Past Practice: The Long and Windy Road

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We have all been there – the Legislature passed a new law, the Department of Education implemented a new rule, or the administration decided to change some part of the educational program. The next morning the Union president is in your office informing you the district can’t make the changes that have been announced because it would violate the district’s past practice.

Unions throw the phrase “past practice” around like a talisman warding off workplace changes and making administrative decisions vanish into thin air. Are you really held hostage to the past? Understanding what makes something a past practice that is actually binding is the key to ensuring you retain the flexibility you need to manage the district’s workforce.

What is a past practice?

Past practice is a doctrine that has developed over decades of labor law practice by arbitrators who have been responsible for interpreting collective bargaining agreements. Sometimes arbitrators have to divine what the parties actually intended when they negotiated a specific provision of a contract or omitted a specific contract term.

The concept of past practice was first introduced by Richard Mittenthal, an arbitrator who wrote the seminal law review article “Past Practices and the Administration of Collective Bargaining Agreements” 59 Mich. Law Rev. 1017 (1961). Mittenthal described a past practice as something that is an “understood and accepted way of doing things over an extended period of time.” Id 1019.

In broad terms, a past practice is a long-standing, frequent practice that has been in use and both labor and management have accepted its on-going use.

When are past practices applicable?

The issue of past practice arises in an effort to make a work-related practice binding. It occurs when:

(1) used by the parties to interpret ambiguous contract provisions;

(2) expanding/amending the written language within the current contract; and

(3) when there is no contract language at all but an unwritten practice exists.

Mittenthal contemplates it takes more than just being a practice that has been used during the operations of the organization to create a binding past practice between labor and management. He stated “mere existence of a practice, without more, has no real significance. Only if the practice clarifies an imperfectly expressed contractual obligation or lends substance to an indefinitely expressed obligation or creates a completely independent obligation will it have some effect on the parties’ relationship.” Mittenthal at 1020.
Mittenthal goes on to state that “a course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a past practice. But where [the parties] invariably respond the same way to the same set of conditions, their conduct may very well ripen into a practice.” Id at 1019.

**What elements are necessary to create a past practice?**

So how do you know a past practice actually exists? If we used union grievance chairs as our guide employers would be creating past practices daily – if not hourly. Elkouri & Elkouri, “How Arbitration Works,” 6th edition (2003) describes a past practice as requiring the practice to be:

(1) unequivocal;

(2) clearly articulated and acted upon; and

(3) ascertainable over a period of time as acceptable by both parties. Id. at 608.

Arbitrators and labor boards have taken these definitions and expanded and clarified what elements must exist for a past practice to be created. For instance, in Oregon, the Employment Relations Board (ERB) adopted Mittenthal’s standard by using the following five (5) criteria in determining whether the parties have established a past practice:

(1) clarity and consistency;

(2) longevity and repetition;

(3) acceptability;

(4) origin and purpose of the practice; and


Let’s take a look at the necessary elements and see how they have been interpreted:

**a. Clarity and consistency**

This element looks at whether the parties’ actions have resulted in conduct or behavior regarding a specific task, rule or event that has been consistently handled in a certain way over a period of time.

One example is a case involving a dispute over the calculation of health insurance benefits for part-time employees. The arbitrator found that while the parties had a past practice entitling part-time employees to pro-rated insurance contributions, there was no established past practice regarding the method used for calculating the pro-ration. The union argued that pro-ration needed to be based on the employee’s full-time equivalent (FTE). The ERB found the parties used the term “worked”, “employed” and “FTE” all interchangeably when referring to the formula for calculating pro-ration of insurance benefits. Consequently, no clear and consistent practice had been established to favor one formula over another. *OSEA v. Lincoln County SD*, Case No UP-10-92-308, 14 PECBR 503 (1993).
In another case involving how an employer set the dollar amounts for employee parking fees, the ERB declined to find a clear and consistent past practice because the employer had occasionally unilaterally changed the fees over the past years. Thus, if any practice had been established it was that the employer could change the rates every once and awhile. *Oregon State Police Officers Association v. State of Oregon and the Oregon Department of State Police*, Case No. UP-79-88, 11 PECBR 332 (1989) at 340.

You need to be careful about relying on minor changes. Making slight or nominal changes in well-established past practices will not always eliminate the practice or create the practice of variability. For example, in *McKenzie Education Association/Lane Unified Bargaining Council v. McKenzie School District*, Case No. UP-81-94, 16 PECBR 156 (1995) the fact that the school district had made some minor changes to school schedules without a union complaint did not create a past practice allowing the District to make changes to future school schedules.

You also need to be careful about where inconsistency occurs. The fact that a practice may be inconsistent between buildings does not necessarily result in one building failing the consistency test. Some arbitrators and labor boards may find that each building created its own individual past practice that is unique to itself.

**b. Longevity and Repetition**

This element of the test looks at how frequently the practice has been repeated and how long the practice has been in place. This means that one or two isolated instances of a specific practice will not rise to the level of a binding past practice.

The problem is no real formula exists stating that if a practice occurs X number of times and for X period of time it will be considered a binding past practice.

In one Oregon case, an employer paid for two (2) employees to take a non-mandatory required certification exam over a seven (7) year period. The union contended that this created a binding practice requiring the employer to pay the fees for all employees who were taking optional certification exams. The ERB held that “such sparse experience is insufficient to show that the employer customarily or always exercised its discretion by approving employee requests to take certification tests. No reasonable observer would seriously contend that an employer’s payment over the past seven years for two employees to take certification tests would result in all employees being able to have the employer pay for certifications tests in the future.” *AFSCME v. Housing Authority of Yamhill County*, Case No. UP-18-90, 12 PECBR 249 (1990) at 254. (Emphasis in original).

In another case, the employer had provided a holiday bonus a couple of times over several years but did not provide a bonus for every holiday. As a result, the ERB concluded the practice of giving gift certificates to employees at the holiday once or twice did not rise to the level of meeting the longevity or repetition element of the past practice test. *AFSCME v. City of Lincoln City*, UP-60-92, 14 PECBR 83 (1992).

Reviewing decisions in your jurisdiction will definitely help to guide your analysis in applying the longevity and repetition element. Factors to consider when analyzing this element include: how frequently the event in question actually occurs (once a year, once a month, once a week) and
what type of working condition it involves (condition subject to management discretion, permissive or mandatory subject of bargaining).

c. Acceptability

Acceptability occurs when “employees and supervisors alike have knowledge of the particular conduct and must regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from long acquiescence in a known course of conduct. Where this acquiescence does not exist, that is, where employees constantly protest a particular course of action through complaints and grievances, it is doubtful that any practice will be created” Mittenthal at 1019.

In Oregon at the Youth Authority’s juvenile educational programs located in Hillcrest and MacLaren there were three teachers who had mistakenly been receiving a full insurance contribution from the employer for over four years. The clerical error was discovered when the Oregon Department of Education took over responsibility for operating and staffing the program. Ultimately the ERB held that “while the practice was no doubt acceptable to the teachers, it obviously was not acceptable to ODE because it changed the practice soon after assuming control of the educational program. Acceptability for past practice purposes requires knowledge from both parties about the practice. The evidence suggested that the practice originated as an apparent mistake. There was no evidence that the practice began on the basis of any joint understanding between the parties.” Mid Valley Bargaining Council/Hillcrest-MacLaren Education Association v. State of Oregon, UP-102-94, 16 PECBR 314 (1995) at 327.

d. Origin and Purpose

Mittenthal states that it is important to consider “the underlying circumstances which give a practice its true dimensions. A practice is no broader than the circumstances out of which it arose, although its scope can always be enlarged in the day-to-day administration of the agreement. No meaningful description of a practice can be made without mention of these circumstances. . . The point is that every practice must be carefully related to its origin and purpose”. Mittenthal at 1019. This means a practice that develops regarding the scheduling of a day work assignment is not necessarily immediately transferrable to the handling of a swing shift work assignment. These can easily be two different issues involving different aspects of how shifts and work are assigned.

An example would be a case where the union argued the employer had a past practice that required a promoted employee to be placed laterally on the salary schedule when he/she was promoted. For example, if an employee was on the top step of their current position he/she must be placed on the top step of the salary range for the position to which he/she was promoted. International Association of Fire Fighters v. City of Springfield, Case No. Up-51-85, 8 PECBR 533 (1986). However, the City was able to demonstrate that the examples being used by the union involved employees who were being re-promoted after being reduced to a lower classification for economic reasons. Id. The City was able to show the employees in question were being promoted for the first time and consequently there was no similar origin or purpose to the past practice being relied upon by the union.
e. **Mutuality**

“Some practices are the product, either in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial discretion without any intention of a future commitment.” Mittenthal at 1019.

This is probably the easiest element for unions to establish. District often argue that they were unaware of the actions of a principal in the one of the elementary buildings and, therefore, there was no mutuality. This is routinely rejected by labor boards and arbitrators. Managers, supervisors and administrators are considered agents of the districts and their actions will be imputed to the district as a whole.

While your local jurisdiction may state the test for establishing a past practice slightly differently than the elements listed above, applying the concepts above to your facts will still provide guidance because even if your jurisdiction’s test is only three elements, all of the concepts above are quite likely to be contained within those three elements.

**How is the doctrine of past practice used?**

Past practice is used in three ways.

a. **Past practice is used to override the clear and unambiguous language of the contract.**

Arbitrators are hesitant to rule that a past practice which is contrary to the clear and unambiguous terms of the contract nullifies the collective bargaining language. In advising an education service district (ESD) several years ago, on setting the length of the work day, the collective bargaining agreement stated unequivocally that the work day was eight (8) hours per day. However, a prior superintendent began a practice of letting everyone go home a half hour early every Friday, making the work day on Friday only seven and half (7 ½) hours. Then during the summer months, he let everyone go home a half hour early every day, resulting in seven and half (7 ½) hour work days Monday thru Thursday and a seven (7) hour day on Friday. The advice to the new superintendent was to comply with the specific terms of the contract, which was that the work day is eight (8) hours every day year-round. The superintendent gave the union and employees two weeks written notice prior to the enforcement of the current contract language.

While the union was clearly unhappy with this turn of events and filed an unfair labor practice, the (ESD) was ultimately successful and the union withdrew its complaint. Arbitrator Wilkinson stated the rule pretty clearly in one of her cases: “[p]ast practice cannot be used to vary the clear terms of the contract. In cases where there is a conflict, the past practice must yield to the contract’s clear language. The stated view of the majority of arbitrators is that a past practice can never be used to alter, change or otherwise modify clear and unambiguous language.” In the Matter of the Arbitration Between Sandy High School District and Sandy Education Association, p. 15 (October 28, 1994).

b. **Unwritten past practice is used to amend current collective bargaining agreement or add a provision that is not expressly part of the current agreement.**
It is somewhat uncommon for unions to rely upon past practice to create a provision that is completely absent from the collective bargaining agreement. However, it can occur when a collective bargaining agreement includes a maintenance of standards or maintenance of benefits clause. These clauses are broad clauses requiring the employer to maintain any existing condition or benefit, whether it is specifically included in the collective bargaining agreement or not. I have seen this applied in cases where employers provided employees with free or discounted lunches or they have given employees athletic passes to district athletic events.

The following is an example of what a maintenance of benefits or standards clause might look like: Matters of employment relations including but not limited to, direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment shall be continued at not less than the level in effect at the time of the signing of this Agreement. Any changes in existing employment relations during the term of the Agreement shall be negotiated with the Union.

It is much more common for a past practice to be used to amend or expand a provision in the current collective bargaining agreement. One example is a case where the district had a collective bargaining agreement that outlined a list of the holidays provided to nine-month employees and those provided to 12-month employees. Over the years, the district allowed Martin Luther King (MLK) day as a holiday for all district employees, but MLK day was not on either of the lists of holidays. One year the district created a calendar that did not include MLK as a paid holiday. The union filed a grievance alleging the district had violated the provisions of the contract regarding paid holidays because MLK had basically been added to the list of contractual holidays due to the parties past practice. Arbitrator Hayduke described this as “a classic case of past practice establishing a benefit or working condition that is not expressly granted in the labor contract.” The Matter of the Arbitration Between Oregon Association of Classified Employees and Butte Creek School District (September 1993). The arbitrator held that the parties past practice required the district to recognize MLK day in future calendars. The arbitrator concluded: “It is axiomatic in labor relations that benefits and work conditions can become established as implicit terms of employment under a series of labor contracts through past practice, even though the terms of employment are never specified in the contract. While such benefits may not be found in a strict reading of the contract language, arbitrators and courts in contract interpretation cases have long recognized that parties’ consistent past practices in implementing the terms of labor contract can develop into binding past practices that become part of the de facto interpretation of the contract.” Id at 10.

c. Past practices used to interpret vague and ambiguous contract provisions in the collective bargaining agreement.

This is the most common use of past practice by both labor and management. In the Matter of the Arbitration Between Silverton Education Association and Silverton Elementary School District (December 23, 1995) the arbitrator stated that “past interpretation and application is relevant if it illuminates the meaning behind unclear language” Id at 11. Contract language is generally found to be vague or ambiguous “if it can reasonably be construed in more than one way.” Sandy High School District, Supra, p.12.
In another arbitration involving Silverton Elementary School, the issue was what constituted “[t]he normal school day.” The collective bargaining agreement stated that the normal school day was eight (8) hours. But district principals were scheduling staff meetings at the end of the day which resulted in an increase in the actual number of hours being worked by teachers to more than eight (8) hours. The union filed a grievance alleging that the manner in which staff meetings were being scheduled by the district was violating the collective bargaining agreement. However, Arbitrator Lankford found the language ambiguous, stating that it failed to answer the question of whether or not a school day with a staff meeting at the end of the day is a normal school day. He ultimately found that the parties’ past practice resolved the issue because the district was able to establish that principals had regularly been scheduling staff meetings that extended beyond the eight (8) hour day. He concluded that if this practice was clearly contrary to the contract the union would have filed a grievance long ago. *In the Matter of the Arbitration Between Silverton Education Association and Silverton Elementary School District* (1995).

**Tips for handling past practices**

a. The bargaining process is one of the best ways for districts to manage past practices.

1. **Propose elimination of specific past practices.** Identify and create a list of the past practices that relate to mandatory subjects of bargaining. Then bring a proposal during the next round of negotiations to eliminate those specific past practices.

2. **Propose broad language eliminating all past practices.** Example language: The signing of this agreement terminates and supersedes all past practices, agreements, procedures, traditions and rules or rules concerning the matters covered in this agreement. This agreement shall not be interpreted or implied to provide employees with specific terms or conditions of employment previous to this agreement unless so stated in the agreement.

3. **Propose resolutions of ambiguous language.** Identify vague and ambiguous contract language and craft proposals to resolve the ambiguities. Negotiators love the terms “when reasonable”, “whenever practicable” or “make a reasonable effort” because they believe it will provide wiggle room and flexibility in the future or as an effort to make distasteful proposals more acceptable. Re-think that solution – the District might actually be better off just not putting any language in the contract rather than having a vague provision that will ultimately be interpreted by a third party (e.g. administrative law judge, arbitrator).

4. **Negotiate the inclusion of either or a combination of both a waiver clause and a zipper clause.**

A waiver clause states the parties have negotiated over all the issues and that it waives its right to bargain over anything that comes up during the term of the collective bargaining agreement. The following is a waiver clause: “Both parties acknowledge that
they had full opportunity during negotiations to make any demands and proposals they felt appropriate and necessary. This is no further obligation on either party during the life of the agreement to bargain collective with respect to any whether included or not included in this agreement, except as provided in this agreement.”

A zipper clause is intended to convey that only the terms and conditions that are included in the collective bargaining agreement are part of the employment relationship between the employer and the employee. The following is a zipper clause: “All matters within the scope of bargaining have been negotiated and agreed upon. The terms and conditions set forth in this Agreement represent the full and complete understanding and commitment between the District and the Association.”

It is not unusual for a proposal to have one section that includes both a zipper and a waiver clause combined together in order to achieve the full benefit of both provisions.

5. **Do not include a maintenance of standard or maintenance of benefits provision in the collective bargaining agreement.** These provisions are used by the unions for the sole purpose of prohibiting the district from making any changes to management practices that are perceived to bestow a benefit on the employee. If the collective bargaining agreement already has one, try to negotiate it out of the contract. If that doesn’t work, make proposals that limit the scope of its application. For instance, prepare a proposal that limits the application of the provision to only mandatory subjects of bargaining and that are written, allowing the district to make changes in practices that have developed in permissive subjects of bargaining. Another option would be to specifically identify which topics the provision covers: insurance benefits, work hours, vacation scheduling practices etc.

b. If the past practice involves clear and unambiguous contract language or a permissive subject of bargaining that is not included in the current contract, then consider going back and implementing the clear provision of the collective bargaining agreement or giving written notice of the district’s intention to discontinue the practice and follow the agreement. This will require giving both the union and employees a reasonable period of advance notice in order for all employees to bring their actions into compliance with the current contract language.

c. Audit district practices on a regular basis, at least once a year. Make sure the district’s practices and procedures are consistent with the terms and conditions of the collective bargaining agreement. If variations are discovered, determine what steps are necessary to get the district’s practices back in-line and consistent with the collective bargaining agreement.

d. Train district supervisors, managers and administrators regularly on how to implement the collective bargaining agreement. This includes some form of orientation for new
supervisors, managers and administrators when they are hired on administering and implementing the collective bargaining agreement.

Develop a handbook on how to apply the more ambiguous provisions. For instance, when taking personal leave an employee must give at least three (3) days’ notice unless there is an emergency, provide examples of what qualifies as an emergency and what does not.

e. If the district believes there is a reasonable basis to make an exception to a negotiated provision of the contract, memorialize the decision and the basis for the variation. This ensures the employee, the union and the district have documentation of what decision was made. Written documents should always include the provision that this decision shall not create a precedent or binding past practice. This prevents any misunderstanding and helps to prevent the creation of unintended past practices.

Past practices materialize in a variety of different ways. They can have a dramatic impact on how a collective bargaining agreement is implemented and the level of management flexibility the district retains. Your antidote to the “past practice” talisman is good contract language, diligent annual reviews of district practices and effective management training on how to implement the actual terms of the contract.