ARBITRATION DECISION NO.:
269

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Health

DATE OF ARBITRATION:

DATE OF DECISION:
June 25, 1990

GRIEVANT:
Sandra Davis

OCB GRIEVANCE NO.:
G87-2566

ARBITRATOR:
Jonathan Dworkin

FOR THE UNION:
Dane Braddy

FOR THE EMPLOYER:
Michael J. D'Arcy

KEY WORDS:
Representation
Performance Evaluation
Appeals

ARTICLES:
Article 1 - Recognition
§1.01-Exclusive Representation
Article 3 - Union Rights
§3.01-Access
Article 22 - Performance Evaluation
§22.01-Use
§22.03-Appeals
Article 25 - Grievance Procedure
§25.03-Arbitration Procedures

FACTS:

The grievant is a Secretary employed by the Department of Health. She received her performance evaluation and was rated superior in every category. The reviewer disagreed and added that she needed improvement in some areas. The completed performance evaluation was not returned to the grievant. When the grievant requested it and discovered the reviewer's comments she initiated an appeal according to Section 22.03

The grievant appeared for the review conference accompanied by a union steward. The steward was excluded from the conference by the Assistant Personnel Director. The grievant claims a violation of Article 1 based on the employee's rights to union representation in matters concerning terms and conditions of employment.

UNION'S POSITION:

The agreement provides for representation in performance evaluations. Article 3 guarantees access to stewards to administer the agreement. Article 1 extends representation to all matters concerning terms and conditions of employment. As performance evaluations affect employment, except concerning layoff according to Article 22, union representation should be provided. The State Employment Relations Board has decided in a similar case that the Ohio Revised Code provides for union representation in performance evaluations. Ohio Revised Code Section 4117.03 (A) guarantees the right to "representation by an employee organization."

A valid past practice exists allowing representation in performance evaluation appeals. The employer's scheduling form requested the name of the steward to be attending the meeting.

EMPLOYER'S POSITION:

The agreement does not provide for Union representation in performance evaluation appeals. The issue was raised during the 1986 and 1989 contract negotiations. No agreement was reached in 1986. The union proposed new language for Section 22.03 in 1989 providing for union representation in performance evaluations, however, the proposed was withdrawn. This indicates a concession on the issue by the union. The employer denies any binding past practice exists, and the State Employment Relation Board decision on the matter is not determinative of contractual intent.

ARBITRATOR'S OPINION:

The 1989 agreement does not require representation at performance evaluations. There was no agreement on the issue in 1986. The fact that new language was proposed and withdrawn during negotiations of the 1989 agreement is evidence of a concession by the union on the issue. The remedy calls for action under the 1989 agreement, therefore, the concession made by the union indicates an abandonment of the demand for union representation in performance evaluations.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE STATE OF OHIO,
Department of Health

-and-

OHIO CIVIL SERVICE EMPLOYEES

**ASSOCIATION, OCSEA/AFSCME,
AFL-CIO Local 11**

Case No.:
G87-2566

Decision Issued:
June 25, 1990

APPEARANCES

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Director, Arbitration
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Janet Collins, Steward
Sandra Davis, Grievant

ISSUE: Articles 3, 22, and past practice: Right to Union representation in evaluation appeals.

**Jonathan Dworkin, Arbitrator
P.O. Box 236
9461 Vermilion Road
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SUMMARY OF DISPUTE

The grievance focuses on rights of Bargaining Unit members in performance evaluation appeals. The issue is whether or not they are contractually entitled to Union representation.

Performance evaluations have long been used to appraise work of State employees. They existed before the advent of labor agreements and the Ohio Public Employee Collective Bargaining Law. Under Chapter

123:1-29 of the Ohio Administrative Code, evaluations were required twice during an employee's probation and once each year thereafter. An important feature of pre-bargaining evaluations was the way in which they influenced job security. According to Section 123:1-29-01(F) of the Administrative Code, efficiency points resulting from appraisals were determinants of whether or not an individual could retain his/her job in a layoff mode. The provision stated:

(F) Performance evaluations shall be used to determine efficiency points in the computation of retention points for layoffs.

The Code also provided for comprehensive reviews of evaluations, including reviews by department directors. An employee could obtain expungement of an unfavorable rating by proving:

(1) That the rater, reviewer, or appointing authority abused his discretion, producing an inaccurate, unfair, or prejudicial evaluation, or

(2) That the employing agency failed to substantially comply with these rules or with the agency's internal procedures in completing or reviewing the performance evaluation. [Ohio Administrative Code §123:1-29-03(D).]

The 1986 and 1989 Agreements between the State and the Ohio Civil Service Employees Association (OCSEA/AFSCME, Local 11) made some changes in evaluations but retained basic procedures. In fact, Article 22, §22.01 of both Agreements refers to the Administrative Code and authorizes the Employer to continue evaluating in accordance with Chapter 123:1-29, "except as modified by this Article." There were essentially two modifications contained in the Article: evaluations were no longer factors in layoffs and appeals were streamlined. The new contractual appeals procedure is set forth in Article 22, §22.03. It states in part:

An employee may appeal his/her performance evaluation, by submitting a "Performance Evaluation Review Request" to the Agency designee (other than the Employer representative who performed the evaluation) within seven (7) days after the employee received the completed form for signature. A conference shall be scheduled within seven (7) working days and a written response submitted within seven (7) working days after the conference.

The Collective Bargaining Agreement contains no explicit language concerning Union representation in evaluation appeals, nor does the Administrative Code. Nevertheless, the Union maintains that representational rights should be inferred from contractual provisions which recognize the Union's exclusive representational capacity and guarantee the Union's right to function as administrator of the Collective Bargaining Agreement. The Union contends that the following portions of Article 1, §1.01 and Article 3, §3.01 prohibit the State from denying representational rights claimed by this grievance:

ARTICLE 1 - RECOGNITION

§1.01 - Exclusive Representation

The Employer recognizes the Union as the sole and exclusive bargaining representative in all matters establishing and pertaining to wages, hours, and other terms and conditions of employment for all full and part-time employees in the classifications [for which the Union is certified and bargaining agent] . . . [Emphasis added.]

. . .

ARTICLE 3 - UNION RIGHTS

§3.01 - Access

It is agreed that the Agencies covered by this Agreement shall grant reasonable access to stewards, professional union representatives and local officers . . . for the purpose of administering this Agreement.

It is the Union's view that evaluations and evaluation appeals are terms of employment governed by the Agreement. It follows that denying stewards access as representatives in evaluation appeals violates the language and spirit of the Recognition and Union Rights Clauses.

In addition to claiming implied contractual support for its position, the Union contends that employees historically received representation in evaluation appeals -- so often and so regularly that a binding past practice developed.

The Employer denies both Union arguments. It contends that the issue raised by the grievance is not subject to determination from implied contractual meanings because the negotiators did not leave their intentions open to implication. The question of representation in evaluation appeals was pointedly bargained. Union negotiators demanded the right; State negotiators resisted. According to the Employer, the contractual silence is not an accident or oversight from which implications can or should be drawn. It is the result of hard bargaining in which the right demanded by the Union was successfully turned down. The Agreement contains no language on representation because Union negotiators were unable to achieve their objective.

The Employer maintains that no relevant past practice exists, at least not in the Department of Health. Representation never existed in the pre-contract era, and the Department generally barred stewards from evaluation reviews once the first Collective Bargaining Agreement became effective.

It is noteworthy that the dispute over representation has been active since the first Agreement. This is not a novel grievance on the subject. But it is the first to be appealed to arbitration. It was initiated during the term of the prior (1986) Agreement, on December 24, 1987. While it is on behalf of an individual Health Department employee, it seeks broad, remedial relief for all represented employees of the Department. The written grievance states in part:

Statement of Facts . . . :

The Health Department . . . [has] denied access to all Health Chapter Stewards in performance evaluation appeal meetings & hearings. Since the effective contract date the Health Stewards have represented employees at appeal meetings. This past practice was discontinued on 12/17/87 when [the Assistant Director of Personnel] said “Mike and I have decided that this is no longer appropriate to allow you access to these meetings.”

. . .

Remedy Sought:

Access be restored in toto to all Health Stewards. [Management] cease intimidating employees . . . and deal directly with the Health Chapter Union Representatives.

ADDITIONAL FACTS

Grievant, a Secretary in the Department of Health, received an annual evaluation on September 17, 1987. As in her prior evaluations, she was assessed superior in every rating area -- quality and quantity of work production, job knowledge, adaptability, dependability, cooperation, judgment, initiative, and personality. Her evaluator's comments were concise: "Very Hard Worker." In accordance with standard practices, the evaluation instrument was forwarded to a reviewer for additional commentary and a copy of the completed document then should have been forwarded to Grievant. But it was not. Through some administrative oversight, Grievant did not receive her copy until approximately a month later. It was only through her call to the personnel office that she discovered her evaluation had been finished and was in her file.

Grievant secured a copy of her evaluation from the personnel office and was surprised to discover that it contained comments which were not entirely positive. The reviewer, disagreeing with the rater's strong approbation, added the following to the document:

"I would not have rated this employee as high in the areas of accuracy, reliability or planning work. She needs to pay more attention to details."

Grievant initiated an appeal under Article 22, §22.03 of the Agreement. A meeting was scheduled for December 17, 1987. The Employee appeared for the conference accompanied by an OCSEA Steward. The Assistant Personnel Director pointedly excluded the Steward, thereby giving rise to the grievance.

THE UNION'S POSITION

The Union relies mainly on Article 3, §3.01 which guarantees stewards reasonable access "for the purpose of administering this Agreement." Admittedly, the contractual language is vague, it does not define the scope and limitations of steward rights. In the Union's judgment, however, it should be interpreted broadly in conjunction with Article 1 which extends exclusive representational authority to all matters "pertaining to wages, hours, and other terms and conditions of employment." The pivotal question, according to the Union, is whether or not evaluation appeals fall within the meaning of "terms and conditions of employment." If they do, employees subject to them are entitled to be represented. Since the entire evaluation process is obviously a condition of employment, the Union maintains that its rights are violated every time the Agency unilaterally excludes stewards from appeals.

The Union's reasoning finds support in a decision of the State Employment Relations Board (SERB). In Trotwood-Madison City School District Board of Education, SERB 89-012, 1989 SERB 3-67 (May 19, 1989), SERB was confronted with a situation similar to this one. Two school employees, a food-service worker and a custodian, asked for and obtained meetings with supervision to discuss their evaluations. Both were members of a bargaining unit represented by the Ohio Education Association. They requested union representation and filed unfair-labor-practice charges when the school board denied the requests.

The SERB decision centered on Ohio Revised Code §4117.03(A), the heart of the Ohio Public Employee Collective Bargaining Law. It "guarantees public employees" five basic rights -- the right to form and join (or refrain from joining) unions; the right to engage in concerted activities for mutual aid, protection, and/or collective bargaining; the right to bargain collectively with public employers on matters of wages, hours, and conditions of employment and to enter into labor-management contracts; the limited right to present and adjust grievances without intervention of bargaining agents; and, in subsection (3), the right to "Representation by an employee organization." It was the statutory right to representation which impelled SERB to decide that the school board had committed an unfair labor practice when it excluded stewards from evaluation reviews.

SERB first determined that the right to representation was independent of the others and entitled to its own intended meaning:

> The "right to representation" is included among a list of other rights, each of which has specific and common meaning within the field of labor relations. The "right to representation" must be construed as a provision with independent effect that is distinct from the other four rights enumerated in O.R.C. §4117.03(A). Such a reading is dictated by this fundamental maxim of statutory construction: each provision in a statute must be given independent meaning and significance. Every word of a statute is designed to have some effect, and, in interpreting a statutory section, we are bound to give meaning to each and every word, phrase, clause, or provision.
>
> . . .
>
> Thus, the "right to representation" is distinct from - the reaches beyond - the representational rights inherent in collective bargaining, concerted activity for mutual aid and protection, participation in an employee organization, and the presentation of grievances. To hold otherwise would reduce the provisions of O.R.C. §4117.03 (A) (3) to a mere repetition of rights articulated elsewhere in the section. [Id, at 3-70.]

SERB could not have ended its opinion at that point. If it had, the implication would have been that representational rights apply to every minute detail of the day-to-day relationship between public employers

and their bargaining-unit employees; an individual would have been entitled to a steward every time s/he received a supervisory directive. The decision clarified that such was not the intent. It created guidelines for determining when the right to representation was and was not guaranteed. It is important to note that, if the guidelines were to be applied to this controversy, the Union would most certainly prevail:

Certainly, such an entitlement to on-the-job representation has limitations. An employer must have the opportunity to pursue without impediment or interruption the day-to-day direction of the nature and quality of an employee's work. O.R.C. §4117.03(A) (3) cannot be applied so as to give rise to representational rights every time there is communication between employees and their supervisors. Nor can the employer be required to engage in ad hoc collective bargaining with the union in meetings where the union's function is that of representing an individual employee. Thus, we must strike a proper balance between the employer's need to manage and our obligation to give effect to the employee's statutory guarantee of representation. Accordingly, we construe the statute as providing that an employee is entitled to have an agent of the exclusive representative assist, accompany, or speak on the employee's behalf in discussions with management that: (a) are relevant to the employer-employee relationship and (b) are not routine supervisory, instructional, or directory encounters. [Ibid.]

The Union urges that the Collective Bargaining Law (and SERB's current interpretation of it) should extinguish all uncertainties resulting from contractual vagueness on representational rights in evaluation appeals. After all, it is the law which is the "foundation on which [the Agreement] was built." [Union Brief, 2.]

The Union directs the Arbitrator's attention to some of the descriptive language SERB used in Trotwood-Madison -- language explaining why representation rights had to be preserved in performance reviews. The decision pointed out that union presence serves a variety of valuable purposes, not the least of which is protecting employees against discrimination and real or perceived intimidation. That has been the Union's purpose throughout its four-year controversy with the State on this issue. When bargaining began, Union negotiators had a mandate from their constituents to do something about supervisory abuses in evaluations and evaluation appeals. Employees complained bitterly to their representatives about favoritism fostered by the evaluation process and threats issued by supervisors behind closed doors. Indeed, this Grievant testified that she received retaliation threats -- when she attended her review meeting unrepresented.

The Union argues that the Employer is bound by past practice to permit representation in evaluation reviews. Beginning on July 1, 1986, when the first Agreement between the parties took effect, the Department of Health routinely invited stewards to attend evaluation appeals. In fact, an August 4, 1987 scheduling letter from the Assistant Personnel Director to Grievant (concerning an earlier evaluation appeal) contained precisely such an invitation. It stated in part:

In accordance with Article 22.03 of the AFSCME contract, a conference will be scheduled to discuss the appeal of your mid/final promotion evaluation. Please contact this office within the next five (5) days with two (2) dates that you and your union steward will be available to discuss the evaluation with the immediate supervisor (D. Beck) and myself.

Prior to your last request date, July 20, 1987, we discussed your appeal of your mid-evaluation, however, I believe we left the conversation whereas you would contact me as to who would be your union steward and a date that would be suitable for us to meet. [Emphasis added.]

In October, 1987, the Agency suddenly stopped allowing stewards into the meetings. The trigger was a memorandum from the Office of Collective Bargaining (OCB), the Agency which oversees labor-management relations in the State system. The memorandum was the outcome of several post-contract meetings between OCSEA and OCB in which unsettled issues were discussed. Representation in evaluation appeals was one of those issues; it was not resolved. The memorandum stated in part:

"An employee may be represented by a site representative . . . at a performance evaluation review only if the

agency's internal review procedure allows representation. A site representative who wishes to represent an employee in this capacity must use his or her authorized personal or vacation time to do so. [Emphasis added.]"

Apparently, the Department of Health saw the memorandum as a directive to preclude representation. The Department had not fashioned a formal review procedure permitting representatives to attend appeals and, therefore, believed that it had to discontinue any custom of granting such permission. The Union contends that the action was too late to effect the Agency's goal. It maintains that a practice of allowing representation materialized before October, 1987, and it was a binding practice. It was not inconsistent with any of the language in the Agreement; it provided a benefit of employment mutually recognized by the parties; it existed long enough to become an entrenched aspect of the relationship between the Department and the Union.

For all the foregoing reasons, the Union demands that the grievance be sustained and that the Department of Health be directed to reinstate the practice of allowing Union representatives to attend performance reviews.

THE EMPLOYER'S POSITION

The Employer readily concedes that contractual vagueness can be clarified by reasonable implication. It insists, however, that representation in evaluation appeals is not a vaguely implied benefit. It is not something the negotiators failed to address. It is an issue they thoroughly bargained and the outcome of their negotiations was that the right now claimed by the Union was purposely omitted from the Agreement. According to the State, Union representatives struggled to obtain language on this very question in both the 1986 and 1989 negotiations. They were forced to relinquish their demands on the subject. The State charges that this grievance is an impropriety through which the Union attempts to reclaim something it clearly lost at the bargaining table.

To maintain its position, the State introduced notes of interim negotiations during the 1986 Agreement and bargaining-table minutes from 1989. It should be observed that the Union objected to the 1989 records, contending that they were after-the-fact -- that this grievance was initiated and pertains to contractual rights under the 1986 Agreement. Technically, the Union's objection was well taken; but the remedy requested in the grievance requires that all bargaining records be admitted and considered. The demand is prospective. It seeks an arbitral directive that stewards be admitted to evaluation reviews from now on. Since the 1989 Agreement was nearly a year old when the grievance was presented to arbitration, it is obvious that granting a remedy pertaining only to the prior contractual term would be useless. Whatever the Union sought under that Agreement would have become moot unless extended into the period covered by the current Agreement. The questioned raised in this case was discussed in 1989 bargaining. Therefore, it is not only proper, it is essential that the Arbitrator review those discussions to ascertain whether or not the Union has an existing contractual basis for its prospective demand.

In 1986 negotiations, the Union spoke to abuses which had taken place under the evaluation system, especially favoritism and intimidation. It proposed that evaluations be eliminated altogether. The State turned down the proposal, but it did agree to study the question and find a better way to carry out evaluations. That concession was made part of Article 22, §22.01 of the Agreement:

Within one hundred twenty (120) days of the effective date of this Agreement, the Employer will enter into a comprehensive study to improve the present performance evaluation system. The Union will have full opportunity for input and consultation prior to and during the study.

The State made the study, as promised, and a new system was developed.

The Union input referred to in §22.01 occurred in July and August 1987 when OCB and OCSEA held post-contract discussions on twelve issues. The second item on the agenda was, "Steward Issues." The following excerpt from the minutes reveals the outcome:

e. Management stated its position that stewards should not be present at performance evaluations or appeals and should not represent at the filing of EEO complaints outside the contract.

The union responded as follows:
i. The union disagrees to the extent that a steward should have the right to be present at an evaluation appeal hearing.

*The parties agree to continue to talk about this matter. If they are unable to reach agreement, then the question can be arbitrated.

The parties had no further discussions on their disagreement, nor did they present the question to arbitration until now. However, after the meeting covered by the minutes ended, OCB issued the directive excluding stewards from evaluation appeals. A courtesy copy of the memorandum was sent to the OCSEA Director. He made no response. A few grievances, some from Health Department employees, were initiated but non were resolved in the Union's favor. All were withdrawn or concluded with denials.

The Employer argues that the Union's failure to assert its claim of representational rights sooner indicates its accession to the OCB policy statement. The contention is tenuous and poorly supported. If it stood alone, the Arbitrator would be inclined to ignore it. However, it does not stand alone. It is supported by records of 1989 bargaining sessions in which the Union again put the issue on the table. Its proposal was to amend Article 22, §22.03 as follows:

[NEW LANGUAGE PROPOSED IS UNDERSCORED AND BOLDFACE]

An employee may appeal his/her performance evaluation, by submitting a "Performance Evaluation Review Re-quest" to the Agency designee (other than the Employer representative who performed the evaluation) within seven (7) days after the employee received the completed form for signature. A conference shall be scheduled within seven (7) working days and a written response submitted within seven (7) working days after the conference. Employees shall have the right to union representation at this conference.

In agencies with multiple Appointing Authorities, the employee may request an additional review with the Agency Head or designee. The conference must be held within seven (7) days of the request and the Agency's written reply shall be completed within seven (7) days of the conference. Employees shall have the right to union representation at this conference. In addition, any employee has the right to a review by the Department of Administrative Services within thirty (30) days after the Agency(s) written response. The employee may present any pertinent information to the Agency and/or the Department of Administrative Services, including the performance evaluation in question and past evaluations, during the review. The Department of Administrative Services shall respond in writing to the employee's appeal within 30 days from receipt of the appeal.

The State rejected the proposal and held firmly to its position even though this was an issue likely to cause impasse. Eventually, however, the Union withdrew the demand. According to Union arguments in this dispute, the withdrawal was of no significance. The representational right already existed and the proposal had been only for clarification. The Employer takes strong exception to the Union's assessment of the withdrawal. Evaluation appeal rights were not by any means jelled during the 1986 Agreement. From the Employer's prospective, they did not exist and the 1989 proposal contemplated an expansion of Union rights.

According to a witness for the Employer, the Union's Chief Negotiator made a telling remark when he withdrew the steward-representation proposal; he said, "Now this is major movement!" That testimony stood unrefuted. Apparently, the Chief Negotiator did acknowledge that the Union's retreat from the representational issue constituted major bargaining-table movement. The statement was significant. It confirmed that the Union was acceding to a contract in which its membership would not be entitled to bring

stewards into evaluation reviews.

With respect to the Union's remaining arguments, the State denies the allegation concerning a binding past practice. It also reminds the Arbitrator that his jurisdiction is limited to interpreting and applying the language of the Agreement. While the Trotwood-Madison decision might well influence Employer and Union rights in a court of law or a SERB hearing, it is not determinative of contractual intent. The clear intent and understanding of everyone who has negotiated on the subject of this dispute, in the Employer's judgment, is that the representational rights claimed by the Union would not be contractual benefits of employment. Therefore, according to the State, the Arbitrator is obliged to deny the grievance.

OPINION

The State's arguments highlight an anomaly in the Union's position. The case for representational rights was far better when the grievance was initiated than when it was heard. During the term of the 1986 Agreement, there was no meeting of minds on the question. The Agreement was silent and there is no evidence that the matter was truly considered at the bargaining table. The probability is that it was not. It was only after ratification that the parties addressed the issue in post-contract discussions. Those discussions revealed significant disagreement between the Employer and the Union. For the first time, the Union made its demand and the Employer resisted it; and they were unable to reach a mutual understanding. All they agreed upon was to continue disagreeing and to leave the ultimate resolution open for arbitration.

If the matter had gone to arbitration during the 1986-1989 term, the Union would have been in a very good position. The contractual silence coupled with honest disagreement between the parties on whether or not the representational rights existed created fertile ground for a binding practice. In making this assessment, the Arbitrator is cognizant of (and disagrees with) the Employer's argument that a binding practice could not have existed because the purported custom of permitting representation did not conform to certain guidelines. The guidelines are those set forth by Arbitrator Jules Justin thirty-six years ago in Celanese Corporation of America, 24 LA 168 (1954). The Celanese case stemmed from a claim that an employee had been bypassed for overtime and that the company was responsible for the lost wage opportunity. Arbitrator Justin's opinion was long and comprehensive; most of it has been forgotten over the years, but one paragraph has been cited over and over again by arbitrators and accorded an exalted position in the literature of arbitration:

"In the absence of a written agreement, "past practice", to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties. [24 LA 168 at 172.]"

It is understandable that so many arbitrators uncritically adopted the Celanese rationale. Practices are hard to define; arguments concerning practices almost always tax an arbitrator's reasoning powers. Arbitrator Justin developed what appeared to be an easy, predictable solution. The problem is that he did not regard his own standards quite so highly as did others who followed them. He viewed practices only as evidence of how the parties meant to bind themselves, not as unwritten, quasi-contractual statements of rights and liabilities. The ultimate quest, according to Celanese, is to discover what the parties themselves intended. Arbitrator Justin made this clear:

Subdivision (e) of Article 11 does not prescribe any method - it simply provides that "overtime shall be distributed as equally as possible." Unless the Parties had agreed to a single method to apply that Contract provision, the method offered by the Company in this case satisfies that provision equally, as does the method sought by the Union. How the Parties themselves have construed or applied a contractual provision, which is ambiguous or which is stated in general terms, as Section 11, Subdivision (e) is, in this case, constitutes an important factor in finding out what they intended under that provision. "Past practice" in applying such a provision, provides material facts to determine what the Parties intended. [Ibid, Emphasis added.]

It is unnecessary to burden this decision with the Arbitrator's concepts of how practices are created and how they become binding. It is sufficient to note that he believes there are a great many more factors to consider than the three listed in Celanese. Nevertheless, even if the Celanese standards were carved in granite, the Union still would have had a compelling case under the 1986 Agreement. The alleged practice was unequivocal; it pertained to representational rights which were routinely allowed by the Department of Health until it received the October, 1987 OCB memorandum. It was clearly enunciated and acted upon; in fact, the Assistant Director of Personnel used a form letter to schedule evaluation appeals which specifically invited Union participation. The letter even indicated that the hearing time would be set to fit a steward's schedule. The practice was readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties; it existed in the Department from July, 1986 to October, 1987. In that period, all employees received at least one annual evaluation. Some undoubtedly received two, and Union representation always allowed. Under the 1986 Agreement, the Department would have been hard put to establish that it had not unilaterally (and impermissibly) abandoned a binding practice.

The 1989 negotiations dramatically altered the force of the Union's claim. Until then, the right to representation in evaluation appeals existed, at least as an inchoate, debatable right. In 1989, however, the Union brought the issue to the fore by its proposal to amend §22.03 and make the right an explicit contractual one. When the proposal was withdrawn, the Union's Chief Negotiator stated that the withdrawal was "major movement." The Arbitrator is familiar with negotiations and knows what those words mean. They sent a signal -- the Union had made what it considered to be a meaningful concession arid was seeking similar movement from Management.

Having made a major concession at the bargaining table in return for some quid pro quo concession from the State, the Union cannot now retrieve in arbitration what it purposefully gave up in negotiations. When it gave up its demand for representation as "major movement," it also relinquished its claim to the practice. It is axiomatic that no practice is binding if it conflicts with the clear, negotiated intent of the parties. Therefore, the right which may have been confirmed by a binding practice under the 1986 Agreement was extinguished in the 1989 negotiations. When bargaining ended, the negotiated intent was clear. Mandatory representation in evaluation appeals no longer existed; it had been relinquished in a bargaining-table concession. In these circumstances, the only course the Arbitrator can legitimately take is to deny the remedy sought by the Union. Any rights which existed before 1989 were moot by the time the dispute reached arbitration, and rights to future remedies had been ceded in the intervening negotiations.

The Arbitrator is aware that his decision will probably conflict with Trotwood-Madison. But an award consistent with the SERB ruling would conflict with the Agreement. The dilemma is resolved by the scope and limitations of arbitral authority outlined in Article 25, §25.03 of the Agreement:

> Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement. [Emphasis added.]

In accordance with this language, the Arbitrator was bound to seek and find the contractual intent. Once that was discovered, his authority ended. He was powerless to substitute SERB doctrine for contractual meaning. If a question exists pertaining to the legality of the negotiated intent, it is for SERB or the courts to resolve.

AWARD

The grievance is denied.

Decision Issued at Lorain County Ohio.

June 25, 1990

Jonathan Dworkin, Arbitrator