

QUICK TIPS

EXERCISING DISCRETION FAIRLY



OMBUDSPERSON
BRITISH COLUMBIA

Decisions are made every day by public sector employees that impact people's rights, interests and privileges. It is essential that decision makers exercise discretion fairly and reasonably in order to avoid having their decisions questioned or viewed as arbitrary and unfair. This quick reference guide provides some tips to exercising discretionary power in a way that aligns with administrative fairness standards.

WHAT IS DISCRETION?

Discretion in administrative decision making involves the power to choose between two or more possible courses of action using professional judgment and expertise. The Supreme Court of Canada explains that discretion is exercised "where the law does not dictate a specific outcome, or where the decision maker is given a choice of options within a statutorily imposed set of boundaries"¹. In legislation or policy, discretion is indicated by the use of the word "may", as opposed to "must" or "shall".

HOW DO I EXERCISE DISCRETION FAIRLY?

Understand your decision making power and purpose

Discretionary decision making power does not mean you can make *any* decision. Your decision must be consistent with all applicable legislation and its overarching goals and purpose.

For example, if your program is established under legislation where the purpose is to promote environmental protection, your discretion should be exercised in a manner that is consistent with this purpose.

2

Consider the specific circumstances of the case

Your decision should be based on your consideration of the particular circumstances of the matter being decided. Each case is different, and the goal is not to treat everyone the same – fairness requires that exceptions to standard processes be made where warranted. In the decision making process, consider the individual circumstances of the case using your own judgment.

Avoid automatically applying policy without considering how it applies to the particular case, and avoid substituting someone else's judgment for your own. Consult with your supervisor if you are unsure how to consider a person's individual circumstances to reach a fair decision.

¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

Follow decision making criteria and act in good faith

3

Base your decision on the criteria set out in policy or legislation, and point to the specific provisions you relied on in making your decision. Act in good faith, and not with any other motive unrelated to the decision making criteria laid out in policy or legislation.

For example, it would be bad faith to reject a business licence application because you don't agree with the type of business being proposed. This is bad faith because, as the decision maker, you are knowingly making the decision for reasons unrelated to the applicable decision making criteria.

4

Make your decision based on *all* and *only* relevant information and considerations

Relevant considerations are those things that logically connect to the decision being made, and may be found in the decision making criteria and by considering the goals and purpose of the applicable legislation. You should not base your decisions on factors that are extraneous or irrelevant.

For example, you should not deny a person's application for a benefit on the basis of budget constraints, assuming that budgetary considerations are not part of the decision making criteria. This would be basing your decision on irrelevant considerations.

Provide reasons and clearly document how you reached your decision

5

When you make a discretionary decision, explain to the person how you considered their individual circumstances, and document the rationale and reasons for your decision. Your documentation should clearly explain how you considered the information and evaluated the facts to reach your decision. Doing so provides the basis for your decision and allows others to see how you exercised your discretion fairly and reasonably to choose one way over another. If you fail to clearly document how you considered individual circumstances to reach your conclusion, you face the risk of others viewing your decision as arbitrary or unfair.

Remember that the standard of proof for most administrative decision making is a **balance of probabilities**. This means that when weighing all of the information in light of the rules that apply, it should be more probable than not that the issue should be decided in a specific way.

HOW CAN ORGANIZATIONS SUPPORT GOOD DISCRETIONARY DECISION MAKING BY STAFF?

In order to help staff exercise discretionary power in a manner that is transparent, fair and consistent with the legislation, public organizations should create policy documents that:

- provide a clear explanation of the overarching intent of the legislation and objectives of the service or program area;
- outline the factors staff should consider when exercising discretion;
- explain when an exception to policy or deviation from the standard practice is permitted; and
- direct staff how to document such decisions and communicate them to those affected.

This can help to:

- avoid arbitrary or inconsistent decisions;
- provide staff with guidance and limits to their decision making authority; and
- provide the public with details on how and why discretionary decisions are typically made in your organization.

For more information, refer to our *Fairness in Practice Guide* and other resources available at www.bcombudsperson.ca

