

CHAPTER 1

THE CHANGE PROPOSAL

Like the Universe that started with a bang, collective bargaining starts with a change. As soon as one party wants it, the bargaining process is triggered, and the parties begin moving through the various bargaining stages. In fact, because collective bargaining almost always ends with a change, it is not a stretch to say it is all about change: one party's idea for a change, another party's reaction to the idea, the interaction and maturation of each parties' initial thoughts, the influence of power and persuasion on the proposed change, the final agreement to change, and the implementation of that change. So, it is only right to begin this review of collective bargaining law and practice with the concept of a change.

The opening section of this chapter examines the concept of a "past practice." After all, just as the Universe needed something to explode to make a bang, collective bargaining changes generally are defined based on what existed before them. Stated differently, it would be hard to know whether you have made a change without knowing first what constitutes the existing practice in the eyes of the law.

The second section explores just what a "change" is—and is not—in the eyes of the law. Completing this analysis is an additional section about "*de minimis*" changes and similar events that are changes, but really not significant enough to trigger the statutory obligation to bargain over them—or at least so says the FLRA at this time.

Of course, no concept of law is properly understood until all the exceptions to the rule also are considered. The additional exceptions are reviewed in another section.

Once these definitions are out of the way, this chapter turns to process matters. These are the obligation to give specific notice of a change, bypassing the party entitled to notice of—and bargaining over—the change, and post-implementation notice and/or bargaining.

The chapter closes with an examination of the union's right to initiate or propose changes during the life of the contract. It is an underused right today, but possesses a lot of potential for both parties.

While I do not claim this discussion touches on every conceivable question related to proposing a change, it more than prepares the reader to move to the next stage of the collective bargaining process: the demand to bargain over the proposed change.

I. PAST PRACTICE

Not every existing practice qualifies as a "past practice" under the collective bargaining law. Generally, a practice must meet three criteria to do so.

In order to establish a condition of employment by past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *See, e.g., USDA Forest Serv., Pacific N.W. Region, Portland, Or.*, 48 FLRA 857 (1993); *see also United States Dep't of Health and Human Serv., Social Security Admin. and Social Security Admin. Field Ops., Region II*, 38 FLRA

193, 207 (1990). Essential factors in finding that a past practice exists are that the practice must be known to management, responsible management must knowingly acquiesce in the practice, and the practice must continue for a significant period of time.

DHS, Border and Transp. Security Directorate, Bureau of Customs and Border Protection and NTEU, 59 FLRA 910 (2004).

But where something does qualify as a past practice in the eyes of the law, or the contract for that matter, it plays a central role in the bargaining process. That is, it cannot be changed with bargaining.

It is well established that parties may establish terms and conditions of employment by practice, or other form of tacit or informal agreement, and that this, like other established terms and conditions of employment, may not be altered by either party in the absence of agreement or impasse following good faith bargaining.

DHS, Border and Transp. Directorate, Bureau of Customs and Border Protection and NTEU, 59 FLRA 910 (2004).

Indeed, a past practice even can even override an existing formal written agreement, forcing the party wishing to suddenly enforce the term agreement to serve notice, and bargain over the change from past practice. Similarly, it can be the decisive factor in the interpretation of an unclear contract clause.

The Arbitrator found that the Agency's work schedule policies, as incorporated into the parties' agreement, had been modified by its practice of allowing employees to work compressed work schedules. The Agency has not demonstrated that the Arbitrator's interpretation and application of the agreement incorporating the regulation, as modified by past practice, was unfounded, implausible, or irrational. Consequently, we conclude that the award is not deficient because it fails to draw its essence from the parties' agreement.

AFGE, Local 2128 and Dept. of Defense, Defense Contract Mgmt. Agency, Dist. West, Hurst, TX, 58 FLRA 519 (2003).

In determining whether a contract provision constitutes a clear and unmistakable waiver, we examine the wording of the provision as well as other relevant contractual provisions, bargaining history, and past practice. *Id.* As noted, a waiver may be evidenced by the parties' bargaining history.

Dept. of Labor, Washington, D.C. and AFGE, Nat'l Council of Field Labor Locals, 38 FLRA 1374 (1991).

Aside from the definition, another common bargaining situation involving a past practice arises when a party seeks to rely upon or enforce the past practice. That party then has the burden of proof.

With respect to the General Counsel's burden of proving an alleged violation, the Authority has held that [i]n order to establish a *prima facie* showing that an unfair labor practice has occurred, the General Counsel must present evidence that would establish the elements of the statutory violation alleged, if such evidence is presumed to be true and the evidence presented by the opposing party is disregarded.

VAMC, Memphis, TN and NAGE Local R5-66, 42 FLRA 712, 713 (1991).

Consistent with this standard, we find that the General Counsel is not always required to prove each alleged fact as it was specifically pled.

Dept. of Transp., FAA, Fort Worth, TX and PASS, 55 FLRA 951 (1999).

Meeting this burden can be difficult, as seen in the following cases where the Authority spotlighted the evidentiary indications that there is no past practice, e.g., isolated incidents, few instances, awareness, acquiescence, etc.

Applying these standards, we agree with the Judge's conclusion that there was no established past practice of permitting employees to use personal cell phones and pagers in the primary and secondary inspection areas. In this regard, the record supports the Judge's finding that the use of personal cell phones and pagers in the Champlain port and other ports amounts to "isolated incidents [that] do not amount to a past practice." Judge's Decision at 14. In particular, the evidence shows that there are a large number of ports as compared to the small number of reported incidents of cell phone use. Compare *Tr.* at 210 with *Tr.* at 174 and Judge's Decision at 6. In addition, the Respondent's witnesses consistently testified that such use was generally prohibited prior to the implementation of the interim guidelines. Specifically, the Director of the Buffalo port testified that the use of personal cell phones and pagers is prohibited in the primary and secondary inspection areas at the Buffalo port. See Judge's Decision at 9. Also, another witness testified that the interim guidelines were implemented to "reaffirm" the Respondent's prohibition on the use of personal cell phones and pagers in the primary and secondary inspection areas. *Tr.* at 154. In our view, the few instances of cell phone use that have been shown are insufficient to establish a widespread practice of using personal cell phones and pagers in the primary and secondary inspection areas or demonstrate that management was aware of, and acquiesced to, the practice. Consequently, we conclude that the Judge's finding that the Respondent's practice was to prohibit the use of personal cell phones and pagers in the primary and secondary inspection areas is supported by substantial evidence in the record as a whole.

DHS, Border and Transp. Directorate, Bureau of Customs and Border Protection and NTEU, 59 FLRA 910 (2004).

In summary, the General Counsel has shown, at most, that two employees who previously had been cited for sick leave abuse were required to present additional medical evidence to justify their requests for sick leave taken after December 1989. We agree with the Judge's conclusion that the General Counsel did not establish that this was a newly imposed requirement or a change in a condition of employment.

VAMC, Memphis, TN and NAGE Local R5-66, 42 FLRA 712 (1991).

Among the most important elements of proof are whether the desire to discontinue a practice was clearly communicated to the other party, and whether the formation of the practice was "open to view" by both parties.

A past practice is deemed to continue, despite management's desires to discontinue it, if the attempt to change the practice is not communicated to the union and if, because the effort to discontinue the practice is not made clear to supervisors, not all supervisors discontinue the practice.

Dept. of Navy, Portsmouth Naval Shipyard, Portsmouth, NH and IFPTE Local 4, 5 FLRA 352, 353 (1981).

If management relies on a union's voluntary compliance with a policy that precludes use of office equipment for union business, and it is reasonable for management to assume union compliance, use of the equipment unobserved by management will not ripen into a past practice that cannot be stopped once discovered by management. If management establishes both that a past practice was terminated and that it relied upon voluntary compliance with directives preventing continuation of the practice, the union can establish a continuing practice only if the practice is "open to view" by management. The reaffirmation of an existing management policy is not a change in employment conditions. The union's failure to comply with the employer's expressed policy may not, without more, be used as proof of a past practice. *Dept. of Treasury, IRS, Cleveland and NTEU*, Chapter 44, 3 FLRA 656, 667-68 (1980) (ALJ Decision). In addition, the "open exercise" of a practice, in a location "where representatives of higher management might appear at any time, supports the inference of acquiescence." *Def. Distrib., Region West, Tracy, Cal.*, 43 FLRA 1539, 1561 (1992). Accordingly, management was aware of the practice; responsible management knowingly acquiesced in the practice; and the practice continued for a significant period of time.

SSA Office of Hearings and Appeals, Montgomery, AL and AFGE, Local 3627, 60 FLRA 549 (2005).

Ironically, where the employer makes a change, it does not matter whether there was a consistent past practice. If there was no uniform practice, but merely a series of discretionary decisions by individual that never ripened into a unit-wide practice, there is still an obligation to bargain if the employer replaces the individuals' discretion with a required practice.

The Authority adopts the Judge's findings in Case Nos. 6-CA-567 and 6-CA-577 that a past practice of allowing Union officers to use official time at their discretion was established at the facility prior to the January 2, 1980 meeting, after which Union officers were required to obtain permission from supervisors in order to take official time, in the same manner required of union stewards under the parties' negotiated agreement. Accordingly, the Respondent's unilateral change in policy without affording the Union notice and an opportunity to bargain concerning that proposed change in established practice violated sections 7116(a)(1) and (5) of the Statute.

VAMC, Muskogee, OK and AFGE Local 2250, 19 FLRA 1054 (1985).

The failure to prove a past practice merely means there is nothing to retroactively enforce, as was the case above; it does not mean that there is no bargaining obligation. A union charging an employer with a failure to bargain over a recent change would be wise to not only allege that there was a past practice to which the employer should be ordered to return while bargaining is conducted, but, in the alternative, even if there was no uniform practice, there still was a change. That the change, perhaps a new policy imposing a uniform practice on the entire office, must be undone, returning the office to incident-by-incident management, while bargaining is conducted.

Proving the existence of a practice becomes harder the more local offices are included in a single unit. However, the parties are permitted to confine their argument about the existence of a past practice to just one or more of the local offices—or just to one manager's practices.

Management at the Aguadilla office was the agent for the Respondent insofar as it provided facilities for the use of the Union president who was stationed

there. We find that the Respondent was bound by the legal acts of its agent concerning matters involving the Union's interests within the geographic limit of Local 2608's jurisdiction. *Cf. Great Lakes Program Service Center, Social Security Administration, Department of Health and Human Services, Chicago, Illinois*, 9 FLRA 499, 508 (1980) (under appropriate circumstances, an agent may, through the exercise of apparent authority, assume the responsibility and liability of the principal). There is no indication that the decisions to provide the equipment were restricted to the Aguadilla office and no such limitations on their use were conveyed to the Union. Indeed, the Judge found that there was sufficient knowledge at the Mayaquez district level to "make it arguable that the District acquiesced in and is bound by the practices." ALJ Decision at 9. This gives added weight to our conclusion that the Aguadilla branch office had authority to, and did, bind the organization at higher levels. We conclude that by providing Romero with the self-correcting typewriter and partitions, the Aguadilla office bound Respondent to continue to provide those items within the area represented by Local 2608. It is immaterial whether officials at Hato Rey or their superiors at the San Juan district level participated in the decisions to provide the equipment to the Union president, or whether they even knew of those decisions. The Respondent has to deal with Union representatives at some level on various matters, and items such as those involved here are logically the responsibility of management at the level of the worksite where the Union official performs his representation duties. The Respondent cannot disavow responsibility for legal actions of its agents who were acting within their scope of authority.

SSA and SSA Field Operations, Region II and AFGE, 38 FLRA 193 (1990).



Best Practices

As demonstrated by the last case excerpt, agencies are liable even if an individual manager establishes a practice or deviates from a broadly applied practice. Consequently, both parties should take steps to train their managers and representatives in how to recognize a past practice. The benefit to the union is that it can enforce that practice until negotiations over a change are completed. Often that can mean the employer is required to destroy certain performance appraisal input, restore leave, increase appraisal scores, and grant back pay, among other remedies. The benefit to the employer is that it minimizes its liabilities, especially to its efficiency and effectiveness, that might be dependent on the continuation of a certain practice.

Beyond training, the parties would be wise to create a process wherein they try to negotiate over allegations of unannounced changes in past practice rather than move immediately to ULP charges and litigation. For example, they could agree that where the allegation is made, they will go informally to a bargaining table without prejudice to either side's litigation position. If they reach a deal, fine. The employer is relieved of any potential retroactive remedies, such as a return to the status quo ante, and the union avoids having to litigate for years to get relief. If they do not reach a deal, they could even agree to empower an arbitrator to try to mediate the dispute before he or she has to decide the rigid legal questions.