Board of Directors' Review of Management Decisions

Learning outcomes:

Upon completion of this section, the learner will understand:

- That the organizational mandate of the Board of Directors is different than Management's organizational mandate.
- The parameters to review a Management decision.

Introduction:

In nonprofit organizations the Board of Directors is mandated with the overall responsibility to ensure that the organization operates within certain policy guidelines. Through good intentions the Board wants to ensure employees are treated in a fair manner. They need to be aware that there is a balance within the workplace to be maintained. Their job is one of being the employer in a political atmosphere while ensuring the organization's services are carried out properly and within the big picture the workplace is a good place to work. Their focus is policy direction, not day-to-day operations.

The Board of Directors' Role in an Organization:

In a nonprofit organization the Board of Directors' role is one of governance. This consists of providing broad policy direction to their employee. Usually a Board only has one employee, and that is the Executive Director/Chief Executive Officer or someone with an equivalent title. That employee/manager is mandated to conduct the business of the organization within the broad policy mandate outlined by the Board of Directors. The employee's responsibilities include day-to-day management with reporting and accountability to the Board.

Unfortunately, with the best of intentions, many Boards think that accountability means they should be aware of and can scrutinize most management decisions. This creates a scenario where all management decisions are "second guessed". This is not accountability; this is a Board of Directors becoming involved in the day-to-day operation. This not only is very disruptive to the organization, but it also undermines the management structure because employees eventually determine that they can circumvent the Manager(s). It also may cause confidentiality problems because client issues and labour relations/human resources issues may be reviewed by individuals that are not trained in that area and should not have access to that information.

The Board of Directors also needs to understand that they are the employer. This means their focus should have a management focus, not becoming an advocate for the employees. That means that when approached by employees they should refer them to follow the appropriate management protocol (i.e., organizations should have some type of Formal Complaint policy and procedures). If that does not happen then they should not entertain the employee's issue. This is a situation where many Board Directors, through good intentions, cross the line into operational issues. In a situation where there is a legitimate process to review management decisions, extreme care must be taken to ensure the proper scope of review is applied.

Scope of the Review:

The main problem that any group has when reviewing a management decision is determining what the parameters of the review are. The tendency of groups like a volunteer Board of Directors is to review the whole situation from start to finish. That is not a fair process to a Manager. It constitutes second-guessing the decision. The focus should be on process. When a tribunal, arbitrator, or judge reviews a management decision they focus on some very specific principles. They include but are not limited to:

- Did management utilize due process? The key to reviewing management decisions is not, "Did they make the right decision?" but, **"Did they utilize an appropriate process in good faith?**" Questions to ask to determine this include but are not limited to:
  - Did management collect information from all appropriate sources?
  - Did management conduct a comprehensive investigation of the situation if the situation was a disciplinary action of an employee?
  - Did management get advice from a third party?
  - Did management apply the proper standard of proof? (The proper standard is the civil standard of a balance of probability, not the criminal standard of beyond a reasonable doubt.)
  - Did management apply the proper case law?

For most situations the Board should be asking what process was used to make the decision.

- Did management act in a fair, reasonable, non-discriminatory, and non-arbitrary manner? **Management is required to consider all the**

information in an objective manner when making a decision. Questions to ask to determine this include but are not limited to:
   - Did management consider the information in an objective manner?
   - Is there any evidence of favouritism?

- Was the decision reasonable based on the information the Manager had access to? **This is a key point because a review of a situation after the fact will usually uncover different information and perceptions.** Managers have to make decisions based on the best information available at the time. Questions to ask to determine this include but are not limited to:
   - Did management consider all the information in an objective manner?
   - Did management make a reasonable decision? Note that this is question to be asked – not whether the decision was right or wrong. In some situations, the decision may be determined to be wrong but if the decision was made in good faith then it stands.
   - Did management make any glaring errors regarding the consideration of the information? Glaring errors include not considering important substantiated information. It does not include disregarding unsubstantiated information.

Protecting the Employees' Rights:

When a Board of Directors reviews a management decision in this sector they are likely to be looking at client issues or labour relations/human resources/employee relations issues. **The Board of Directors is not the employees' advocate, they are the employer.** That does not mean that the Board should be insensitive to the employees – just that they should focus on the organization. If an employee needs an advocate they have legislative avenues, legal avenues, or, in some organizations, union representation to provide that service if they cannot deal with the issue themself. Management has a responsibility to operate within legislation, or, if there is a union, local collective agreement provisions and legislation, while adhering to their own policies.

If the employee is a member of a union local then the union has the legal standing as the sole legal representative of the employee. The employee cannot contract out that service without agreement of the union and even in most circumstances the union maintains that legal responsibility. This means that even if an employee retains legal council the union still is their legal representative so the lawyer's role becomes one of challenging or reviewing the union's actions in representing the employee. Neither management nor the Board of Directors has a right to interfere in the operation of a union even if they feel the union is not adequately representing their member, the employee. That is between the member/employee and their union.

The Board's Relationship with Management:

As has been stated, the Board of Directors is the employer. They have one employee which reports to them who is responsible for the day-to-day operations. That employee is usually involved in policy decisions made by the Board because they help the Board understand the operational implications of their potential decision. The Board's employee has a legal responsibility to act honestly and in good faith in the best interests of the employer when carrying out their duties and exercising their authority within the parameters of the job description.

This responsibility is higher on the Manager than support staff because their authority is higher. Basically, they are required to carry out the direction of the organization as outlined by those making the policy decisions. Those making the policy decisions should not be directing how those decisions are carried out because that falls under operational responsibilities.

If a Manager does not agree with a policy decision, they should have been allowed an opportunity to give their input during the decision making process. Undermining or ignoring the direction of the organization after the decision is made is not an option because this is a serious violation of the employer/employee relationship and has serious implications in regard to the trustworthiness of the Manager.

Trust is a very important factor in the relationship. It is seriously undermined if the Board of Directors is not very cautious on how they review a management decision. Other than a very rare occurrence these reviews should not be happening; otherwise, it sets the tone that the Board may not trust management. Frequent reviews of management decisions are perceived as second guessing, not due diligence. It should be noted that they may also be a serious violation of the employment contract, either formal or implied, between the Board and their employee when they interfere with the Manager's decisions when carrying out the duties as required in the job description. This action provides the Manager with an argument for constructive dismissal if this happens a number of times or in some situations even in a single event. If the Manager is successful, the employer will not only be liable for pay in lieu of notice but also damages because the Board of Directors acted in bad faith.

Best Practices:

Following are some suggested best practices in regard to the process to review management decisions:

- Review of a management decision by the Board of Directors should be a very rare occurrence.
- The Board of Directors must focus on their role as the employer. Employees have other individuals to act as their advocate.
- If they must review a management decision the Board of Directors should concentrate on the process utilized to make the decision, not collect new facts and re-consider the decision. Managers make decisions based on the best information available at the time.
- The Board should not reverse or revise a management decision unless the process is flawed or the decision is unreasonable because all the information available at the time was not taken into account.
- If new information comes forward after the fact that may require a change in the decision, the whole situation should be referred back to the Manager for reconsideration.
- The Manager is accountable to the Board of Directors but also responsible to ensure confidentiality in regard to labour relations situations and client information.
- When employees try to circumvent management by going to the Board of Directors, they should refer the employee back to following due process within the management structure.

Summary:

The Board of Directors in an organization is mandated with the overall responsibility to ensure that the organization operates within certain policy guidelines. The Board also wants to ensure employees are treated in a fair manner. They need to be aware that there is a balance within the workplace to be maintained. That is management’s job.