

CBA Archeology: Unearthing the Meaning of Your CBA Language

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Federal Mediation and Conciliation Service

The Federal Mediation and Conciliation Service

Independent Federal Agency

- Established in 1947 with the signed of the Taft Hartley Act
- 143 mediators
- 65 hubs



The Federal Mediation and Conciliation Service

FMCS Mission

- Promote sound, stable L-M relations
- Prevent, minimize work stoppages
- Advocate collective bargaining, mediation & voluntary arbitration
- Develop methods of conflict resolution
- Improve employment security & organizational effectiveness

What Brings You Here?

Raise your hand if.....

- You are responsible for negotiating collective bargaining agreement(s) covering your workplace (chief spokesperson or committee person)
- You are responsible for administering terms of the collective bargaining agreement(s) covering your workplace

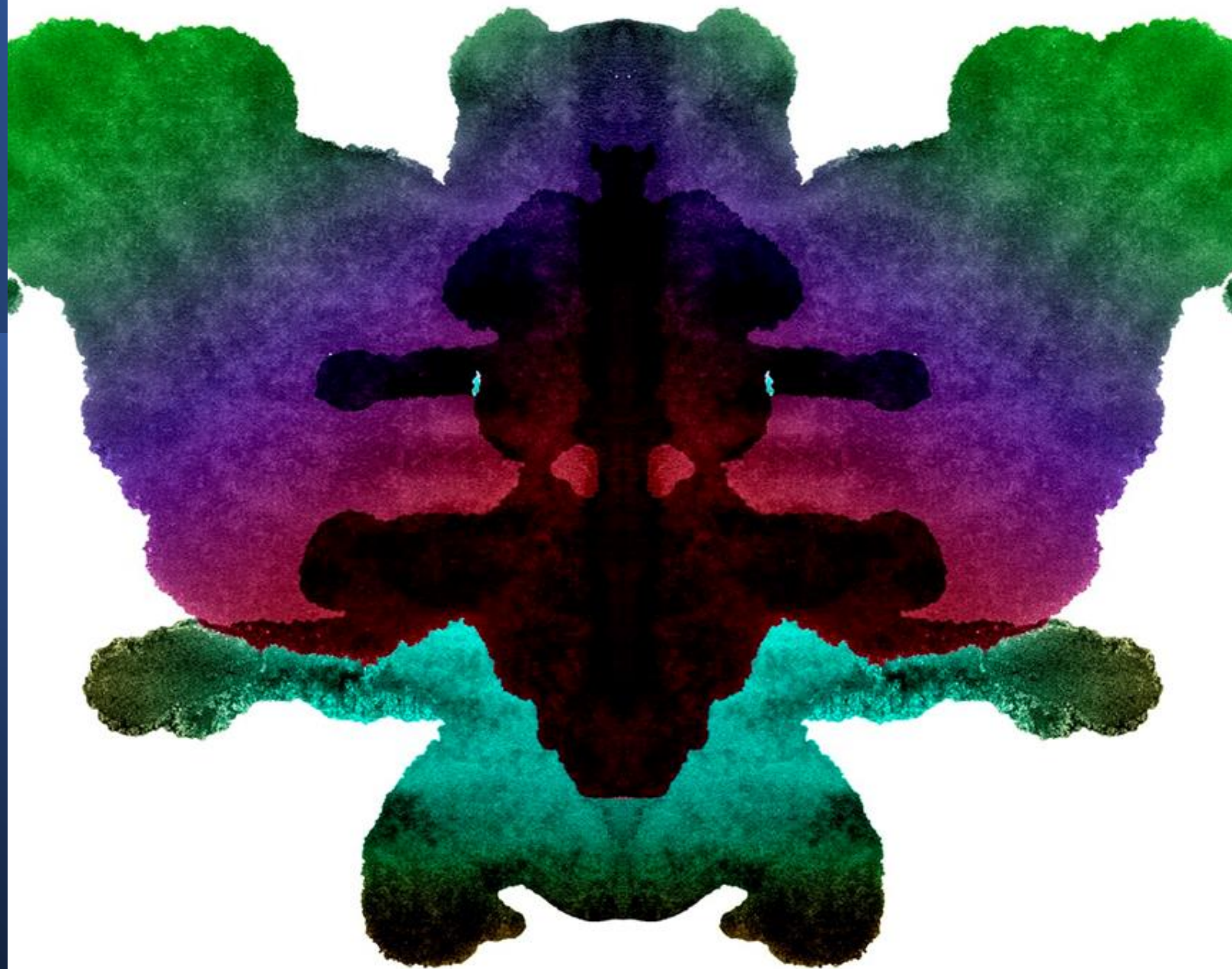


AGENDA

Agenda

1. The Total Labor Contract
2. Contract Interpretation
Resources
3. Rules of Contract
Interpretation
4. Questions

What Do You
See?





The Total Labor Contract

The Total Labor Contract

- Four Components
- The Written Contract
- Written Supplements
- Grievance Settlements and Arbitration Awards
- Past Practices

The Total Labor Contract

Past Practice

- Past Practice is an unwritten implied term of the contract. It is used by the parties for the purposes of establishing the meaning of contract terms, Enforcing unwritten terms, providing proof that the contract language has been amended by the parties.
- Past Practice can give meaning to ambiguous contract language in dispute.
- Past Practice can be utilized to confirm an unwritten right or terms

The Total Labor Contract

Past Practice Considerations

- Silent/ambiguous contract
- Mutuality
- Regularity
- Bridge effect
- Working condition vs. gratuity

The Total Labor Contract

Past Practice Example:

“Regular working hours end at 3 p.m. on Christmas Eve.”

Vs.

“Employees will be granted early release on Christmas Eve.”



Succession of Considerations

Succession of Considerations

1. Clear, plain, and unambiguous (not susceptible of more than one meaning) contract language
2. When contract language is unclear and ambiguous (is susceptible of more than one meaning), consideration of the intention of the parties may be considered via evidence outside the contract
 - Prior contracts
 - Prior proposals
 - Bargaining notes
 - Past practice



Critical Artifacts

A photograph of two ancient, rounded clay pots resting on a dirt floor inside a cave. The pots are dark brown and show signs of age and wear. The background is a rough, light-colored rock wall. The lighting is dim, creating a sense of mystery and discovery.

CBA Interpretation: Critical Artifacts

Previous Contracts

- Store and retain all previously expired CBAs
- Language succession over CBA terms is evidence of language intent



CBA Interpretation: Critical Artifacts

Previous Contracts

“It is agreed that internal Union business, such as soliciting membership, collecting dues, and posting or distributing Union literature, will not disrupt the agency work of the employee(s) involved.”

Language first appears in CBA term 2007-2010

CBA Interpretation: Critical Artifacts

Previous Contracts

“It is agreed that internal Union business, such as soliciting membership, collecting dues, and posting or distributing Union literature, will not disrupt the agency work of the employee(s) involved.” CBA 2007-2010

Agency: Prohibits internal union business during paid work hours.

Union: Internal union business permitted during paid work hours so long as it is not disruptive.



CBA Interpretation: Critical Artifacts

Previous Contracts

“It is agreed that internal Union business, such as soliciting membership, collecting dues, and posting or distributing Union literature, will be conducted during the unpaid non-duty hours of the employee(s) involved.”

Language in CBA term 2004-2007



CBA Interpretation: Critical Artifacts

Written Bargaining Proposals

- Critical practice to retain bargaining files, including all proposals, from all bargaining committee participants
- Accepted, modified, and withdrawn bargaining proposals are evidence of language intent





CBA Interpretation: Critical Artifacts

Written Bargaining Proposals

“It is agreed that internal Union business, such as soliciting membership, collecting dues, and posting or distributing Union literature, will not disrupt the agency work of the employee(s) involved.”

Language unchanged from original contract term 1976-1979



CBA Interpretation: Critical Artifacts

Written Bargaining Proposals

“It is agreed that internal Union business, such as soliciting membership, collecting dues, and posting or distributing Union literature, may be conducted during paid duty hours so long as it does not disrupt the agency work of the employee(s) involved.”

Union bargaining proposal 1992

Rejected by Agency

Subsequently withdrawn by Union

CBA Interpretation: Critical Artifacts

Bargaining Notes

- Collect and maintain all bargaining notes as part of bargaining committee bargaining files
- Notes capturing dialogue and explanation of proposals by the parties are evidence of language intent



CBA Interpretation: Critical Artifacts

Bargaining Notes

“It is agreed that internal Union business, such as soliciting membership, collecting dues, and posting or distributing Union literature, will not disrupt the agency work of the employee(s) involved.”

Language unchanged from original contract term 1976-1979

CBA Interpretation: Critical Artifacts

Bargaining Notes

“It is agreed that internal Union business, such as soliciting membership, collecting dues, and posting or distributing Union literature, will not disrupt the agency work of the employee(s) involved.”

- The proposal leading to this language was made by the employer.
- Bargaining notes of both parties reflect that the union asked what the employer intended by this language and the employer responded, “Union business should be done when both employees involved are on break or if on the clock, during down-time.”



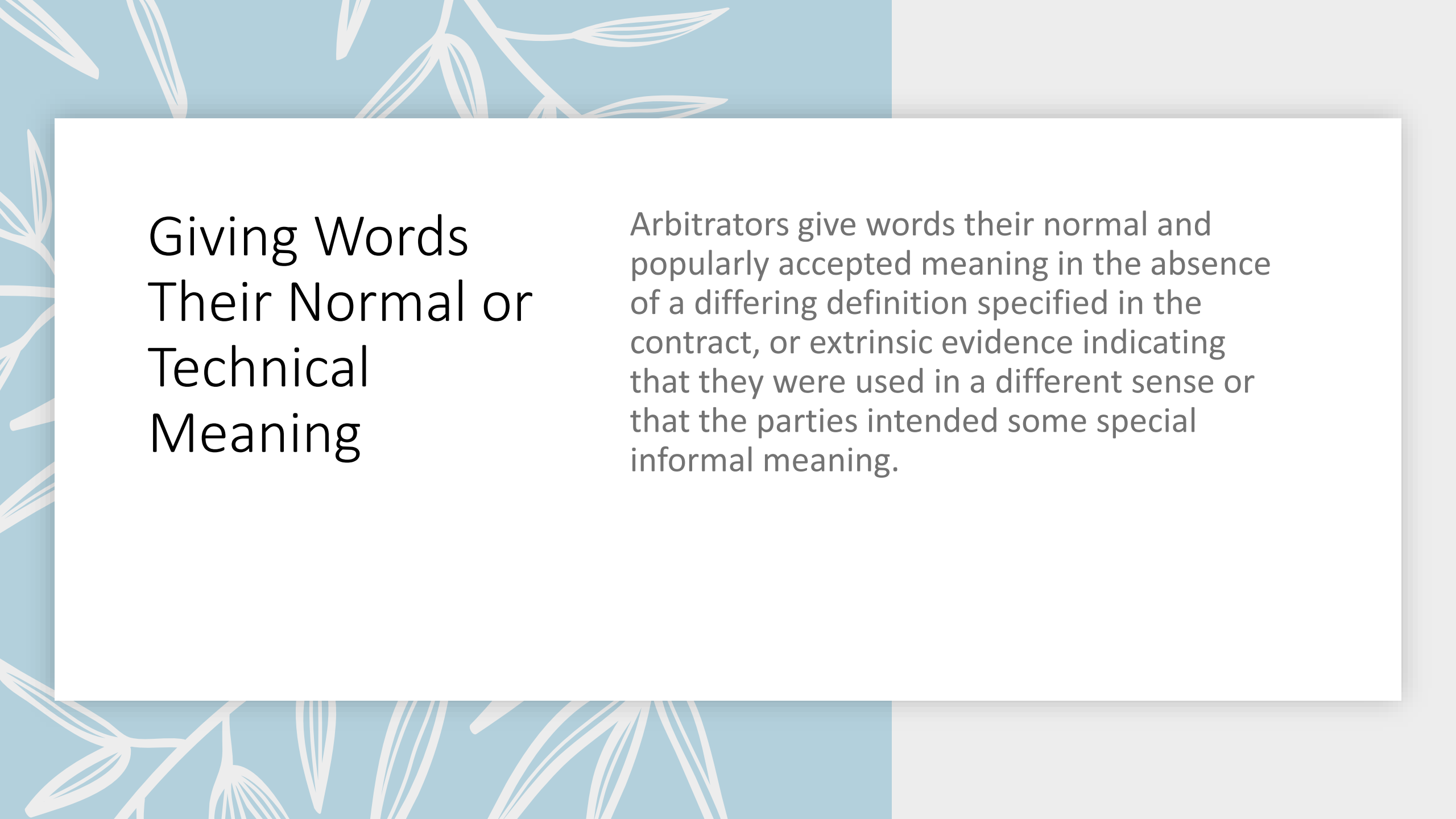
Rules of
Contract
Interpretation

Giving Words Their Normal or Technical Meaning

Example:

“In addition to any other cause for the termination of an employee’s continuous service, an employee’s continuous service seniority shall be terminated by the employee’s:

- Resignation, or
- Discharge, or
- Retirement, or
- Failure to return to work within the time limits of a leave of absence or an extended leave of absence, or
- Absence from work for any reason for more than 30 days on any one occasion and the employee is a probationary employee.”



Giving Words Their Normal or Technical Meaning

Arbitrators give words their normal and popularly accepted meaning in the absence of a differing definition specified in the contract, or extrinsic evidence indicating that they were used in a different sense or that the parties intended some special informal meaning.

Use of Dictionary Definitions

Example:

“In addition to any other cause for the termination of an employee’s continuous service, an employee’s continuous service seniority shall be terminated by the employee’s:

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Use of Dictionary Definitions

Arbitrators often have ruled that in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern. *Cardinal Foods* 90 LA 521-526-1988

Use of Dictionary Definitions

Example:

Resignation noun

1. An act or instance of resigning something:
surrender
2. A formal notification of resigning

Merriam Webster Dictionary



Keep Meaning Consistent Throughout Collective Bargaining Agreement

Example:

Grievance Procedure:

“If no adjustment and settlement is reached in step one within five (5) days, the grievance will be processed to step two.”

Probationary Employees:

“An employee shall be considered on probation until the employee has completed ninety (90) days of employment with the company.”

Keep Meaning Consistent Throughout Collective Bargaining Agreement

Whether the words are “ordinary” or of a technical nature, it is said to be a well recognized rule of construction that a word used by the parties in one sense is to be interpreted, in the absence of countervailing reasons, as used in the same sense throughout the contract.

Interpretation In Light of Purpose

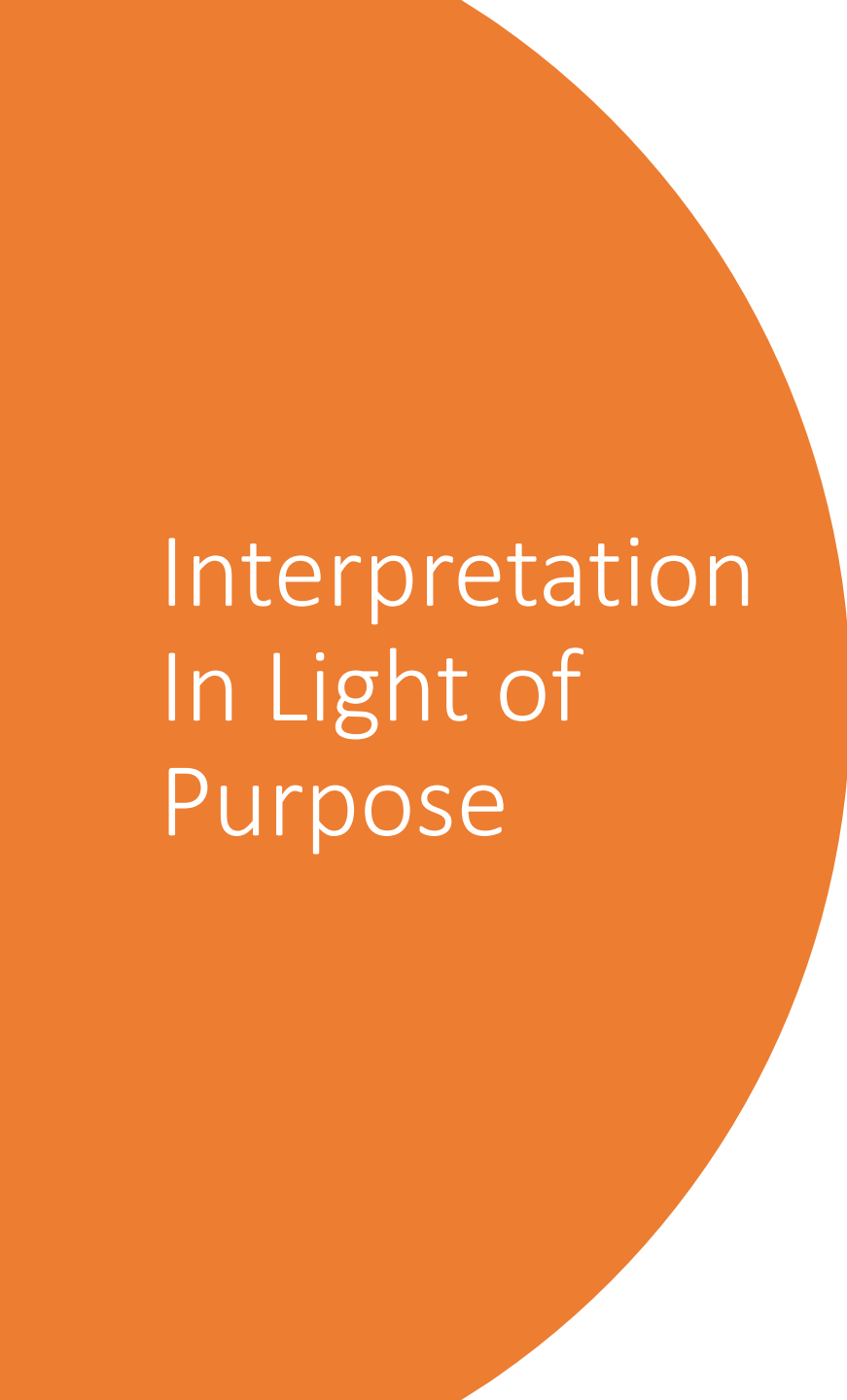
Example:

Break Periods

“Breaks: The Employer and Union recognize and agree that the benefits associated with taking breaks can have a positive impact on quality of care.”


“Meal Period: If an employee is not relieved of work duties during the meal period or a meal period is meaningfully interrupted, the employee will be paid for the missed meal period.”

Ex. An RN being required to complete charting during lunch.



Interpretation In Light of Purpose

The premise behind the “Interpretation in light of purpose” principle is to give greater weight to the terms or words which are congruent with the purpose of the provision. Generally, arbitrators will favor an interpretation in tune with the purpose of the provision over one that conflicts with it.



The Mention of One Thing is the Exclusion of Another

Example:

Filling Vacancy

“Procedure:

- A. Vacancy will be posted on the bulletin boards for 48 hours during which time an employee must sign the bid.
- B. The posting must include qualification requirements, classification, shift, time, date, and also include primary assignment information.”

Must the posting include vacation bidding process?

The Mention of One Thing is the Exclusion of Another

Parties will often time list specific items related to one another in an agreement without a general catch all term. In these instances, contracts are generally interpreted to exclude any related item not specifically mentioned.

This is also true with exclusions. If the parties specifically make an exclusion or exclusions, then all others not specifically excluded shall be considered not excluded.

Exact Terms Given Greater Weight Than General Language

Example:

Management Rights:

“The union recognizes and agrees that the Employer retains the sole and exclusive responsibility to manage, control and operate its business.....etc.”

Hours of Work:

“The regular daily work period shall consist of eight consecutive working hours, excluding the time taken out for meals, and the workweek shall consist of five daily scheduled work periods in seven consecutive days.”

Ex. Management right to change the workday to twelve-hour shifts?

Exact Terms Given Greater Weight Than General Language

Unless a contrary intention appears from the contract interpreted as a whole, or from relevant extrinsic circumstances, more specific provisions should restrict the meaning of a general provision.

In *Airco Carbon 86 LA 6,9* arbitrator Dworkin writes “A broadly observed principle of contract interpretation, acknowledged in both courts of law and arbitration holds that specific language prevails over general language.”

Example:

Holidays

“Regularly scheduled full time pharmacists shall not be required to work on Memorial Day, July 4th, and Labor Day.”

Management position: Regularly scheduled full time pharmacists are those regularly assigned to one store, which EXCLUDES undistributed full time pharmacists who shall be required to work on Memorial Day, July 4th, and Labor Day.

Union position: Regularly scheduled full time pharmacists are those regularly scheduled to work full time hours, which INCLUDES undistributed full time who shall not be required to work on Memorial Day, July 4th, and Labor Day.

Interpretation in Light of Entire Agreement

Example:

Holidays

“Regularly scheduled full time pharmacists shall not be required to work on Memorial Day, July 4th, and Labor Day.”

Discontinuation of 24-Hour Pharmacy

“In the event that a pharmacy ceases 24-hour operation, overnight pharmacists shall have bidding rights in other stores, giving preference in the following order:

1. Regularly scheduled full time pharmacists
2. Undistributed pharmacists.
3. Part-time pharmacists. “

Interpretation in Light of Entire Agreement

It has been widely accepted by arbitrators that disputed portions of an agreement “must be read in light of the entire agreement.”

In Great Lakes Dredge & Dock Co., 5 LA 409,410 arbitrator Kelliher writes: “Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose and the agreement of the parties as evidenced by the entire document... The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole.”

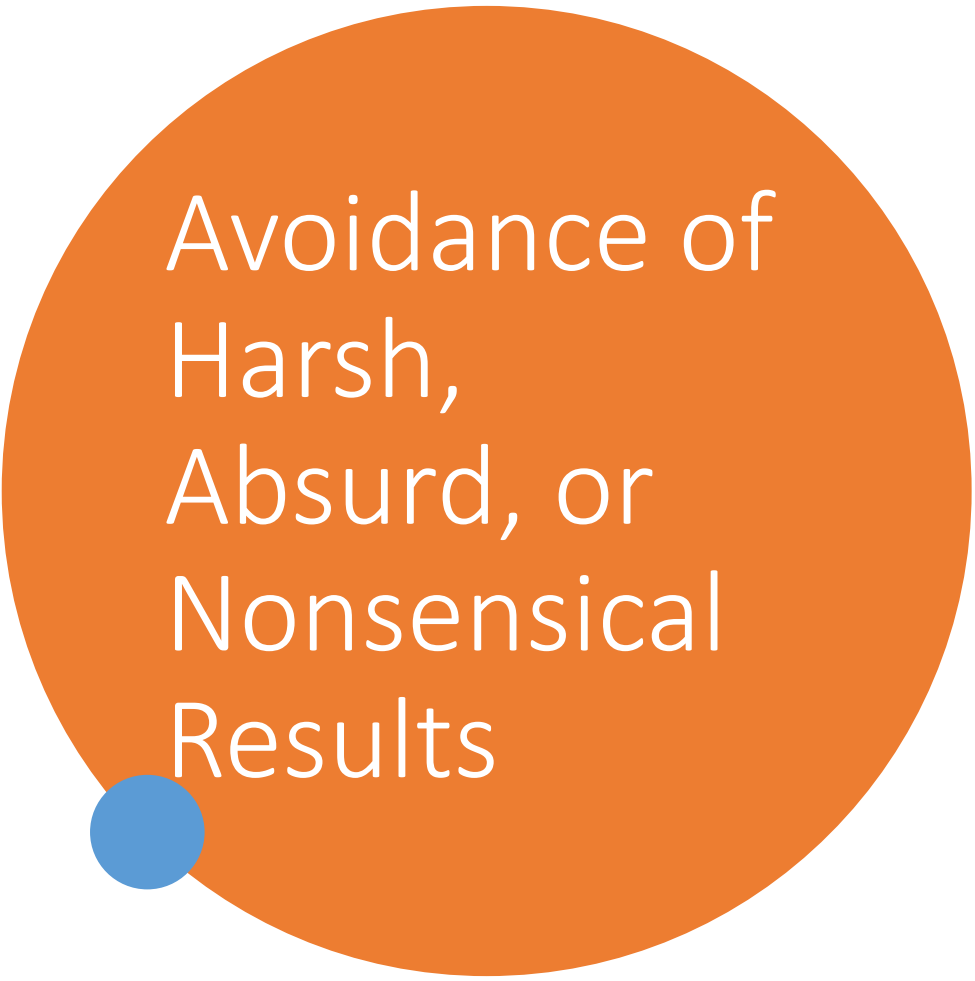
Avoidance of Harsh, Absurd, or Nonsensical Results

Example:


Absenteeism and Tardiness

“Notification: Caregivers are personally responsible to properly notify their Manager or designee whenever they will be absent, tardy, or need to leave early.”

Ex. An employee goes into labor and the employee’s spouse gives notice to the employer that the employee will be absent.



Avoidance of Harsh, Absurd, or Nonsensical Results



When one interpretation of an ambiguous contract would lead to harsh, absurd or nonsensical results, while an alternate interpretation, equally plausible, would lead to just and reasonable results, the latter interpretation will be used.

Interpretation Against Party Selecting the Language

Example:

Health Insurance

Full time and part time pharmacists will be offered health insurance on the same conditions and at the same cost as non-union management and hourly employees, respectively.

Management position: Full time pharmacists will be offered health insurance on the same conditions/cost as non-union management. Part time pharmacists will be offered health insurance on the same conditions/cost as non-union hourly employees.

Union position: Pharmacists will receive health insurance on the same conditions/cost as the better of non-union management and hourly employees.

Interpretation Against Party Selecting the Language

The “contra proferentem” (against the proponent) principal states that “if language supplied by one party is reasonably susceptible to two interpretations... the one that is less favorable to the party that supplied the language is preferred.

Questions?



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