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What Negotiators Must Also Know—About Past Practice

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Frank Ferris has over 35 years experience in federal sector labor relations as a union leader, manager, and university faculty member. He holds a doctorate from the University of Southern California and has published extensively in the field. The opinions of the author expressed herein are not necessarily those of his employer(s), e.g., the National Treasury Employees Union, where he serves as the elected National Executive Vice President. The ideas in this article are taken from the author's new book that critiques FLRA case law and provides advice on how to bargain more effectively using case law.

Ask most negotiators what they must know about collective bargaining law, and you will probably hear them rattle off the same a half-dozen precedents, e.g., must notify the other party before making a change in past practice; must bargain in good faith; no need or right to negotiate over de minimis, covered-by, or non-negotiable changes; the union waives its right to bargain if it fails to timely demand bargaining or FSIP assistance once impasse is declared; unilateral changes can result in some very costly remedies; and the agency head can disapprove an agreement.

Admittedly, those are the core of what a negotiator must know about the law, especially if all negotiations are amicable and untouched by complicating circumstances. But, the reality of federal sector bargaining is that too much of it is not amicable, and too much is touched by, if not pounded by, complicating circumstances.

Consequently, the most legally expert negotiators know there are about 75 different places in the bargaining process where there are opportunities to legally blunder—or benefit and about 500 precedential FLRA and court cases that flesh out those 75 rules. Anyone running a bargaining table for a union or management without a firm grasp on all of them is operating from a dangerously abridged version of the rulebook—taking a lot of risks with management's resources, employees' job satisfaction, and a union's future.

Ideally, the FLRA drafts practitioner-friendly precedents to clearly guide everyone, but that does not always happen. For example, here is what it has said about past practice:

> In this regard, a past practice is not binding unless it has been exercised consistently over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. . . ."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." (See 64 FLRA No. 25 (2009))

But is that a three or four-part criteria? Is acquiescence more than simply not challenging a practice? Which managers are not responsible officials? Does consistently exercised mean without exception? Why the change from "consistently exercised" in the first sentence to "continue" in the second one? So, until we reach the state of simple, clear, and unambiguous precedents, negotiators have no choice but to read a wide range of cases to master this area of law. If you want to see how ready you are to take the lead at a bargaining table, try to identify whether the following ten statements are true or false. The answers are at the end of the questions.

TRUE OR FALSE:

#1- The FLRA defines a "significant period of time" as at least one full fiscal, contract, or calendar year.

#2- A past practice is not enforceable unless it was followed each and every time the matter arose during the significant period of time.

#3- A party is considered to have "acquiesced" to a practice if it had knowledge of it and did not act to challenge the practice.

#4- If an agency signs any paperwork related to administrative implementation of a particular practice, it will be considered to have acquiesced.

#5- When management wants to change a past practice or establish one, it must clearly communicate that to the union.

#6- In a national bargaining unit of many local offices an otherwise negotiable change in the valid past practices of just one office can require advance notice and bargaining at the union's national level.

#7- A locally established past practice moves with an employee reassigned to a new office.

#8- If a current practice is illegal, management can change it immediately without any need to notify the union in advance of implementing the change and impacting employees.

#9- A valid past practice can render a clear and unambiguous contract clause that conflicts with the practice unenforceable until the parties negotiate again over the issue.

#10- A valid past practice is considered to be part of the parties' agreement.

ANSWERS:

#1- FALSE. The FLRA has avoided a hard definition and found as little as three months to be a significant period. "Further, the record shows that the Respondent furnished bottled water to bargaining unit employees for 3 months after the city water was certified as potable. There is no doubt that the practice of providing bottled water was known to both parties. In our view, the practice of providing bottled water was consistently exercised for a sufficient period of time so as to ‘establish' that practice." (See 38 FLRA 899 (1990)). But, for some unknown reason, FLRA occasionally substitutes the words "extended," "sufficient, or "considerable" for "significant." (See 52 FLRA 103 (1996))

#2- FALSE. An occasional deviation from the practice does not necessarily undermine its legal enforceability. The test is "consistently exercised," not exercised without exception. In fact, the FLRA generally has been swayed by what happened the majority of the time. "The record reflects that over a period from 1975 to October 1978 management at the level of branch chief or above met, on the majority of occasions, with more than one Union representative without objection and without requiring the Union to show to its satisfaction good and sufficient reason why more than one representative was necessary. These meetings were of such sufficient numbers and over such a long duration that a reasonable person would have recognized this practice and would have expected it to continue in the future." (See 6 FLRA 713 (1981) See also 59 FLRA 910 (2004) for the Authority's continued focus on majorities versus absolutes.)

#3- FALSE. Acquiescence is something more than failing to react once a party has knowledge of a practice. "The mere fact that Respondent in the past changed food or vending prices without objection from the Union does not, standing alone, establish a longstanding past practice. Although the Union may have known of past price adjustments, those changes may have met with Union approval, giving it no reason to object or to request negotiations. Furthermore, it may not have recognized the price increases as changing a condition of employment.

In any event, Respondent has not established on the instant record that the Union acquiesced in a practice of allowing unilateral changes in the vending machine prices." (See 46 FLRA 782 (1992)) Indeed, a mere failure to request bargaining is insufficient to show acquiescence. "To then conclude that a union's failure to demand bargaining when it could have done so ripened into an acquiescence sufficient to privilege an employer to refuse a request to bargain on the matter on a subsequent situation without violating the Statute would merely encourage unions to go through a wasteful, time consuming, useless exercise of making bargaining demands when matters were really not in dispute or filing unfair labor practice changes over situations of no consequence or benefit to employees. Such conduct cannot be construed as express or implied consent sufficient to establish a past practice under the Statute." (See 42 FLRA 287 (1991))

However, a failure to object when the practice is openly followed repeatedly for an extended period of time can amount to acquiescence. "Despite the objection of some supervisors, the open exercise of this practice over an extended period, in the presence of first-level and in some cases of higher level supervisors appears to have been sufficiently consistent that it had become a

condition of employment. The occasional challenge by individual supervisors does not negate the overall pattern of behavior in this respect. . . .The apparent blatancy of the practice requires the inference that many supervisors, as well as employees, assumed the acquiescence of management." (43 FLRA 1539 (1992))

Consequently, the safest course is to tangibly oppose or attempt to terminate a budding practice if one wishes to show that it did not acquiesce. "Clearly local management did not acquiesce in the alleged past practice for upon finding that smoking was taking place in the fire houses it terminated the practice. (See 55 FLRA 968 (1999))

#4- FALSE. One or even a few ministerial acts do not bind an employer to a practice. "Although the Arbitrator found that local supervisors were aware that union representatives on official time were telecommuting and that Agency headquarters had approved ‘a few' Union representatives' applications to telecommute, he found that this limited approval did not constitute knowledge or acquiescence at the national level. Award at 53. He also found that, once Agency headquarters discovered that Union representatives on official time were telecommuting, it ordered local supervisors to discontinue such arrangements." (See 60 FLRA 311 (2004))

However, the new FLRA appointees seem to be saying where there is no evidence of acting to challenge a practice, signing time sheets can show acquiescence. "Moreover, noting testimonial evidence to this effect, the Judge found it "undisputed" that the former district director, and another former district manager, signed employees' daily time sheets and were "aware" of the hours that employees worked. Judge's Decision at 7 n.10. This refutes the Respondent's claim that the disputed practice "was not condoned by management." (See 64 FLRA No. 25 (2009))

#5- TRUE. "The record before us does not provide a basis on which to conclude that the Union knew, or should have known, of the Respondent's intentions to limit the practice of providing bottled water. There is nothing in the record to show, for example, that at the time the practice was instituted, either the Union or employees were informed of any intended limitations on the practice. Moreover, shortly after the practice was initiated, the Union inquired about the water problem at a labor-management meeting.

According to the Respondent's notes regarding that meeting, the Union was ‘advised that management has provided bottled drinking water on the floors where the problem exists.' Respondent's Exh. E, item 13. Nothing in those notes shows that the Union was informed of any limitations on the practice." (See 38 FLRA 899 (1990))

#6- TRUE. Even a modest change in just one office out of hundreds in a unit requires advance notice and bargaining, particularly where a local responsible official is aware of it. "The Respondent asserts that a past practice was not established because the Agency's national office was not aware that the Hearing Office had a magnetometer and did not acquiesce in this local exception. We reject this argument. The Judge's finding that the HOCALJ 'is in overall charge of the facility' supports a finding that the HOCALJ is responsible for the management of the Hearing Office. Judge's Decision at 2. In this regard, the HOCALJ testified that when he takes an action, he is acting as an agent on behalf of the Agency. See Tr. at 150. 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." (60 FLRA 549 (2005))

#7- TRUE, at least under certain conditions. If the employee can establish that the practice relates to the position he will continue to hold at the new location, the practice must continue. "Contrary to the Judge, we find that the obligation to furnish those items continued after the transfer because the conditions of employment related to Romero in his status as Union representative, and, therefore, the Respondent was required to continue to provide them as long as Romero's work station was within the area of his jurisdiction as Union representative. . . . 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. . . . 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. . . .In our view, it is irrelevant whether Romero was transferred at his request or because of the needs of the Respondent." (See 38 FLRA 193 (1990))

#8- TRUE. "In this regard, an agency that implements a change in order to correct an unlawful practice is only obligated to bargain after implementation over the impact and implementation of the change." (See 55 FLRA 69 (1999)) But, what if an agency learns in November that an employee reimbursement it makes every September is illegal. Can it simultaneously announce immediate termination of the illegal practice and insertion of a replacement practice? Or, must it terminate the illegal practice and then bargain over the replacement practice since it has time before it need implement it? What if it had the choice between two or more replacement practices? The FLRA has not yet addressed that head on.

#9- TRUE. "Such a past practice may be established under these circumstances even where it is inconsistent with the terms of the parties' agreement." (See 55 FLRA 968 (1999)) However, do not overlook the importance of knowledge and acquiescence, which I have underlined below. "The practice initiated by the Respondent and the Union for employee Hensley specifically conflicted with the terms of Article 17 of the national agreement and therefore could not constitute a past practice binding upon HUD and AFGE in the absence of their knowledge and acquiescence. (See 55 FLRA 571(1999))

Nor should anyone ignore that an arbitrator's finding as to whether a practice inconsistent with contract is valid, gets deference. "Under Authority precedent, an arbitrator may appropriately determine whether a past practice has modified the terms of a collective bargaining agreement; such a determination is a matter of contract interpretation subject to the deferential essence standard of review." (See 61 FLRA 684 (2006))

#10- TRUE. "The Authority has held that where a past practice establishes a condition of employment, that condition of employment is incorporated into the parties' collective bargaining agreement." (See 60 FLRA 731 (2005). See also 5 FLRA 272 (1981)). However, it is far from clear what that means. The FLRA has relied on that holding to rule that a past practice can constitute a non-discretionary requirement, entitling an employee to back pay if ignored. But

does it also mean that a past practice is subject to ratification or agency head approval or even that either party has the right to insist that it be put in writing? Does it create "covered-by" protection or bar management from proposing to change a substantively negotiable practice during the life of a term agreement? Stay tuned.

Not every one of these rules is ironclad or immutable. Slightly different facts, alternate perspectives, or judicial prejudices could produce different results. Nor are these all the case precedents a good negotiator need be ready to tap into while bargaining. For example, who is a responsible official, when can a past practice expand the scope of bargaining, who has the power to demand bargaining when a change is purely local, is unwitting acquiescence valid, etc. (These have been drawn the 500 or so critical bargaining questions in *Collective Bargaining Law For the Federal Sector* (2009), published by www.deweypub.com/store/.)