

97-016

**STATE OF OHIO  
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Defiance City School District Board of Education,

Respondent.

Case No. 96-ULP-09-0544

**DISSENTING OPINION**

MASON, Board Member:

I disagree with the majority's finding that the School Board committed no violation when it unilaterally changed the established past practice of providing the six High School English Composition teachers with two planning periods each day since at least 1980. I find that this past practice did not conflict with the collective bargaining agreement but interpreted it and as such was clearly established as a term and condition of employment. Therefore, the School Board should have bargained over the change.

It is well established that a practice that is unequivocal, clearly acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties qualifies as what is called in the trade a past practice. There is no dispute in the case at issue that the practice of providing the six High School English Composition teachers two planning periods each day qualifies as past practice. This practice was unequivocal, it was clearly enunciated and acted upon, and was readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties, in this case since 1980. There also is no dispute that planning periods for teachers is a mandatory subject of bargaining. I differ from the majority in analyzing the relationship between past practice, the collective bargaining agreement, the duty to bargain under O.R.C. Chapter 4117, and its application to the case at issue.

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an ordinary contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.<sup>4</sup> The source of rules governing the community of the industrial plant cannot be restricted to the words of the contract but must be considered in light of the common law of the shop which implements and furnishes the context of the agreement.<sup>5</sup> Hence, because collective bargaining agreements cannot cover every detail of life in the workplace, the parties' course of performance may be the best evidence of their intent in using a particular term.<sup>6</sup> Moreover, it is not unusual for the parties to a labor agreement to develop working relationships, customs, and practices which are understood to be the norm, but which are nowhere reduced to a formal contract term. When long-standing practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change as though it were part of the collective bargaining agreement itself.<sup>7</sup>

Let us apply these principles to the case at issue. The record shows that the past practice of providing the six High School English Composition teachers two planning periods each day has been in place since 1980.<sup>8</sup> In 1984 the parties added Article XII(G)(3)(b), which establishes a minimum standard of one planning period for all members of the bargaining unit, and this Article has existed in every collective bargaining agreement between the parties since 1984.<sup>9</sup> The addition of Article XII

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<sup>4</sup>*United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347, 1351 (1960).

<sup>5</sup>*Id.* at 580, 80 S.Ct. at 1351, quoting *Cox, Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1499 (1959).

<sup>6</sup>*Martinsville Nylon Employees v. NLRB*, 140 L.R.R.M. 2873 (D.C. Cir. 1992).

<sup>7</sup>*BMW Lodge 16 v. Burlington Northern*, 802 F.2d 1016, 1019, 123 L.R.R.M. 2593, 2597 (8th Cir. 1986).

<sup>8</sup>Finding of Fact (A.F.F.) No. 9.

<sup>9</sup>F.F. No. 5.

did not in any way change the practice of providing the High School English Composition teachers two planning periods. The practice of providing two planning periods to all High School English Composition teachers does not in any way conflict with Article XII(G)(3)(b), since this Article only establishes a minimum level of one planning period. The past practice of providing the High School English Composition teachers two planning periods clearly complies with this Article since, obviously, two is not less than one. As a matter of fact, since other teachers were provided with only one planning period, Article XII was a perfect accommodation of both the well established practice of two planning periods for the High School English Composition teachers and the provision of only one planning period for other teachers. There is no reason to doubt that this was the intention of the parties when this Article was drafted.

During the negotiations for the 1993-1996 collective bargaining agreement, for the first time, the School Board proposed to eliminate the past practice involved in Article XII(G)(3)(b). This proposal was objected to and the School Board withdrew it.<sup>10</sup> Clearly there was no meeting of the minds to abolish the practice of two planning periods for the High School English Composition teachers. This history of negotiations clearly shows that the School Board acknowledged the existing past practice, tried to negotiate a change, and when unsuccessful during the negotiations made a unilateral change without notice during the term of the collective bargaining agreement. Such a tactic is unfair, does not comport to established SERB law, and does not promote constructive relations, the purpose of the collective bargaining act.<sup>11</sup> The School Board should have notified the teachers= exclusive representative of its intent to change this term of employment, should have bargained in good faith if the union so requested, and only after reaching impasse could have implemented the change.<sup>12</sup>

The majority=s finding that the contract *expressly* allowed the School Board to unilaterally reduce the number of planning periods of the High School English Composition teachers defies law

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<sup>10</sup>F.F. No. 10.

<sup>11</sup>See O.R.C. § 4117.22.

<sup>12</sup>*In re SERB v. Youngstown City School Dist Bd of Ed*, SERB 95-010 (6-30-95).

and logic. Article XII(G)(3)(b) states that no member of the bargaining unit who teaches grades seven through twelve shall be provided with *less* than one planning period per day. But that is the only clear and unambiguous meaning of this Article. The Article does not *expressly* say how many more planning periods can be provided, who should be provided with them, or how it should be determined whether to provide more than one. None of these issues has a clear and unambiguous answer in the relevant Article. In this case the 17-year-old past practice indicates that the parties acknowledged that teaching a particular subject matter warranted an additional planning period over and above the minimum.<sup>13</sup>

The majority first took it upon itself to modify Article XII(G)(3)(b) by reading into it that the parties agreed to give the employer the discretion to unilaterally determine how many planning periods teachers may have as long as it is no less than one, and then analyzed the majority-modified Article as a clear and unambiguous provision giving the employer the discretion to unilaterally determine how many planning periods teachers may have as long as it is no less than one. This is clearly a circular argument.

Nowhere does Article XII contain any language conferring on the School Board the discretion to unilaterally change the number of planning periods for the High School English Composition teachers. As a matter of law, implying that the parties intended to confer such discretion on the School Board is tantamount to finding that the union waived its statutory right to bargain on a term and condition of employment. The established law on such a waiver, including SERB=s law<sup>14</sup>, is that a waiver of statutory right must be clear and unequivocal. The language of this Article does not constitute a waiver by the union of its statutory right to bargain the elimination of 50% of the planning periods for the High School English Composition teachers. As SERB stated, it is proper to consider contract language, bargaining history, and extrinsic evidence in determining whether a statutory right has been waived. \* \* \* we do not hold that contract language must specifically waive

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<sup>13</sup>For example, Ms. Harmon is performing more work outside the contractual work day, up to 12 hours per day, as a result of the reduction in the planning periods. See F.F. No. 15.

<sup>14</sup>*Id.* See also *In re City of Akron*, SERB 97-006 (5-1-97).

the right to bargain over a particular issue before the conduct of the parties can be considered. A party=s intent can be best determined by examining all the foregoing factors together.<sup>15</sup>

Had the Article at issue read, *“All teachers shall have one planning period,”* it would not have readily accommodated the past practice of providing two planning periods to the High School English Composition teachers. Had the Article at issue read, *“The School Board reserves the right to change the number of planning periods as long as it is at least one,”* then the School Board may arguably reduce the planning periods of the High School English Composition teachers from two to one without bargaining. However, neither scenario is present in this case.

The language the parties agreed to in the Article at issue reserves some rights for the School Board in regard to determining the number of planning periods, but the language is not specific enough to establish by itself a clear and unmistakable waiver by the union of its right to bargain on changing the number of planning periods for the High School English Composition teachers. In this situation, under *Youngstown*<sup>16</sup>, it is proper to consider, in addition to contract language, bargaining history and extrinsic evidence in determining whether a statutory right has been waived. Under the specific facts of this case, which include a history of over 17 years of established past practice providing High School English Composition teachers two planning periods daily; where the language of the Article at issue readily accommodates this past practice, which existed both before and after the Article was added to the contract; and where the School Board tried unsuccessfully to negotiate this past practice out of the contract, clearly no waiver by the union of a statutory right can be found.

The majority today creates a new policy on waiver, according to which general language solely will constitute a waiver of a statutory right. This policy conflicts with any and all established law on what constitutes a waiver, including SERB=s own established policy in *Youngstown*. Moreover, the majority=s policy will tend to promote voluminous contracts as parties attempt to cover every imaginable aspect of every subject, whether or not it is at issue at the time of the

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<sup>15</sup>*Youngstown, supra* at 3-81.

<sup>16</sup>See n.12 above.

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negotiations, for fear that what is left unspecified will constitute a waiver of statutory bargaining rights. This policy also may cause many more impasses and potential strikes, due to this unnecessary increase of difficult and contentious issues during negotiations of collective bargaining agreements.

One final note. The majority claims that the mere fact that the School Board has not chosen to enforce its contractual rights in the past does not mean that it is forever precluded from doing so. The School Board had no *expressed* right under Article XII(G)(3)(b) to eliminate 50% of the planning time for the High School English Composition teachers, and on the contrary, there exists past practice that established the two planning periods as a condition of employment. The question of whether the past practice should be granted a binding effect as an implied term of the contract precluding the employer's unilateral change (*i.e.*, "enforce its contractual rights") is an issue properly decided by an arbitrator. On the other hand, the statutory obligation to bargain does not require the employer to forfeit its contractual "reserved rights"; it requires notifying the union of its intentions, bargaining in good faith upon request, and implementing only upon impasse.

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**ORDER**  
**(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman McGee, and Board Member Mason:  
November 20, 1997.

On September 26, 1996, the Defiance City Education Association OEA/NEA filed an unfair labor practice charge against the Defiance City School District Board of Education ("Respondent") alleging that the Respondent has violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5). On November 21, 1996, the State Employment Relations Board ("Board" or "Complainant") determined that there was probable cause to believe that Respondent has committed an unfair labor practice by unilaterally changing the High School English Composition teachers' work schedule and workload and refusing to bargain over the matter. On December 16, 1996, the Board issued a Complaint against the Respondent alleging violations of Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

A hearing was conducted on February 11, 1997. On April 15, 1997, the Hearing Officer's Proposed Order in the above-styled case was issued. Exceptions to the proposed order and responses to exceptions were filed.

The Board has reviewed the record, the Hearing Officer's Proposed Order, exceptions, and responses. For the reasons stated in the attached opinion, incorporated by reference, the Board amends Conclusion of Law No. 3 to read: "The Respondent's elimination, without bargaining, of one of the High School English Composition teachers' planning periods does not violate §§ 4117.11(A)(1) and (A)(5)."; adopts the Findings of Fact and Conclusions of Law, as amended, in the Hearing Officer's Proposed Order; dismisses the complaint; and dismisses the charge with prejudice.

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It is so ordered.

POHLER, Chairman, and McGEE, Vice Chairman, concur; MASON, Board Member, dissents.

  
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SUE POHLER, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen (15) days after the mailing of the Board's order.

I certify that this document was filed and a copy served upon each party on this  
21st day of November, 1997.

  
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LINDA S. HARDESTY, LEGAL ASSISTANT

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**OPINION**

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB") on exceptions and responses to exceptions to the Hearing Officer's Proposed Order issued on April 15, 1997. For the reasons stated below, we find that the Defiance City School District Board of Education ("School Board") did not violate Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) when it eliminated, without bargaining, one of the High School English Composition teachers' two planning periods.

**I. BACKGROUND<sup>1</sup>**

The Defiance City Education Association OEA/NEA ("Association") is the deemed-certified exclusive bargaining representative for the teaching personnel in the Defiance City School District. The Association and the School Board were parties to a collective bargaining agreement effective August 15, 1993 through August 14, 1996. The parties mutually consented to extend the agreement through the 1996-1997 school year.

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<sup>1</sup>Finding of Fact Nos. 1-5, 8-11, 13, 15.

Article XII(G)(3)(b) of the collective bargaining agreement, a provision that has been included in every collective bargaining agreement between the parties since 1984, states:

b. Full time Secondary (7-12)

Members of the bargaining unit who teach grades seven through twelve shall be provided a minimum of one (1) planning and conference period per day.

The High School English Composition teachers in the bargaining unit have had two planning periods each day since at least 1980. There are 60 teachers employed at the High School. Except for the vocational and home economics teachers, all of the remaining faculty members have one planning period. The English Composition teachers used this extra planning period to prepare and grade the structured writing curriculum for that course.<sup>2</sup>

During negotiations for the parties' 1993-1996 collective bargaining agreement, the School Board proposed an amendment to the planning periods provision so that no evidence of past practice could be relied upon in the grievance procedure; the School Board later withdrew this proposal. In late 1995 or early 1996, the School Board authorized the Superintendent to reduce the number of planning periods from two to one for the six High School English Composition teachers for the 1996-1997 school year as a "budget cutting device."<sup>3</sup> Every time between then and August 1996 when the Superintendent or the High School Principal would mention to Deborah Harmon, the Association President and a High School English Composition teacher, the *possibility* of reducing the planning periods to one, she would respond that doing so would constitute an unfair labor practice. The School Board did not provide any notice of an actual change to be implemented in the coming school year to the Association. Ms. Harmon did not learn of the reduction in planning periods until the day before school started when she received her class schedule.

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<sup>2</sup>Transcript ("T.") 172.

<sup>3</sup>T. 196-197.

## II. DISCUSSION

O.R.C. §§ 4117.11(A)(1) and (A)(5) state as follows:

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Chapter 4117. of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;

\* \* \*

(5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code[.]

The issue before us is whether the School Board violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when it reduced one of the High School English Composition teachers' two planning periods without bargaining first with the Association. The School Board acknowledged that it did not bargain with the Association before the elimination of one of the High School English Composition teachers' planning periods. The School Board claimed that Article XII(G)(3)(b) of the collective bargaining agreement mandates a minimum of one planning and conference period per day; thus, reducing the conference periods from two to one is within the framework of the contract and is not a change that invokes bargaining rights. We find that the School Board acted within the negotiated limits of the collective bargaining agreement and, thus, was not required to bargain further over this subject.

### A. What Is a Past Practice?

A past practice is a custom or practice evolved as a normal reaction to a recurring situation; it must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances.<sup>4</sup> According to the National Labor

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<sup>4</sup>See *Juniata-Mifflin Tech. School v. Corbin*, 155 L.R.R.M. 2108, 2110-2111 n.7 (1997); *County of Allegheny v. Allegheny County Prison Employees Independent Union*, 476 Pa. 27, 34 n.12, 381 A.2d 849, 852 n.12, 96 L.R.R.M. 3396, 3397 n.12 (1978).

Relations Board: "It is well settled that an employer's 'past practice' refers to an activity which has been satisfactorily established by practice or custom."<sup>5</sup> The nature of the past practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a term or condition of employment.<sup>6</sup>

To determine whether an employer's unilateral change constitutes an unfair labor practice, SERB will look first to the collective bargaining agreement. If there is no contractual language on point, SERB will then look to any past practice on this issue, focusing on whether the past practice is a term or condition of employment. If the past practice was a term or condition of employment, the Board must then determine whether it was a mandatory or permissive subject of bargaining. A past practice is not automatically a mandatory subject of bargaining merely because it is a term or condition of employment. The Board must look at the issue itself to see if it is mandatory or permissive by applying the *Youngstown* balancing test, where appropriate, to determine whether a particular item affects wages, hours, and terms or conditions of employment or is a managerial prerogative.<sup>7</sup> Where both tests are met, the various competing interests of the public employer and the public employees are balanced to determine whether a particular issue is a mandatory subject that must be bargained.

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<sup>5</sup>*Dow Jones & Co.*, 150 L.R.R.M. 1089, 1091 (NLRB 1995). See also *Exxon Shipping Co.*, 291 NLRB 489, 131 L.R.R.M. 1233 (1988).

<sup>6</sup>The "term or condition of employment" approach is consistently followed by the federal courts as well as the public sector jurisdictions. Federal cases: see, e.g., *Smiths Industries, Inc. v. NLRB*, 152 L.R.R.M. 2475 (6th Cir. 1996); *Borden, Inc. v. NLRB*, 19 F.3d 502, 145 L.R.R.M. 2833 (10th Cir.), cert. denied, 115 S.Ct. 316, 147 L.R.R.M. 2512 (1994); *NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 64 L.R.R.M. 2320 (8th Cir. 1967). Public sector jurisdictions: see, e.g., *City of Detroit v. Goolsby*, 151 L.R.R.M. 2787 (MI Ct.App. 1995); *Board of County Comm'rs of Orange County v. Central Fla. Professional Fire Fighters Assn.*, 467 So.2d 1023 (FL Ct.App. 1985); *Oberle v. City of Aberdeen*, 139 L.R.R.M. 2337, 2344 (SD S.Ct. 1991); *Appeal of Town of Rye*, 154 L.R.R.M. 2653 (NH S.Ct. 1995); *Rhode Island v. R.I. Council 94*, 155 L.R.R.M. 2071 (RI S.Ct. 1997); *Shamong Township Bd. of Education*, 19 NJPER ¶ 21213 (NJ PERC 1990); *County of Nassau*, 26 NYPER ¶ 3083 (NY PERB 1993).

<sup>7</sup>*In re SERB v. Youngstown City School Dist Bd of Ed*, SERB 95-010 (6-30-95).

The School Board argued that past practice does not apply in this case since the High School English Composition teachers are only a part of the bargaining unit and a practice that is not uniformly applied to all members of the bargaining unit cannot constitute past practice. This argument is not persuasive. Bargaining units often include a variety of employee subgroups with different conditions of employment and different needs, all reflected in different terms and conditions of employment.<sup>8</sup> If the subgroup is clearly defined and the specific practice is applied consistently and uniformly to the members of the subgroup, we will consider whether a past practice was established for the subgroup.<sup>9</sup> In the present case, the School Board has established a past practice that provides two planning periods per day to the High School English Composition teachers, absent any contractual language to the contrary.

***B. What Effect Does a Past Practice Have on Subsequent Contract Language?***

The law in Ohio is well-settled that if a contract is clear and unambiguous, the court need not go beyond the contract's plain language to determine the rights and duties of the parties.<sup>10</sup> Thus, parol evidence is unnecessary when the intent of the parties can be determined by examination of the writing alone.<sup>11</sup> "We are mindful that where, after negotiations, parties reduce mutual promises to an integrated, unambiguous writing executed by them, a court will not give such a contract 'a construction other than that which the plain language provides.'"<sup>12</sup>

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<sup>8</sup>*In the Matter of North Arlington Board of Education*, 23 NJPER ¶ 28077 (NJ PERC 1997).

<sup>9</sup>*In the Matter of Shamong Township Board of Education*, 16 NJPER ¶ 24233 at n.11 (NJ PERC 1990).

<sup>10</sup>*Uebelaker v. Cincom Systems, Inc.* (1988), 48 Ohio App.3d 268.

<sup>11</sup>*Yoder v. Electric Co.* (1974), 39 Ohio App.2d 113; *Blatnick v. Shell-Globe Corp.*, Appeal No. 56695 (CA, Cuyahoga, 1990) (unreported).

<sup>12</sup>*Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 544 N.E.2d 920, syllabus; *Blatnick v. Sheller-Globe Corp.* App. No. 56695 (CA, Cuyahoga, 5-17-90) (unreported).

This view is shared by other public sector jurisdictions regarding past practices.<sup>13</sup> For example, when an employer began to enforce a collective bargaining agreement provision calling for secretaries to work a specific number of hours per day, the union presented evidence that the employer had a conflicting past practice of a reduced work day for secretaries during holidays and recess periods. The New Jersey Public Employment Relations Commission ("NJ PERC") held that there was no evidence that the contract language incorporated the reduced hours and that the contract language gives the employer the right to have a specific workday length throughout the year.<sup>14</sup> The NJ PERC also held: "Where clear and unambiguous contract language grants a benefit to employees, an employer does not violate the [New Jersey Employer-Employee Relations] Act by ending a past practice granting more generous benefits and by returning to the benefit level set by the contract."<sup>15</sup>

In a California case, the collective bargaining agreement stated that all teachers were to teach no more than 25 hours per week, and six periods per day (five classes, one preparation period), excluding only drivers' education teachers from this requirement. The California Public Employment Relations Board held that these provisions established a ceiling or maximum teaching assignment below which the employer had the freedom to operate consistently with the collective bargaining agreement; thus, the employer could lawfully require special education teachers to teach five classes although historically they had only taught four classes.<sup>16</sup>

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<sup>13</sup>See *New Brunswick Board of Education*, 4 NJPER ¶ 84 (NJ PERC 1978), *aff'd* App. Div. No. A-245-707 (1979); *Illinois Departments of Central Management Services and Corrections*, 5 PERI ¶ 2001 (IL SLRB 1988); *Port Huron Education Assn. v. Port Huron Area School District*, 452 Mich. 309, 550 N.W.2d 228 (MI S.Ct. 1996); *Rapid City Education Assn. v. Rapid City School District*, 433 N.W.2d 566 (SD S.Ct. 1988).

<sup>14</sup>*Kittatinny Regional Board of Education*, 17 NJPER ¶ 22230 (NJ PERC 10-1-91).

<sup>15</sup>*Id.* at 475. See also *Marysville Joint Unified Teachers Assoc.*, 7 PERC ¶ 14163 at p. 639 (5-27-83) (citation omitted), where the California Public Employment Relations Board held: "The mere fact that an employer has not chosen [to] enforce its contractual rights in the past does not mean that *ipso facto*, it is forever precluded from doing so."

<sup>16</sup>*Grossmont Union High School Dist.*, 7 PERC ¶ 14162 (CA. PERB 1983). See also *Pascack Valley Board of Education*, 6 NJPER ¶ 11281 (NJ PERC 1980).

The Michigan Employment Relations Commission ("MERC") declined to find a past practice constituting a term or condition of employment where, pursuant to express contractual provision, the employer retained the option to deviate from the alleged "past practice."<sup>17</sup> The City of Detroit had a written agreement specifying "triggers" for various levels of discipline that dictates what level of the six-step disciplinary procedure would be applied to a particular employee. Pursuant to the agreement, the "triggers" were to be set by reference to the average absences of the city's Department of Transportation ("DOT") employees in the previous year. Despite its express reservation of the right to adjust the "triggers" each year on the basis of actual absences, DOT did not do so for seven years. The union contended that the city's "past practice" of failing to readjust the "triggers" created a term or condition of employment that could not be unilaterally altered. The MERC rejected this theory, noting that there was no conflict between the failure to readjust and the language of the policy that allowed, but did not require, readjustment. The MERC also opined that merely refraining from action does not establish a "past practice" precluding future action, and found no evidence that the city had consented to the elimination of its express option contained in the written policy to readjust the "triggers" for disciplinary action.

This view is also mirrored in the federal courts. For example, one Court held that rail carriers cannot rely solely upon past practices to change the otherwise unambiguous language of the agreement.<sup>18</sup> Reliance upon past practice is appropriate where a contractual term is silent on a particular issue or is ambiguous as to that issue or where it makes explicit reference to such practices.<sup>19</sup> The law of the shop cannot be used to modify the clear and unambiguous language of the collective bargaining agreement.<sup>20</sup>

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<sup>17</sup>*AFSCME v. Detroit Transportation Dept.*, 2 MPER ¶ 20030 (MERC 1989).

<sup>18</sup>*BMW v. Santa Fe Railway Co.*, 155 L.R.R.M. 2153, 2158-2159 (DC CIII 1996).

<sup>19</sup>*Judsen Rubber Works, Inc. v. Manufacturing, Prod. & Serv. Workers Union Local No. 24*, 889 F.Supp. 1057, 1062-64, 149 L.R.R.M. 2641 (N.D. Ill. 1995).

<sup>20</sup>*I.A.M., Progressive Lodge No. 1000 v. General Elec. Co.*, 865 F.2d 902, 130 L.R.R.M. 2464 (7th Cir. 1989); *Tootsie Roll Indus., Inc. v. Local Union No. 1, Bakery, Confectionary and Tobacco Workers' Int'l Union*, 832 F.2d 81, 126 L.R.R.M. 2700 (7th Cir. 1987).

We adopt the foregoing precedent and hold that where the contract language establishes a limit, whether a ceiling or a floor, the employer may operate lawfully without bargaining within that limit, even when the subject is a mandatory subject of bargaining. Where an employer has engaged in a practice exceeding the minimum set forth in the collective bargaining agreement, the employer is not precluded from exercising its contractual rights, even to impose the minimum set forth in the contract. The mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that it is forever precluded from doing so.

In the present case, Article XII (G)(3)(b) of the 1993-1996 agreement provides: "Members of the bargaining unit who teach grades seven through twelve shall be provided a minimum of one (1) planning and conference period per day." This provision has existed in every collective bargaining agreement between the parties since 1984. The record also shows that all High School English Composition teachers have had two planning periods per day since at least 1980.

Under these facts, we find that the School Board did not unilaterally change a term or condition of employment since it acted within the limits established by the collective bargaining agreement provision and there was no conflict between the School Board's actions and the contract language. When Article XII(G)(3)(b) was entered into, the past practice of two preparation periods for the High School English Composition teachers had been established. Because the contract language is clear and unambiguous, a review or comparison of the past practice is unnecessary. We also find that the mere fact that the School Board has not chosen to enforce its contractual rights in the past does not mean that it is forever precluded from doing so.

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### III. CONCLUSION

For the reasons above, we find that the Defiance City School District Board of Education acted within the agreed-to limits contained within the parties' 1993-1996 collective bargaining agreement when it eliminated one of the High School English Composition teachers' two planning periods without bargaining with the Defiance City Education Association OEA/NEA. As a result, the School Board did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5).

McGee, Vice Chairman, concurs; Mason, Board Member, dissents in a separate opinion.

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**DISSENTING OPINION**

MASON, Board Member:

I disagree with the majority's finding that the School Board committed no violation when it unilaterally changed the established past practice of providing the six High School English Composition teachers with two planning periods each day since at least 1980. I find that this past practice did not conflict with the collective bargaining agreement but interpreted it and as such was clearly established as a term and condition of employment. Therefore, the School Board should have bargained over the change.

It is well established that a practice that is unequivocal, clearly acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties qualifies as what is called in the trade "past practice." There is no dispute in the case at issue that the practice of providing the six High School English Composition teachers two planning periods each day qualifies as past practice. This practice was unequivocal, it was clearly enunciated and acted upon, and was readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties, in this case since 1980. There also is no dispute that planning periods for teachers is a mandatory subject of bargaining. I differ from the majority in analyzing the relationship between past practice, the collective bargaining agreement, the duty to bargain under O.R.C. Chapter 4117, and its application to the case at issue.

At the outset it should be pointed out that the established labor law on past practice, contrary to what the majority mistakenly believes, is that past practice is admissible even when the contract language is clear and unambiguous. There are three primary purposes for which past practice is admissible: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of ambiguous contract language; or (3) to support allegations that clear language of the written contract has been amended by mutual action or agreement.<sup>1</sup> As the Supreme Court of Michigan elaborated, where a collective bargaining agreement is ambiguous or silent on a subject for which past practice has developed, proof of mutual acceptance may arise by inference from the circumstances. To vary the clear written mandates of the contract, the past practice must be evidenced by substantially stronger evidence.<sup>2</sup> Thus, when past practice does not conflict with the collective bargaining agreement it governs the interpretation of the agreement, but even when past practice conflicts with the clear language of the collective bargaining agreement, it always must be considered as part of a proper analysis of the parties' mutual intent.

The reason why past practice is so fundamentally important in the labor arena lies in the unique character of the collective bargaining contract, which is different in nature, scope, and purpose from an ordinary commercial contract. This uniqueness was completely ignored by the majority when it erroneously utilized strict conventional principles of commercial contract law to declare that if a contract is clear and unambiguous, the court need not go beyond the contract's plain language to determine the rights and duties of the parties.<sup>3</sup>

The United States Supreme Court recognized that a collective bargaining agreement is not an ordinary contract; "it is a generalized code to govern a myriad of cases which the

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<sup>1</sup>*Port Huron Educ. Ass'n, MEA/NEA v. Port Huron Area School Dist.*, 452 Mich. 309, 550 N.W.2d 228 (MI S.Ct. 1996); *County of Allegheny v. Allegheny County Prison Employees Independent Union*, 476 Pa. 27, 381 A.2d 849 (PA S.Ct. 1977); *Ramsey County v. AFSCME, Council 91, Local 8*, 309 N.W.2d 785, 113 L.R.R.M. 2630 (MN S.Ct. 1981); *Sergeant Bluff-Luton Educational Association v. Sergeant Bluff-Luton Community School District*, 282 N.W.2d 144 (IA 1979); *Jacinto v. Egan*, 391 A.2d 1173 (RI 1978) and cases cited therein.

<sup>2</sup>*Port Huron Educ. Ass'n, MEA/NEA v. Port Huron Area School Dist.*, *supra*.

<sup>3</sup>See p.5 of the majority's slip opinion.

draftsmen cannot wholly anticipate."<sup>4</sup> The source of rules governing the "community of the industrial plant" cannot be restricted to the words of the contract but must be considered in light of the "common law of the shop which implements and furnishes the context of the agreement."<sup>5</sup> Hence, because collective bargaining agreements cannot cover every detail of life in the workplace, "the parties' course of performance may be the best evidence of their intent in using a particular term."<sup>6</sup> Moreover, "it is not unusual for the parties to a labor agreement to develop working relationships, customs, and practices which are understood to be the norm, but which are nowhere reduced to a formal contract term. When long-standing practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change as though it were part of the collective bargaining agreement itself."<sup>7</sup>

Let's apply these principles to the case at issue. The record shows that the past practice of providing the six High School English Composition teachers two planning period each day has been in place since 1980.<sup>8</sup> In 1984 the parties added Article XII(G)(3)(b), which establishes a minimum standard of one planning period for all members of the bargaining unit, and this Article has existed in every collective bargaining agreement between the parties since 1984.<sup>9</sup> The addition of Article XII did not in any way change the practice of providing the High School English Composition teachers two planning periods. The practice of providing two planning periods to all High School English Composition teachers does not in any way conflict with Article XII(G)(3)(b), since this Article only establishes a minimum level of one planning

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<sup>4</sup>*United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347, 1351 (1960).

<sup>5</sup>*Id.* at 580, 80 S.Ct. at 1351, quoting *Cox, Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1499 (1959).

<sup>6</sup>*Martinsville Nylon Employees v. NLRB*, 140 L.R.R.M. 2873 (D.C. Cir. 1992).

<sup>7</sup>*BMW Lodge 16 v. Burlington Northern*, 802 F.2d 1016, 1019, 123 L.R.R.M. 2593, 2597 (8th Cir. 1986).

<sup>8</sup>Finding of Fact ("F.F.") No. 9.

<sup>9</sup>F.F. No. 5.

period. The past practice of providing the High School English Composition teachers two planning periods clearly complies with this Article since, obviously, two is not less than one. As a matter of fact, since other teachers were provided with only one planning period, Article XII was a perfect accommodation of both the well established practice of two planning periods for the High School English Composition teachers and the provision of only one planning period for other teachers. There is no reason to doubt that this was the intention of the parties when this Article was drafted.

During the negotiations for the 1993-1996 collective bargaining agreement, for the first time, the School Board proposed to eliminate the past practice involved in Article XII(G)(3)(b). This proposal was objected to and the School Board withdrew it.<sup>10</sup> Clearly there was no meeting of the minds to abolish the practice of two planning periods for the High School English Composition teachers. This history of negotiations clearly shows that the School Board acknowledged the existing past practice, tried to negotiate a change, and when unsuccessful during the negotiations made a unilateral change without notice during the term of the collective bargaining agreement. Such a tactic is unfair, does not comport to established SERB law, and does not promote constructive relations, the purpose of the collective bargaining act.<sup>11</sup> The School Board should have notified the teachers' exclusive representative of its intent to change this term of employment, should have bargained in good faith if the union so requested, and only after reaching impasse could have implemented the change.<sup>12</sup>

The majority's finding that the contract *expressly* allowed the School Board to unilaterally reduce the number of planning periods of the High School English Composition teachers defies law and logic. Article XII(G)(3)(b) states that no member of the bargaining unit who teaches grades seven through twelve shall be provided with *less* than one planning period per day. But that is the only clear and unambiguous meaning of this Article. The Article does not *expressly* say how many more planning periods can be provided, who should be provided

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<sup>10</sup>F.F. No. 10.

<sup>11</sup>See O.R.C. § 4117.22.

<sup>12</sup>*In re SERB v. Youngstown City School Dist Bd of Ed*, SERB 95-010 (6-30-95).

with them, or how it should be determined whether to provide more than one. None of these issues has a clear and unambiguous answer in the relevant Article. In this case the 17-year-old past practice indicates that the parties acknowledged that teaching a particular subject matter warranted an additional planning period over and above the minimum.<sup>13</sup>

The majority first took it upon itself to modify Article XII(G)(3)(b) by reading into it that the parties agreed to give the employer the discretion to unilaterally determine how many planning periods teachers may have as long as it is no less than one, and then analyzed the majority-modified Article as a clear and unambiguous provision giving the employer the discretion to unilaterally determine how many planning periods teachers may have as long as it is no less than one. This is clearly a circular argument.

Nowhere does Article XII contain any language conferring on the School Board the discretion to unilaterally change the number of planning periods for the High School English Composition teachers. As a matter of law, implying that the parties intended to confer such discretion on the School Board is tantamount to finding that the union waived its statutory right to bargain on a term and condition of employment. The established law on such a waiver, including SERB's law<sup>14</sup>, is that a waiver of statutory right must be clear and unequivocal. The language of this Article does not constitute a waiver by the union of its statutory right to bargain the elimination of 50% of the planning periods for the High School English Composition teachers. As SERB stated, "it is proper to consider contract language, bargaining history, and extrinsic evidence in determining whether a statutory right has been waived. \* \* \* we do not hold that contract language must specifically waive the right to bargain over a particular issue before the conduct of the parties can be considered. A party's intent can be best determined by examining all the foregoing factors together."<sup>15</sup>

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<sup>13</sup>For example, Ms. Harmon is performing more work outside the contractual work day, up to 1 ½ hours per day, as a result of the reduction in the planning periods. See F.F. No. 15.

<sup>14</sup>*Id.* See also *In re City of Akron*, SERB 97-006 (5-1-97).

<sup>15</sup>*Youngstown, supra* at 3-81.

Had the Article at issue read, "All teachers shall have one planning period," it would not have readily accommodated the past practice of providing two planning periods to the High School English Composition teachers. Had the Article at issue read, "The School Board reserves the right to change the number of planning periods as long as it is at least one," then the School Board may arguably reduce the planning periods of the High School English Composition teachers from two to one without bargaining. However, neither scenario is present in this case.

The language the parties agreed to in the Article at issue reserves some rights for the School Board in regard to determining the number of planning periods, but the language is not specific enough to establish by itself a clear and unmistakable waiver by the union of its right to bargain on changing the number of planning periods for the High School English Composition teachers. In this situation, under *Youngstown*<sup>16</sup>, it is proper to consider, in addition to contract language, bargaining history and extrinsic evidence in determining whether a statutory right has been waived. Under the specific facts of this case, which include a history of over 17 years of established past practice providing High School English Composition teachers two planning periods daily; where the language of the Article at issue readily accommodates this past practice, which existed both before and after the Article was added to the contract; and where the School Board tried unsuccessfully to negotiate this past practice out of the contract, clearly no waiver by the union of a statutory right can be found.

The majority today creates a new policy on waiver, according to which general language solely will constitute a waiver of a statutory right. This policy conflicts with any and all established law on what constitutes a waiver, including SERB's own established policy in *Youngstown*. Moreover, the majority's policy will tend to promote voluminous contracts as parties attempt to cover every imaginable aspect of every subject, whether or not it is at issue at the time of the negotiations, for fear that what is left unspecified will constitute a waiver of statutory bargaining rights. This policy also may cause many more impasses and potential strikes, due to this unnecessary increase of difficult and contentious issues during negotiations of collective bargaining agreements.

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<sup>16</sup>See n.12 above.

One final note. The majority claims that the mere fact that the School Board has not chosen to enforce its contractual rights in the past does not mean that it is forever precluded from doing so. The School Board had no *expressed* right under Article XII(G)(3)(b) to eliminate 50% of the planning time for the High School English Composition teachers, and on the contrary, there exists past practice that established the two planning periods as a condition of employment. The question of whether the past practice should be granted a binding effect as an implied term of the contract precluding the employer's unilateral change (*i.e.*, "enforce its contractual rights") is an issue properly decided by an arbitrator. On the other hand, the statutory obligation to bargain does not require the employer to forfeit its contractual "reserved rights"; it requires notifying the union of its intentions, bargaining in good faith upon request, and implementing only upon impasse.