

FAQ re: Past Practices

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The following presents a collection of frequently asked questions re: the current state of the case law on (b)(1) bargaining. It represents solely the personal conclusions and opinions of the author. 6/2/02

1. What is a past practice?

Past practice is a labor relations term of art that is used to describe a pattern of behavior that is clear and unequivocal, longstanding, known to both parties, and accepted without protest or significant attempt to stop the behavior.

If the pattern of behavior is not in conflict with law or controlling government-wide regulations, and if it involves a condition of employment of bargaining unit employees, it usually qualifies as a “past practice.”

2. What constitutes a “condition of employment?”

The Statute defines condition of employment as those matters involving the personnel policies, practices or other matters affecting working conditions.

3. Can a matter that does not actually involve a condition of employment become a past practice?

No. A matter that doesn't involve the conditions of employment of bargaining unit employees can't magically “ripen” into a past practice. See *IRS*, 27 FLRA 322, and *Fort Buchanan*, 37 FLRA 919.

4. What if management doesn't know about an alleged practice; for example, if employees are taking an extra break every afternoon without a supervisor's knowledge?

A pattern of behavior, no matter how often or how long repeated, does not become a valid past practice without the knowledge and implied consent of both parties. See *Dept. of Labor*, 38 FLRA 899 (1990), 90 FLRR 1-1633.

5. Can the exercise of a management right in the same manner over an extended period of time create a past practice?

No. Valid past practices cannot conflict with applicable law. And law—specifically the federal labor relations Statute—grants management the right to exercise certain enumerated rights. No claimed practice can override that statutory right. See *Federal Grain Inspection Service*, 18 FLRA 119 (1985), 85 FLRR 1-1168.

6. Can a practice replace a conflicting labor agreement provision?

In some cases, yes. Most arbitrators recognize that a written agreement constitutes the best evidence of the parties' intent in most situations. However, if a pattern of behavior is long

enough and clear enough, known to both sides and clearly in conflict with the contract, arbitrators will sometimes rule that the practice has modified or replaced the contract provision. See, for example, *Bureau of Land Management*, 12 FLRA 686

7. Can the failure of a single supervisor to properly apply the contract result in a conflicting past practice?

Not in most cases, though it has been ruled to have done so in some cases. See, for example, *Social Security Administration*, 9 FLRA 229 and *Social Security Administration*, 38 FLRA 193.

8. What if a conflicting past practice has been established?

Then it has the same status as a negotiated provision, and can't be changed without first bargaining. See *Bureau of Land Management*, 12 FLRA 686

9. What if a practice is in conflict with law or controlling government-wide regulations?

Then it is not a valid past practice, and the agency is entitled to terminate it without first having to obtain union agreement. Note, however, that the agency acts "at its own peril" in taking such action; i.e., if the practice is eventually found not to conflict with law or regulation, the agency is liable to a ULP finding. See *U.S. Marine Corps*, 34 FLRA 635; *Dept. of Justice v. FLRA*, 727 F.2d 481 (5th Cir. 1984); *Portsmouth Naval Shipyard*, 49 FLRA 1522, and *Naval Underwater Systems Center*, 30 FLRA 697.

10. Does the agency have to provide advance notice before terminating an "illegal" past practice?

Yes. Although there's no obligation to bargain on the change itself, the agency is still required to provide advance notice of the change and to bargain on the impact of the change, if any—though such bargaining doesn't have to be completed before the change is made. See *Customs Service, New Orleans*, 38 FLRA 163