

Chief Executive Officer's Report

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The term "past practice" is one which is continually tossed about when a member or members believe the employer has violated either a term or condition of employment or long held method of operation within a department. While these occurrences do often exist, many do not rise to the level of a past practice. By simply claiming the employer repeatedly engaged in a pattern of conduct does not in and of itself create a past practice. A consistent and typically long term relationship must exist if the practice is to stand the test of time.

Although different definitions exist, and have been presented during various collective bargaining seminars you may have attended, one which has been most useful for my purposes is the following;

"A prior course of action which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances." Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance:

- 1) clarity and consistency
- 2) longevity and repetition
- 3) acceptability
- 4) a consideration of the underlying circumstances
- 5) mutuality

AFSCME v. Ramsey County, Minn., 309 N.W. 2d 785 (Minn 1981), AFSCME 309 N.W. 2d Id. at 788 n. 3.

Either through direct testimony, exhibits, or both it is extremely important each criterion be introduced and fully explained if the matter rises to the level of an arbitration. A past practice must be clearly articulated to employees and maintain a level of consistency. When no formal written policy exists, a directive or course of action acted upon by both supervisors and subordinates will meet this test. The method of conduct must also have longevity and be repetitive in nature. An action occurring once per year can eventually be deemed a past practice but may take years too mature, while an action occurring daily, weekly or monthly will obviously take less time to establish.

A practice will be deemed acceptable when both management and employees agree it is a legitimate method to managing a particular work situation. A perfect example of this is, shift bidding by seniority. Many contracts do not contain specific language spelling out the method of seniority shift bidding, but many departments do operate in this fashion. Time and time again if employees bid their shifts and are awarded their preference based upon seniority, this will be considered the accepted method of operation. If it can be established, the method of operation

was a common sense, or rational business sense approach, and even more so if it can be determined the approach was the current management style it will meet the criteria as a consideration of the underlying circumstances. And finally when all tests have been met and the practice has been agreed upon by management and labor the mutuality aspect will have been reached.

In and of themselves these criteria will not establish a past practice. Logically applying each one to your situation cumulatively will provide the basis to establishing a past practice.

As always contact me at the LELS office or at dwells@lels.org.