PAST PRACTICE

Can the employer change the rules in the middle of the game?

An often overlooked or misunderstood concept in labor relations is that of "past practice." It is an invaluable tool for the enforcement of rights that employees may have that are not explicitly stated in the collective bargaining agreement. In the case of an established and legitimate past practice, the employer does not have the right to change such a practice unilaterally. The practice has become, by its nature, an unwritten part of the contract.

A legitimate past practice is as enforceable as any written article or provision of the contract. Therefore, the union can compel the employer to comply with a past practice that benefits the employee even though it is not expressly written or if the contract is silent on the issue. Arbitrators will recognize and uphold bona fide past practices if they can be proven and established, even if the contract states that a grievance must be a violation of the written agreement. But the burden of proof is on the union to confirm and validate the practice. The union must research and document as much as possible about the existence of the practice.

Basically, a past practice is any longstanding, recurring practice that both the union and the employer know about and accept—either implicitly or explicitly. The practice must deal with the same type of situation over a substantial period of time. A past practice is binding on the parties to the collective bargaining agreement just as any written contract language would be. The practice has become an "implied agreement" (also referred to as an agreement by conduct) between the parties. However, past practice cannot supersede clear and unambiguous contract language.

A practice is not binding on the employer if it involves a method of operation or direction of the workforce, and has no effect on benefits for the employee. Also, a practice that does not meet the four tests listed below also does not rise to the level of an enforceable "past practice."

Two examples of incidents or conditions that do not qualify as past practices are:

- The clerical staff has for years used typewriters to conduct their work. With the advent of new technology such as computers, it is appropriate and within the rights of management to change the basic work tool.
- The employer celebrates a milestone in its history (i.e., 100 years anniversary) and provides all the employees with a free meal.

Past practice tests

There are four critical tests to determine if there is an existing past practice. These are elements that must all be met for a condition to qualify as a genuine past practice.

1. The practice has a patterned occurrence over a considerable length of time

The practice has to have recurred with regularity over a significant period of time. Some arbitrators favor a period of three to five years, meaning that the practice continued to

occur over the course of at least two collective bargaining agreements.

A practice probably does not qualify if it has occurred irregularly or sporadically over the course of years or, conversely, the practice has occurred repeatedly, but for a very short time in unusual circumstances (i.e., the hospital is under construction and free parking is provided for a six month period to ease congestion).

A practice may exist if the employer has consistently acted in the same manner over the years even if the occasion occurs infrequently each year. An example of such a practice could be when the hours change from daylight-saving time, to standard time and back.

2. The practice or benefit has been clear and consistent

The practice must be a clearly defined one that is clear, certain and unequivocal. It must be something that the union can point to without qualification. Some minor variations or deviations may be acceptable.

An example might be that for the last 20 years at Thanksgiving, the employer has given each employee a holiday turkey. If the employer changes the practice to one of providing a grocery certificate to each employee for a turkey, that deviation is acceptable because the basic benefit remains. The turkey has become a part of the benefit package that employees enjoy and cannot be unilaterally changed or stopped by the employer.

3. The practice does not conflict with any specific contract language

Past practices can never supersede clear and unambiguous contract language that directly addresses the same issue. If a long-standing practice has occurred over time—but clearly conflicts with existing contract language—it is most likely not enforceable. But if the contract is moot or ambiguous on an issue, the practice can serve to define the meaning of the provision.

An example is: A voluntary sick leave bank exists in the contract that allows employees to annually contribute sick leaves days. The contract does not specify how many days an employee may contribute annually. The practice established over many years has been that individual employees have contributed as many sick days per year as they liked. Therefore, that clear practice—that each employee is unrestricted in how many sick days they voluntarily contribute to the sick bank—cannot be unilaterally changed, modified or limited by the employer.

If the employer seeks to change the unwritten but clear practice, they would have to explicitly raise the issue at the next round of contract bargaining.

4. Both the union and employer have known about the practice and accepted it

Management and the union must be aware of the practice and have accepted it. The practice cannot simply be between two individuals, but has to be at the level of senior management and the union leadership.

For instance, if a supervisor in a particular building of the employer has allowed those unit employees to take extended lunch periods or a grace period for reporting late to work—but the employer's upper management is unaware of the arrangement—the practice most likely will not be considered to be legitimate.

Other issues involving past practice

If the employer has been lax in enforcing a particular work rule that is clearly a management right or one that is referenced in their policies, they may enforce the work rule once they give notice to the employees. This would be management's right despite a period of laxness on their part and would not be considered a change in past practice.

Similarly, if a condition changes—or if there is an abuse of a practice—an arbitrator would most likely rule against the union if a change in the practice was challenged.

Examples of this would be:

- Free parking shuttles for employees to distant lots may be discontinued if a new and closer parking structure is built and available to the employees. The condition that created the practice has changed and management would be within its rights to make a change.
- The allowance for RNs to switch shifts among themselves without supervisory approval might be modified if such changes begin to incur overtime costs for the hospital. The employer might claim an abuse of the practice.

What if a past practice is changed?

If the employer changes or ends an established past practice, the union should grieve the matter just as it would any other grievable matter. The union may cite the article violated as "Management Rights." The union can also file an unfair labor practice charge with the National Labor Relations Board or the state labor commission (for the public sector) since the change constitutes a unilateral change of a mandatory issue (wages, hours and/or working conditions). The union should also send a letter to the employer putting them on notice that the union is challenging the change, and demand that the practice be restored as it was before.

Time is of the essence though. The union cannot wait for months if it is aware that a change in a practice has occurred. A delay in formally responding to the change imposed by management may be interpreted by the arbitrator as the union's acquiescence. Also, the union has to be aware of the contractual timelines to file a grievance under the grievance procedure. Both the NLRB and the labor commission have guidelines for filing an unfair labor practice charge that is a firm six months from the date of occurrence. If the union files an unfair labor practice regarding a change that was made beyond six months, the charge will be dismissed as being untimely.

Finally, if there is a past practice that management seeks to modify or eliminate, it can raise it as a proposal at the next negotiations for a successor contract. The practice is treated as any other contract provision that either party can negotiate to change. But the change has to be negotiated between the parties to be effective and must not be unilaterally imposed.

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