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Understanding Past Practices

It is not unusual for a public employer to fail to follow the exact wording of a contract with its employees. However, once the employer realizes that its conduct contradicts the contract, the employer may revert to following the contract terms. This is especially true if an employer continues to disregard the wording of a contract over time to the benefit of its employees. In response, employees frequently charge that the employer's deviation from the contract constitutes a "past practice" and should be followed instead of the contract language. A recent case presents a good example of this scenario and how New Jersey courts address the issue of past practices versus express contract terms.

In *Essex County Prosecutor's Office v. P.B.A. Local 325 and the Essex County Superior's Office Association*, the Appellate Division reviewed a trial court decision upholding an arbitrator's award in favor of Essex County Prosecutor's Office. The case focused on the conflict between a written contractual provision concerning vacations days and a verbal agreement between the Prosecutor's Office and the P.B.A., which the P.B.A. alleged should govern as a past practice. The Court was asked to determine which agreement governed the entitlement to and use of vacations days, the written contractual provision or the verbal agreement.

For roughly eighteen years, the written contract between the Prosecutor's Office and the P.B.A. contained a schedule granting vacation days based upon years of service. The provision also contained language that allowed a maximum number of vacation days that could be carried over into a successive year if not utilized in the year in which they were earned. The contract had been renegotiated several times through the years, but the terms of the vacation provision always remained the same.

However, both the Prosecutor and the P.B.A. agreed that the practice of accumulating and carrying over of vacation days varied from the express terms of the contract in several ways and for many years. For example, the Prosecutor's Office routinely granted officers extra vacation days in a given year above the amount granted in the contract and also allowed officers to carry over more vacation days than provided for under the written contract. (*cont'd* ➔)

In 2004, the Acting County Prosecutor began to enforce the contract as it was written, thereby reducing the vacation benefits to which the P.B.A. had grown accustomed. In response, the P.B.A. filed a grievance. Initially, the arbitrator decided the grievance in the P.B.A.'s favor by determining that the vacation procedure should be interpreted in accordance with the longstanding practice between the parties rather than as written in the contract. The arbitrator also found that as the parties were in interest arbitration before PERC at the time the Prosecutor altered the vacation practice, he had violated N.J.S.A. 34:13A-1, the Public Employment Relations Act (the "PERC Act"), which prohibits changing the terms and conditions of employment during the pendency of interest arbitration.

The Prosecutor subsequently filed an order to show cause with the Superior Court seeking to vacate the arbitrator's award. After hearing oral argument, Judge Klein rejected the arbitrator's award finding that the arbitrator exceeded his authority when he ignored the "clear and unambiguous" language of the contract concerning the manner in which vacation days were earned. The Judge noted that in doing so, the arbitrator had effectively rewritten the contract and reached a result that neither party had bargained for during negotiations. The Judge also determined that the arbitrator wrongly concluded that the decision to alter vacation benefits while interest arbitration was pending.

The P.B.A. appealed Judge Klein's award to the Appellate Division, asking the Court to reverse her ruling and arguing that it was an unwarranted interference in the grievance process. The P.B.A. also argued that the arbitrator's ruling should stand as it was reasonably debatable. The Appellate Court disagreed and affirmed Judge Klein's ruling, holding that the arbitrator's decision was contrary to public policy and that he improperly applied a past practice to depart from the unambiguous terms of the contract for which the parties had negotiated. The Appellate Division noted that the contract clearly specified the

amount of vacation time to which officers were entitled to and what limitations existed regarding carrying unused time from year to year. The Appellate Division also recognized that the agreement was renegotiated several times, but that the vacation provision was approved each time by both parties without any changes. As a result, the Appellate Division affirmed the trial judge's holding that the express contract language, not the past practice, should prevail.

In general, a past practice will not overrule clear and unambiguous contract language. If an issue arises as to the enforceability of a past practice, the first step is to review the contract language at issue so that you have a complete understanding of its meaning. The next step is contact the P.B.A.'s counsel to discuss whether the filing of a grievance is warranted.



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact D.B. Ross, Jr. (dross@lindabury.com) or Eric B. Levine (elevine@lindabury.com) of the Public Safety Law Group.



With more than 33 years in the practice of law **D.B. Ross, Jr.** has a national reputation as a labor relations expert and is a respected negotiator. He has developed a concentration in the critical areas of police labor relations and has negotiated hundreds of labor contracts. He can be contacted at dross@lindabury.com



Eric B. Levine has over ten year's legal experience. He has significant experience in contract negotiations, mediations, and arbitrations before New Jersey Public Employee Relations Commission labor arbitrators. *He can be contacted at elevine@lindabury.com.*

