine whether or not a union has acted in a manner that is arbitrary, discriminatory or in bad faith. When filing a complaint with the LRB it is **imperative** that you identify the actions of the union, in terms of its handling of the grievance that you filed or attempted to file, that you believe fall within one or all of these categories. The Board's assessment is made based upon the **actions** taken by the union in handling the employee's grievance. The Board considers whether the union objectively considered the merits of an employee's grievance and made an objective and rational judgment about how to handle the grievance. The Board **does not** assess the merits of the grievance; that is the role of the union and an arbitrator, if the grievance proceeds to arbitration. This does not mean that unions cannot be wrong or make mistakes; they do not always have to be correct in their assessments and decisions they make in relation to the handling of a grievance as long as they do not act in an arbitrary, discriminatory or bad faith manner in so doing.

As stated in Gagnon, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion to decide whether to proceed to arbitration.

If your complaint moves beyond the Stage 1 process and the Investigating Officer has filed his or her full investigation report with the parties and the Board, your complaint will then be assessed based on the above noted legal principles.

II. FILING A COMPLAINT

Disclosure of personal information

When filing any complaint (application) with the Board, all information included in the application is provided to the other party or parties as respondents or interested parties. Further, such information may be referred to in any order or reasons issued by the Board at the conclusion of the matter, on the Board's website and in print and online reporting services that may publish the Board's decision.

A complaint with the Board must, in accordance with Section 37 of the [Labour Relations Board Rules of Procedure](#), include the following information:

- the name and address of the complainant;
- the name and address of the local trade union; and,
- the grounds on which the complaint is based.

It is important to note that **this means** that the name of each party to the complaint, with the name of the contact person, mailing address, email address, fax number and telephone number, must be supplied by the complainant **at the time of filing the complaint** with the Board. The staff of the Board is not responsible for collecting this information. Receiving the correct information is vital as matters before the Board are highly confidential and time sensitive and are treated accordingly. The staff of the Board has a responsibility to move this time sensitive matter along to the affected parties as expeditiously as possible. The Board cannot efficiently serve a complaint on a party without valid contact information.

There is a specific Duty of Fair Representation Complaint Form available for your use (please refer to the **Forms and Applications** section of the Board's website at www.gov.nl.ca/lrb/). An employee or former employee **must** file a complaint by filling out this form, which includes requirement for the above-noted information, and submitting it the Board. In addition to the information stated above, the complaint must also include the following:

- the piece of legislation under which the complaint is filed, i.e., either Section 130 of the **Labour Relations Act** or Section 43 of the **Public Service Collective Bargaining Act**;
- the nature of the grievance which the employee filed or attempted to file;
- the circumstances of the complaint including a chronology of the events, times, dates and people involved;
- details of the actions or conduct of the union officials that it is alleged were arbitrary, discriminatory or in bad faith;
- a statement of the remedy the complainant is seeking from the Board;
- whether it is believed that a hearing is required; and
- copies of any relevant documents that the complainant has referred to in the complaint and intends to rely upon must be supplied and clearly identified as attachments (i.e., attachment or exhibit 1,2,3, etc) to the complaint and referenced accordingly where relied upon in the submission. Within your complaint, you must clearly outline to the Board the relevance of the attachment supplied and relied upon.

The complaint must be verified by affidavit or statutory declaration that the facts set out therein are true to the best knowledge of the complainant. This means that it must be signed by the complainant in the presence of a commissioner for oaths or a solicitor/lawyer who witnesses the signing. One of the Board's staff is a commissioner for oaths and can assist a complainant in having the document sworn. If a complaint is filed that **has not** been verified by statutory declaration, it cannot be processed until it has been sworn.

A complaint may be filed at the Board's offices by delivery in person, by courier, by mail or by email. It is considered to be filed at the time it is received by the Board office with the information required to be considered by the Board. Please be reminded that if the original of any complaint filed with the Board is not supplied to the Board at the time of receipt, it must be supplied to the Board as soon as possible thereafter.

It is strongly recommended that employees who wish to file such complaints should review some previous decisions of the Board by contacting one of the Board Officers (Investigating Officers) who can provide copies of previous decisions. These decisions explain the reasoning of the Board and the principles which the Board applies to decide duty of fair representation complaints. All Board decisions are also available on the Board's searchable Decision System which can be found on our website at www.gov.nl.ca/lrb/. Questions may be addressed to one of the Labour Relations Board Officers at telephone number (709)729-2707.

III. PROCESSING THE COMPLAINT (detailed overview)

Stage 1: Preliminary Review

When a complaint is filed, it is reviewed by the Chief Executive Officer (CEO) or Deputy Chief Executive Officer (Deputy CEO) of the Board. The Board also employs Labour Relations Board Officers that may review an incoming complaint. All employees of the Board are impartial and assist the Board in the processing of complaints and applications. They do not advocate for employees, unions or employers.

The reasons for the complaint being reviewed by the CEO are to ensure that the complaint is timely and complete. As previously noted herein, a complaint must be made within **90 days** from the date on which the complainant knew or, in the opinion of the Board, ought to have known, of the action or circumstances, giving rise to the complaint. If it is clear from reading the documents supplied to the Board by the complainant that the complaint is untimely, it will be rejected at that point in the process and returned to the complainant. The CEO will accordingly issue a letter to the Complainant to advise him/her of such.

Stage 2: Preliminary Investigation

If additional information is required to make that determination (i.e., Is the complaint timely?), the CEO will assign an Investigating Officer to carry out a **Stage 2 preliminary investigation** and file a preliminary report exclusively on whether the Board has the jurisdiction to consider such complaint. If the complaint is found to be in order, it will undergo a **Stage 3 full investigation**.

If a **Stage 2** preliminary investigation is to be carried out, the affected parties will only receive a copy of **Part 1** of the complainant's completed complaint form.

Stage 3: Full Investigation

If a **Stage 3** full investigation is to be carried out, both Part 1 and Part 2 of the completed complaint form will be issued to the affected parties.

In the case of both a Stage 2 preliminary investigation or a Stage 3 full investigation, the union and the employer (and any other interested party) will be provided with the appropriate documents for reply. At that time, the CEO will also appoint a Board Officer to investigate and attempt to settle the complaint.

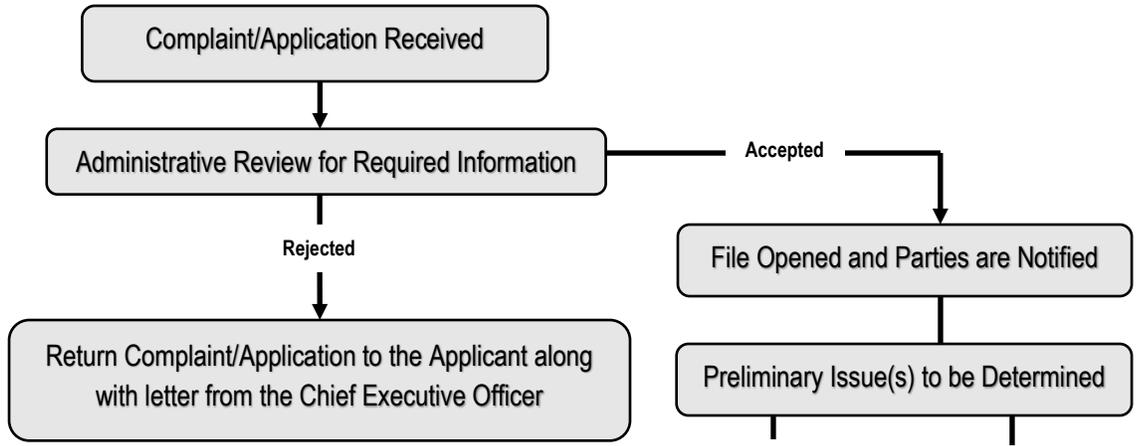
The Board's **Rules of Procedure** provides a time limit of **10 calendar days** (Section 7(2)) for the union and the employer (and other interested parties) to file a written reply to the complaint. When such replies are filed, they are sent to the complainant and the other interested party with a time limit of **5 calendar days** (Section 9.1) in which they may file a response to a reply. Responses are sent to the parties for information only. Please refer to the Policy Circular titled [Applications, Replies and Interventions](#) which is accessible on the Board's website. **Please be reminded that if a Stage 2 investigation is required, the Board will automatically abridge** (as per Section 15 – Labour Relations Board Rules of Procedure) **the time limits as follows:** a time limit of **5 calendar days** will be provided for the union and the employer (and any other interested party) to file a written reply to the Stage 2 complaint material. When such replies are filed, they are sent to the complainant and the other parties with a time limit of **2 calendar days** in which they may file a response to a reply.

If the CEO and/or the Board determine that a Stage 2 investigation should be initiated prior to a Stage 3 full investigation at the time of filing the complaint, the parties will be sent Part 1 of the complaint form only and notified to file replies and/or responses accordingly.

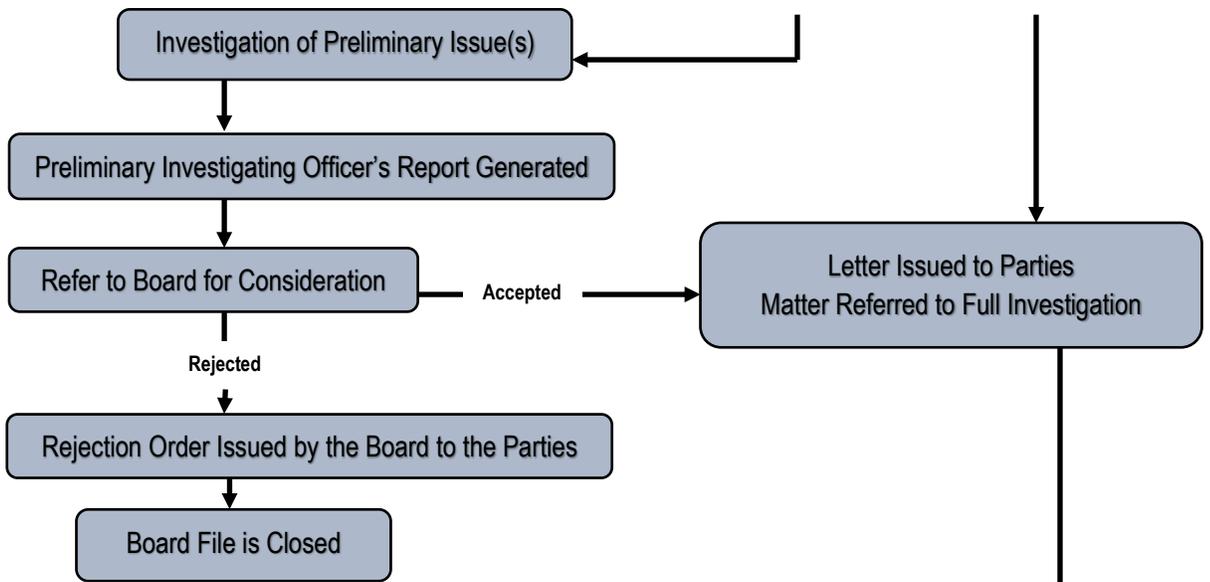
If required, the Board Officer will contact all of the parties with respect to one or both parts of the complaint and, if a resolution cannot be reached, the Officer will file a report with the Board setting out the facts surrounding the complaint (i.e., preliminary or full investigation) and the positions taken by the parties in relation to same. This written report of the Officer is sent to the complainant, the union and the employer (and any other interested party) (or their representatives). The parties may comment on some or all of the contents of the Officer's report. Any comments which the parties wish to make in relation to the report must be filed with the Board within **two (2) working days** for a full investigation report or **one (1) working day** for a preliminary investigation report. The process for delivery of the documents is very important and has been previously discussed.

DUTY OF FAIR REPRESENTATION PROCESS

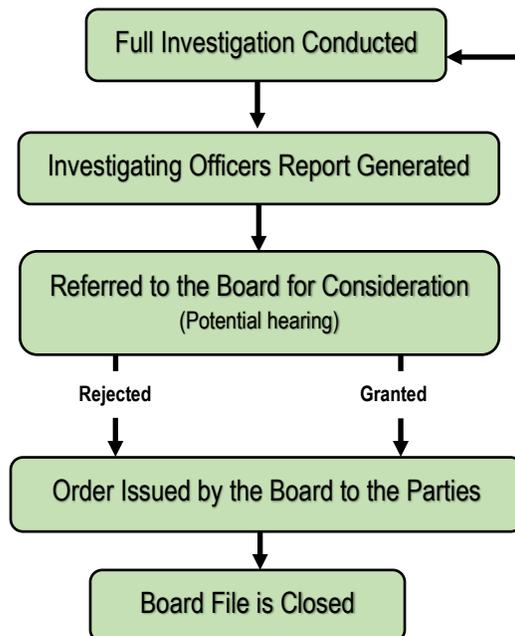
STAGE 1 PRELIMINARY REVIEW



STAGE 2 PRELIMINARY INVESTIGATION



STAGE 3 FULL INVESTIGATION



IV. DISPOSING OF THE COMPLAINT

As previously discussed, it is possible for your complaint to be rejected without undergoing a Stage 2 or 3 investigation.

If your complaint undergoes an investigation and it is determined by the Board, upon full review of all materials (the complaint, replies, responses and Board Officer report) placed before the Board with respect to a Stage 2 preliminary investigation, that it does not have the jurisdiction to deal with the matter, the complaint will be rejected at that stage and a Board Order **will** be accordingly issued. If it is determined that the complaint is timely, the Board will consider the Stage 3 full investigation report when it has been presented to the Board. A Board Order **will** be accordingly issued following the Stage 3 process.

Board Meetings

Board meetings are held regularly and as deemed necessary to review applications and complaints. Hearings may or may not be held to assist the Board in its consideration of complaints. The Board meets to review the file which includes the complaint, replies and responses filed by the parties, the officer's report, the replies to the officer's report and any other relevant documents. The Board will assess whether or not a hearing is required before making a decision.

In its decisions over the years the Board has examined the conduct of the union in the handling of the employee's grievance and answered such question as: Did the conduct of the union in handling the employee's grievance amount to acting in an arbitrary, discriminatory or bad faith manner? It has focused on how the union officials behaved. The Board **does not** have the jurisdiction or power to assess or decide the **merits** of the grievance; that is the role of the union and an arbitrator, if the grievance proceeds to arbitration. As stated in Gagnon, the right to take a grievance to arbitration is reserved to the union; the employee does not have an absolute right to arbitration and the union enjoys considerable discretion. For example, unions may settle grievances even if the affected employee does not agree with the settlement. This does not mean that unions cannot be wrong or make mistakes; they do not always have to be correct in their assessments and decisions they make in relation to the handling of a grievance as long as they do not act in an arbitrary, discriminatory or bad faith manner in so doing.

If the Board determines that either the complaint is untimely or the conduct of the union in handling the employee's grievance was not arbitrary, discriminatory or in bad faith and, therefore, was not a violation of the Act, it will dismiss the complaint. If the Board finds that the union has breached either Section 130 of the **Labour Relations Act** or Section 43 of the **Public Service Collective Bargaining Act**, it can direct the bargaining agent to take those steps the Board deems appropriate in the circumstances. The types of orders that the Board has made in the past include an order that the bargaining agent file a grievance (in a case where the employee has attempted to file a grievance); that the union refer the

grievance to arbitration; or comply with a requirement contained in the collective agreement or the union's constitution in relation to the handling of a grievance, and others.

The Hearing

If the Board determines that a hearing is necessary at Stage 2 or Stage 3, a hearing date(s) and location will be set. The hearing panel consists of three Board members, the Chairperson (or a Vice-Chairperson), an employee representative and an employer representative. At the hearing, each party presents evidence and introduces documents and possibly case law to support its case. The parties may be represented by legal counsel. Please refer to the Policy Circular titled [Scheduling of Hearings](#) which is accessible on the Board's website.

Following the completion of the hearing, the Board will consider the evidence and argument adduced at the hearing and will issue an order and a written decision.

Issuance of Board Decisions

All decisions of the Board are issued in the form of Board Orders. Where there is no hearing held, Orders are issued following a Board meeting. If a party wishes to have written reasons for the Board's decision, a written request for reasons can be filed with the Board within 30 calendar days of the party's receipt of the Board Order (the date the Board emails the Order). Where a formal hearing has been held, written reasons for decision are generally issued together with the Board Order. (See Section 12 of the **Labour Relations Act** and Section 16 of the **Labour Relations Board Rules of Procedure**)

If you have any questions or wish to seek clarification on this process or any other Board process, you may have your questions addressed by contacting one of the Labour Relations Board Officers at telephone number (709)729-2707.