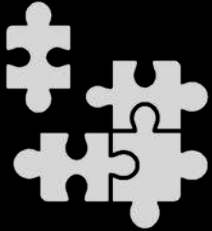


PAST PRACTICE & THE SLEA-SLSD COLLECTIVE BARGAINING AGREEMENT

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ELEMENTS OF PAST PRACTICE



CHALLENGES OF ESTABLISHING PAST PRACTICE



NAVIGATING PAST PRACTICE



ENFORCING PAST PRACTICES

PART I: PAST PRACTICE

DEFINITION

Past practice refers to a long-standing, accepted, and consistent way of doing things that is *not* explicitly addressed in the collective bargaining agreement (CBA). These practices can become binding on both the employer and the union, even if they are not written down.

THE CORE ELEMENTS OF PAST PRACTICE

To be considered a binding past practice, a practice must meet the following:

1. **CONSISTENCY**: The practice must have been consistently applied over a substantial period of time.
2. **CLARITY**: The practice must be clear and unequivocal.
3. **MUTUAL AGREEMENT**: Both the employer and the union must have been aware of the practice and accepted it as the norm.
4. **NON-CONTRACTUAL**: The practice must not be specifically addressed or contradicted by the CBA.
5. **SIGNIFICANCE**: The practice must be a significant matter affecting the terms and conditions of employment.

A LEGITIMATE PAST PRACTICE

Southern Lehigh SD has a long-standing practice requiring teachers to provide a note from a healthcare provider following three (3) or more consecutive sick days.

1. **CONSISTENCY**: The Office of Human Resources has enforced this practice for at least the last 10 years.
2. **CLARITY**: Three (3) or more days require a healthcare provider's note.
3. **MUTUAL AGREEMENT**: SLEA bargaining unit members have been complying with this directive for years.
4. **NON-CONTRACTUAL**: The practice is *not* addressed in Part V of the extant SLSD-SLEA CBA.
5. **SIGNIFICANCE**: The requirement limits the use of a benefit.

ESTABLISHING A PAST PRACTICE IS NOT AS EASY AS IT SEEMS

Labor arbitrators tend to employ strict definitions of each of the five (5) conditions:

1. **CONSISTENCY**: Near-perfect application (*at least 90%*) with leeway only for *exceptional* circumstances. The less frequent the practice, the longer it takes to establish length.
2. **CLARITY**: The practice has to be simple enough to be clear; practices riddled with nuances do *not* qualify.
3. **MUTUAL AGREEMENT**: Both parties are accountable for implementing the practice. The practice ends if one party “drops the ball” on enforcement (barring an *exceptional* reason).
4. **NON-CONTRACTUAL**: No text in the CBA speaks to the issue.
5. **SIGNIFICANCE**: Significance almost always means property (compensation and benefits) or fundamental aspects of the employment (working conditions).

A COMMON MISCONCEPTION

SLSD has allowed teachers for the last decade to leave work two (2) hours early on the last day of school before Winter Break.

1. **CONSISTENCY**: The Superintendent has permitted this practice for the last 10 years.
2. **CLARITY**: The practice is simple – two (2) hours early on the last day of school before Winter Break.
3. **MUTUAL AGREEMENT**: The Administration (under the direction of the Superintendent) allows it and SLEA is happy with it.
4. **NON-CONTRACTUAL**: The practice is *not* addressed in any part of the SLSD-SLEA CBA.
5. **SIGNIFICANCE**: There is **NO** property loss or significant change in working conditions.

CONCLUSION: This does *not* qualify as past practice.

NAVIGATING PAST PRACTICE

Past practices have a powerful effect on daily work life (arguably even more than the CBA language itself):

1. **"Fill in" gaps in the CBA.** The fewer the articles, the more likely past practices will govern your everyday work interactions. (Conversely, more articles mean the working environment becomes more prescriptive.)
2. **Both parties are accountable:** Past practice requires both parties to *mutually* implement a *significant* practice *consistently* with *clarity*. Thus, each party has certain expectations of the other.
3. **A past practice can survive a CBA:** Because a past practice is non-contractual, it can retain force after the old CBA expires and a new one is adopted (even if the new one eliminates the practice).

INVALID PAST PRACTICE

Past practice has low priority on the hierarchy of compliance. It *cannot* contradict the CBA or local, state, and federal law.

EXAMPLE: TEACHER EVALUATIONS

The SLSD-SLEA CBA does *not* have an article that speaks to teacher evaluations. The District's Supervisor of Humanities consistently failed to do a pre-observation meeting with her assigned teachers for several years. Not only has Central Office turned a blind eye to this practice but the assigned teachers do not care and have implicitly consented.

The practice meets all the criteria necessary to define past practice: **CONSISTENT, CLEAR, MUTUALLY AGREED UPON, NON-CONTRACTUAL, and SIGNIFICANT.**

However, it *cannot* be considered a past practice because **it contravenes state law**. Act 13 of 2020 requires pre-observation meetings. (This supervisor should, at a minimum, receive a Letter of Disciplinary Action.)

ENFORCING PAST PRACTICE

Once a past practice has been established, it has the force of contractual law and **the practice can be grieved**. Assuming the past practice is *bona fide* and legitimate, it becomes implied language. Thus, the union can grieve a breach of practice.

Remember that a **past practice can only be nullified through contract language**. Any elaboration of the CBA itself becomes part of the CBA (implied language). The Administration and the union must negotiate the proposed change during the contract's life (e.g., Side Letter, MoU) or the collective bargaining process.



WHAT DO I DO WHEN AN EMPLOYEE CLAIMS PAST PRACTICE?

You should *not* fear the claim that you have breached past practice. Instead, do the following:

QUESTION THE EMPLOYEE

Unfortunately, many bargaining unit employees (and even union leaders) have a nebulous understanding of past practice. It is important to ask the employees why they believe action is a past practice.

REFER THE MATTER TO HUMAN RESOURCES

Responding to a breach of past practice requires research into when the practice started, if it was ever discussed in writing (emails, prior instances of collective bargaining), if there is a history of grievances that led to or stemmed from the practice, etc.

ASK FOR ANY SUPPORTING DOCUMENTATION

If the union decides to file a grievance, remember that the burden of proof is on the accuser. That means the union must show that the past practice meets all five (5) criteria: **CONSISTENT, CLEAR, MUTUALLY AGREED UPON, NON-CONTRACTUAL, and SIGNIFICANT.**



PROVISIONS IN (AND NOT IN) THE CURRENT CONTRACT



THE (BUILDING-LEVEL) IMPLICATIONS OF PTO



YOUR ROLE IN THE NEGOTIATIONS PROCESS

PART II: CBA WORKING CONDITIONS

DEFINITION

Working conditions refer to the working environment and the relationship employers and employees have when performing their respective jobs.

They are one of the three (3) mandatory subjects of bargaining (the other two being compensation and benefits). Without an agreement on these three (3) subjects, there is no (new) contract.

THE SLSD-SLEA COLLECTIVE BARGAINING AGREEMENT

PROVISIONS IN THE CBA

Part II (Work Day, Year, Positions, Seniority) all define and impose controls on working conditions for SLEA bargaining unit members:

1. **WORK TIME (ALL)**: New teachers work 195 days (new teacher orientation, induction) whereas all others work 191 days. Workday is 7.5hrs but employees can be assigned an additional *unpaid* 15 hours (12 + 3 activity).
2. **WORK TIME (STUD SERV)**: Counselors (≥ 10 days, min 201); Tech Coaches & Speech Therapists (≤ 10 days, max 201); Nurses (≤ 3 days, max 194); School Psychologist (≤ 40 days, max 231) – all additional days paid per diem prorated salary.
3. **ASSIGNMENT**: SLEA employees must receive *preliminary* notice of assignment for the next school year by June 30th.
4. **SENIORITY**: Determined by [1] certification area, [2] years of service (in district), and [3] date of hire.

PROVISIONS NOT IN THE CBA

The following provisions are present in CBAs of other school districts *but are not* in the current SLSD-SLEA CBA:

1. **CLASS SIZE**: There are no provisions on class size for any grade level and/or certification area.
2. **PREP TIME**: There are no provisions on guaranteed preparatory time and, by extension, compensatory time for any grade level or educator type.
3. **ASSIGNMENT**: There are no controls on Administration as to which (appropriately) certificated employee can be reassigned to a new grade level or subject area.
4. **SAFETY**: There are no provisions related to building-level security (e.g., number of SROs, campus patrols) or classroom safety (e.g., mandated trainings, required safety equipment).

IN THE ABSENCE OF THESE PROVISIONS, PAST PRACTICE OR LOCAL/ STATE/ FEDERAL LAW PREVAILS.

PAID TIME OFF AND ITS IMPLICATIONS FOR BUILDING CLIMATE AND CULTURE

THE CBA & PTO

Paid Time Off (PTO) is a generic term for sick, personal, bereavement, personal, and all other leave types. Part V of the CBA defines and imposes controls on the use of PTO:

1. **THE SLSD-SLEA CBA:** 10 sick days, up to five (5) bereavement days, two (2) personal days, and two (2) emergency days; sick and personal have carryover provisions.
2. **SABBATICALS:** Sections 1166-1171 of the Public School Code *guarantees* all professional employees the right to either a professional development (“academic”) or restoration of health (“medical”) sabbatical for up to one academic year.
3. **FMLA:** FMLA entitles any employee of an employer with at least 50 employees to a minimum of six (6) and a maximum of 12 weeks of leave for an *approved* medical condition.

KEEP IN MIND THAT THE CBA AND BOARD POLICIES CAN IMPOSE CONTROLS/ RIGHTS TO THESE LEAVES.

PTO IS NOT AN UNREGULATED RIGHT!

We expect employees to use their PTO but the problem arises when there is a deliberate pattern in usage.

- (1) **TALK TO THE EMPLOYEE:** Some employees are greater offenders than others. Speaking to the “offending” employee about his/her reasons for the absence(s). There may be a worthwhile reason.
- (2) **CONSULT WITH HR:** We can require an employee to present a healthcare provider’s note even for a day’s absence.
- (3) **CBA CONTROLS:** The contract permits the Administration to limit personal days to 10% of each building’s population.

YOUR ROLE IN THE NEGOTIATIONS PROCESS

As the building leader, the working conditions language will affect you more than any other administrator. So, your voice is essential in helping us craft viable and meaningful proposals.

Dr. Trinkle will chair the **WORKING CONDITIONS COMMITTEE**, which will (1) review the current language in Part II and V of the CBA, (2) draft proposals, and (3) evaluate counter proposals.

DON'T ASK FOR THE MOON!

Because chances are you are *not* going to get it.

- (1) **WHAT YOU WANT VS. WHAT YOU NEED:** A *want* may make your life easier, but a *need* is something that will *improve* school climate as well as promote teaching and learning.
- (2) **THINK LONG-TERM:** You will likely *not* solve all your problems in one contract so consider proposals for the current contract that are a stepping stone for the next.
- (3) **HOPE FOR THE BEST BUT PLAN FOR THE WORST:** You are welcome to propose what I call a “shock proposal” (one that lets the opposing side know this is a major issue). But you will need to be flexible or risk the topic being dismissed in its totality.



PARTING THOUGHTS



" WE HAD THE UNION MEETING HERE BECAUSE I FELT THIS WAS THE MOST APPROPRIATE PLACE TO PRESENT MANAGEMENT'S CONTRACT OFFER. "

"What do we care about?
We care about the
satisfaction of human
needs. We care about the
welfare of the working
people. We care about
the future of our
children."

-Samuel Gompers
*(First President of the
American Federation of
Labor,
1866-1924)*