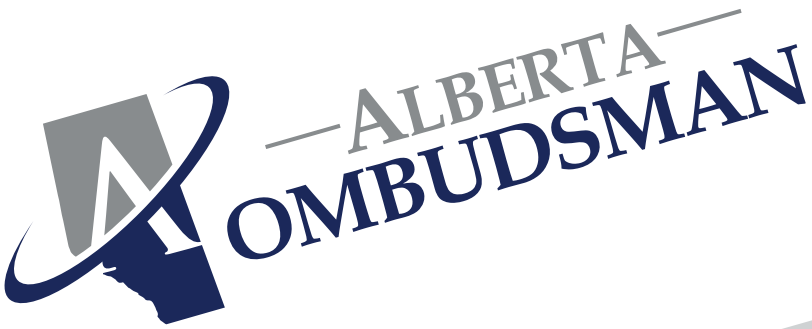


Administrative Fairness Guidelines



Your voice
■ ■ of *fairness.*



Introduction

This guidebook has been created to help you learn how the Alberta Ombudsman investigates complaints of unfair treatment by Alberta government departments, agencies, boards, commissions, designated professional organizations, the Patient Concerns Resolution Process of Alberta Health Services, and municipal levels of government.

As a public servant or member of a professional body, you may be required to make an administrative decision. If this decision affects the rights, privileges or interests of an individual, it triggers what's called a "duty of fairness."

Natural justice and administrative fairness are at the core of Ombudsman investigations. Natural justice is to administrative fairness what due process is to criminal law. For example, if an accused is not informed of his or her rights, there is an error in process. Similarly, if an individual is denied a service but is not informed of their right to appeal, the process is flawed.

The application of administrative fairness principles in decision-making affects people in a variety of ways. They range from administrative tribunal decisions (including workers' compensation benefits, income support benefits, or disciplinary sanctions for inmates in provincial correctional centres), to situations where there is a less formal (or no formal) process.

The Alberta Ombudsman has authority under the *Ombudsman Act* to consider whether an organization was procedurally fair in its decision-making process and to consider whether a decision was legal, just, non-discriminatory and correct. The following guidelines are the most common factors we consider in assessing whether a situation has been dealt with in an administratively fair manner.

Chain of Legislative Authority

What legislation created the authority or power to make a decision? And who can make that decision?

The powers of government departments, agencies, boards, commissions, designated professional organizations, the Patient Concerns Resolution Process of Alberta Health Services, and municipal levels of government, are derived from statute. Legislation may grant the organization the ability to make decisions, or it may grant the decision-maker the authority to exercise discretion based on parameters set out in legislation or in policy.

Where legislation has granted a decision-maker the power to make decisions, those decisions must be made in accordance with the legislation, regulation and policy. In other words, the ability to make decisions and the reasons for the decision must be based on the enabling legislation as well as any related regulations or policy.



Duty of Fairness

Is there a meaningful review process?
What is the impact of the decision on the individual?

Duty of fairness means there must be procedural fairness in decision-making. Generally, a more detailed decision-making process and adherence to this process is required if there is:

- No right of appeal established within a statute;
- No further appeal mechanism within an organization; and
- A substantial effect on an individual's rights (such as loss of financial benefits).

Decisions made by administrative bodies often have a more immediate and profound impact on people's lives than a court decision. Flowing from these decisions is a duty to act fairly and to make procedurally fair decisions.

While all decisions must be fair, greater scrutiny may be given to the decision-making process depending on the statute involved and the nature of the decision. The level of scrutiny depends on factors such as the effect of the decision on the rights of affected parties and whether there is an established avenue of appeal.

Participation Rights

Was the individual given a full and fair opportunity to present his or her case to the decision-maker? Was there full disclosure of the case against the person, to the person?

Parties have the right to participate in the decision-making process. When providing parties with the right to participate, the decision-maker should ensure a person has sufficient time to respond when requesting information. A decision-maker should also ensure there is a valid process for all parties to provide written submissions or present orally at a hearing. These actions provide a meaningful opportunity to be heard.



Adequate Reasons

Is there a rational connection between the evidence presented and conclusions reached by the decision-maker? Have all the major arguments been addressed?

Canadian courts impose a common law obligation on administrative decision-makers to provide adequate reasons.

There must be a rational connection between the evidence presented and the conclusions reached by the decision-maker. The decision-maker should be able to answer the question, "Why did you make that decision?"

It is not enough to outline the evidence and arguments made by the parties. There must be a rational connection drawn between evidence and conclusions, including a clear explanation of how relevant legislation, regulation or policy was applied. Decision-makers should also be able to explain what evidence was rejected, and why it was rejected. A well-written decision must address the major arguments raised by all parties. While decision-makers are not required to address every point or piece of evidence, they must address the major evidence they relied on (or rejected) to make the decision.

Apprehension of Bias

Has any prior relationship between the decision-maker and any of the parties been declared? Did the decision-maker behave in an impartial manner at the hearing?

Decision-makers must demonstrate impartiality and independence when making decisions. “Impartial” applies to the state of mind or attitude of the decision-maker so there is no bias, either real or perceived. Impartial decisions are based on objective criteria. To be “independent,” the decision-maker must be free from interference by the executive and legislative branches of government and from other external forces such as business interests, corporate interests or other pressure groups.

Decision-makers should declare real or perceived conflicts of interest. The appearance of impartiality is necessary to maintain confidence in the decision-making process. In cases where it appears decision-makers are not objective, even when they feel they could make an unbiased and fair decision, they must disclose the potential conflict or excuse themselves from the case.

Decision-makers should be careful to avoid a perception or appearance of bias. An appearance of bias might result from the behaviour of a decision-maker at a hearing, such as repeatedly silencing a party, or behaving in an aggressive or sarcastic manner. If the decision-maker was involved in the case prior to the hearing, it may appear they have prejudged the matter.



Legitimate Expectation

Was the regular process followed? Was any explanation provided when the regular process was not followed?

There is a legitimate expectation that decision-makers will follow their regular practices and procedures when making a decision. For example, someone who submits a request for review has a legitimate expectation that the request will be processed in accordance with the decision-maker's regular and known procedures.

A failure to meet a legitimate expectation may result in a decision being found to be administratively unfair. Examples of failing to meet legitimate expectations may be as simple as an official failing to follow through after agreeing to take action or write a decision letter; it becomes more complex if the authority fails to follow a regular process without valid reasons.

Exercising Discretionary Power

What discretionary powers does a decision-maker have? How were they exercised?

Decision-makers are often provided with the ability to exercise discretion. Discretionary decision-making can be established in policies, legislation and guidelines. Discretionary decisions must be made honestly and only within the scope of the discretionary power granted to the decision-maker. The decision-maker must consider only relevant considerations. Although decision-makers enjoy considerable deference which allows them to make their own decisions and determine the scope of their jurisdiction, discretion must be reasonably exercised having regard to the wording of the legislation or policy.

When exercising discretionary decision-making powers, the decision-maker must do only what he or she is authorized to do in accordance with legal requirements.

Was the Decision Reasonable?

This final fairness guideline is one that flows through all our investigations. Determining whether a decision is reasonable is not the same as determining whether it is correct or even whether a different conclusion could have been reached. Whether a decision is reasonable will be based on whether the decision-maker reasonably explained his or her assessment of the arguments and evidence.

Two different decision-makers may interpret legislation and assess evidence differently and, given the same set of circumstances, come to different conclusions and a different decision. Both decisions may be considered reasonable if they both have provided a clear and reasonable explanation as to how the decision was made.

A reasonable decision shows how the decision-maker considered and assessed the arguments and evidence. If this does not appear in the decision, the complainant is left wondering how their circumstance was considered.

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