

INFORMATION ON DUTY TO ACCOMMODATE

8.2 Accommodation due to disability

Your Employer is legally obliged to accommodate employees with disabilities up to the point of undue hardship. Your Employer has the primary responsibility to make efforts to accommodate employees with disabilities that includes eliminating barriers to employment. Disabled nurses and the Union have a responsibility to participate and be reasonable in the search for accommodation. If you are seeking an accommodation, it is very important that you contact your OH&S Steward who, along with a BCNU Labour Relation Officer, will assist you. Your OH&S Steward can provide you more information on the accommodation process and what you need to do.

8.2.1 ACCOMMODATION FUNDAMENTALS

- Employers and unions are required to make every reasonable effort, short of undue hardship, to accommodate an employee with a disability;
- The requirement for accommodation is based on the Collective Agreement, BC Human Right Code and rulings from the Supreme Court of Canada;
- Accommodation due to disability is done for "bona fide" medical conditions (as defined by the severity and duration of the condition, and the functional limitations and restrictions) - the employee must establish a "prima facie" case of having a physical or mental disability that required employment accommodation;
- The Employer and the union must be provided with medical evidence supporting need for accommodation;
- The accommodation exploration process must consider all possible accommodative options in a collaborative and genuine manner by all involved;
- Each case is assessed on its own merit;
- Determination of undue hardship is made on a case by case basis and the threshold is high; and
- An accommodation may include changing/modifying schedule or tasks of existing or an alternate job, adapting the work environment or equipment to the needs of the employee, providing an alternate job or a newly created position.

8.2.2 MEDICAL EVIDENCE

In order for the accommodation process to commence, the employee needs to indicate interest in the process. Her/his physician must support the employee's ability to work and provide a medical letter that outlines the following:

- the employee's need for accommodation due to disability;
- the employee's specific limitations/restrictions(e.g. work activities/tasks, schedule, or work environment);
- the date on which the employee is able to return to work provided the limitations/restrictions can be accommodated;
- the prognosis and approximate time expected for recovery if accommodation is sought for a temporary condition;

- when possible, an outline of return to work schedule indicating the increases in hours, tasks, number of shifts and distribution of those shifts (if applicable); and
- all other necessary details that affect the employee's successful return to work and ability to perform her/his duties.

The medical information the Employer and union may require can be extensive and change as the process evolves. A typical sick note will not normally indicate diagnosis. However, medical evidence related to a request for an accommodation must contain identification of a problem or disorder and its prognosis, including whether the problem is permanent, prolonged or temporary in nature.

It may be necessary to have the employee participate in a Functional Capacity Assessment. A Functional Capacity Assessment is a fitness-to-work examination conducted by a professional to determine the physical capabilities and stamina to perform specific job(s). The assessor needs to know the actual physical demands of the job to measure the individual's capacities to perform those demands.

8.2.3 RESPONSIBILITIES

Accommodation is a joint effort requiring the participation of the employee seeking the accommodation, the Employer and the union. During the accommodation process, the full spectrum / range of possible accommodative options must be explored collaboratively and with genuine reasonable effort by all involved.

The Employer

The primary responsibility for accommodation rests on the Employer, because it has the ultimate control in the workplace. Once receiving a request, the Employer must initiate the accommodation exploration process with every reasonable genuine effort to accommodate. The Employer has the right to operate a productive workplace and is not required to accommodate where undue hardship would result. However, if deeming itself unable to accommodate, an Employer would need to prove that it is "impossible to accommodate". See Undue Hardship for factors that need to be taken into account in assessing whether there is undue hardship.

The Union

The union has the duty to accommodate the employee's disability up to the point of "undue hardship" as well. The union must cooperate with the accommodation process and carefully consider all viable accommodation options. In addition to considering the individual's needs, the union also has to consider and balance the needs and rights of other members under the Collective Agreement.

The Employee

The employee has the duty to:

- communicate needs in sufficient detail and to co-operate with the Employer and union in order to enable them to accommodate;
- apply / indicate interest in other available positions e.g. Actively review job postings and apply for positions for which they are qualified in areas that would provide an accommodation matching their abilities and medical limitations;
- participate in the accommodation exploration process, facilitate reasonable efforts and accept reasonable accommodation; and
- demonstrate ability to perform the essential job duties of the existing, re-structured or newly assigned accommodation position.

8.2.4 UNDUE HARDSHIP

All reasonable measures must be exhausted and obligations fully discharged in order for both the Employer and the Union to meet the undue hardship standard. Both parties must be able to prove that their efforts were serious and conscientious. The factors considered when evaluating undue hardship must be balanced with the right of the employee seeking an accommodation to be free from discrimination. The factors that will be taken into account when assessing whether there is undue hardship include:

- safety: impact on the individual, colleagues, patients / clients / residents and the general public - needs to be proved with specifics of the magnitude of risk;
- financial cost - undue hardship would have to be substantial and be supported with detailed financial and accounting evidence;
- size of the Employer's operation;
- interchangeability of the work force and facilities;
- legitimate operational requirements at the workplace - functioning of the unit / department, delivery of services;
- disruption of collective agreement - significant interference with the rights of others; and
- employee morale - inconvenience and/or upset on other employees would have to be substantial and based on well grounded concerns of impact on their rights.

8.2.5 ACT PROMPTLY AND CONTACT YOUR OH&S STEWARD FOR ASSISTANCE

Recent arbitration awards indicate that timely filing of grievances is critical if an Employer fails to accommodate a disabled employee. Contact your BCNU OH&S Steward who will assist in coordinating a meeting with the appropriate Employer representatives once your medical documentation is available. Your steward will also assist you with filing any necessary grievances.



MEMORANDUM

TO: Council, CEP staff and PCA stewards

FROM: Peggy Dyke, Coordinator, Negotiations and Servicing

RE: Duty to Accommodate Documents

At the follow up Policy discussions in January of 2005, it was agreed that the Nurses' Bargaining Association (NBA) and the Health Employers Association of BC (HEABC) would work together to develop material regarding Duty to Accommodate (DTA).

A sub-committee was formed with 4 NBA representatives and 4 HEABC representatives. This committee met on a number of occasions prior to the June 27, 2005 follow up Policy discussions. The committee jointly prepared 4 documents regarding DTA which were endorsed at the Policy discussions on June 27th and are attached to this memo.

Due to the on-going development of jurisprudence that is being developed through the courts, arbitrations and Human rights tribunals, it was agreed that this material is not to be used as evidence at any 3rd party hearings. (See attached letter from HEABC).

The Ministry of Health has set aside some monies so that the educational program can be developed into a 1 ½ - 2 hour presentation that can be jointly presented by Union and Management at the local level.

June 24, 2005

Ms. Peggy Dyke
Coordinator, Negotiations and Servicing
BC Nurses' Union
4060 Regent Street
Burnaby, BC V5C 6P5

Dear Ms. Dyke:

Re: Duty to Accommodate

This letter will serve to confirm the parties' agreement re the DTA material, jointly developed through the Policy sub-committee.

The parties agree that nothing in the above referenced material is intended to establish, modify or revise applicable arbitral, court or tribunal tests regarding DTA. This resource will not be entered as evidence in proceedings of any kind and is without prejudice or precedent to any position taken by the parties.

Sincerely,

Chris Grant
Senior Advocate

DUTY TO ACCOMMODATE

RESOURCE MATERIAL

Prepared through a joint effort by the Health Employers
Association of BC and the Nurses' Bargaining Association
August 2005

DUTY TO ACCOMMODATE (DTA)

- This resource is designed to assist Employers, Unions and employees in understanding the Duty to Accommodate.
- The Duty to Accommodate flows from the BC Human Rights Code which prohibits discrimination on the following grounds: "race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person."
- The collective agreement reference is Article 31:

"The Employer and Union subscribe to the principles of the Human Rights Code of British Columbia."

- The majority of DTA claims involve physical or mental disability.
- A disability is a particular infirmity, impairment or impediment caused by injury or disease which interferes with a person's physical, psychological and/or social functioning.

"Disability" has been interpreted broadly by human rights tribunals and arbitrators to include many conditions that are not easily recognizable such as blindness or confinement to a wheelchair. For example, the definition includes alcohol or drug dependence, HIV status, depression, mobility limitations, visuals or hearing impairments, and obesity.

- Duty to Accommodate concepts, principles and practice are based on evolving jurisprudence from the courts, arbitration boards and human rights tribunals.

DUTY TO ACCOMMODATE: ROLES AND OBLIGATIONS

DTA is "everyone's responsibility"; Employers, Unions and Employees. The Supreme Court has stated that, "The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation."

All parties can be found liable if accommodation fails. For the Employers and Union, there may be financial obligations. e.g. For an employee, the right to an accommodation may be lost.

I **Employer's Role**

- Employer has the primary burden. Burden is substantial and ongoing.

- Duty to accommodate to the point of undue hardship.
- Innovative and practical in search for accommodation. Discern employee needs and investigate workplace. Examples of accommodation include; providing adaptive technologies or equipment, modification of the employee's own duties or work schedule; modification of another job; bundling of job duties from own or other job; training / retraining / orientation to equip individual for work; job sharing; modification of the physical layout of the work area; etc.

II Union's Role

- Facilitate accommodation efforts.
- Agree to collective agreement variations or exceptions required for reasonable accommodation.
- Look at accommodation to another bargaining unit, as a last resort.
- Accept reasonable accommodation.

III Employee's Role

- Identify need for accommodation.
- Proactively participate in the search for, and assist in the formulation of, reasonable accommodation.
- Show fitness to return to work.
- Provide information required to facilitate accommodation efforts, including relevant medical information. The provision of medical information is balanced against employee privacy rights.
- Accept reasonable accommodation. Employees are entitled to as reasonable, not a perfect accommodation.

DUTY TO ACCOMMODATE: MEDICAL INFORMATION

- Accommodation is everyone's responsibility. Among the employee's obligations is to identify a need for accommodation.
- Identifying the need for accommodation includes:
 - " ... bringing to the attention of the employer the facts relating to the [accommodation] ... The expression 'the facts relating to the [accommodation]' must be given content. In our view it means that the employee has an obligation to inform the employer as to the nature of her illness, the nature of the restrictions which she suffers as a result and to make a request for an accommodation."

Ontario Public Service Employees Union, Local 255 vs. Ontario (1997) O.J. No. 533

- A finding that an impairing condition amounts to a disability is necessary before the duty to accommodate is triggered.
- To the extent that the medical information provided is inadequate for the purpose of establishing a disability and/or facilitating the goal of accommodation an employer is within its rights to request further information regarding the disability and specific limitations.
- The employer's right to disclosure of medical information is balanced against privacy rights but an employee cannot stand on privacy rights while simultaneously requiring accommodation from the employer without benefit of medical information.
- Medical information must be held in confidence and first solicited from an employee's own doctor.

DUTY TO ACCOMMODATE

The sub-committee of the Provincial Policy group believes there should be a jointly developed education program for management and Union members regarding the Duty to Accommodate (DTA) process.

Purpose of the Education Program

This voluntary education program should be jointly presented at the authority, employer, work-site or unit level where appropriate to familiarize everyone with the statutory requirements of the Human Rights Code as well as relevant Collective Agreement provisions that trigger the Duty to Accommodate process.

The interpretations in this manual are provided on a *without prejudice, errors and omissions basis* to any position Unions in the Nurses' Association of Bargaining Agents may take in any arbitral proceeding or any other forum.

Goals of the Education Program

1. Dissemination of consistent information when dealing with the DTA process and the statutory requirements related to that process.
2. Familiarize management representatives and Union members with terminology associated with the duty to accommodate process.
3. Assist managers and Union members at the work-site to understand the needs of individuals who are accommodated to their unit in order to make the transition as smooth as possible.

Components of the Education Program

1. A review of the BC Human Rights Code.
2. A review of the relevant Collective Agreement articles.
3. A review of the Duty to Accommodate (DTA) principles / requirements for the Employer, the Union and the employee flowing out of the Code's statutory obligations and subsequent jurisprudence. This would include having copies of the Code available as well as putting together a synopsis of the jurisprudence (like Meiorin, Grismer, Renaud as well as several arbitrations and Human Rights decisions).
4. A review of definitions used in the DTA process
 - Disability - a particular infirmity, impairment or impediment caused by injury or disease which interferes with a person's physical, psychological and/or social functioning.
 - Discrimination - making a distinction or giving unfair treatment because of a disability or prejudice.
 - Undue Hardship - implies that every alternative must be assessed for the accommodation up to excessive disruption or interference with the employer's operation.
 - Bona fide Occupational Requirement (BFOR) - essential tasks or physical needs required to perform a job.
 - Job Demand Analysis - a breakdown of the physical and psychological demands of the job into tasks. Each task (pushing, pulling, lifting and reaching with detailed information about weights and distances) is looked at for the duration and frequency at which it has to be performed. Cognitive assessments may be necessary to assess decision making capability and emotional capacity.
5. A review of the components of an Effective DTA process
 - Triggering the need for an accommodation.
 - Roles and responsibilities of the Employer, the Union and the Employee in the accommodation process.
 - How to work with 3rd parties (LTD, WCB, etc) when they are involved.
 - Notification of appropriate individuals when the need for an accommodation arises.
 - Forms (if required) and submission of documentation to support the request for an accommodation.
 - Exploration process in order to achieve an accommodation.
 - Types of accommodation

DTA

- Timelines - The DTA process should be a timely process.
- Documentation of the need for the accommodation, the process as well as the final outcome in the appropriate files.
- Best practices: i.e. early Union involvement; identification of possible collective agreement conflicts and facilitation of variations if necessary, notification of co-workers; individualized approach

**BRITISH COLUMBIA NURSES' UNION**

Memorandum

TO: All BCNU Stewards

FROM: Lara Acheson, Coordinator, OH&S

RE: **Duty to Accommodate Form Letter**

DATE: September 21, 2005

Attached please find a form letter that BCNU is requesting that stewards use when assisting members who are seeking an accommodation in the workplace due to disability.

Recent arbitrations have reinforced the importance of having full and detailed notes of accommodation efforts to establish both the timing of a member's request for an accommodation and the process followed. In addition, arbitrators often rely on the date in which a grievance was initiated to establish an employee's entitlement to retroactive pay and benefits in cases where an Employer has delayed in accommodating a member. Arbitration decisions have also established the union can be jointly liable for lost wages and benefits if the union contributed to the delay in accommodating a member or would not agree to a reasonable accommodation.

We hope that you will find the attached letter useful in documenting the first steps of the accommodation process. A suggested protocol for using the form letter is outlined.

1. Send a copy of the form letter when you become aware that a member needs an accommodation in the workplace due to disability. Notify your LRO by copying her/him on the form letter and faxing or mailing a copy of the letter to the head office. This letter also needs to be copied to the BCNU member.
2. Arrange a meeting to discuss the member's need for an accommodation. Ensure that the meeting is scheduled in a timely manner as delays in scheduling meetings often result in members being without pay and benefits. If you are unsure about whether the timing of the meeting is reasonable consult your LRO.
3. Consult with your LRO about possible accommodations options in advance of the meeting. In any accommodations in which there is a need to vary or waive a provision of the collective agreement

The interpretations in this manual are provided on a *without prejudice, errors and omissions basis* to any position Unions in the Nurses' Association of Bargaining Agents may take in any arbitral proceeding or any other forum.

(freezing a job posting) the LRO must be involved as only the LRO has the authority to waive or vary provisions of the collective agreement.

Stewards should also encourage members to identify and seek out positions and duties that they are capable of performing.

4. Attend the accommodation meeting and identify as many accommodation options as possible. Ensure you receive relevant documentation such as seniority lists, vacancy lists, a job demand analysis for the employee's current job and job demand analyses for other possible job matches.

Document the discussion at the meeting. Your notes will be very important if an accommodation is not found and the union files a grievance.

Please note that in some cases, the LRO may wish to attend the accommodation meeting with you.

5. If the Employer is delaying in setting up a meeting or there is no progress in finding a suitable accommodation, discuss with your LRO and file a grievance about the employer failing to accommodate the member. Ensure that you seek wages and benefits along with a suitable accommodation as remedy.

The actual filing of a grievance is important as many arbitrators will only consider awarding remedy back to the date that a grievance was filed.

DTA

<Date>

<File Number>

<Facility Name>

Dear <Name of manager> :

**RE: ACCOMMODATION REQUEST — <NAME OF NURSE>
ARTICLE 31, HUMAN RIGHT'S ACT**

This letter is to confirm that <Name> has formally requested an accommodation for medical reasons and to request a meeting to explore possible options for her accommodation.

We are seeking that <Name> be accommodated on an expedited basis and that she receive wages and benefits retroactive to the date that <Name> advised the Employer that she was cleared to return to work.

We are anticipating that the meeting to discuss <Name>'s accommodation will be set up in a timely manner and request that you provide the physical job demand analysis for <Name>'s current position as well as current seniority and vacancy lists in advance of the meeting.

While we expect that the Employer will be cooperative in setting up a meeting and looking for a suitable accommodation in a timely manner, we must advise that if a meeting has not taken place by [date] or if appropriate actions are not taken by the Employer to find a suitable accommodation, the union will file a grievance.

Yours truly,

BRITISH COLUMBIA NURSES' UNION

<Name of Steward>

Enclosures

pc: <Name of Member>
<Name of LRO>