

The Rights and Duties of CUEFA Members

The Right to the Application of Principles of Procedural and Natural Justice: General Principles

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A. CUE’s Collective Agreement (dated January 24, 2022) refers to the principles of procedural and natural justice.

CA provisions that confirm that faculty and ASOs both enjoy the Right to the Principles of Procedural and Natural Justice

s. 30.1: The following Articles of this Collective Agreement apply to the Academic Service Officers:...

- s. 2 Academic Freedom
- s. 25 Grievance and Arbitration

Academic Freedom

- s. 2.10 The University recognizes that freedoms are never absolute. Where the limits of academic freedom are alleged to have been exceeded, the University will apply the principles of procedural and natural justice in its investigations. Contraventions of s. 2 of the CA and/or the University’s Statement of Academic Freedom will be dealt with according to Article 13 (Discipline: Faculty Members) or Article 25 (Grievance and Arbitration) or Article 38 (Discipline: Academic Service Officers) of the Collective Agreement.

Grievance and Arbitration

- s.25.2.1 In cases in which it is alleged that:
 - a) The decision maker acted in bad faith;
 - b) The decision maker had a reasonable apprehension of bias; or
 - c) There was a significant breach of the principles of procedural fairness.

B. What are the “principles of procedural and natural justice”?

The concept of procedural fairness evolved from the following common law principles:

- the right to know the case against you; this includes the right to have adequate notice, and to be informed of the allegations against you;

- the right to be heard (*audi alteram partem*) and to present your case;
- the right to a fair and coherent procedure and hearing, and to have a reasoned decision (*nemo iudex in sua causa debet esse*);
- the right to have an impartial decision-maker not judging their own case or having an interest in the outcome of the case; and
- the right to have a decision-maker who listens to all sides of a case before making a decision.

The principles of procedural and natural justice provide that whenever a person’s “rights, privileges or interests” are at risk, there is a duty to act in a procedurally fair manner.

The principles of natural justice focus on the general manner in which a decision is made: that is, did the decision-maker follow proper procedures in arriving at their decision? The principles of natural justice and procedural fairness are based on the theory that the result of a decision is more likely to be fair if the procedure -- through which that decision was made -- was also fair.

CUE’s administration does not always follow the principles of procedural and natural justice, especially when it investigates CUEFA members. The failure of CUE’s administration to follow the principles of procedural and natural justice has often occurred in its administration of:

- CUE’s *Code of Conduct Policy and Procedures*; and
- CUE’s *Discrimination, Harassment and Accommodation Policy and Procedures*

against CUEFA members. In the past, a CUE administrator has sometimes acted as the complainant, case manager, investigator, decision-maker, and disciplinarian in a case involving a CUEFA member. **This constitutes not only a serious breach of the principle of procedural and natural justice, but also a serious conflict of interest.**

C. Specific procedures related to the principles of procedural and natural justice.

Below are most common specific procedures related to the principles of procedural and natural justice.

PLEASE NOTE: Concordia’s administration does NOT permit CUEFA members to use the following procedures. And when CUE’s administration does permit a particular procedure, it sometimes does so in a very limited and conscripted manner. When this occurs, CUE’s administration may be in breach of the principles of procedural and natural justice.

1) Notice: The respondent (CUEFA member) must be given adequate notice of the nature of the proceedings and of the issue to be decided.

CUE's administration does not always give CUEFA members adequate and proper notice. In one case, CUE's administration provided the CUEFA member with 20-minutes notice of a meeting that commenced an investigation with the possibility of discipline. In this case CUE's administration also failed to notify the CUEFA grievance officer of the meeting.

2) Disclosure: All evidence to be used against a respondent (i.e. CUEFA member) must be disclosed to the respondent.

CUE's administration does NOT always follow this principle; CUE's administration does NOT always disclose all of the evidence related to an investigation of or disciplinary matter related to a CUEFA member. The failure to disclose all evidence makes it difficult for the CUEFA member to be able to respond to the case against them. It also enables CUE's administration ambush the CUEFA member with evidence not previously disclosed.

CUE's administration also likes to use "anonymous" student complaints against CUEFA members. Because the name of the student is not disclosed, it makes it impossible for the CUEFA member to determine:

- whether the student is a student in the class of the CUEFA member; and
- the particular circumstances in which the student's allegation arose.

3) Opportunity to present one's case and cross examine witnesses: The respondent (i.e. CUEFA member) must be provided with an opportunity to present whatever evidence they wish to be considered. When the credibility of the individual is at issue, the principles of natural justice and procedural fairness usually require an interview or an oral hearing. Moreover, if a decision-maker denies the respondent the right to cross-examine a witness in an oral hearing, this could be procedurally unfair.

CUE's administration (or its investigator) will often examine and cross-examine:

- witnesses in meetings separate from the CUEFA member; and
- the respondent (the

But CUE's administration will:

- NOT permit the CUEFA member (or representative) to examine or cross-examine witnesses;
- NOT permit the CUEFA member (or representative) to review the interview recordings and evidence that the investigator has collected.

This results in a patently unfair process for the CUEFA member.

- 4) Opportunity to respond:** When the decision-maker (e.g. CUE VPA) is in possession of evidence not presented by the respondent (CUEFA member), the decision-maker must allow the respondent an opportunity to know and respond to that evidence.

CUE's administration does NOT always follow this principle; CUE administration does NOT always disclose all of the evidence related to an investigation of or disciplinary matter related to a CUEFA member. This can make it very difficult for the CUEFA member to be able to respond to the case against them.

- 5) Duty to consider all of the evidence:** The decision-maker (e.g. CUE VPA) is required to consider all of the relevant evidence and information pertaining to a specific case.

CUE's administration does NOT always follow this principle. That is because CUE's administration does NOT always consider all of the evidence related to an investigation of or disciplinary matter related to a CUEFA member. This can make it very difficult for the CUEFA member to have a fair hearing or confidence in the decision made by CUE administration.

- 6) Right to legal counsel:** In some cases, fairness will dictate that the respondent (i.e. CUEFA member) be granted the right to legal counsel.

The only provision in the Collective Agreement that allows a CUEFA member to have legal counsel is s. 13.9 which deals with disciplinary investigations:

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.

- 7) Legitimate expectation:** Where a respondent (CUEFA member) has been assured by CUE's administration that a particular procedure will be followed, the individual is entitled to that procedure.

CUE's administration does not handle investigations consistently; consequently, it is not possible for there to be a legitimate expectation of the outcome the procedures that will be followed.

8) Right to impartial decision maker and freedom from bias: Procedural fairness requires the decision maker to be impartial and free from bias; the conduct and statements of the decision maker must also be impartial and must not raise a reasonable apprehension of bias. A respondent (CUEFA member) has the right to a fair and impartial hearing and a fair and impartial decision maker. Decision makers must not allow personal beliefs or interests to influence their decisions. The respondent does not have to prove that the decision maker was biased. The mere possibility of bias may be enough to show bias. The following are examples of situations that may show bias:

- commenting on a matter before the hearing;
- prior involvement in the case;
- a relationship between the decision maker and one of the parties;
- marked hostility toward one of the parties;
- possibility of financial benefit from the outcome of the proceedings.

CUE's administration does NOT always follow this principle. In some disciplinary investigations involving CUEFA members, for example, CUE's VPA has acted as the complainant, case manager, investigator, decision-maker, and disciplinarian. Even in cases when CUE's VPA has assigned a third party to conduct an investigation, these investigators owe their position and/or compensation to CUE's VPA. The result is that the investigator is NOT impartial and NOT free from bias.

Moreover, the duty of CUE's VPA is to advance the interests of CUE's administration; consequently, the CUE VPA is NOT a decision-maker who is impartial NOR free from bias. This can make it very difficult for the CUEFA member to have a fair hearing or have confidence that the decision made by CUE's administration is impartial or free from bias.

9) Institutional independence and requirement that the person who hears the case must decide: The decision maker must be independent. Institutional independence requires that the person entrusted with making a decision have sufficient decision-making independence for there to be a perception of independence and impartiality. There is a general requirement that the person who hears the case is the only person that should make a final determination on the case.

CUE's administration does NOT usually follow this principle. In some disciplinary investigations involving CUEFA members, for example, CUE's VPA does NOT have institutional independence, but instead acts at the behest of CUE's senior administration.

10) Delay: Unreasonable delay in conducting a hearing may cause prejudice toward the respondent (CUEFA member) and may therefore breach procedural fairness.

CUE's administration does NOT always follow this principle. In one case, for example, CUE's administration delayed the resolution of a CUEFA member matter for more than 18 months, causing undue prejudice and harm to the CUEFA member.

11) Adjournments: Sometimes, unexpected things happen that prevent a respondent (CUEFA member) from attending a hearing or meet certain required deadlines related to the proceeding. In such cases the respondent should be given a reasonable adjournment.

There are no guarantees that CUE's administration will grant an adjournment to a CUEFA member.

12) Right to reasons: The reasons must be sufficiently clear, precise and intelligible to enable the individual to understand the basis of the decision of the decision maker.

CUE's administration will usually provide written reasons for its decision involving a CUEFA member. If the CUEFA member is dissatisfied with the reasons, the CUEFA member can seek to "grieve" the decision as per the provisions of the Collective Agreement.

D. CUE University Policies that May or Do Violate the Right to the Application of Principles of Procedural and Natural Justice

- CUE's Code of Conduct Policy and Procedures;
- CUE's Discrimination, Harassment and Accommodation Policy and Procedures;
- Board of Governors' Bylaws; and
- Various provisions in the Collective Agreement that favour CUE's administration.

E. Sources:

- Procedural Fairness in Administrative Hearings:
<https://legaid.bc.ca/sites/default/files/2021-01/2020-11-10%20Procedural%20Fairness%20in%20Administrative%20Hearings.pdf>
- BC Human Rights Tribunal:
<https://www.bchrt.bc.ca/complaint-process/after-hearing/review-options/court-review/fairness/>

- Alberta Ombudsman:
<https://www.ombudsman.ab.ca/determining-fairness/administrative-fairness-guidelines/>