Past Practice and Last Chance Agreements

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What is Past Practice?

A “past practice” is the way things have been done that becomes so consistent and a matter of reliance that it becomes a term of the contract.

Criteria To Create A Binding Past Practice

1. The practice was clear and applied consistently
2. The practice was not a special, one-time benefit given as an exception to a general rule

Criteria To Create A Binding Past Practice

3. Both the union and management knew the practice existed and management agreed with the practice or, at least, allowed it to occur
4. The practice existed for a substantial period of time and occurred repeatedly

How to Change a Past Practice

- Management must notify the union of its intent to change a practice and may have to bargain over the proposed change
- If “past practice” is contrary to law or government regulations management may unilaterally change the practice without bargaining either the decision to change the practice or the practice itself

How to Change a Past Practice

- Management may unilaterally change a past practice if contrary to clear and unambiguous contract language.
- But, be very careful with what you think is “clear and unambiguous.”

"Clear and Unambiguous"

"That plain meaning approach to contract interpretation which precludes consideration of extrinsic evidence unless an ambiguity is found has given way among many arbitrators who now recognize "extrinsic evidence is relevant for the preliminary inquiry of *whether* the questioned contract provision is ambiguous. A better approach would be to use extrinsic evidence… 'to prove meanings to which a contractual provision is reasonably susceptible.'"

City of Highland Park, Illinois (Arb. Sonneborn, 2020)

How to Change a Past Practice

Remember: potential impact and effects bargaining obligations

How to Change a Past Practice: Practice Violates Clear Contract Language

Example:

- Contract says, “When an employee takes the place of a Foreman for eight (8) consecutive hours, he shall receive the Foreman's rate of pay for all hours as acting Foreman.”
- In practice, employer paid acting Foreman’s pay for all hours worked.

How to Change a Past Practice: Practice Violates Clear Contract Language

Proposal During Negotiations:

"The City proposes no changes to this language, but specifically advises the Union that it intends to enforce this section as written, including but not limited to the fact that an employee must "take the place of a Foreman for eight (8) consecutive hours" in order to receive additional pay."

How to Change a Past Practice: Practice Violates Clear Contract Language

Alternatively:

- Consider your bargaining position:
  - Is it better to raise the issue during negotiations?
  - Or is it better to take your chances in arbitration?
- If you are going to pursue arbitration, beware the maxim: “you cannot receive in arbitration what you failed to achieve in negotiations.”

Consider Your Entire Agreement Clause

"This Agreement constitutes the complete and entire agreement between the parties, and concludes collective bargaining between the parties for its term. **This Agreement supersedes and cancels all prior practices and agreements**, whether written or oral, unless expressly stated in the Agreement….

Consider Your Entire Agreement Clause

"…. The Lodge specifically **waives** any right it might have to **impact or effects bargaining** for the life of this Agreement."

The Case of Tooth Hurty

- Village and Union have been parties to a collective bargaining agreement since 1990
- On 12/7/17, Grievant files a claim for reimbursement of a dental bill ($457)
- Village denies the claim
- Grievance filed and advanced to arbitration
- Evidence established:
  - Grievant continuously employed as part-time office clerical since 7/20/16
  - Grievant regularly works 4 hours a day or less

The Case of Tooth Hurty

- Union - Provisions in parties' CBA since inception
- Dental Insurance: "… for each member of the bargaining unit …"
- Recognition: "… all full or regular part-time employees …"
- Grievance Procedure:
  - "All grievances must be filed within 10 days of the event giving rise to the grievance, or within 10 days of when the grievant knew or reasonably should have known of event giving rise to grievance."
  - "… arbitrator has no power to add to, alter, disregard … terms of contract."

The Case of Tooth Hurty

- Village offers unrebutted evidence that for the past 27 years, employer has not granted dental insurance benefits to regular part-time employees
  - Insurance reimbursement forms – dental claims only available to “full-time” employees
  - Several requests by regular part-time employees for dental reimbursement have been denied with no grievance ever having been filed by the Union
  - Village does not contest that Grievant is a member of the bargaining unit

The Case of Tooth Hurty

- Union rebuts –
  - It had no knowledge that the Village was not living up to its obligations under the contract until the instant grievance was filed
- Parties agree that if Grievant had been a full-time employee, her claim would have been granted
- Employer asserts grievance untimely – if there has been a violation of the contract, it has been ongoing since 1990; “A grievance must be filed within seven (7) days of the date of the occurrence giving rise to the grievance or within seven (7) days after such violation reasonably could have been known to the Grievant.”

The Case of Tooth Hurty

YOU BE THE ARBITRATOR:

A. Grievance Denied – because it was untimely filed
B. Grievance Denied – because the parties' unbroken past practice has, in practical effect, amended the plain language of the contract
C. Grievance Granted – the Grievant is reimbursed for $457

The Case of Tooth Hurty: The Shoe is on the Other Foot

Consider Instead:

- The CBA now says that dental insurance benefits are provided to all “full-time bargaining unit employees.”
- For 30 years, the employer has allowed both full-time and part-time bargaining unit employees to participate in the insurance plan.

The Case of Tooth Hurty: The Shoe is on the Other Foot

Consider Instead:

- The Village hires a new HR Manager who reads the CBA and notices the Village has no contractual obligation to provide dental insurance to part-time employees
- During open enrollment, part-time employees are not offered dental insurance. The Village gave the Union no prior notice of the change.
- The Union grieves the unilateral change in benefits.

The Case of Tooth Hurty: The Shoe is on the Other Foot

YOU BE THE ARBITRATOR:

A. Grievance Granted – because the parties' unbroken past practice has, in practical effect, amended the plain language of the contract
B. Grievance Denied – the CBA does not require the employer to provide health insurance to part-time employees

What Else Could The Union Do?

Last Chance Agreements

What Is A Last Chance Agreement?

- Written agreement
- Between the Employer
- And the Employee
- And His Union Representative
- To Waive a “Cause” Standard for Future Discipline
- In Exchange for Lesser Discipline Today

When You Should Use A Last Chance Agreement

1. When the employee faces serious discipline, and the employer wants to limit its risks.
2. When special circumstances merit avoiding termination, but you want to avoid setting precedent.

When You Should Not Use A Last Chance Agreement

1. When the employee does not have a "cause" interest in continued employment:
   a) Probationary employees
   b) At-will employees
2. When there is no meaningful risk to the employee if the employee says "no" to the LCA
3. Be very careful about bluffing

The Role of the Union

Arbitrator Lamont Stallworth, 2014:

- Village and FOP had CBAs from 2004 to the present
- CBA at all times required “just cause” for discipline of non-probationary employees.
- In 2006, termination charges filed against Officer O. for twice failing to wait for backup when responding to emergency calls
- Charges withdrawn in exchange for a 7-day suspension with an LCA

The Role of the Union

- Agreement negotiated by attorneys for the Village and the Union.
- LCA provides that if Officer O. is found guilty of insubordination or excessive use of force, the penalty shall be termination.
- Agreement signed by Village and Officer O.
- In 2013, Officer O. is terminated for insubordination

The Role of the Union

Arbitrator's Ruling:

"As the Elkouri treatise discusses, an important feature that contributes to making a last-chance agreement enforceable in arbitration is that, although the last-chance agreement is not a part of the collective bargaining agreement, in the proper case it can be viewed as a modification of the master collective bargaining agreement in [its] application to special employees."

The Role of the Union

Arbitrator's Ruling:

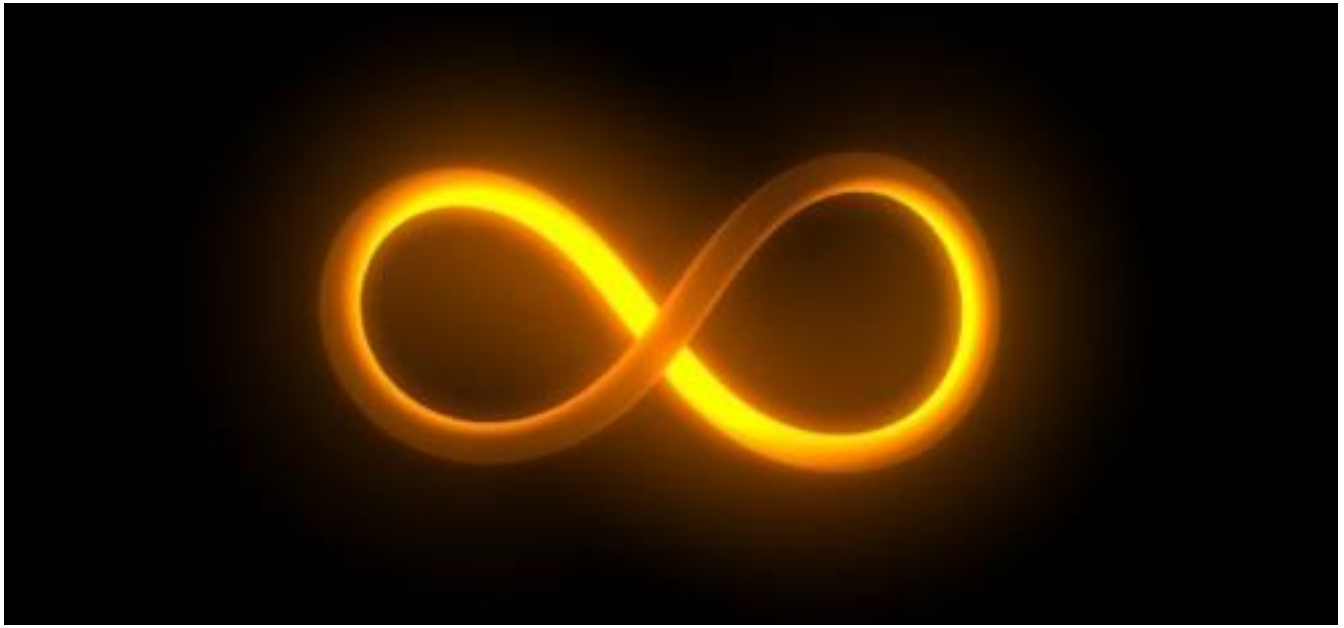
"In order for a settlement to be viewed as a modification of the collective bargaining agreement, however, the Union which is a signatory to the collective bargaining agreement must be involved. A contract may not be modified without the active involvement, or at least the clear acquiescence, of all Parties to the contract."

The Role of the Union

Arbitrator's Ruling:

"The fact that an IFOP attorney advised or represented the Grievant in the settlement negotiations cannot, in the opinion of the Undersigned Arbitrator, fulfill the need for Union involvement in the Settlement Agreement under the particular and unique circumstances of this case."

Length of the Last Chance Agreement



Length of the Last Chance Agreement

"[T]here is little question that the current thinking of arbitrators is … that a last chance agreement requires an ending date. And those agreements that have not had an ending date have been enforced only because the triggering event giving rise to the violation of the last chance agreement came within a reasonable time."

City of Flint, 128 LA (BNA) 609 (Arb. Roumell, 2010)

Common Subjects of Negotiation Within a Last Chance Agreement

1. Type of discipline to be issued
2. Length the Last Chance Agreement will be effective
3. Types of violations that will result in termination
4. Appeal rights if the employer decides there was a violation

Types of Violations

Example #1 – “probationary” type:

If during the two (2) years following his return to duty Employee violates any rule or regulation of the City, his employment shall be immediately terminated.

Types of Violations

Example #2 – middle ground:

If during the two (2) years following his return to duty Employee violates any non-trivial rule or regulation of the City, his employment shall be immediately terminated. "Non-trivial" is defined as conduct that would ordinarily result in a suspension of one day or more for employees not working under a Last Chance Agreement

Types of Violations

Example #3 – narrow grounds:

If during the two (2) years following his return to duty Employee commits the same or similar rule infraction to that which led to this agreement, his employment shall be immediately terminated. "Non-trivial" is defined as conduct that would ordinarily result in a suspension of one day or more for employees not working under a Last Chance Agreement

Appeal Rights

Example #1 – no challenge:

The parties specifically agree that this Last Chance Agreement specifically modifies and supersedes any “just cause” or other discipline standards in the current and successor collective bargaining agreements between the City and the Union and any successor union. Employee and the Union further agree that if Employee is terminated for any violation of this Agreement, the Union and Employee waive their right to file a grievance over the disciplinary action.

Appeal Rights

Example #2 – challenge facts only:

Employee and the Union further agree that if he is terminated for any violation of this Agreement, the Union and Employee waive their right to file a grievance over the disciplinary action or to appeal the matter to the Board of Fire and Police Commissioners, except that a grievance may be filed solely challenging whether the Agreement was actually violated.

To Be Or Not To Be?

Should The Agreement be “Non-Precedential?”

Special Situation:
LCA For Drug and Alcohol Violations

Be sure to address:

1. Treatment required
2. Must sign waivers to be able to verify compliance with treatment program
3. Pay and benefits while being treated
4. Who pays for treatment?

Special Situation:
LCA For Drug and Alcohol Violations

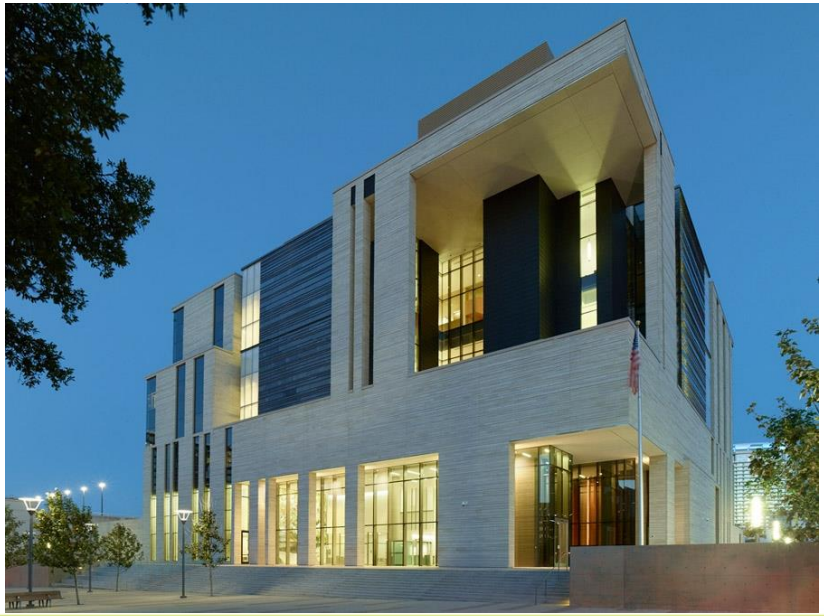
5. Does suspension time run concurrently with treatment?
6. Time in treatment is for benefit of employee and is not work time
7. Does penalty increase if there is a conviction/restriction on driving privileges?

Special Situation: LCA For Drug and Alcohol Violations

8. Suspicion-less testing upon return to work
   a) How long?
   b) How often?
   c) Supplements, does not replace, CBA testing

A Final Word of Caution

Remember Title VII and Similar Non-Discrimination Statutes



QUESTIONS