

# The Rights and Duties of CUEFA Members

## The Right to Representation: General Principles

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### 1. CUE's Collective Agreement (dated January 24, 2022) refers to the CUEFA member having the right to representation.

The table below outlines which Collective Agreement provisions state that a faculty member/ASO is entitled to CUEFA representation:

#### **Collective Agreement provisions that confirm that faculty and ASOs both enjoy the Right to Representation:**

##### 4. Recognition, Representation and Association Dues

- s. 4.1 The Employer recognizes the Association as the certified exclusive bargaining agent for all Members in the Bargaining Unit.
  - s. 4.2 The Employer shall not meet with any Member or group of Members undertaking to represent the Association without written authorization of the Association Executive.
  - s. 4.3 In representing a Member or group of Members, the Association shall elect or appoint a representative to be the spokesperson.
- s. 30.1: The following Articles of this Collective Agreement apply to the Academic Service Officers:...
- 4. Recognition, Representation and Association Dues

#### **Collective Agreement provisions defending the Right to Representation:**

##### **Recognition, Representation and Association Dues**

- s. 4.1: The Employer recognizes the Association as the certified exclusive bargaining agent for all Members in the Bargaining Unit.
- s. 4.2: The Employer shall not meet with any Member or group of Members undertaking to represent the Association without written authorization of the Association Executive.
- s. 4.3 In representing a Member or group of Members, the Association shall elect or appoint a representative to be the spokesperson.

##### **Ranks and Categories of Appointments and Continuing Appointments for Faculty Members**

- s. 9.7.7 At least five (5) business days prior to the FRC Meeting, the Vice-President Academic & Provost or a designate of the Vice-President Academic & Provost shall submit to the Chair of the FRC and the Faculty Member any materials the Vice-President Academic & Provost intends to rely upon in the review. Within three (3) business days prior to the FRC Meeting, the Faculty Member shall submit to the Chair of the FRC and the Vice-President Academic & Provost or the Vice-President Academic & Provost's designate any materials that the Faculty Member intends to rely upon in the review. The Vice-President Academic & Provost or Vice-President Academic & Provost's designate and the Faculty Member may attend the FRC Meeting to make oral submissions regarding the relevant issues. The Faculty Member may be accompanied at the meeting by a representative Member of the Faculty Association.

#### **Discipline: Faculty Members and ASOs**

- s. 13.7: Upon receiving a complaint under this Article 13, the Vice-President Academic & Provost shall: a) Within seven (7) business days, send a copy to the respondent Faculty Member and the Association; b) Advise the Faculty Member of their right to meet with the Vice-President Academic & Provost, and to have a representative from the Association attend such a meeting, and arrange such a meeting upon the Faculty Member requesting it; and c) provide the Faculty Member and the Association with at least seven (7) business days' notice of the time of this meeting.
- s. 13.9: The investigator: a) shall meet with the complainant and the respondent separately and provide the complainant and the respondent with the opportunity to make written representations, or to have legal representation and/or an advocate from the Faculty Association present at the meeting;
- s. 13.10: Upon completion and receipt of the investigation report, and before making a decision, the Vice-President Academic & Provost shall offer to meet with the respondent, the complainant, and a representative of the Association and may also require further investigation.
- s. 13.15 In the event that the form of discipline is dismissal, and unless circumstances demand immediate action, the Vice-President Academic & Provost will normally first write to the Faculty Member and the Association and advise the Faculty Member and an Association representative to attend a meeting with the Vice-President Academic & Provost. The meeting is intended to allow the Faculty Member the opportunity to discuss and explain facts relating to the pending decision to dismiss the Faculty Member that the Faculty Member did not address in earlier steps of the process. Within ten (10) business days following the meeting, the Vice-President Academic & Provost will inform the Faculty Member and the Association in writing as to whether there will be a dismissal of the Faculty Member.

### **Reduction in Force Through Financial Exigency or Program Redundancy**

- s. 24.3 Prior to terminating a Member's employment pursuant to this Article, the University will meet with the Member who may be accompanied at the meeting by representative Member of the Faculty Association and determine, in its discretion whether the Member can reasonably meet the job requirements for deployment to another position available in administration within the bargaining unit or another academic unit.

### **Grievance and Arbitration**

- s. 25.9.10 The arbitrator shall conduct any hearing in private in the presence of the grievor and the Parties and/or their representatives (if any) unless the grievor and the Parties agree otherwise in writing.
- s. 25.7.1 Before the Association files a formal grievance, a representative of the Association shall meet with the Vice-President Academic & Provost, in order to discuss the matter and any potential for resolution.

### **Discipline of ASO**

- s. 38.2 d): Investigation and Right to Representation: The University will investigate to ascertain all relevant facts prior to considering and making a final disciplinary determination. If an Academic Service Officer is required to attend an interview or meeting as part of a disciplinary investigation they will be entitled to have an Association Representative in attendance and the University will inform the Academic Service Officer and the Association with at least three (3) business days' notice of the time of meeting.

## **3. The Collective Agreement provision referring to when to a CUEFA member may have legal representation.**

The following Collective Agreement provision states when a CUEFA member may have a lawyer represent the member:

### **Collective Agreement provision that confirms the right to Legal Counsel**

#### **Discipline: Faculty Members and ASOs**

- s. 13.9 The investigator: a) shall meet with the complainant and the respondent separately and provide the complainant and the respondent with the opportunity to make written representations, or to have legal representation and/or an advocate from the Faculty Association present at the meeting;

#### **4. CUEFA as the exclusive bargaining agent for CUEFA members – s. 4.1 of the Collective Agreement**

CUEFA is the exclusive bargaining agent for all CUE faculty members and ASOs, and therefore CUEFA negotiates the Collective Agreement with CUE's administration.

#### **5. The Duty of Fair Representation**

“If a union believes the employer is violating the collective agreement, it enforces the agreement by filing a grievance. Unions have a large amount of discretion when they deal with grievances. For example, unions may settle or drop grievances even if the affected employee disagrees. To counterbalance this power, the [Alberta] *Labour Relations Code* requires unions to fairly represent all members of the bargaining unit on matters in the collective agreement. This duty of fair representation requires unions act in good faith.”

“The Supreme Court of Canada has set the principal features of the duty of fair representation in five points:

- The exclusive power conferred on a union to act as spokesperson for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent employees comprised in the unit.
- When... 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. “

“In essence, this means unions have a large amount of discretion when they deal with grievances. For example, unions may settle or drop grievances even if the affected employee disagrees. To counterbalance this power, the *Labour Relations Code* requires unions to fairly treat all members of a bargaining unit. This duty of fair representation requires unions to exercise this power in good faith. This usually means unions must carefully examine grievances. The union must also consider the significance of the case and

its consequences for the union and the employee. The representation by the union must be fair, genuine and not merely apparent. The union must act with integrity and competence as well as without serious or major negligence. The union must act without hostility towards the employee. This also means the union's decision must not be arbitrary, capricious, discriminatory or wrongful. The duty of fair representation involves rights and obligations for both trade unions and employees. “

### **A. The Responsibilities of the CUEFA Member under the Duty to Fair Representation**

“Employees must protect their own interests. Employees do this by filing grievances, co-operating with the union, and minimizing their losses. If employees do not protect their own interests, claims of a breach of the duty of fair representation may not succeed. Employees must follow the grievance procedure in the collective agreement. They must report the problem to the union and co-operate with the union. In most collective agreements, employees do not have the absolute right to have grievances taken to arbitration. A union normally has the right to settle or drop a grievance even if the individual grievor disagrees.” This is so even in discipline and discharge cases. The union has the right to make these decisions but must do so according to the considerations set out above.”

“Employees must act to minimize their losses. This means they must do everything required of them in pursuing their grievance. They must not sit on any rights they have that would advance their cases. They must, if they suffer losses, take reasonable steps to minimize those losses. For example, they must seek new employment if they are dismissed. A [Labour] Board order for compensation will be for actual losses. This means losses that the complainant could not avoid by taking reasonable steps to protect his or her own interest. The [Labour] Code protects unions from losses caused by the employee's own conduct.”

### **B. The responsibilities of CUEFA under the Duty to Fair Representation**

When deciding about how to pursue a grievance, CUEFA must consider several factors:

#### **i) CUEFA's discretion in handling grievances:**

“There is no exhaustive list of items that unions must consider in deciding whether or not to take a grievance to arbitration. The following extract from a British Columbia case offers some guidance.

The judgment in particular cases depends on the cumulative effect of several relevant features: how critical is the subject matter of the grievance to the

interest of the employee concerned? How much validity does (the employee's) claim appear to have, either under the language of the agreement or the available evidence of what has occurred, and how carefully has the union investigated these? What has been the previous practice respecting this type of case and what expectations does the employee reasonably have for the treatment of earlier grievances? What contrary interest of other employees or of the bargaining unit as a whole have led the union to take a position against the grievor and how much weight should be attached to them? See: *Rayonier Canada Ltd.* [1975] 2 Can. L.R.B.R. 196 at 204 (B.C.L.R.B.)

“A union should address these questions when deciding to abandon or settle a grievance.”

**ii) CUEFA must avoid ill will:**

“Decisions [about a grievance] must not be motivated by ill will. Union officers must not let personal feelings influence whether or how to pursue a grievance. Decisions influenced by personal hostility, revenge or dishonesty may violate the Labour Code.”

**iii) CUEFA must not discriminate:**

“A union must fairly represent all employees in a bargaining unit. This means a union must not discriminate on the basis of union membership and factors such as, race, religion, sex or age should not influence the way a union handles a grievance. Each member should receive individual treatment. Favouritism and prejudice should play no part in grievance handling. Unions should consider only relevant and lawful matters when deciding whether or not to file or continue grievances.

**iv) CUEFA must not be arbitrary:**

“In deciding whether or not to pursue a grievance, a union must avoid arbitrary, capricious, discriminatory or wrongful conduct. It must not act in bad faith. It is arbitrary to give only superficial attention to the facts or matters in issue. It is arbitrary to decide without concern for the employee's needs and interests. “

“It is arbitrary not to investigate. It is arbitrary to make no effort to discover circumstances surrounding a grievance. It is arbitrary to fail to assess the merits of an employee's grievance.”

“A union should thoroughly investigate all of the facts and evaluate the probable outcome of arbitration before deciding to abandon or settle a grievance. This includes a review of the merits of the grievance and of arbitration decisions for similar grievances. This becomes more important where an employee faces serious discipline or dismissal, particularly a senior employee. Union officials can make honest mistakes. Proof that a union has acted negligently in the handling of a grievance or complaint does not necessarily amount to arbitrary conduct. A union can also wrongly assess a grievance, yet not act arbitrarily. “

The Labour Board will uphold the union’s decision if it concludes that the union:

- investigated the grievance and obtained full details of the case, including the employee’s side of the story;
- put its mind to the merits of the claim; and
- made a reasoned judgment about the disposition of the grievance.

“A union can fulfill its duty by taking a reasonable view of the grievance. This means it must consider all of the facts surrounding the grievance. It must weigh the conflicting interests of the union and the employee. It should then make a thoughtful judgment about the grievance. “

**v) CUEFA’s right to consider other factors:**

“A union can consider legitimate factors other than the grievor’s interests. For example, the union may have promised the employer that it would not advance a particular interpretation of the contract. Or the union may be concerned that a victory would have an adverse effect on the other employees in the unit. A union may also decide that cost of achieving the resolution the grievor seeks is too high given the issue at hand. The union must weigh these factors fairly against the wishes of the grievor.”

“Sometimes conflict arises between the interests of a grievor and the bargaining unit. For example, unions and employers may settle an ongoing grievance in exchange for bargaining concessions. This is not forbidden. It may, however, amount to unfair conduct if the grievance concerns serious discipline or dismissal.” See: *Centre Hospitalier Regina Ltee v. Labour Court*, [1990] 1 S.C.R. 1330.

**vi) CUEFA is not required to hire legal counsel:**

“A union may use its own staff to arbitrate a grievance. A union with adequate internal resources does not have to hire a lawyer. The Board rarely examines union conduct at arbitration. Usually it does so only in cases involving major abuse or bad faith. Arbitrators are primarily responsible for the conduct in a hearing.”

**vii) CUEFA’s handling of conflicting grievances:**

“Often the rights of the grievor will conflict with the rights of other bargaining unit members. This often occurs in cases involving seniority rights on promotion or layoff. It also happens in cases involving a reinstatement that triggers the displacement of another employee. In deciding whether or not to arbitrate such grievances, the union must act fairly. If it has done so, the union need not represent each affected employee.”

**viii) CUEFA’s duty to advise employees of hearings:**

“The union must advise all employees of any hearings that may affect their positions. It must clearly tell them that they can attend and can have their own representative. The attendance of such a representative is subject to the decision of the arbitrator. The union need not provide a representative for the employee. A union is not required to pay for any representative the employees choose for themselves.

## **5. CUEFA’S responsibilities outside of the Collective Agreement:**

“The duty of fair representation is not the only factor governing a union’s relationship with the employees it represents. An employee may have rights flowing from the union’s constitution..., from other statutes, and from other sections of the *Labour Relations Code*.”

- i) **CUEFA’s Constitution / Bylaws:** CUEFA’s Bylaws sets out the duties and responsibilities of CUEFA to its members.
- ii) **Government Legislation:** Government legislation also may bind CUEFA and its members. The rights and duties stem from the legislation and not from the Collective Agreement. For example:
  - The **Alberta Human Rights Act**, for example, prohibits certain types of discrimination. Complaints about these forms of discrimination must be directed



to the Alberta Human Rights Commission. CUEFA does not provide representation to CUEFA members filing a Human Rights complaint.

- The ***Workers' Compensation Act*** (“WCB”) gives employees rights. These rights stem from this Act, and not the Collective Agreement. CUEFA does not provide representation to CUEFA members filing a WCB claim.
- The ***Labour Relations Code*** (“LRB Code”). The LRB Code sets out requirements regarding Alberta labour relations for most employers and unions; it also defines the roles and rights related to bargaining and managing/resolving disputes. If CUE’s administration violates the rights of a CUEFA member, then CUEFA may (but is not obligated to) provide representation to a CUEFA member in a Labour Board matter.

**iii) Legal and Professional Charges:** “Unions are not required to pursue issues not covered in a collective agreement. For example, unions do not have to pay for a lawyer to represent an employee facing criminal charges. This also applies to employment-related lawsuits, professional discipline proceedings or fatality inquiries.”

**iv) Collective Bargaining Process:** “Unions are not bound by the duty of fair representation during negotiations. Negotiations may lead to decisions that some employees see as against their interests.”

Sources: Alberta Labour Relations Board Information Bulletin #18 – Effective: May 31, 2023. <http://www.alrb.gov.ab.ca/bulletins/18bulletin.pdf> ; *Noel v. Societe d’energie de la Baie James*, [2001] 2 S.C.R. 207; *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509); *Darius L’Heureux v. CSU 52 and the City of Edmonton*, [1993] Alta. L.R.B.R. 556; *Rita Vickers et al. v. HSAA and the University of Alberta Hospitals*, [1997] Alta. L.R.B.R. 11.

## **6. When does the Right to Representation arise in disciplinary matters?:**

“Union representation in disciplinary matters is a key right arising from the collective bargaining relationship. Many collective agreements explicitly include provisions that require the union’s presence at meetings where discipline is or may be imposed. The determination of whether a union representation provision has been breached is fact-specific...ultimately the right to union representation is determined by the specific wording of the relevant collective agreement.”

Scenario: If a member of CUE's People & Culture requests a meeting with a CUEFA faculty member/ASO, does that meeting trigger the right of the faculty member/ASO to have CUEFA representation present at the meeting? The answer to this question is: "it depends." If the meeting is purely for fact-finding purposes, then the meeting may not attract union representation. But if the meeting could potentially lead to discipline (including a fact-finding meeting with a potential for discipline), then it does necessitate a CUEFA representative to be present [see *Amalgamated Transit Union v. Toronto Transit Commission, Local 113*, 2019 CanLII 23860], and there should be adequate notice for that meeting. What is adequate notice? Section 38.2 d) of the Collective Agreement (Investigation and Right to Representation for ASOs) states:

"The University will investigate to ascertain all relevant facts prior to considering and making a final disciplinary determination. If an Academic Service Officer is required to attend an interview or meeting as part of a disciplinary investigation they will be entitled to have an Association Representative in attendance and the University will inform the Academic Service Officer and the Association with at least three (3) business days' notice of the time of meeting."

While the Collective Agreement stipulates a 3-day notice period for a disciplinary meeting with an ASO, it does not specifically state what is adequate notice for a disciplinary meeting with a faculty member.

"This broader conception of what constitutes a "disciplinary meeting" for the purposes of union representation is supported by caselaw. In *Saskatchewan Crop Insurance* it was held that "the application of union representation provisions extends beyond encounters or meetings where discipline is actually imposed'... an employer's investigative interview [can be] captured by the union representation provision because it was possible that the information gathered in the meeting could 'move the situation from interview to actual discipline.' This is particularly the case when the conduct under investigation is serious and would, on its face, justify a disciplinary response...."

**Please note: CUE's administration has previously initiated a "fact-finding meeting with the potential for discipline" with a CUEFA member:**

- **WITHOUT providing adequate notice (in one case, CUE's administration only provided 15 minutes notice to the CUEFA member of the meeting);**

- **WITHOUT allowing the CUEFA member to have a CUEFA representative present during the meeting.**

**Regrettably CUE’s Administration can NOT be counted on to respect the rights of members in these. If CUE’s administration (including People and Culture) to attend a meeting, CUEFA recommends that before attending such a meeting, you insist on:**

- **adequate notice (i.e., 3 business days); and**
- **having a CUEFA representative attend the meeting with you.**

Source: Jeffrey Sack and Wassim Garzouzi, *Winning cases at Grievance Arbitration*, 2<sup>nd</sup> edition (Toronto: Lancaster House; 2023), 215-17.

## **7. When should CUE provide a CUEFA Faculty Member or ASO with legal representation?”**

“Where a challenge to the exercise of academic freedom is brought forward outside the university – in a court, before a human rights tribunal, or in the court of public opinion – the university’s obligation to protect academic freedom means that it must immediately conduct its own internal assessment, consistent with the procedures noted above, to determine if the academic staff member’s academic freedom is at risk. If it is, the university must do one of two things, depending on whether the matter arose as a part of the member’s academic work. Where it did so arise, the university is obligated to provide the academic staff member with financial aid and other support to obtain independent legal advice or to ensure that such support is provided for the defense of the individual in the external proceeding. Where the matter did not arise as part of the member’s academic work, but is nevertheless to an exercise of academic freedom – for example, the laying of criminal charges because of participation in a protest against government military policy – the university does not have an obligation to aid in the individual’s legal defense. However, it does mean that that the university must not normally itself take any action against the individual because of their extra-mural expression.”

“If it is to act in accordance with academic freedom principles, the university may take action against an academic staff member for their external behavior only in circumstances in which that behavior renders the member unable to fulfil their employment obligations or indicates unfitness for their position within the university. In relation to the latter, universities cannot discipline ‘unless [the academic staff member’s behaviour] bears on

professional competence, and judgments of professional competence... are primarily reserved for faculty determination.”

Source: James L. Turk, “Academic Freedom in Canada: Its Origins, Components and Limits,” *Canadian Labour and Employment Law Journal* 25 (2023), 35-72.