**Past Practice**

**Overview**

Past practice is a common term used to describe work site behavior that is consistent and of significant duration such that it takes the form of an unwritten but enforceable policy, if it concerns conditions of employment. Once established, past practices are considered incorporated into the collective bargaining agreement and enforceable through the grievance-arbitration process. It is an unfair labor practice for an agency to unilaterally change an established lawful practice. This guide addresses the various definitions of past practice that have been applied over the years. It also highlights arbitration awards and unfair labor practice rulings where past practices were central to the dispute.

**Key Points**

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source. The references to ***Broida*** in this Quick Start Guide are to federal employment law expert Peter Broida's treatise, *A* *Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publishing Inc.), to which ***cyber*FEDS®** has exclusive Web rights.

**The basics**

* In order to establish the existence of a past practice, there must be a showing that the practice had been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *Customs and Border Protection*, 104 LRP 22938, 59 FLRA 910 (FLRA 2004); *Social Security Administration, Mid-America Service Center*, 82 FLRR 1-1539, 9 FLRA 229 (FLRA 1982).
* Generally, factors relevant to a finding of a binding past practice are the duration and consistency of its application and the parties' acquiescence in it. *Cruz-Martinez v. Department of Homeland Security*, 105 LRP 24091, 410 F.3d 1366 (Fed. Cir. 2005).
* ***Broida:*** The Federal Circuit, reviewing an adverse action that proceeded through arbitration, found no difficulty crediting an arbitrator's determination that past practice barred a grievance that was not actively prosecuted and declined to credit the union's construction of what it considered to be the plain meaning of the contract, in *Cruz-Martinez v. Department of Homeland Security*, 105 LRP 24091, 410 F.3d 1366 (Fed. Cir. 2005).[*Broida Guide to FLRA Law and Practice:* Significance of Past Practice](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+09:+Review+of+Arbitration+Awards,+Subchapter+08:+Grounds+For+Review,+Section%20F:+Attacks+on+Reasoning+of+Award,+Subsection+02:+Significance+of+Past+Practice).
* Essential factors in finding that a past practice exists are that the practice must be known to management, responsible management must knowingly acquiesce, and the practice must continue for a significant period of time. *Department of Health, Education and Welfare*, 80 FLRR 1-1479, 4 FLRA 736 (FLRA 1980).
* If a local manager has the authority to establish a practice, the fact that the practice was not known to higher level managers may not be relevant in finding the existence of a past practice. *Social Security Administration*, 90 FLRR 1-1579, 38 FLRA 193 (FLRA 1990).
* There can be no binding past practice that requires the performance of an unlawful act. *Federal Aviation Administration*, 104 LRP 29004, 60 FLRA 20 (FLRA 2004).
* Proposals that are nonnegotiable do not become negotiable through past practices. *Department of Labor*, 105 LRP 42839, 61 FLRA 209 (FLRA 2005); *VA Medical Center, Providence*, *R.I.*, 88 FLRR 1-1301, 32 FLRA 944 (FLRA 1988).

**Past practice in ULP claims**

* ***Broida:*** In order to make a determination that a past practice has been changed, there must be evidence of the practice. The FLRA has dismissed ULP complaints where the record has been so scant that it would not support a finding that a particular practice existed in the past. *See Internal Revenue Service, Louisville District*, 91 FLRR 1-1400, 42 FLRA 137 (FLRA 1991). [*Broida Guide to FLRA Law and Practice:* Historical Patterns](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+02:+Management+Violations,+Section+D:+Unilateral+Changes+in+Employment+Conditions+and+Past+Practice,+Subsection+02:+Defining+Past+Practice,+Part+B:+Historical+Patterns).
* ***Broida:*** To establish a change in practice, there must be evidence of the practice "before and after" a given time. Evidence from a few employees involving isolated incidents, without evidence showing how those incidents reflect either present practice or a departure from a defined past practice, likely will not make out a prima facie case of a ULP. *VA Medical Center, Memphis, Tenn.*, 91 FLRR 1-1441, 42 FLRA 712 (FLRA 1991).[*Broida Guide to FLRA Law and Practice:* Historical Patterns](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+02:+Management+Violations,+Section+D:+Unilateral+Changes+in+Employment+Conditions+and+Past+Practice,+Subsection+02:+Defining+Past+Practice,+Part+B:+Historical+Patterns)*.*
* The burden of proving the existence of a past practice rests with the party relying on it. *VA Medical Center, Memphis*, *Tenn.*, 91 FLRR 1-1441, 42 FLRA 712 (FLRA 1991).

**Impact on conditions of employment**

* A matter that is not otherwise a condition of employment does not become a condition of employment through past practice. When determining whether an agency is required to bargain over a change in practice, the FLRA first examines whether the change concerns a condition of employment. *Internal Revenue Service*, 108 LRP 29053, 62 FLRA 411 (FLRA 2008); *Internal Revenue Service, Hartford*, *Conn.*, 87 FLRR 1-1251, 27 FLRA 322 (FLRA 1987).
* In close cases where a matter might or might not be a condition of employment, the existence of a past practice can be determinative. *Department of Labor*, 105 LRP 627, 60 FLRA 533 (FLRA 2004); *AFGE Local 2761 v. FLRA*, 89 FLRR 1-8002, 866 F.2d 1443 (D.C. Cir. 1989).
* Where a past practice establishes a condition of employment, that condition of employment becomes incorporated into the collective bargaining agreement. *Defense Contract Management Agency*, 103 LRP 19393, 58 FLRA 519 (FLRA 2003).
* The terms of a collective bargaining agreement may be modified by the past practices of the parties. *Defense Contract Management Agency*, 103 LRP 19393, 58 FLRA 519 (FLRA 2003).

**Before an arbitrator**

* ***Broida:*** In the interpretation of past practice, the arbitrator may use any relevant source, including a past arbitration award, to construe the negotiated agreement. *Immigration and Naturalization Service*, 88 FLRR 1-1398, 33 FLRA 412 (FLRA 1988).[*Broida Guide to FLRA Law and Practice:* Significance of Past Practice](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+09:+Review+of+Arbitration+Awards,+Subchapter+08:+Grounds+For+Review,+Section%20F:+Attacks+on+Reasoning+of+Award,+Subsection+02:+Significance+of+Past+Practice)*.*
* An arbitrator's finding on whether a past practice exists cannot be challenged as a nonfact if the parties argued the existence of the past practice before the arbitrator. *DVA Medical Center, Hampton, Va.*, 106 LRP 8032, 61 FLRA 510 (FLRA 2006).
* An arbitrator may appropriately determine whether a past practice has modified the terms of a collective bargaining agreement. *Office of Aviation Systems Standards*, 93 FLRR 1-1262, 48 FLRA 764 (FLRA 1993).
* In finding the existence of a past practice, an arbitrator may not rely on incidents occurring after the action upon which a grievance was based. *Federal Deposit Insurance Corporation*, 105 LRP 11778, 60 FLRA 731 (FLRA 2005).
* An arbitrator's refusal to recognize a past practice that allegedly modified the terms of the agreement was entitled to deference under the essence of agreement standard. *National Park Service*, 105 LRP 9019, 60 FLRA 641 (FLRA 2005)
* An arbitrator's refusal to recognize a past practice, finding that only some supervisors approved of a particular practice, was consistent with the standard established by FLRA precedent. *Department of Housing and Urban Development*, 104 LRP 46283, 60 FLRA 311 (FLRA 2004).
* The FLRA upheld the award of an arbitrator finding a local supervisor lacked the authority to bind the agency to a particular practice, and there was no evidence the practice was ever accepted by the agency or the union. *DVA Medical Center, Grand Junction*, *Colo.*, 91 FLRR 1-1201, 40 FLRA 342 (FLRA 1991).
* The FLRA found that an arbitrator's ruling that a two-year post agreement practice was not sufficient to alter the unambiguous terms of the agreement was not inconsistent with FLRA precedent concerning past practice. *Navy Public Works Center, San Diego,* 93 FLRR 1-1253, 48 FLRA 679 (FLRA 1993).

**Nonfact vs. essence-of-agreement exceptions**

* An arbitrator's ruling on whether a past practice exists is a factual finding that may be challenged through a nonfact exception. *Environmental Protection Agency*, 108 LRP 34543, 62 FLRA 466 (FLRA 2008).
* When the existence of a past practice is disputed at arbitration, the arbitrator's finding on this matter is usually a factual one that cannot form the basis of an exception. *Bureau of Prisons, FCI, Waseka, Minn.*, 110 LRP 30927, 64 FLRA 791 (FLRA 2010).
* An arbitrator's ruling on whether a past practice modified the terms of a collective bargaining agreement is a matter of contract interpretation that may be challenged through the essence of agreement exception. *Customs and Border Protection*, 106 LRP 50874, 61 FLRA 684 (FLRA 2006).
* The FLRA analyzes an exception challenging an arbitrator's finding of a past practice as a nonfact exception, while an exception challenging an arbitrator's interpretation of a past practice is viewed as an essence of agreement exception. *Mine Safety and Health Administration*, 105 LRP 44093, 61 FLRA 232 (FLRA 2005).
* ***Broida:*** The existence of a past practice may defeat an "essence" argument based upon contract language, since the past practice creates an additional term or modification of existing terms of the contract. *Federal Deposit Insurance Corporation*, 105 LRP 11778, 60 FLRA 731 (FLRA 2005).[*Broida Guide to FLRA Law and Practice:* Significance of Past Practice](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+09:+Review+of+Arbitration+Awards,+Subchapter+08:+Grounds+For+Review,+Section%20F:+Attacks+on+Reasoning+of+Award,+Subsection+02:+Significance+of+Past+Practice)*.*
* Whether challenged as a nonfact or essence of agreement exception, an arbitrator's finding of a past practice is generally entitled to deference. *U.S. Army* *Corps of Engineers, St. Paul District*, 105 LRP 42837, 61 FLRA 201 (FLRA 2005).

**Changing practices**

* An agency is required to fulfill its obligation to bargain in good faith when it changes a condition of employment that was established through past practice. *Food Safety and Inspection Service*, 108 LRP 19510, 62 FLRA 364 (FLRA 2008).
* Although the agency implemented established policy when it changed employee working conditions, it still had an obligation to bargain because the changes were contrary to past practices and very broad in scope. *Department of Homeland Security v. FLRA*, 111 LRP 55338, 647 F.3d 359 (D.C. Cir. 2011).
* Even when an agency's decision to terminate a past practice involves the exercise of a management right, the agency must give notice to the union and provide them with an opportunity to engage in impact bargaining. *DOD, Domestic Dependent Elementary and Secondary Schools*, 105 LRP 48955, 61 FLRA 327 (FLRA 2005); *U.S. Geological Survey*, 82 FLRR 1-1571, 9 FLRA 543 (FLRA 1982).
* While an agency may be required to change an unlawful practice without delay, there remains an obligation to give notice to the union and provide them with an opportunity to bargain over the impact and implementation of the change. *U.S. Geological Survey*, 82 FLRR 1-1571, 9 FLRA 543 (FLRA 1982).
* An agency has no obligation to bargain the substance of its decision to eliminate an unlawful practice. However, the agency must provide notice to the union and an opportunity to bargain over impact. *Portsmouth Naval Shipyard*, 94 FLRR 1-1157, 49 FLRA 1522 (FLRA 1994).

**Waiver**

* A union's past practice of not exercising its right to bargain over some changes in conditions of employment did not constitute a clear and unmistakable waiver of its right to bargain over other changes. *Scott AFB*, 81 FLRR 1-1002, 5 FLRA 9 (FLRA 1981).