STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME IOWA COUNCIL 61, Complainant,	)	
and	)	CASE NO. 100702
CITY OF CLINTON, IOWA, Respondent.	)	

DECISION ON APPEAL

This case is before the Public Employment Relations Board (PERB or Board) upon Complainant AFSCME Iowa Council 61's (AFSCME) notice of appeal, filed pursuant to PERB subrule 621—9.2(1), which seeks the Board's review of a Proposed Decision and Order issued by a PERB administrative law judge (ALJ) on April 12, 2017. In her Proposed Decision and Order, the ALJ concluded that AFSCME had failed to establish the City of Clinton's commission of prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(*a*) through (*h*) when the City changed its handbook policy regarding the Family and Medical Leave Act (FMLA). The ALJ further concluded the complaint should be dismissed.

The parties' representatives presented oral arguments to the Board on July 25, 2017. Ty Cutkomp represented AFSCME and attorney Bill Stone represented the City. Prior to oral arguments, the parties filed briefs outlining their respective positions.

Pursuant to Iowa Code section 17A.15(3), on appeal from an ALJ's proposed decision, the Board possesses all powers that it would have

possessed had it elected, pursuant to PERB rule 621—2.1, to preside at the evidentiary hearing in the place of the ALJ. Pursuant to PERB rules 621—11.8 621—9.5, on this appeal we have utilized the record as submitted to the ALJ.

Based upon our review of this record, as well as the parties' briefs and oral arguments, we adopt the ALJ's findings of fact with additions and set forth our own conclusions of law. We conclude the City did commit prohibited practices, but AFSCME did not timely file its complaint. In accordance with our factual findings and conclusions of law, the complaint filed by AFSCME Council 61 is DISMISSED.

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the Proposed Decision and Order are fully supported by the record. The parties do not dispute the ALJ's findings of fact. The findings of fact are summarized with several additions as follow:

The City employs 190 to 200 employees.[1] It negotiates collective bargaining agreements (CBA) with the certified employee organizations that represent three City employee bargaining units—a police unit, a fire unit, and a "mixed" unit. AFSCME is the certified representative of the "mixed" bargaining unit consisting of 40 to 50 employees who are employed in the City's Public Works Department, the Parks and Recreation Department, and the Municipal Transit Administration.

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[1] The City is a public employer within the meaning of Iowa Code section 20.3(10). The Complainant AFSCME is a certified employee organization within the meaning of Iowa Code section 20.3(4). All references are to Iowa Code (2015).

The City and AFSCME were parties to successive CBAs, the last of which was negotiated in August 2014 and effective July 1, 2015 through June 30, 2018. The parties' CBA, Article 9 "Leaves of Absence," provisions addressed application for leave, paid leaves, unpaid leaves, and employees' returns to work following leaves of absences. The CBA, including Article 9, however, did not address the FMLA.

A. The City's FMLA Policy.

After the last City CBAs were negotiated, a personnel situation prompted City Administrator Jessica Kinser to question the City's FMLA policy. The policy allowed employees to exhaust all paid leave then take an additional 12 weeks of unpaid FMLA-qualifying leave (referred to as FMLA leave) even if the employee's absence was an FMLA-qualifying event from the start of the paid leave.[2] The City's FMLA policy was contained in its 2013 handbook, which provided in part,

> ***Family Medical Leave Act***
> In accordance with the Family Medical Leave Act (FMLA), the City of Clinton will grant up to 12 weeks unpaid leave annually, based on the previous rolling 12-month period. . . .
>
> FMLA leave will be granted for the following circumstances:
> 1. Employee's serious medical condition.
> 2. Birth, adoption or placement of a child.
> 3. Caring for a spouse, child or parent, with a serious health condition.
> 4. Military medical and exigency leave.
>
> The employee must provide a written request for leave and sufficient medical certification to the Finance Office within 15 calendar days from the date of absence. The City of Clinton

[2] The FMLA protects employees from adverse employment actions during and up to a 12-week period in which the employee has a FMLA-qualifying event, *e.g.*, serious medical condition.

> reserves the right to request re-certification at the [C]ity's discretion in accordance with federal law.
>
> The annual FMLA allowance will run concurrent with any Workers' Compensation leave.
>
> The employee's insurance benefits will be maintained for up to 12 weeks during leave under the same conditions as if they continued to work. . . .
>
> . . . .

This policy only required concurrent counting of FMLA leave with Workers' Compensation Leave and not concurrent counting of FMLA leave and paid leave. This allowed employees to take up to 12 weeks of unpaid FMLA-qualifying leave after exhausting their paid leave. Additionally, employees were provided health insurance for the duration of unpaid FMLA leave.

As the handbook provided, employees were required to complete certain paperwork when requesting designated-FMLA leave. However, because an employee could use paid leave first, the FMLA paperwork was never completed at the beginning of the employee's absence and never completed at all if the employee did not exhaust paid leave and request the use of unpaid FMLA leave.

For operational and budgetary reasons, the City decided to change its FMLA policy and require FMLA leave to run concurrently with paid leave from the very start of the FMLA-qualifying event. The City, in consultation with its bargaining representative and City attorney, Bill Stone, reviewed its rights and obligations under the FMLA, the three CBAs, and chapter 20.

B. Notification to Unions.

Via email on April 24, 2015, Kinser notified the representatives of the three bargaining units, including AFSCME representative Ty Cutkomp, of the City's proposed change to its FMLA policy:

> Effective May 15, 2015, please note that the City proposes to require that all FMLA leave will be accounted for *concurrently* with other paid leave (under the current city handbook, FMLA only runs concurrently with workers compensation leave[])[.] In other words, eligible employees with FMLA-qualifying situations will receive their federally protected FMLA leave, but contrary to past practice in some situations, the City will not allow the tacking of FMLA leave subsequent to the use of regular paid leave for an employee's own or a qualifying family member's serious health condition. Employees will be required to take paid leave along with the unpaid federal leave. This is consistent with the City's prerogative under federal law when notice is provided to all employees. Please consider said notice. New handbooks with this change included will be issued later this year. Please advise when you are available to discuss this new policy in the next ten days.

The fire unit accepted the change without bargaining and the police unit accepted the change to the FMLA policy after one meeting with the City.

C. AFSCME's Request to Bargain.

On May 1, Cutkomp emailed a copy of Kinser's communication to the City's attorney, Stone, and indicated that FMLA-related leaves were an Iowa Code section 20.9 mandatorily negotiable subject. That same day, they conversed by phone then Stone followed up with an email, which provided in part,

> I hope I answered your questions about this issue. The City is available to meet with you and your team to discuss at your convenience. [SIC] If necessary. Please also see the contract regarding the 10 day notice of any work rule. Article 19, section 7.

Article 19, Section 7 provided in relevant part, "The Employer shall establish reasonable work rules and they shall be posted at least ten (10) working days prior to their effective date."

On May 5, Cutkomp replied and copied Kinser and AFSCME bargaining team members in on his email. He offered several dates in May to meet "over this FMLA proposed change" and wrote in part,

> Since this City change is perceived by the union to be dealing with the mandatory bargaining topic of "leaves of absence", [SIC] I request that the City not proceed forward with any implementation for the AFSCME bargaining unit during the period within which we are meeting over the issue.

Stone promptly responded in part,

> Ty: the [C]ity will plan on meeting with you Tuesday, May 12, 3:00 PM, at City Hall. In addition, please also note the City's right to implement reasonable work rules with 10 days [SIC] notice to the union. Thank you.

D. May 12 Meeting.

City representatives Stone and Kinser, Cutkomp, and the AFSCME bargaining team were present when the parties met on May 12. The parties did not exchange written proposals, but discussed issues related to the FMLA policy and the CBA. The City explained its purpose behind the change and pointed out other leave provisions that were contained in the CBA: employees with serious medical conditions who had exhausted their sick leave banks were entitled to have sick leave donated from other employees; and employees were also entitled to up to six months of unpaid leave for any "reasonable purpose" without benefit accrual.

At the meeting, AFSCME discussed its concerns with the proposed change: employees' overall leave entitlement would be reduced by 12 weeks after the exhaustion of paid leave; and employees would lose a corresponding 12 weeks of health insurance coverage. The parties discussed whether the City would be willing to provide an additional 12 weeks of health insurance if an employee was not otherwise covered during a leave or during leave for any "reasonable purpose."

Finally, Stone discussed the City's right to implement the proposed FMLA policy change as a reasonable work rule under the CBA. Cutkomp responded that despite the CBA work rule provision, the City was obligated to negotiate the City's proposed change to what the parties mutually agreed was a mandatory subject of bargaining. The meeting concluded and Stone indicated that he "was keeping an open mind on the issue" and would talk to Kinser who had left the meeting early.

E. Change to FMLA Policy.

On May 15, the City changed its FMLA policy, procedures, and practice to require concurrent counting of FMLA leave with paid leave. As a result, the City automatically issued FMLA paperwork for completion to all City employees who were absent for three days. At least three AFSCME-represented employees were identified and issued FMLA paperwork pursuant to the new policy and procedure.

F. July 7 Meeting.

A week later, Stone contacted Cutkomp and scheduled a second meeting for July 7 due to the parties' unavailability in June. It was at this meeting that AFSCME was notified of the City's change in its FMLA policy for everyone, including AFSCME-represented employees.

Stone, Kinser, Cutkomp and his bargaining team attended the July 7 meeting and discussed some of the same topics previously addressed. The City informed AFSCME that a three-day absence triggered the City's issuance of FMLA paperwork to employees for completion. AFSCME requested a copy of the paperwork and the parties discussed whether employees would be in pay status while completing the documents. The City discussed specific situations involving the City's issuance of FMLA paperwork to three AFSCME-represented employees since the City had implemented the change on May 15.[3] One of the three employees (SS) was an AFSCME bargaining team member and present for the meetings. However, the employee had never fully exhausted paid sick leave to raise an issue of unpaid status.

AFSCME questioned the City's rights to designate leave as FMLA-qualifying leave and request related medical information. Lastly, Cutkomp

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[3] Kinser testified at hearing:

Q: And there was another discussion then about two transit employees who were off for a month and the City sent them FMLA paperwork without any issues?
A: Yes. I mean, May 25th, 2015, was the day when things changed, and May 15th was – even though we were still meeting over this and still bargaining over it, we were following through with our practice city wide which had changed as of May 15th, and so transit employees were sent – those were the only two at that time I could identify – I mean, [SS] and those two employees who had actually had any sort of contact with sort of the new rule change.

asserted the City did not have a right to require concurrent counting of FMLA leave with paid leave. He shared a copy of a federal circuit case purporting to support AFSCME's position that Stone indicated he would review.

The next day, July 8, Stone emailed Cutkomp to schedule another meeting "to discuss the new city policy about running FMLA concurrently with all other leave." Stone indicated another firm attorney would be present at the meeting to answer questions. He informed Cutkomp that the federal circuit case relied on by AFSCME was inconsistent with Department of Labor (DOL) regulations and other FMLA case law, both of which require the employer to designate leave as FMLA leave when it has notice of the employee's FMLA-qualifying event. Stone attached two federal circuit cases to his email and concluded, "Finally, I again encourage you or your membership to contact the [C]ity's FMLA coordinator, Brenda, regarding any questions or information needed."

G. August 25 Meeting.

The parties exchanged several emails to schedule the next meeting, which was eventually held on August 25. Cutkomp, his bargaining team, Kinser, Stone, and Stone's colleague, Amy Reasner, were present. The parties discussed the exchanged federal cases and still disagreed whether the City was required or if it was optional for the City to concurrently count FMLA leave with other leaves. They again discussed the employees' submission of medical information. Reasner indicated that the City would provide health insurance coverage upon exhaustion of FMLA leave and paid leave for an employee on

long-term disability (LTD) or ADA-related leave. The City reported that it had FMLA information on posters located throughout the City. During the meeting, Stone requested a proposal from AFSCME regarding the City's FMLA policy. However, no proposals were exchanged.

H. Subsequent Communications.

By email on September 3, Cutkomp notified Stone, Kinser, and Reasner that AFSCME was reviewing draft material. He also requested an additional meeting date. Cutkomp emailed them again on September 16 to confirm AFSCME's preparation of a proposal and he also requested an explanation for the City's position. Additionally, he requested a negotiation date and promised to forward a proposal to the City in advance of the meeting.

Reasner replied to Cutkomp on September 18 and indicated Cutkomp was conflating two separate issues. First, under DOL rules, the City as the employer "may require" the employee to use accrued paid leave concurrently with FMLA leave. She pointed out that this was the issue they had been discussing, "the City's entitlement to and decision to propose a change to its handbook regarding running paid leave concurrently with FMLA leave." The second issue was "employees don't get to pick and choose when FMLA leave runs" and it was the City's responsibility to designate leave as FMLA leave when sufficient notice existed that the employee was unable to work for FMLA-qualifying reasons.

On October 6, Cutkomp responded to the City, again disagreeing with what he understood the City's position to be on whether concurrent counting

was required. He identified "concurrent counting [a]s the real issue." Since both parties agreed the City's FMLA policy was a mandatory subject of bargaining, Cutkomp wrote, "it is appropriate to proceed discussing bargaining proposals." He attached AFSCME's contract proposals with provisions that addressed an additional 12 weeks of unpaid leave, FMLA paperwork, an appeal process for FMLA designated leave, and health insurance for LTD or ADA leave for inclusion in the parties' collective bargaining agreement.

When City representatives met to review AFSCME's proposals, Kinser was "dumbfounded" because the parties had discussed the issues and concerns during their meetings. By email dated October 16 to Cutkomp, the City rejected what Stone characterized as AFSCME's latest "counteroffer." However, Stone clarified the City's health insurance coverage for LTD.

The parties exchanged several emails in October and November attempting to schedule a meeting. On November 6, Stone confirmed the City's only available date of November 24 and requested Cutkomp to electronically send an "additional counterproposal" if the union had one for the City to evaluate and negotiate electronically over the leading weeks. Cutkomp responded on November 10 and accepted the November 24 date, but indicated in part, "In terms of expecting another proposal from us, we have already submitted one. We await the City's proposal."

I. City's Assertion of the Parties' Impasse.

The next day, Stone emailed Cutkomp and cancelled the November 24 meeting indicating the City had reviewed the union counteroffers and "have not

identified any reason why the City has a duty to accept the union's positions." Stone went on to assert that after bargaining, "the [C]ity has determined to proceed with handling FMLA leave as previously outlined, which is consistent with the law." Stone relayed the City's belief that it had satisfied its duty to bargain in good faith and did not believe further bargaining would result in a different outcome.

Cutkomp responded on November 18 and indicated the union did not believe the parties were at impasse; the union had only submitted one written proposal and had not received one from the City; and AFSCME may have follow-up proposals once they had an opportunity to discuss its original proposal with the City. Cutkomp offered dates for the parties to meet.

Stone replied on November 21 and reiterated the City's belief that the parties' multiple discussions had more than satisfied the City's duty to bargain in good faith and he did not believe further bargaining would result in a different outcome. No further meetings or discussions were held.

J. AFSCME's Filing of Its Complaint.

AFSCME filed the instant prohibited practice complaint on February 5, 2016, alleging the parties were not at impasse on November 11 when the City refused to engage in further discussions on the changes to its FMLA policy.

The City contends AFSCME's complaint is untimely because AFSCME had notice on April 24, 2015, that the City was going to implement a change to its FMLA policy effective May 15, 2015, but AFSCME did not timely file its complaint within the required 90 days. Alternatively, if PERB finds the

complaint timely, the City contends it has fulfilled its bargaining obligation because the parties were negotiating over the FMLA policy change up until November 11 when the parties reached impasse.

Although it is not clear when, the parties seemingly agreed throughout this period that the City's FMLA policy was a mandatorily negotiable subject not "contained in" the parties collective bargaining agreement.

CONCLUSIONS OF LAW

AFSCME's complaint alleges the City's commission of prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(*a*), (*e*), and (*f*) when the City implemented unilateral changes to its FMLA policy.[4] The provisions relevant to this claim provide,

> **20.10 Prohibited practices.**
> 1. It shall be a prohibited practice for any public employer, public employee, or employee organization to refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.
> 2. It shall be a prohibited practice for a public employer or the employer's designated representative to:
> *a.* Interfere with, restrain, or coerce public employees in the exercise of rights granted by this chapter.
> . . .
> *e.* Refuse to negotiate collectively with representatives of certified employee organizations as required by this chapter.
> *f.* Deny the rights accompanying certification granted in this chapter.
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> . . . .

Iowa Code § 20.10(1), 20.10(2)(*a*),(*e*), and (*f*).

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[4] Although AFSCME cited Iowa Code sections 20.10(1) and 20.10(2)(*a*) through (*h*), the relevant sections are Iowa Code sections 20.10(1), 20.10(2)(*a*), (*e*), and (*f*) for an alleged unlawful unilateral change implemented by a public employer.

A. Employer's Bargaining Obligation for Intended Changes.

The employer's duty to bargain in good faith arises before an employer can implement changes to mandatorily negotiable subjects during the term of an existing collective bargaining agreement. *See Des Moines Educ. Ass'n & Des Moines Indep. Cmty. Sch. Dist.*, 1975 PERB 516 at 6 (noting the employer may "not institute changes in negotiable conditions of employment without, at a minimum, allowing the certified representative input into that decision-making process"). The law is well settled that an employer's implementation of a change in a mandatory subject without first fulfilling its bargaining obligation constitutes a prohibited practice within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(*a*),(*e*), and (*f*). *Des Moines Ass'n of Prof'l Fire Fighters, Local 4 & City of Des Moines*, 2014 PERB 8535 at App. 16, *aff'd, Des Moines Ass'n of Prof'l Fire Fighters, Local 4 v. Iowa Pub. Emp't Rel. Bd.*, No. CVCV047951 (Polk Cnty. Dist. Ct. 02/16/2015), *aff'd, Des Moines Ass'n of Prof'l Fire Fighters, Local 4 v. Iowa Pub. Emp't Rel. Bd.*, 881 N.W.2d 471 (Table) (Iowa App. Ct. 2016); *Cedar Rapids Ass'n of Firefighters, Local 11 & City of Cedar Rapids*, 1993 PERB 4610, 4712, 4715, & 4729 at 15. In contrast, an employer's implementation of a unilateral change in a permissive subject of bargaining is not a prohibited practice. *Des Moines Ass'n of Prof'l Fire Fighters*, 2014 PERB 8535 at App. 18; *Black Hawk Cnty. & PPME, Local 2003*, 2008 PERB 7929 at 11-12 (concluding such a complaint "fails to state a claim upon which relief may be granted").

If an intended change is to a section 20.9 mandatory subject, the employer's bargaining obligation differs depending upon whether the mandatorily negotiable term is "contained in" or not "contained in" the collective bargaining agreement. *Des Moines Educ. Ass'n & Des Moines Indep. Cmty. Sch. Dist.*, 1978 PERB 1122 at 4 (commonly cited as "*Des Moines Indep. Cmty. Sch. Dist.*"). Neither party has a duty to discuss any proposed mid-term modification of any mandatory term "contained in" the contract and neither party may lawfully insist on such a discussion. *AFSCME/Iowa Council 61 & Louisa County*, 2011 PERB 8146 at 11 (quoting *Des Moines Indep. Cmty. Sch. Dist.*, 1978 PERB 1122). A mid-term modification of any such "contained in" term may only be lawfully made after consent of the opposing party has been voluntarily given. *Id.*

If the proposed mid-term change is to a mandatory term not "contained in" the contract, the change may be lawfully implemented by the employer only after it has given the certified employee representative notice of the change and, if requested, the opportunity to negotiate it to impasse. *Id.*; *Waterloo Police Protective Ass'n & City of Waterloo*, 2001 PERB 6160 at 3.

In order to prevail in an unlawful change case, a complainant thus must show that (1) the employer implemented a change; (2) the change was to a mandatorily negotiable matter; and (3) the employer had not fulfilled its bargaining obligation before making the change. *Des Moines Ass'n of Prof'l Fire Fighters*, 2014 PERB 8535 at App. 16-17. The complainant bears the burden

of establishing each element of the charge. *Int'l Ass'n of Prof'l Firefighters, Local 2607 & Cedar Rapids Airport Comm'n*, 2013 PERB 8637 at 10.

1. Change implemented.

The first step in the analysis of a unilateral change case requires identification of the alleged change and the date it was implemented. When the change or its timing is not readily apparent or the parties are in disagreement, it may be necessary to determine the "status quo" of the policies, procedures, or practices in operation at the approximate time of the alleged change. *See Cedar Rapids Ass'n of Fire Fighters, Local 11 & City of Cedar Rapids*, 1995 PERB 4898 at 11-13 (finding that after an examination of established policies and practices, it was apparent "no real changes were made in the status quo by adoption of the '93 [City] Policy"). A determination of the "status quo" of procedures, policies, or practices assists in ascertaining if there was ever a change or identifying what changed and when the change took place. *See, e.g., Des Moines Ass'n of Prof'l Firefighters*, 2014 PERB 8535 (concluding the changes did not alter the status quo of "job classifications" or "wages," but plainly related to duty assignments of lieutenants and occurred on the date a lieutenant reported for duty and took charge of a single-company station).

In the present case, the status quo of the City's FMLA policy is that which was outlined in the City's 2013 handbook and in effect on April 24, 2015, when Kinser notified Cutkomp and the other bargaining unit representatives of the City's intended changes. The policy did not require concurrent counting of paid leave and FMLA leave. As a result, procedures and

practices were such that employees were allowed to exhaust their paid leave before completing FMLA paperwork and thereafter utilize up to 12 weeks of unpaid FMLA leave with health insurance coverage. These were the FMLA policy, procedures, and practices in place as of April 24.

The evidence demonstrates the status quo of the FMLA policy, procedures, and practices changed on May 15 when the City required concurrent counting of paid leave and FMLA leave. The change in the FMLA policy applied to all City employees, including AFSCME-represented employees. As Kinser testified in part, "[O]ur practice city wide [ ] had changed as of May 15." In its implementation of the change in policy, the City also changed its corresponding procedure with respect to FMLA paperwork. After the change, the City automatically issued FMLA paperwork to employees who were absent for three days. This included AFSCME-represented employees; three were issued FMLA paperwork to complete pursuant to the new policy. It is undisputed that the City's FMLA policy, procedures, and practices changed on May 15 with respect to all City employees.

2. Mandatory topic.

The parties do not dispute that the City's intended change to its FMLA policy was a mandatorily negotiable matter pursuant to Iowa Code section 20.9.

3. Fulfillment of bargaining obligation.

The parties also agreed that the City's FMLA policy was a mandatorily negotiable subject not "contained in" the parties' CBA. Thus, the City was

obligated to provide notice of its proposed change and, if requested, an opportunity for AFSCME to bargain the proposed change to impasse. *See AFSCME/Iowa Council 61*, 2011 PERB 8146 at 11.

The City fulfilled its obligation to provide notice of its proposed FMLA changes when, on April 24, Kinser emailed the three unions and notified them of the City's intended changes to its policy. On May 1, AFSCME requested to bargain the proposed change when Cutkomp emailed Stone and made the request to bargain what Cutkomp asserted was a mandatorily negotiable matter. The parties met on May 12, but they were not at impasse by the end of the meeting. The meeting ended with Cutkomp asserting AFSCME's right and the City's obligation to bargain the intended FMLA changes as a mandatorily negotiable matter. Stone responded that he would keep an open mind. As the parties' subsequent communications demonstrate, the parties intended future bargaining on the FMLA policy. The parties were not at impasse.

Despite AFSCME's assertion of its right to bargain, the City unilaterally implemented changes to its FMLA policy three days later, on May 15, before the parties had an opportunity to reach impasse. Regardless of subsequent meetings or correspondence, the City failed to first fulfill its bargaining obligation before implementing changes to its FMLA policy. The City failed to negotiate to impasse a mandatorily negotiable matter not contained in the CBA after a request for bargaining had been made by AFSCME. Therefore, the City committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(*a*),(*e*), and (*f*).

B. Timeliness of Complaint.

The unilateral change complained of occurred on May 15. The complaint which alleges the unilateral change was filed the following year on February 16. Iowa Code section 20.11 restricts PERB's jurisdiction to prohibited practices committed within 90 days of the filing of the complaint and provides in part,

> **20.11 Prohibited practice violations.**
> 1. Proceedings against a party alleging a violation of section 20.10 shall be commenced by filing a complaint with the board within ninety days of the alleged violation, causing a copy of the complaint to be served upon the accused party. . . .

The 90-day filing requirement is mandatory and jurisdictional. *Brown v. Pub. Emp't Rel. Bd*, 345 N.W.2d 88, 94 (Iowa 1984). The complainant bears the burden of proof on the jurisdictional timeliness issue. *Id.*; *Holecek & City of Hiawatha*, 2010 PERB 8073 at App. 9.

AFSCME failed to file its complaint within 90 days following the City's unilateral change to its FMLA policy on May 15. It is apparent, however, that as of the parties' meeting on May 12, AFSCME representative Cutkomp was laboring under the understanding that Stone was keeping an open mind. Through the parties' subsequent communications to schedule another meeting, Cutkomp had every reason to believe the parties would bargain proposed changes to the City's FMLA policy.

An untimely complaint may be deemed timely if a factual and legal basis exists which excuses the untimely filing. *Brown*, 345 N.W.2d at 94; *Martin & UniServ Unit Two/ISEA/NEA*, 2014 PERB 8539 at 12. There are two recognized

exceptions to the 90-day limitation period. The complainant bears the burden of proving the facts which the exception requires. *Brown*, 345 N.W.2d at 94.

The first is a "discovery rule" exception to the section 20.11 limitation period. *Id.* at 95-96. Under this exception, a party's cause of action does not accrue, and the applicable limitation period does not begin to run until the complainant first knew or should have known of the acts which constituted a prohibited practice. *Id.*; *Holecek*, 2010 PERB 8073 at App. 11.

The second is the misrepresentation exception (also referred to as the doctrine of fraudulent concealment). *Brown,* 345 N.W.2d at 96; *Holecek*, 2010 PERB 8073 at 3. To establish the applicability of the misrepresentation exception, a complainant must allege and prove facts showing (1) that the party against whom the cause of action exists did some affirmative act to conceal the cause of action; and (2) that the complainant exercised diligence to discover the cause of action. *See Brown*, 345 N.W.2d at 96 (remanding the case for PERB to determine if the association misled Brown into thinking she could not file a complaint until she sustained damages notwithstanding her due diligence otherwise); *Holecek*, 2010 PERB 8073 at 3 (rejecting claim that the City intentionally misrepresented Holecek's exclusion from the bargaining unit thereby depriving her exercise of collective bargaining agreement rights).

The discovery rule applies here when Cutkomp was seemingly not aware that the City changed its FMLA policy on May 15. Cutkomp had attempted to schedule a meeting and bargain the changes through his email exchanges with

Stone after their May 12 meeting. Stone appeared to respond in kind with the same intentions.

Although the discovery rule applies in this case, AFSCME's complaint is still untimely under the circumstances. Regardless of what Cutkomp correctly or incorrectly believed in May and June about the FMLA policy, when the parties met on July 7, AFSCME knew or should have known that the City had already implemented changes to its FMLA policy for all City employees. In that meeting, the parties discussed three specific instances where the City had issued FMLA paperwork to AFSCME-represented employees based on the changes in policy. These were concrete examples of the City's unilateral changes in a mandatorily negotiable matter. When AFSCME representatives left the July 7 meeting, they knew of the changes that had been made before the parties had bargained the matter to impasse.

AFSCME failed to file its complaint within ninety days after its discovery of the City's unlawful unilateral changes to the FMLA policy. Despite the parties' intentions going forward in their negotiations, it was incumbent that the City fulfilled its bargaining obligation before making any changes to its FMLA policy. Under the settled law, an employer cannot unilaterally implement a change to a mandatorily negotiable matter and thereafter fulfill its bargaining obligation.

The acts complained of and AFSCME's discovery of the unlawful changes occurred more than 90 days prior to the filing of the complaint. Thus, the complaint is untimely.

Accordingly, we enter the following:

ORDER

The prohibited practice complaint filed by AFSCME Iowa Council 61 is hereby DISMISSED. The costs of reporting and of the agency-requested transcript in the amount of $810.00 are assessed against the Complainant pursuant to PERB rule 621—3.12. A bill of costs will be issued to the Complainant in accordance with PERB subrule 621—3.12(3).

DATED at Des Moines, Iowa this 18th day of October, 2018.

PUBLIC EMPLOYMENT RELATIONS BOARD

Jamie K. Van Fossen, Interim Chair

Mary T. Gannon, Board Member

Original filed EDMS.