ALAA/UAW 2325
Executive Board Agenda

January 9, 2002

Estimated length: 2 hours

1. Postponed: LAS Funding/Budget (with Theresa De Leon)
2. Collective Bargaining.
   - 2.1. Draft CBA.
   - 2.2. Affirmative action plan.
   - 2.3. New comp. day policy (attached).
3. Grievances.
   - 3.1. Zachary Smith (JRD).
   - 3.2. Jim Rogers (CDD--Bx)(attached).
4. Bylaws Revision.
5. Draft Statement in Defense of Civil Liberties (attached).
6. Political Action.
   - 6.1. Liz Krueger race.
   - 6.2. Council speaker election.
7. Meeting Schedule for 2002.

For over eighteen years, the union has used a room at the plant as a union office. With two years to go in our current agreement, the human relations manager informed us that the space is needed for storage and the union has three weeks to vacate. The contract makes no reference to union office space. Can we file a past practice grievance?

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INDEPENDENT PAST PRACTICES

PAST PRACTICES that concern subjects not mentioned in the written agreement are called *independent past practices.* A vending machine in a break area is a typical independent past practice. Other common examples are rest breaks, employee discounts, work assignments, and starting times.

When called on to decide whether an independent past practice is contractually binding, arbitrators usually apply *the rule of reasonable expectations.* Under this rule, if the nature of a practice is such that the union should have had a reasonable expectation that the practice would continue, the practice will likely be considered binding. If the nature of the practice is such that the union should

have been aware that it was subject to change, the practice will likely be ruled as nonbinding.

In most cases, the rule of reasonable expectations gives binding effect to practices that confer *personal or economic benefits* on employees, such as vending machines, rest breaks, and discounts. Practices that concern *methods of work* or *the direction of the workforce,* such as work assignments and starting times, usually do not satisfy the rule and therefore can be changed by management after bargaining to impasse.

The Silent Agreement

U.S. SIXTH CIRCUIT COURT: "An arbitrator may properly incorporate the past practices of the parties or the 'common law of the shop' into the written collective bargaining agreement where that document is silent or ambiguous on a matter."[25]

ARBITRATOR WHITLEY P. McCOY: "Custom can, under some unusual circumstances, form an implied term of a contract. Where the company has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the contract was entered into upon the assumption that that customary action would continue to be taken, such customary action may be an implied term."[26]

BENEFIT PRACTICES

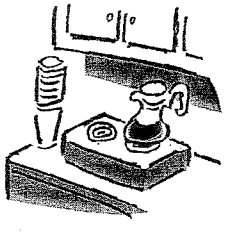
Past practices that create personal or economic benefits, union or employee privileges, or favorable working conditions are called benefit practices. When a benefit practice is longstanding and

does not conflict with the written agreement, it is reasonable for the union to rely on its continuance. The union's expectation, combined with the employer's silence on the matter during negotiations, implies an agreement to maintain the practice.

Pay practices. When an unwritten practice favorably affects employees' pay, it usually creates reasonable expectations. Practices found binding by arbitrators include:

- Paying employees on a weekly basis.[27]
- Time-and-a-half pay for Sunday work.[28]
- Paying employees for their lunch period.[29]
- Holiday pay for employees absent from work because of illness.[30]
- Paying employees for time lost when seeing a doctor for an industrial injury.[31]
- Providing a Christmas bonus.[32]
- Reimbursement for damage to employee cars.[33]
- Providing uniform allowances.[34]
- Giving employees shares of stock after twenty-five years of service.[35]

Rights and privileges. Past practices that create rights, privileges, and other fringe benefits create reasonable expectations. Practices found binding include:

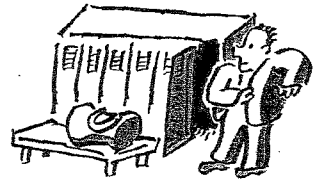


- Applying seniority in making promotions.[36]
- Furnishing and cleaning work gloves without cost to employees.[37]
- Holding an annual picnic during work hours.[38]
- Employee discounts on company products.[39]
- Free meals.[40]
- Free coffee.[41]

- Scheduling group leaders to work overtime when employees they assist and instruct are so scheduled.[42]
- Calling in off-duty workers for overtime duties.[43]
- Allowing employees to decline work on holidays.[44]
- Allowing employees to choose their vacation schedules.[45]
- Three-month paid leave of absence before an employee's retirement date.[46]
- Half-day off the day before Thanksgiving.[47]
- Allowing employees to take home company vehicles.[48]
- Allowing employees to use work vehicles to travel to and from work.[58]

Favorable working conditions. Past practices that provide favorable working conditions usually create reasonable expectations. Practices found binding include:

- Letting employees arrive late or go home early when a heavy snowfall occurs.[50]
- Allowing employees to enter the plant early.[51]
- Permitting employees to leave the employer's premises during downtime.[52]
- Allowing employees to take breaks on the honor system.[53]
- Employee parking in company lots.[54]
- Providing vending machines on the shop floor.[55]
- Letting employees drink coffee in work areas.[56]
- Providing personal lockers.[57]
- Allowing employees to stop work early to wash up.[58]
- Personal coffee pots.[59]



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December 28, 2001

James Rogers
Legal Aid Society
Criminal Defense Division
1020 Grand Concourse
Bronx, New York 10451

Dear Jim:

Enclosed please find a copy of a letter, dated Dec. 27, 2001, from Owen Rumelt, ALAA's Counsel, summarizing his legal research on the unmarried, opposite sex domestic partner health benefits issue which concerns you. Also enclosed is a NYLJ article on a 1999 federal case deciding a Title VII challenge to the denial of such benefits.

Please feel free to call me to further discuss this issue.

Sincerely,

George Albro
Secretary/Treasurer

cc: Michael Letwin

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December 27, 2001

George Albro, Esq.
Secretary-Treasurer
Association of Legal Aid Attorneys
568 Broadway, Room 702A
New York, NY 10012

Dear George:

You have inquired whether the provision of dependent health insurance coverage to same-sex domestic partners and married couples, but not to opposite-sex domestic partners, is violative of any New York State or New York City statutes or regulations which preclude discrimination based upon sexual orientation. There is no clear answer as to whether, generally speaking, the provision of benefits to same-sex couples, but not to opposite-sex ones, constitutes unlawful discrimination on the basis of sexual orientation. Notwithstanding the foregoing, the benefits at issue here are provided under an employee benefit plan which is subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA.") The Supreme Court has held that, to the extent that state law prohibits employment practices which are permissible under Title VII, such state law is preempted with respect to ERISA benefit plans. *See, Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 77 L.Ed.2d 490 (1983). Accordingly, although discrimination on the basis of sexual orientation may proscribed under New York State and New York City regulations, the current practice is not subject to legal challenge. Similarly, a benefit program which provides dependent coverage solely to married couples and domestic partners (regardless of the partners' sexual orientation) where the employee has a child (and would, therefore, be otherwise entitled to dependent coverage) would not be unlawful. We note, parenthetically, that, in the event there was no preemption, any challenge of the benefit program would had to have been pursued through the courts; the matter could not have been grieved, as it is my understanding that benefits were being provided in accordance with the collective bargaining agreement.

Please do not hesitate to call if you have any additional issues you wish to discuss.

Sincerely yours,

Owen M. Rumelt

OMR:bms

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Proposed ALAA Statement in Defense of Civil Liberties
January 9, 2002

As a labor union whose members fight each day for the statutory and constitutional rights of indigent New Yorkers, The Association of Legal Aid Attorneys, UAW Local 2325, is deeply opposed to the Bush administration's broad assault–largely by executive fiat--on essential civil liberties and democratic rights.

This assault includes the:

•"USA Patriot Act," which authorizes the executive branch to designate domestic groups as "terrorist organizations"; permits the attorney general to indefinitely incarcerate or detain non-citizens based on mere suspicion; permits deportation of immigrants for innocent association with others; violates confidential financial, medical, educational and other records without probable cause; and, as explained by the ACLU, gives "enormous, unwarranted power to the executive branch -- which can be used against U.S. citizens -- unchecked by meaningful judicial review." (First, Fourth, Fifth, and Sixth amendments).

•Largest campaign of mass detention in this country since World War II, based on racial and ethnic profiling rather than probable cause, of more than 1200 foreign nationals–almost all of them from the Mid-East and South Asia--about whom the government has refused to provide information, who have often been denied access to legal counsel or consular officials, who suffer inhumane conditions of confinement–and virtually none of whom have been charged with terrorist acts. (Fourth, Fifth, Sixth and Eighth amendments.)

•Detention and deportation hearings before secret immigration courts hearing secret evidence. (Fifth Amendment.)

•Coercive and discriminatory questioning of 5,000 young male legal immigrants men, mostly of Middle Eastern descent, without any basis or showing of probable cause. (First and Fifth amendments.)

•Authorization by the attorney general–without judicial review--for eavesdropping on confidential attorney-client communication. (Sixth Amendment.)

•Plans to try non-citizens accused of terrorism before secret military tribunals in which the accused are deprived of an independent forum, their chosen attorneys, the presumption of innocence, proof beyond a reasonable doubt, confrontation of evidence against them, exclusion of hearsay, a

unanimous verdict, and habeas corpus review by civilian courts. Columnist Anthony Lewis has called this measure–which could theoretically be used against any of 20 million noncitizens in the United States--"the broadest move in American history to sweep aside constitutional protections." (Fourth, Fifth, and Sixth amendments; Geneva Convention).

•Plans to relax restrictions against FBI spying on domestic religious and political organizations. (First Amendment.)

•Mandatory "patriotism," evidenced in government antagonism to free and open debate over the administration policy–as reflected in the attorney general's claim that critics were providing "ammunition to America's enemies." (First Amendment.)

•Open consideration of torturing prisoners suspected of terrorism. (UN Convention Against Torture, Fifth and Eighth amendments).

These policies threaten our freedom and security, without effectively addressing the problem of terrorism. Indeed, we have invariably come to regret, and even apologize for, similar episodes of hysteria and repression in American history, among them the Alien and Sedition Acts (1790s), World War I (1917), the Palmer Raids (1920), Japanese-American internment (1940s), McCarthyism (1950s), and the FBI's COINTELPRO war on dissent (1960s). For just this reason, the AFL-CIO recently urged Congresss "not to allow hysteria to supplant judgment in granting new and secretive powers to the Justice Dept. and the intelligence agencies."

Surely, the lesson is that civil liberties and democratic rights are most at-risk–and most precious--during times of crisis. ALAA, therefore, joins those the many unions, professional associations, and other organizations who have called for defense of our essential rights.