THE MEANING AND RELEVANCE OF PAST PRACTICE

"Past Practice" is often cited by local associations in support of their opposition to a change initiated by the district's administration. Informal meetings, formal grievances and unfair practice charges will include references to: "You can't do this—it is against our past practice." Puzzled boards and administrators will carefully peruse the printed pages of their negotiated agreement to find no express limitations on their ability to act or to initiate the challenged modification in the terms of employment. What, then, is the basis of this union challenge?

The Basis of Past Practice

In citing past practice, the union may be relying on a general contractual clause, frequently found in the miscellaneous article of the agreement, which states:

> *Except as this Agreement shall otherwise provide, all terms and conditions of employment applicable on the effective date of this Agreement to employees covered by this Agreement as established by the administrative procedures and practices in force on said date, shall continue to be so applicable during the terms of this Agreement. Unless otherwise provided in this Agreement, nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce, or otherwise detract from any employee benefit existing prior to its effective date.*

This provision, or variations thereof, incorporate into the contract any established practice not specifically addressed by the express terms of the agreement. This clause binds the board to observe all existing procedures as if they were written into the contract and raises unwritten practices to the same level as the express terms of the negotiated agreement.

In the absence of such a "Past Practice" or "Savings" clause, boards may still be statutorily bound to unwritten work rules. Section 5.3 of the PERC Law provides that:

> *Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.*

This legislated rule may be the basis of the Association's reliance on "past practice." It may also give rise to an unfair practice claim that the board has violated the Act by refusing to negotiate a change in established terms and conditions of employment.

Further, labor law and practices generally recognize that the negotiated contract may not contain the parties' complete agreement. As one arbitrator stated:

> *An enforceable labor agreement, unless expressly stated to the contrary, consists at the time of its execution of the written agreement, itself and the then existing valid and binding past practices which have not been changed, altered, or modified by the parties.*

The parties' unwritten, but mutually accepted and expected standards of interaction may thus be examined by an arbitrator or by the Public Employment Relations Commission to better understand the context of employment and to resolve disputes that may arise within their ongoing relationship.

Therefore, an Association's reliance on past practice as an inhibitor to the Board's ability to act may well be justified by the contract, the Act, or by general rules of contract interpretation. However, not all past practice claims are justified: not all district practices become binding on the board nor do all employer actions rise to the level of rules of employment. Well-accepted standards of labor relations define what constitutes a "binding" past practice and when the binding practice will be relevant to an understanding of the parties' employment relationship. An understanding of these principles will assist school boards and their administrators to assess their ability to act and the validity of the union's past practice allegations.

Defining a Binding Past Practice

Since past practice is examined to understand the parties' expectations of their relationship, the key in determining that a past practice is binding on the parties rests in demonstrating mutual knowledge, acceptance, and reliance on the unwritten rule. To be deemed binding upon the parties, the past practice must be marked by the following criteria:

- *clarity:* the existence of the practice can be proven
- *longevity:* the practice must be of long-standing
- *consistency:* the practice occurs regularly, not randomly, in the same circumstances
- *repetition:* the practice occurs frequently
- *mutuality and acceptability:* both parties know and accept the practice

In determining the validity of past practice claims, these criteria will be applied to the facts of the case. Although individual arbitrators may give different weight to each criteria, and each case may require considerations of unique circumstances, it is generally accepted that all these criteria are necessary in establishing a binding past practice.

Clarity If a binding practice defines an aspect of the employment relationship, then it must clearly be proven to exist. For example, a local association pursued arbitration of a grievance challenging the Board's assignment of five instructional preparations. The Association argued that the Board's action violated the district's past practice of assigning not more than four different teaching preparations to high school teachers. To support its alleged past practice, the Association introduced the affected teacher's schedule for the last few years as well as the schedules of some other high school teachers. The board's evidence, however, included a variety of high school teachers' schedule which indicated that, although many teachers received only four preparations, five preparations had been and continued to be assigned when the situation so warranted. In light of the evidence, the arbitrator concluded that there was no clear pattern to the number of teaching preparations and that the Association's cited practice was not binding on the board of education.

In a similar dispute raised in unfair practice proceedings, PERC also held that the parties' long-standing practice of assigning some middle-school teachers up to six instructional periods authorized the Board to add a sixth period to other teachers' daily schedule. PERC found that, under this unwritten rule, the Board had the right to change teachers' schedules as long as those assignments did not exceed the number of teaching periods previously assigned to other teachers at other times.[1]

Longevity An established practice of long-standing will generally add weight to a contention that the practice is an excepted and accepted standard of employment. However, if a relatively new practice is the result of new con-ditions in the district, and meets all other criteria of a binding practice, the absence of longevity will not diminish the validity of the practice. For example, a new longevity clause was negotiated into a three year contract; for the first two years, the Board compounded the payment but refused to do so in the third year. The Association claimed a violation of past practice and the arbitrator concurred as he found that, given the circumstances of the case, the parties' intent could only be demonstrated over that two year period.

The importance of circumstances in applying the criteria of a binding past practice is underscored by another arbitrator who writes:

> *No past practice exists in a vacuum. Every past practice necessarily rests upon a foundation. That foundation is the factual circumstance(s) out of which the practice arose. Thus, a practice must be viewed in light of those conditions in effect at the time it came into being. When those conditions change, when the foundation upon which the practice rests shifts, then the practice itself may properly be altered. The point, in brief, is that no past practice is broader than the circumstances out of which it has arisen.*

Consistency Whether in the context of labor relations or in any other interaction, consistency is a key element leading to expectations. It is not surprising, therefore, that arbitrators look at the consistency of the practice when assessing whether or not it is binding on the parties. Given the circumstances, is the employer response consistently predictable? Over a number of years, has the employer generally reacted in the same manner? If the answer is yes, then the arbitrator may find that a departure from that expected and anticipated behavior constitutes a breach in the relationship.

In a dispute involving tuition reimbursement, the Association claimed the Board had violated the parties' past practice when it denied reimbursement for a teacher's undergraduate course work. The arbitrator found that, for the past eight years, the district had routinely reimbursed for similar course work. He therefore concluded that the divergent result, occurring without a change in the contractual provisions, violated the practice between the parties and was an arbitrary decision. However, in another tuition reimbursement dispute, the Board demonstrated that undergraduate courses were routinely approved only when the course was directly related to the teacher's assignment in the district. In this situation, the arbitrator ruled that the course which was denied reimbursement was not directly related to the teacher's assignment and thus the practice was governed by the Board's routine and consistent denial of reimbursement for non-related courses.

A determination of consistency is dependent upon the specific circumstances of the case. A lack of a consistent response to the same situation will be deemed to not establish a clear practice or clear expectations; inconsistent responses do not establish a pattern of behavior which can be relied upon to predict responses in the labor relationship; rather, inconsistencies may simply

[1] *Phillipsburg Board of Education,* PERC No. 90-35, 15 *NJPER* 20258.

signal a complete lack of predictability and render the practice haphazard rather than binding. As one arbitrator noted in a case marked by contradicting documentation of the practice: "There is enough conflicting testimony to rule out the establishment of any practice, one way or the other."

Arbitrators will examine similarities, or differences, in the circumstances triggering the board's response. Once the circumstance is deemed to be comparable, the consistency of the response will be given considerable weight in defining a binding practice.

Repetition Consistency is dependent upon repetition. One isolated response to a unique circumstance does not establish a consistent pattern and arbitrators are fond of saying that "one incident does not a past practice create." Therefore, the similarity of repeated responses to similar circumstances is another standard in establishing a binding past practice.

However, some situations arise so infrequently that establishing the requisite "long-standing, consistent, repetition" pattern is impossible. Such was the case in a dispute over the union president's right to have time off, with pay, to attend court in cases involving the union. While the practice had occurred only four times, and all in one year, it was the kind of situation which would not arise frequently, and the arbitrator held:

> *There is no question, but a single incident or the happening of a solitary circumstance does not a practice create. However, when a situation arises only on occasion, fewer instances or happenings would be required to establish a practice than would be required where the situation often arose. Thus, even a limited number of incidents comparable to the very matter before the Arbitrator could create a past practice, where comparable situations are not likely to occur too often.*

Mutuality and Acceptability If the purpose of past practice is to understand the parties' "standard operational procedures," then a requisite of a binding practice must involve a determination that the parties recognized the existence of the practice and accepted its conditions and benefits. Regardless of how the practice was initiated, both parties have accepted the procedure as governing an aspect of their relationship and neither has attempted to change the "S.O.P." through negotiations. Such a practice is said to be marked by mutuality and acceptability.

Mutuality and acceptability can be partially established through a determination that the practice was consistent, frequent and clear. However, mutuality also requires evidence that the parties had a tacit agreement to conduct themselves in that manner; that their practice was intentionally designed to provide guidance in that aspect of their relationship and that both recognized and accepted the benefits of the practice. In other words, the parties had reached a mutual, but unwritten, agreement. As one arbitrator stated:

> *A practice based in such fashion on mutual agreement may be subject to amendment only by mutual agreement. However, its obligatory quality results not from the fact that it is past practice but rather from the agreement upon which it is based. There may be other practices which are not resultant from mutual decision making. They may be merely happenstance, that is things that develop without design or deliberation. Or they may very well be selections made by management in the exercise of managerial discretion. In such cases, it is held that there is no sense of obligation or commitment for the future.*

In a case involving the scheduling of half-days before certain holidays, the Association claimed that the Board had violated a binding past practice when it scheduled a full day on the day before the winter recess. The arbitrator found that the Association annually made recommendations for the formulation of the calendar but that the Board annually adopted a calendar which did not consistently incorporate all Association suggestions. He therefore concluded that the practice demonstrated the Board's reserved discretion in setting the calendar and that, although the Association regarded the grant of half-days as a benefit, the benefit was determined annually without a commitment to the future. The arbitrator ruled that the practice lacked mutuality and acceptability and was thus not binding on the Board.

Mutuality and acceptability can also be found when a practice has existed for a period of time and has never been challenged by the union. In those cases, the Association's failure to grieve, or to otherwise challenge, a board's action has been seen as a tacit acceptance of the practice.[2] However, in those circumstances, it is important that both parties had the same understanding of the practice; without a shared, common understanding of a practice, mutuality and acceptability will not be found.

For example, a union filed an unfair practice charge against the Board alleging that, without prior negotiations, the Board changed its method of placing new employees on the salary guide. The Board asserted that the method now disputed by the union had been used for a number of years and that several new employees had been placed on the guide in the last few years without challenge from the Association. However, PERC found that the new criteria had never been formally communicated to the Association and that, although the Board had applied its new criteria in the past, the resulting placement in those cases appeared to be identical to the placement that would have resulted from the use of the old policy. PERC therefore

[2] See, for example, *South River Board of Education,* PERC No. 86-132, 12 *NJPER* 17167.

concluded that, under the circumstances of this case, the Association could not have suspected a change in the practice and that, absent this knowledge, its earlier failure to grieve could not be seen as evidence of acceptability and mutuality.[3]

Mutuality and acceptability has also been found to be lacking when the practice was not consistent in the entire district. In a dispute involving elementary prep time, an arbitrator held that the variations in the buildings' scheduling indicated an absence of a district-wide mutuality and no binding past practice was found.

However, under some circumstances, a practice that affects only a specific category of positions within a bargaining unit may be binding for that classification of employees. For example, PERC has held that a contract that created distinctions between "teachers" and "nurses" established that "a subgroup of employees can be the right referent point for purposes of analyzing a past practice."[4] Otherwise, if the contract does not create distinctions among employees in its recognition clause, salary guides, work hours and work year, or any other contractual clause, then the unwritten work rules will apply to all members of the bargaining unit. Under those circumstances, PERC has found that an increase in the kindergarten teachers' work hours, though significant, still remained well "within the established range of pupil contact time for all other teachers" and did not constitute a violation of a past practice.[5]

Summary To be binding, the practice must meet all the criteria listed above. However, each criteria will be examined in light of the circumstances of the case in dispute. Consistency, longevity, and repetition will take on different meanings given the factual pattern of each situation. Individual arbitrator's perspective may also influence the weight given to each criteria. Nevertheless, all past practice allegations that are relevant to the dispute will be subjected to the above analysis; those practices which are deemed to be clear, long-standing, consistent, repetitive, and marked by mutuality and acceptability will be considered to be binding on both parties. However, not all binding practices may be relevant to the dispute at hand.

Relevance of Past Practice

A binding past practice becomes relevant in understanding the parties' relationship *only* when the express written terms of the negotiated agreement do not clearly explain the relationship. Therefore, past practice will be only when the contract is silent or when it is ambiguous. When the contract is clear, past practice will not be examined and the written rule will prevail.

The Silent Contract When the contract does not address a specific term and condition of employment, the parties' binding practice may be the only available indicator of the parties' understanding. In a dispute involving an increase in work load, the arbitrator noted:

> *Where the contract is silent, a past practice, recognized as such and implemented over a long period of time by the parties, becomes an implied condition of the contract.*

In this case, the arbitrator held that the contract's silence on the number of daily instructional periods did not give the Board the discretion to unilaterally increase the class load of English teachers. Rather, the Board was bound by its clear, long-standing past practice of scheduling only four instructional periods for that group of teachers. In the absence of contract language, the binding past practice governed the parties' work load relationship as an integral, but unwritten, part of the negotiated agreement.

The Ambiguous Contract Contractual provisions which may have been crystal clear on their adoption, frequently lose lucidity over the years. In these instances, where words become open to differing interpretations, the arbitrator will look at the parties' binding past practice to determine the parties' past interpretation of the ambiguous language; a binding past practice can give meaning to vague or imprecise language.

An arbitrator was called upon to resolve a dispute over part-time teachers' entitlement to temporary leaves of absence. The relevant contractual provisions granted leave to "teachers"; the Association challenged the Board's proration of benefits for part-time teachers asserting that all members of the bargaining unit were entitled to the full benefits of the contract. The Board contended that it had been the parties' intent to only grant full benefits to full-time teachers. The arbitrator found that the district's consistent prior practice of not prorating benefits explained the parties' original interpretation of the now disputed language and ruled that the Board was obliged, under the contract, to grant full benefits to part-time teachers.

Ambiguities caused by conflicting contractual articles will also be resolved by an examination of past practice. A binding past practice will generally carry more weight in understanding the parties' intent than their conflicting recollections of their true intent in negotiations. The readoption of ambiguous language in successor agreements will be deemed to constitute a reaffirmation of the past practice.

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[3] *Stanhope Board of Education,* PERC No. 90-81, 16 *NJPER* 21076.

[4] See *East Brunswick Board of Education,* PERC No. 86-109, 12 *NJPER* 17132, contrasted in *Board of Education of Shamong Township,* PERC No. 91-21, 16 *NJPER* 21213.

[5] *Board of Education of Shamong Township, supra.* Note, however, that PERC contrasted this case with *Hamilton Township Board of Education,* PERC No. 90-80, 16 *NJPER* 21075, where an increase in workload for subgroup of employees was found to violate a past practice when there was no proof or allegations that the challenged increase was within an established range of pupil contact time for a larger group of employees.

The General Clause A well-accepted rule of contract interpretation is that specific contract provisions prevail over general provisions. The same rule can apply to the relevance of a binding past practice: if the binding practice is specific, it may prevail over a general written contractual provision.

A contract established a uniform workday for all teachers. For many years, special education teachers worked a shorter day than the rest of the staff. When the Board attempted to enforce the uniform workday, the arbitrator held that the specific practice for the special classification of teachers constituted a binding practice. He reasoned that the teaching conditions of special education teachers were so unique, the practice was of such long-standing and so mutually recognized that it could only be changed through direct negotiations.

The Clear Contract Clear contract language will always prevail over a past practice. Indeed, in the face of clear, precise and unambiguous language, many arbitrators will not even consider past practice arguments. When the union argues that a well-established past practice grants more benefits than the clear, express terms of the contract and should therefore prevail as the most recent agreement of the parties, most arbitrators will reject that argument. Citing an accepted rule of contract administration, arbitrators will hold that: "The mere non-use of a negotiated right is not evidence that the right has been abandoned." Thus, an arbitrator held that a Board's reduction of teachers' duty-free lunch period to 30 minutes was a contractual right, even though teachers had enjoyed a longer lunch for several consecutive school years. Arbitrators agree, however, that a Board should notify the Association of its intention to abandon the practice and to return to the contractual condition.

Clear contract language is also given priority by PERC. The Commission has consistently found that clear and unambiguous contract language can provide boards of education with the authority to change a practice that differs from the terms of the contract. For example, PERC found that a contractual provision that specifically established the length of the secretaries' workday authorized the Board to change its long, unwritten practice of granting shorter workdays during the summer months, as the contractual time applied to all workdays in the school year.[6]

The adoption of new clear contract language signifies an end to a well-established practice. A district's fifteen year practice of paying super-maximums to eligible employees was considered nonapplicable under the new contract which specifically terminated the practice. Not only does new language signify a new agreement in the relationship but the precise written language of the negotiated document will always be given precedence in understanding the parties' relationship.

Implications for Boards of Education

Understanding the definition of a binding past practice, and the conditions under which the practice will be considered, can assist boards to wisely administer their written and unwritten agreements, to assess the validity of the union's past practice allegations, and to prepare a worthy defense for the arbitration hearing or proceedings before PERC. Neither the Commission nor an arbitrator will argue the case for a board of education and boards and their advocates must be prepared to fully support their past practice defenses in whatever forum the dispute arises. However, reliance upon past practice to protect the board's and the administration's rights may be risky as determining a binding practice depends on the circumstances of the situation and the arbitrator's subjective judgment. Boards can limit their exposure to past practice by attempting to negotiate several safeguards.

Avoiding or Limiting the Past Practice Clause If your contract does not contain a "Past Practice" or "Savings" clause, continue to avoid inclusions of this type of provision. In the presence of these provisions, propose to delete the past practice clause or, when the time is right, counterpropose that the union specifically delineates the terms and conditions of employment which they understand to constitute past practice; after you have concurred to their list, specifically exclude conditions not specified. This specificity will at least identify the areas in which you have incurred a commitment and foreclose any unidentified practice.

Limit the Authority of the Arbitrator In the absence of a past practice clause, the arbitrator can be denied the authority to review the parties' practice if the contract specifically limits arbitral review to "the express written terms of the agreement." Since the arbitrator derives authority from the contract, this language forecloses arbitration of grievances which claim a violation of past practice rather than a specific violation of a contractual clause. (This clause, though limiting arbitration, would and could not prevent allegations of failure to negotiate new rules of employment before PERC.)

Avoid Ambiguous Contract Language In successor negotiations, try to make your new provisions as clear as possible. Clearly establish the parties rights and obligations and make sure the language clearly reflects your intent. In preparing for negotiations, carefully review your existing agreement to identify areas in need of clarification. In your contract analysis also identify areas in which the language contradicts the practice; if your board would prefer to see the language enforced, give the union notice of the board's intent of returning to the express terms of the contract.

[6] *Kittatinny Regional Board of Education,* PERC No. 92-37, 17 *NJPER* 22230.

Negotiate Changes in Existing Binding Practices A binding past practice can only be changed through negotiations. If a practice in your district has outlived its usefulness or is no longer supported by the board, draft a negotiations proposal to change the practice. Be aware, however, that a failure to obtain agreement on the change will be seen as a reinforcement of the practice. Do not propose to include in the written agreement a right you have under a clear, binding practice; the union's refusal to agree to such language could be seen as a repudiation of their agreement to the practice; this may weaken your past practice argument in future arbitration.

Negotiate a "Zipper" Clause A "Fully Bargained" or "Zipper" clause is the direct counterpart of a Saving Clause. A Zipper clause establishes that:

> *All prior agreements either oral or written are hereby cancelled and this Agreement constitutes the entire agreement between the parties.*

When the contract does not address the issue that is under dispute, this type of language can deter most arbitrators from considering alleged violations of past practice. However, this language will not preclude arbitrators from relying on past practice to shed light on the parties' past interpretation of ambiguous contractual provisions that are still included in the parties' new contract. A fully bargained clause can therefore limit the relevance of some, but not all, alleged binding past practices during grievance arbitration.

Furthermore, zipper clauses will have even less relevance in PERC's analysis of unwritten work rules. PERC has repeatedly held that the broad language of a "zipper" clause does not serve as a waiver of the employer's obligation to negotiate changes in terms and conditions of employment nor its obligation to negotiate before implementing new or modified work rules. Thus, in a number of decisions (see, for example, *City of Newark*, PERC No. 88-38, 13 *NJPER* 18313), PERC has rejected employers' reliance on zipper clauses to defend their nonnegotiated decisions.

Although fully bargained clauses do not provide total insulation from binding past practices, their limited applications can be helpful under certain circumstances and these provisions can limit districts' exposure to past practice allegations.

Negotiate a Strong Management Rights Clause A strong, specific management rights clause which clearly delineates the areas specifically reserved for managerial authority can be very helpful to a board of education. A clause specifically indicating that the board has the right to make reasonable work rules and to implement policy to meet its goals, may prevail over a general and vague savings clause.

Remember—the Contract Includes an Invisible Section Many rights and obligations of a labor relationship can be found within the pages of the written labor agreement. However, the contract does not, and cannot, contain all of the parties obligations. Unwritten past practices will, under certain conditions, be as binding as the printed words of the agreement. Be aware of the unwritten responsibilities that both the board and the union have tacitly negotiated.