



## Structure of this session

- For purposes of this session, each of you is acting as the principal officer of your local.
- We will work through a set of facts, toggling between the facts and the law.
- You will be asked to make a series of decisions. Discussion is encouraged as we work through the issues.
- TW: Some of the content includes a brief description of a sexual assault.

## What is the DFR?



- A duty imposed by federal law on a union that is the exclusive representative of a bargaining unit, in “exchange” for the union acquiring the right to represent that bargaining unit.
- It has roots in constitutional concepts of due process and equal protection.

3

## Who should care about the Duty of Fair Representation?



- If you wear any of these hats, **you have a role in the legal Duty of Fair Representation:**
  - Elected Local officer
  - Elected Local board member
  - Local office staff
  - Orchestra Committee
  - Negotiating Committee
  - Union Steward
- **Violation of the DFR can expose the union to liability, including substantial monetary liability. Simply defending against a baseless claim of violation of the DFR can be very costly!**

4

## What does the DFR require?



A union that is the exclusive representative of a bargaining unit must represent bargaining unit members in a way that is:

- **Reasonable:** Thinking things through, not driven by emotion
  - Because unions must balance sometimes-competing interests, there is a range of what is reasonable
- **Fair and focused on the facts:** Focused on the grievance, not the grievant
  - If the facts are the same, you take the same course of action regardless of the identity of the actual grievant
- Acting **honestly** and in **good faith**
  - Making your best effort and not consciously betraying a grievant or the union

5

## What violates the DFR?



A union and its representatives will violate the DFR when they act, in negotiation and enforcement of the CBA, in ways that are:

- **Arbitrary:** You could just as well be flipping a coin. There's no real reason for your decision, and your decision looks completely *unreasonable*.
- **Discriminatory:** Your decision depends on the race, gender, religion, politics, union politics, or another characteristic of the grievant that has nothing to do with the grievance.
- **In bad faith:** Allowing motives and factors to shape your decision that you wouldn't want to become public. You may be seeking revenge for political opposition, or to benefit yourself in a way you shouldn't. You may be making misrepresentations or acting deceitfully.

6

## When does the DFR apply?



- It applies when a union is by law the exclusive representative of a bargaining unit and in relation to collective bargaining, both in grievance handling and contract negotiations.
- The union owes this duty to **each and every member of the bargaining unit, regardless of the individual's union membership status**, and to the bargaining unit as a whole.
- In general, the duty of fair representation does not apply with respect to individual claims under other laws.

7

## Problem #1



- The long-time principal bassoonist of the Gotham Symphony, Klaus DuBois, calls you, clearly upset. He says he has been asked by the personnel manager to attend a meeting with the general manager and asks for your help.
- What do you tell Klaus?
- What information do you need and from whom?
- What do you do next?

8

## Pre-Disciplinary Advocacy



- Employees are entitled to union representation and should be trained to ask for it at any interview the employee **reasonably believes might lead to discipline**.
- Weingarten statement:
  - “If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I request that my steward/OC member/union officer be present at the meeting. Without representation, I choose not to answer any questions.” (*This is my right under a Supreme Court decision called Weingarten*)
- Employee and union rep have a right to know the subject matter of the meeting before attending and to consult with each other.

9

## During the Investigatory Interview



- The union rep can and should take an active role in the investigatory meeting.
- Get the employer to talk as much as possible & the employee as little as possible until the facts are clear.
- Ask questions to find out what employer knows. Get details, including names of accusers. Get copies of documents the company refers to.
- **Take notes!**
- After you get all the facts and documents, take the employee outside and find out what s/he knows. Evaluate credibility of facts from all perspectives.
- Remember: this may be the best moment to resolve the matter—before discipline has been imposed. Try to convince employer not to impose discipline, to reduce the discipline, to hold off pending further investigation.

10

## In the meeting



- The general manager says the GSO has been conducting an investigation into an allegation that 6 years earlier, Klaus engaged in misconduct relative to another musician. The GM introduces the outside investigator, also in attendance at the meeting, who wants to ask Klaus some questions.
- In light of these revelations, how do you handle the meeting?
- What questions do you have for the employer? For Klaus?

11

## More information



- The employer's investigator says the allegations center around a reception that occurred at a patron's home after a concert that was part of a tour to Florida 6 years earlier.
- You have been president of the Local for 10 years and have no memory of any such allegation.
- What do you do?
- [Note: next slide describes a sexual assault]

12

## According to the employer...



- Sylvia Loree, who was the probationary principal oboe player at the time has alleged the following:
  - Both musicians had been drinking heavily and flirting. As the reception was winding down, Klaus cornered her in a bedroom, pushed her against a wall, pressed his body against hers, kissed her and fondled her breasts.
  - Sylvia says she attempted to resist and told Klaus to let her go but he did not for several minutes. Eventually, Sylvia broke free.

13

## What Klaus tells you



- Klaus is irate. He says the employer's version of events is completely false. According to Klaus, he and Sylvia were "tour buddies" and spent a lot of time together on that tour, both before and after the reception the employer is asking about.
- He remembers them both having too much to drink that night and "getting a little sloppy" but he says they both had partners at home and they were never again physically intimate.
- He believes Sylvia had an affair with the principal clarinet and that her flirtation with Klaus was part of her campaign to "sleep her way to tenure."

14

## Just Cause: the Seven Questions



- Did the employer actually communicate to the employee the possible or probable disciplinary consequences of the employee's conduct?
- Was the rule in question reasonably related to the orderly, efficient and safe operation of the business?
- Did the employer investigate to determine whether the employee violated a rule or disobeyed management before imposing discipline?
- Was the employer's investigation fair and objective?
- Did the investigation yield substantial evidence that the employee was guilty as charged?

15

## Just Cause: the Seven Questions (cont.)



- Has the employer applied its rules and penalties uniformly?
  - Was the degree of discipline imposed reasonably related to:
    - the seriousness of the employee's proven offense; and
    - the employee's record of service.
- 
- The focus of the just cause inquiry is on progressive (corrective) discipline, fairness and due process.

16



## The day after the meeting



- The GM sends a letter advising Klaus that his employment is being terminated immediately.
- Klaus insists that the union must file a grievance on his behalf.
- What information do you want?
- How do you advise Klaus?
- What possible actions could be taken?

17

## Grievance Basics



- A grievance is a complaint alleging a violation of the contract or other dispute between the parties or involving an employee. Precise definition depends on the contract.
- Contractual language governs grievance processing—a series of “steps” through which the grievance moves before arriving at arbitration.
- Federal law allows an employee(s) to present a grievance to the employer but arbitration is a creature of the contract between the union and the employer. Generally only those parties can advance a grievance to arbitration.

18

## Types of Grievances



- Discipline
  - In general, a “just cause” standard applies to any discipline in the collective bargaining context.
  - Even where your CBA provides a separate appeals procedure for musical standards discipline/termination, the employer should still be required to prove that it had just cause for the discipline.
  - Employer bears the burden of proof.
- Contract Interpretation
  - Anything that is not discipline. Examples:
    - failure to make overtime payments as required by the CBA;
    - failure to provide required notice of schedule changes;
    - improper application of contractual relief time or rotation provisions.
  - Includes violation of past practice, employer policy, etc
  - Union bears the burden of proof.

19

## What to do when a musician comes to you with a complaint, generally



- Listen carefully and take notes.
- Be supportive of the individual, but never give an opinion on the spot about the merits of the complaint
- Bring the committee into the loop, depending on specifics.
- Make a preliminary investigation of the complaint to confirm it is an issue that is susceptible of resolution pursuant to the grievance procedure.
- **Present the grievance within contractual timelines.**
- Continue investigation as appropriate to the matter.
- **Inform the musician about the steps you have taken.**

20

## Grievance Investigation



- Single most important part of grievance handling
- Essential to uncover the facts of the case in order to:
  - evaluate the merits of the grievance
  - craft arguments in support of the grievance
  - rebut employer's arguments
  - help protect the Union against a claim of breach of DFR
- Investigation must be reasonably meaningful considering the facts and circumstances of the grievance.

21

## Rudiments of Grievance Investigation



- Ask for and listen to employee's side of the story. Have them complete a grievance fact sheet.
- Discuss the facts with witnesses the grievant identifies.
- Review documents the employee identified in support of their claim.
- Gather information and documents first from sources readily available to the Union and then from the employer
- Get the Employer's side of the story.
- Take and save good notes throughout the investigation.
- **Stay on top of timelines and use calendar program (at minimum) to track important dates**
- **Inform the grievant about the actions you've taken**

22

## Requesting Employer Information



- National Labor Relations Act requires an employer to furnish “relevant information that the union needs for the proper performance of its duties as collective-bargaining representative,” i.e., to administer the contract (including the grievance procedure), prepare for arbitration and prepare for contract negotiations.
- Information concerning bargaining unit employees is *presumptively relevant* and the employer is obligated to provide it.
- Request information early and set a time limit for responding. If employer does not fully respond, consider filing a ULP charge early.
- What you request will depend upon the issue and the type of dispute.

23

## The union sends an information request to the employer



- The employer responds that it will provide the investigation report but will redact the names of witnesses to keep them confidential and protect them from retaliation.
- The employer insists it must have the written permission of any employee to provide the union with that employee’s personnel file.
- Are these valid positions?

24

## The employer's investigation report shows:



- Several witnesses at the reception observed Klaus and Sylvia drinking and flirting together. Some observed Klaus with his arm draped casually around Sylvia while they both chatted with others. No one observed Klaus assault Sylvia.
- One person observed Sylvia leave the reception alone, looking flustered, but chalked that up to her drinking.
- Sylvia did not immediately report the incident to the GSO.
- She says she did tell a friend in the orchestra about the assault the next day. The friend, Sylvia says, encouraged her to keep it to herself because raising it could harm her chances of attaining tenure.
- One musician told the investigator that Sylvia told her some days later that Klaus “really pushed her boundaries” at the reception. Sylvia did not elaborate when pressed for details.

25

## Why an investigation now?



- Sylvia did not attain tenure and left the orchestra 4 months after the alleged assault. She went on to hold other positions before finally winning an audition for an orchestra abroad and attaining tenure there.
- The employer's investigator reports that Sylvia came forward with her account after learning that Klaus had accepted a teaching position at Gotham University.
- The investigator notes that most witnesses had a difficult time remembering events from 6 years prior. Some potential witnesses had left the orchestra and could not be reached. One witness had died.

26

## Other documents received (1)



- Klaus's personnel file is unremarkable—there is no other discipline. In fact, he appears to have been an exemplary citizen of the orchestra for his entire 20 year career.
- There is a file concerning the 4-week suspension, 15 years previous, of a musician who came to blows with a colleague who ended up needing stitches in his face. There are no other records of comparable discipline.

27

## Other documents (2)



- There is a copy of the CBA article prohibiting discrimination and harassment, which reads:

It is agreed that there shall be no discrimination against any employee or any applicant for employment by either the Symphony or the Local because of age, race, color, creed, sex, sexual orientation, disability, marital status, religion or union membership or union activities, and that the provisions of this Agreement shall be applied without discrimination to all employees.

28

## Based on what you know...



- Does the GSO's discipline of Klaus violate any of the tests of just cause? If so, how?
- Will you file a grievance?
- Are there other things you want to know before making that decision?

29

## Just Cause: the Seven Questions



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30

## Just Cause: the Seven Questions (cont.)



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31

## Preparing to file the grievance



- Check the contract for:
  - **TIME LIMITS!!!**
  - To whom it must be first presented
  - Form—written or oral, grievance form
- Timeliness is essential because a mistake here can bar the grievance and expose the Union to a claim for DFR violation.
  - If you miss the deadline, file anyway and do not raise the timeliness concern.
  - If the employer answers without raising timeliness, it may have waived its timeliness objection.

32



## Writing the grievance



- Only include the most basic facts, the nature of the violation and the remedy sought.
- Discipline:
  - “The [discharge/discipline] of [grievant] on [date] is not for just cause and is in violation of the CBA and the past practice.”
  - If employee claims discrimination based on sex, race, national origin, age or disability, include a claim that the Company’s actions were discriminatory.
- Contract interpretation:
  - “The Company violated the past practice and/or the CBA including, but not limited to [list all clauses you think may be relevant] on [date(s)] when it [describe the Company’s actions in general terms].”

33

## Writing the grievance--remedy



- Remedy: use “including, but not limited to...” language
  - Discipline: Grievant reinstated and made whole for all losses, discipline removed from file
  - Contract: Cease and desist from unlawful conduct; make-whole remedy for affected employees

34

## Klaus's grievance



- The termination of Klaus DuBois on April 17, 2024 was not for just cause and is in violation of the parties' CBA and the past practice.
- We seek a remedy including, but not limited to, having Klaus reinstated and made whole in every respect.

35

## Processing the grievance



- Contractual language governs grievance processing—a series of “steps” through which the grievance moves before arriving at arbitration.
- **Where contractual timelines exist, it is imperative that the Union stay on top of them.**
- **Any agreement to extend deadlines must be in writing.**
- If employer raises a procedural issue as a defense to the grievance, do not stop processing the grievance! Request the employer go forward. Procedural issues are for the arbitrator to resolve.

36

## Decisions about grievance processing



- Gotham SO CBA grievance process includes 2 steps before advancing to binding arbitration. At each step a meeting is held.
- How do you handle those meetings?
- What result do you advocate for?

37

## Klaus gets his own lawyer



- After the grievance is filed, Klaus obtains his own lawyer and wants to bring that lawyer to the grievance meetings.
- Can he? Should he?
- If he has his own lawyer does that mean the union can step back and stop processing the grievance?

38

## Advancing the grievance to arbitration...or not...



- The grievance is not resolved after the 2 meetings set forth in the grievance process.
- Klaus's personal lawyer threatens to sue the union if it does not take the grievance to arbitration.
- Your executive board is deeply divided as to whether or not the grievance should go to arbitration.
- What do you do?

39

## Damages for a breach of the DFR



- Back pay.
- Compensatory damages – other economic harm that resulted from the breach.
- Pain and suffering – the courts are split over whether these are available.
- Punitive damages are not available. *IBEW v. Foust*, 442 U.S. 42 (1979)
- Attorney fees—the courts are split over whether this is available.
- All damages in a failure to arbitrate a case must be apportioned between the employer and union based on the degree of responsibility for the damages. *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983).
  - There is no hard and fast rule about how the apportionment is done.
  - In *Bowen*, the Court approved an apportionment based on an estimated date that the employee would have been reinstated if the union had arbitrated the grievance. But this method is not required.
- In an NLRB case where a breach has been found, the NLRB can order the union to provide the grievant with an attorney of their choice to represent the grievant at an arbitration hearing.

40

## What if...



- #1: Sylvia approached the union immediately after the assault, asking for help?
- Why might someone in Sylvia's position NOT approach the union for help?
- What steps can we take to ensure that ALL musicians feel comfortable asking the union for help?

41

## Some steps we can take now



- Get familiar with the harassment policies and reporting procedures of the employers you bargain with. If they have none, ask to bargain them.
- Make sure the musicians who work for those employers know their policies and procedures. Bargain with employers to provide training to their employees—on the clock.
- Identify multiple people with different characteristics within your own organization to receive complaints. Make sure those people are trained in how to respond.

42

## What if...



- #2: Sylvia immediately reported the assault to her employer, which conducted an investigation at that time. Because no witnesses came forward with information, the employer found Sylvia's claim unsubstantiated. Later, Sylvia is denied tenure and asks for the union's help because she thinks her complaint caused her not to get tenure.

43

## Probationary vs. tenured musicians



- Tenured musicians are protected from discipline except for just cause.
- Probationary musicians generally may have their employment terminated at any time, for any reason.
- Except: even probationary musicians are entitled to protection from discrimination based on protected characteristics.
- And, to the extent the CBA spells out a process by which someone attains tenure and the process is violated, that violation may be grievable.

44

## Typical probation language



The decision to grant tenure is at the discretion of the Music Director. However, prior to February 1 of each Contract Year, the Music Director and five to seven musicians selected by the Orchestra Committee (in consultation with the Personnel Manager) drawn from a pool including the Principal of the relevant section, members of that section, members of the ensemble and other relevant musicians shall meet and confer regarding the future tenure status of each probationary musician. During the probationary period, the Music Director shall meet with the Probationary Musician from time to time as may be mutually convenient to both, to assess the Musicians' job performance and to offer such insights and observations as may be helpful to the Musician in fulfilling their position in the orchestra. Before meeting with the Probationary Musician, the Music Director shall receive comments and observations regarding the Musician's job performance from the members of the Tenure Review Committee.

45

## Another what if...



- Look at the guidelines proposed by NAAS and the BON.
- If the GSO probationary process reflected those guidelines, would we have been better able to represent Sylvia in challenging a denial of tenure?

46