PAST PRACTICE: A THING OF THE PAST?

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Any school administrator knows, past practice is a panacea for every conceivable slight one can imagine for school employee unions. Until recently, once a practice was even hinted at in an arbitration, it was a herculean task to get the arbitrator not to buy in to the past practice argument. Until recently, that is.

Given the downturn in the economy, and the general lack of funding and consequent increase in unwarranted and frivolous demands, we have found arbitrators more inclined to dismiss a past practice argument than they ever have been in the past. While the underlying cases justifying the dismissal are not new, we have noticed a significant willingness to apply long-standing Pennsylvania Supreme Court and Commonwealth Court case law which has, in the past, been woefully ignored by arbitrators.

Recently, an arbitration award denied a grievance alleging a past practice violation on the use of sick leave at a school district in the region which heretofore would likely have been upheld on past practice. In this case, the arbitrator ruled that any practice preceding the new agreement is invalid with an integration clause and with language to the contrary in the collective bargaining agreement (CBA). It did not matter whether the language changed from the previous contract. Several additional awards have followed with similar rulings.

As most employers know, the Pennsylvania Supreme Court has identified four situations where an arbitrator may use evidence of a past practice:

- to clarify ambiguous language;
- to implement contract language which sets forth only a general rule;
- to modify or amend apparently unambiguous language which has arguably been waived by the parties; and
- to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement. *County of Allegheny v. Allegheny County Prison Employees Independent Union,* 476 Pa. 27, 34, 381 A.2d 849, 852 (1977). *Dep't of Corr. v. Pennsylvania State Corr. Officers Ass'n,* 38 A.3d 975, 981 (Pa. Cmwlth. Ct. 2011).

In *County of Allegheny*, the court refused to honor a past practice where the CBA had a "broad integration clause" providing that the written contract expressed the complete agreement of the parties. More recently, the courts have ruled that where a CBA makes no mention of past practices and also includes a broad integration clause, an arbitration award which incorporates into the agreement past practices which antedate the effective date of that agreement cannot be said to draw its essence from the CBA. *Dep't of Corr. v. Pennsylvania State Corr. Officers Ass'n,* 38 A.3d 975, 982 (Pa. Cmwlth. Ct. 2011). If your CBA does not contain an integration clause, that should be a negotiation goal.

The law is well-settled that it is incumbent upon the association to either bargain new terms or include a clause

asserting that all past practices remain in effect in order to have a practice survive. Where the asserted terms contradict express CBA terms or even where a contract is silent on the asserted terms, a past practice predating an agreement with a broad integration clause cannot survive. Where the union fails to bargain new terms or bargain in a past practice preservation clause but asserts a long standing past practice, the employer should argue that the union is attempting to procure at arbitration what it failed to get in bargaining.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.