STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, LOCAL 896 (COGS), Complainant, and STATE OF IOWA (BOARD OF REGENTS), Respondent.	CASE NO. 100800
STATE OF IOWA (BOARD OF REGENTS), Complainant, and UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, LOCAL 896 (COGS), Respondent.	CASE NO. 100814

DECISION ON APPEAL

This case is before the Public Employment Relations Board (PERB) on United Electrical, Radio & Machine Workers of America, Local 896's (COGS') appeal and the State of Iowa's (Board of Regents') cross-appeal of a proposed decision and order issued on PERB Case Nos. 100800 and 100814. In PERB Case No. 100800, United Electrical, Radio & Machine Workers of America, Local 896 (COGS) (hereafter referred to as UE or COGS) alleged State of Iowa (Board of Regents) (hereafter referred to as Board of Regents, Regents, or BOR) filed a prohibited practice complaint alleging the BOR committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(*a*), (*e*), and (*f*). UE alleges that during the negotiation of the parties' 2017-2019

bargaining agreement, the BOR failed to negotiate in good faith by refusing to make any movement from its initial bargaining position, refusing to reach agreement on any item of negotiation even when no disagreement existed, and deliberately delaying participation in impasse resolution procedures.

In PERB Case No. 100814, the BOR filed a prohibited practice complaint alleging UE's arbitration offer included proposals on non-mandatory subjects of bargaining after the BOR informed UE that it did not agree to submit non-mandatory impasse items to arbitration. The BOR claims this action constitutes a prohibited practice within the meaning of Iowa Code section 20.10(3)(*b*) and (*d*).

The Board consolidated the cases by order filed March 24, 2017. The ALJ held an evidentiary hearing on August 28, 2017. In her proposed decision issued September 12, 2018, the ALJ dismissed both complaints finding neither party established the commission of any prohibited practice alleged.

On October 1, 2018, UE appealed any adverse ruling or finding in the ALJ's proposed decision and order. On October 2, 2018, the BOR filed a notice of cross-appeal from any adverse findings or ruling contained in the proposed decision and order.

In accordance with Iowa Code section 17A.15(3), on appeal from an ALJ's proposed decision and order, 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 place of the ALJ. On this appeal, we have utilized the record as submitted to the ALJ.

Counsel for the parties, Charles Gribble for UE and Andrew Tice for the BOR, telephonically presented oral arguments to the Board on February 12, 2019. Prior to the oral arguments, both parties filed a brief outlining their respective positions.

After a review of the ALJ's proposed decision and order, the record, and the parties' briefs and arguments, we conclude, in PERB Case No. 100800, that UE established the BOR's commission of prohibited practices. In PERB Case No. 100814, we affirm the ALJ's conclusion that the BOR failed to establish UE's commission of any prohibited practice alleged in the BOR's complaint.

FINDINGS OF FACT

The findings of fact set out in the ALJ's Proposed Decision and Order are fully supported by the record and we adopt them as our own, as set out in full below:

> The State of Iowa, Board of Regents is a public employer as defined by Iowa Code section 20.3(10). The Board of Regents governs the State's public universities including the University of Iowa. UE is an employee organization within the meaning of section 20.3(4). UE was certified in 1996 as the exclusive bargaining representative for certain University of Iowa graduate and professional students employed as teaching and research assistants, a bargaining unit that now consists of approximately two thousand employees. The Board of Regents and UE have negotiated successive two-year bargaining agreements since UE's certification in 1996. All agreements were reached voluntarily without binding arbitration.
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> At the time the instant complaints were initiated, the parties' agreement in effect was due to expire on June 30, 2017. The approximately 30-page agreement included provisions related to wages, insurance, leaves of absence, and other subjects of negotiation that were mandatory or permissive under section 20.9 when the agreement was negotiated in 2015.

As early as summer 2016, UE began gathering information for the upcoming negotiation of the 2017-2019 successor agreement. On August 1, 2016, UE representative Jennifer Marsh emailed an information request to Shelley Stickfort, Interim Director of the University's Employee and Labor Relations, seeking responses to fifty nine inquiries by August 30, 2016.

By August 30, Stickfort sent UE the information she had gathered thus far, indicating she prioritized information relating to "financials" as Marsh had requested. By September 30, Stickfort sent another set of responses to UE. She requested an in-person meeting to clarify the remaining eleven information requests. Stickfort also sought to make introductions with UE and Michael Galloway, the Board of Regents' new chief negotiator, and discuss the upcoming negotiations given that new representatives were involved.

On October 10, Stickfort and Galloway met with UE representative Marsh and the bargaining unit's current president and chief negotiator, Landon Elkind. Galloway expressed to Marsh and Elkind that the Board of Regents' initial proposal would be as reasonable as he could get within his given authority. Galloway also indicated that it did not make a lot of sense to him to hold over ten bargaining sessions, as the parties had done in prior contract negotiations, without utilizing available impasse resolution procedures. If the parties are not in agreement after two to three bargaining sessions, Galloway explained his expectation was to request mediation services.

During the October 10 meeting, the parties set a schedule for exchanging their initial bargaining positions, agreeing UE would present its initial proposal on November 1 and the Board of Regents would present its initial proposal on November 15, 2016. The parties also confirmed two bargaining sessions, agreeing to meet on November 29 and December 5. The record indicates that in prior negotiations, the parties typically did not discuss financial "figures" until February, even though they held negotiation meetings prior to that time.

UE's negotiating team consisted of UE representative Marsh, bargaining unit president and chief negotiator Elkind, and seven bargaining unit employees. UE's internal bargaining arrangement was to discuss proposals with the bargaining team and secure their agreement prior to presenting it to the Board of Regents. As such, while Marsh and Elkind presented proposals on behalf of UE, they were not authorized to unilaterally determine the

substance of UE's proposals or accept the Board of Regents' proposals without agreement from the bargaining team. Nate Willems was UE's attorney during the 2017-2019 contract negotiations but he was not present for any of the negotiation sessions.

As the Board of Regents' chief negotiator, Galloway was the only representative authorized to meet with UE and present proposals on behalf of the Board of Regents. Galloway was given authority to negotiate an agreement within certain financial parameters. During negotiations, Galloway worked with both the University to make sure it supported the proposals being put forth and also the Board of Regents because it had final approval over any agreement reached.

Consistent with the parties' prior agreement, UE presented its initial bargaining position on November 1 and the Board of Regents presented its initial bargaining position on November 15, 2016. The parties used the existing agreement as the basis for their proposals, both proposals including a statement that unless a change or deletion was indicated, the proposal was to include the current contract provisions in the successor agreement.

In formulating its initial proposal, UE considered the bargaining priorities of its members and other factors such as the rising housing costs in Iowa City, the salary of graduate students at other universities, both unionized and non- unionized, and information that the University's president had purportedly received a twelve percent salary increase. After such consideration, UE's initial proposal sought to increase the minimum salary for teaching and research assistants by over nine percent in year one and over twelve percent in year two of the contract. For returning employees, UE proposed a salary increase between about $1,100 and $1,400 in both year one and year two of the contract. In the parties' 2015-2017 contract, the returning employees had received a salary increase of about $180 to $220 in year one and $550 to $670 in year two of the contract.

UE's initial proposal also proposed continuing with one hundred percent tuition scholarships, increasing fees reimbursement from twenty five to fifty percent, and adding eight weeks of paid parental leave to the successor agreement. UE's initial insurance proposal sought to raise the employer's contribution toward health and dental insurance premiums from seventy to ninety percent, reduce the employee's coinsurance share

from ten percent to $10 for seven covered treatments, and add infertility treatment and transgender care to the insurance plan.

UE had "rough estimates" for the total cost of its initial proposal, but that estimate is unknown on this record. UE knew at the time that the cost of its initial proposal exceeded the parties' prior settlements; but UE believed its initial proposal represented an "equitable" compensation package for its members and that it was not beyond the University's financial ability to fund it. Nevertheless, UE anticipated reducing at least some of its financial proposals through the course of bargaining. The record shows, for the fees reimbursement proposal, UE's "bottom line" as part of a voluntary settlement was accepting a fifty percent reimbursement on fees.

Upon receipt of UE's initial proposal, the Board of Regents found the proposed increases to be "very, very high" and estimated the total cost to be around a fifteen percent increase. The record reveals the highest salary increase the parties had negotiated in the past fifteen years was a 1.8 percent increase; UE's initial proposal sought a salary increase over nine percent in both years of the contract term.

In formulating its initial proposal, the Board of Regents considered the parties' past negotiated agreements and the unit's internal and external comparability to other organized units. In assessing the unit's external comparability, the Board of Regents relied on the "Purdue Report" that revealed the compensation packages (salary, tuition and fees) that research and teaching assistants received at the "Big Ten" universities. The Purdue Report indicated the University of Iowa ranked number three in its total compensation (salary, tuition and fees) for teaching assistants and ranked number four in total compensation for research assistants. In the Board of Regents' assessment, if it were to accept UE's initial proposal, it would have placed this unit at or above the number one ranked school in the Purdue Report.

In its initial bargaining position, the Board of Regents proposed increasing the minimum salary for bargaining unit employees over three and a half percent in year one and one percent in year two of the contract. For returning employees, the Board of Regents proposed an increase between about $95 to $120 in both year one and year two of the contract. As previously noted, the parties' 2015-2017 contract provided that returning employees received an increase between about $180 and $220 in year one and between $550 and $680 in year two of the contract. The Board

of Regents' initial proposal also included a $300 minimum salary increase for employees that completed their "comprehensive examination," which was not a negotiated increase in the parties' 2015-2017 contract.

The record indicates there were between one hundred to two hundred graduate students who had been treated as part of the research and teaching assistants bargaining unit but were actually performing administrative-type tasks, not research or teaching assistant tasks. The Board of Regents' position was that the negotiated salary should reflect the type of duties the graduate students were performing. As such, in lieu of seeking to exclude them from the bargaining unit, the Board of Regents proposed creating a separate salary for "administrative" assistants and paying them between $3,000 and $4,000 less, which was about a twenty percent decrease in pay for employees in this newly-created salary category. The remainder of the contract would apply equally to all graduate students including employees who were performing administrative-type tasks. The Board of Regents estimated the "total package" cost of its initial proposal, accounting for the proposed reductions, was an increase of approximately 1.8 percent. This proposed increase was in line with the parties' prior negotiated agreements.

Following the exchange of initial proposals, the Board of Regents and UE met on November 29 for their first scheduled bargaining session. UE did not present a counterproposal at the November 29 meeting. Instead, during the two-hour meeting, the parties discussed their initial proposals. UE explained the importance of the items they proposed and tried to "defend and justify the reasonableness" of its initial proposal. The parties reached a verbal agreement to add transgender care to the insurance plan. Neither party asked to memorialize this agreement.

The parties met again on December 5. UE presented a counterproposal which sought a minimum salary increase of approximately eight percent in year one and ten percent in year two of the contract, which was lower than the nine and twelve percent increases proposed in its initial proposal. For returning employees, UE proposed an increase between $940 and $1,150 in year one and $990 and $1,200 in year two of the contract, which was about $100 to $250 lower than its initial proposal sought. UE also lowered the proposed employer's premium contribution for dental insurance from ninety to eighty five percent. UE retained its proposals regarding full tuition scholarship, one hundred percent

fees reimbursement and increasing the employer's insurance contribution to ninety percent.

During the two-hour bargaining session on December 5, Galloway explained that the Board of Regents relied upon internal and external comparability figures and the parties' prior settlements in formulating its initial proposal. Galloway communicated that in his interpretation of chapter 20, comparability drives the financial package offered and, if the parties went to arbitration, the interest arbitrator is directed to consider and select the most reasonable offer based upon factors such as comparability and the parties' historical settlements. Galloway explained his comparability and bargaining history arguments and pointed out that he had not heard UE's arguments with regard to these factors. He advised UE that the parties were very far apart on the financial proposals and the Board of Regents did not anticipate meeting in the middle of the two positions.

Since the majority of the proposals involved some cost (e.g. premium contribution, wage increase, fees reimbursement, etc.), Galloway suggested adopting a "total package" approach when discussing the cost of the proposals. Agreeing on the total cost increase will enable the parties to productively discuss the distribution of the money that make up the agreed-upon total increase. Galloway indicated during the December 5 meeting that he could make another proposal but he had very limited financial authority and the parties' proposals were so far apart in terms of the total package increase. He informed UE that the Board of Regents was flexible on how money was distributed between the proposals but that distribution needed to be at or very close to the 1.8 percent total package increase. Galloway informed UE during the December 5 meeting that the Board of Regents' initial proposal at the 1.8 percent total package increase was still on the table. Galloway suggested he might have slightly more room for movement, indicating the Board of Regents may be willing to approve a two percent total package increase but that he would first have to discuss that figure with his client.

Since University classes concluded around December 9, the parties agreed to wait until January to meet again. By December 20, UE and the Board of Regents confirmed their third bargaining session for January 25, 2017.

In January 2017, information was circulating, particularly among bargaining representatives, that the Iowa Legislature intended to amend chapter 20, the statute that governs the scope

and procedures of the parties' bargaining. Neither party knew the substance of the expected changes but only that changes to chapter 20 would be passed by the Iowa Legislature.

When classes resumed on January 17, 2017, Marsh emailed Galloway that same day, stating:

> I believe we have confirmed only January 25th at 1:30 pm for the next negotiations session. The union's bargaining team have finalized their teaching and course schedules for the Spring semester. It appears that Friday after 1:00 pm is the best day of the week for us. Thursday afternoon is also a possibility if necessary. Will your team be available on upcoming Friday afternoons, February 3 or 10?

Galloway responded to Marsh the same day, stating:

> We are still waiting to determine whether the financial package we have been authorized to offer will increase. To be frank, I doubt it will be based upon the likelihood of substantial changes to Chapter 20 and the financial position other Unions have taken. If UE is unwilling to accept the total package we have offered, I think it will be a waste of time to engage in additional negotiation sessions. I would suggest that we schedule a mediation. If you would still like to meet on the 25th for a regular negotiation session please let me know.

The "total package" Galloway referred to in his email was the 1.8 percent total package increase the Board of Regents presented in its initial offer. Galloway's reference to financial positions of other unions referred to contract settlements that other unions had reached in negotiating their contracts.

Marsh replied the next day, on January 18, confirming UE still wanted to meet for a bargaining session on January 25, and proposed holding the mediation on either February 3 or February 10, if the assigned PERB mediator, Diana Machir, was available. Galloway responded on January 20 that the parties can discuss mediation dates during the January 25 bargaining session, but indicated he already had other mediations scheduled for February 3 and February 10.

The January 25 bargaining session lasted about an hour. The parties again discussed the total cost of UE's December 5

counterproposal and the Board of Regents' November 15 proposal. Galloway expressed that although UE may not like the financial package offered by the Board of Regents, it did not intend to increase it.

The parties also discussed the anticipated legislative changes to chapter 20. UE specifically asked the Board of Regents whether it planned to remove insurance from the successor agreement. Galloway responded that any legislative changes were out of his control and he could only speak to what he knew. Galloway indicated he did not know the exact substance of the anticipated changes, but it appeared that insurance and supplemental pay would most likely be excluded from bargaining after the amendments to chapter 20 were enacted.

At the conclusion of the January 25 meeting, the parties were at impasse. Marsh completed and signed a request for arbitration services on January 25. It is not known on this record when she sent the request to PERB. The next day, on January 26, Galloway contacted the assigned PERB mediator Machir, including Marsh on the correspondence:

> The parties met yesterday and did not reach a voluntary agreement. [Marsh] provided us days of the week that her group could mediate, and based upon those restrictions, we are available on February 9th or 21st. The parties understand that there is a very high probability that Chapter 20 will be modified and it is very ha[r]d to negotiate/mediate unless we know what the law will be. Therefore, we would prefer that the mediation be on the 21st.

Machir responded to the parties the same day, stating, in part:

> As far as mediation, I do not believe you can make the March 15 deadline if the parties mediate on February 21. I could write about waiving this deadline or that, but there is also logistics of getting an arbitrator, etc. Thus, mediation will take place on February 9. Please give me a location and time. The parties also need to designate an interest arbitration date for [PERB's impasse coordinator] Susan [Bolte].

About half an hour after Machir's first response, Galloway responded that he might now have a conflict on February 9 and that he will get back to them as soon as he could. The record

reveals that since February 9 had not been confirmed on his calendar, Galloway set a meeting on a different client matter for that day. Less than ten minutes after Galloway's reply, Machir sent a second response to the parties, which stated:

> In talking with Susan [Bolte], the parties could meet the March 15 deadline if:
> 1. File request for interest arbitration early – by Feb 1 see PERB rule 621-7.7(3)
> 2. The parties strike the list shortly thereafter
> 3. Figure out date of exchange
> 4. Interest arbitration hearing must take place by Feb 28 unless arbitrator agrees to less than 15 days to return award by March 15-Susan needs this date to filter out arbitrators willing to hold the hearing on this date and under any restrictions
> *** you would need to have an agreement to all of the above
> Given the above, do both parties agree to February 21 for mediation?

After Machir's second email, Marsh responded:

> The union is available to mediate on February 9 as [Galloway] proposed. We are also available on February 2, 3, 7, and 10. We are not interested in waiting until February 21st to meet. Please confirm February 9th or suggest an earlier date for mediation.

The record does not reveal that any other written responses were exchanged in this particular email chain.

On January 30, four days after the parties' email exchange about scheduling mediation, UE's attorney Nate Willems emailed mediator Machir, including Galloway on the correspondence:

> I know that [UE] would like to setup an arbitration for Feb. 21 and find a date and time for mediation prior to Feb. 21.
>
> Do you need an independent impasse agreement signed by the parties?

Galloway responded to Willems' email the next day, January 31, stating he has "no authority to agree to set the arbitration" for

February 21. About half an hour later, Galloway elaborated on his earlier response, stating:

> To provide a little more clarity, my client has informed me that I cannot agree to anything until the introduction and subsequent passage of the reforms to Chapter 20. They believe this will all occur in mid-February. That is why we set the United Faculty schedule the way we did so that at least there was some clarity.[1]

From the parties' third bargaining session on January 25 through February 15, the record reveals the parties communicated only about scheduling impasse procedures. During this time period, neither UE nor the Board of Regents initiated any substantive discussions on resolving the parties' impasse and neither party gave any indication that it was willing to accept the other party's bargaining proposal.

On February 6, 2017, UE filed the complaint docketed as PERB case number 100800 alleging the Board of Regents was not negotiating in good faith.

On February 7, attorney Ann Smisek sent an email to Willems on Galloway's behalf, including mediator Machir and impasse coordinator Bolte, which stated she was sending him an independent impasse agreement "with the timelines we have agreed to." The attached agreement was signed on February 7 by Smisek on behalf of Galloway. The agreement stated the parties already requested a list of arbitrators from PERB and expect to receive it by February 7. The remainder of the agreement outlined that the parties agreed to the following impasse schedule:

- An arbitrator will be selected within 2 days of receiving the list from PERB
  - Mediation will occur on February 21 at 2p.m.
- If an impasse persists, the parties shall exchange final offers on February 24.
  - Arbitration, if necessary, will occur on March 1.
  - The arbitrator shall issue an award no later than March 15, 2017.

[1] Willems and Galloway were also negotiating a contract concerning a different bargaining unit of employees of the State of Iowa, Board of Regents.

It is unknown on this record whether Willems ever signed the impasse agreement Smisek sent. The record as a whole, however, demonstrates UE agreed to the impasse schedule as outlined in Smisek's February 7 correspondence. Willems' inquiry to Machir on January 30 whether she needed an independent impasse agreement supports a finding that the parties were discussing dates for scheduling impasse procedures. Additionally, after Willems' January 30 inquiry, the record is devoid of any indication that UE disagreed with or objected to the impasse dates Smisek outlined in the agreement.[2]

The same day Smisek circulated the independent impasse agreement, on February 7, the Iowa Legislature introduced a bill that sought to significantly amend chapter 20, including limiting mandatory bargaining to "base wages" for non-public-safety units such as this unit.

The weekend immediately after the changes were introduced in the Legislature, on February 11 and 12, UE called a meeting of its bargaining members to ratify a "tentative agreement" it purported to have reached with the Board of Regents.[3] On February 15, 2017, after the "ratification" vote, Marsh sent a message to Galloway that stated:

> In light of the Board's failure to bargain in good faith since December 5, 2016, the [UE] bargaining committee accepted your last offer of 2% total package, and the members of UE Local 896 ratified the attached tentative agreement based upon that package offer. UE expects you to present this agreement to the Board of Regents for ratification, and we urge the Board to ratify. We await your official response.

The attached "ratified agreement" indicated that all current contract provisions will remain unchanged except for the wage increase. The "agreement" had a minimum salary increase of 4.44

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[2] The record reveals that on February 10 PERB sent an email to the arbitrator the parties selected and informed him the arbitration would take place on March 1 and he had to issue his award by March 15. Galloway and Willems were included in this correspondence. There is no indication that UE ever objected to or disagreed with the dates PERB set in its February 10 email to the arbitrator and the parties.

[3] The "tentative agreement" is based on Galloway's comments to Marsh and Elkind on December 5 that the Board of Regents may be willing to offer a two percent total package increase. He subsequently informed UE in a January 17 email that an increase in the proposed financial package was "unlikely."

percent in year one and 2.82 percent in year two of the contract. For returning employees, the proposed wage increase was between $263 and $322 in year one and $267 and $326 in year two of the contract, compared to $181 and $221 in year one and $267 and $326 in year two in the current contract.

Galloway responded to Marsh's email the following morning, February 16, stating:

> I have received and reviewed your correspondence. It appears that you have only selected a portion of the [Board of Regents'] original offer that was submitted to the Union as a package proposal. Furthermore, I believe the Union had made a counter proposal to this offer and thus the offer was rejected in its entirety by the Union. I am confused by the position the Union has now taken. Do you believe we have a binding contract? If so, are you cancelling mediation of the 21st? Please advise.

Marsh replied that she wanted Galloway "to poll the Board immediately for ratification of the Agreement you were authorized to make."

The same day this email exchange occurred, February 16, the Iowa Legislature passed House File 291, a bill amending chapter 20. The Governor signed it on February 17 and the amendments became effective upon enactment.

H.F. 291 amended many aspects of chapter 20, but two are particularly relevant to the instant complaints. The changes required all parties who had not ratified a contract by the enactment date to cease and commence bargaining anew pursuant to the amended chapter 20, starting with an exchange of initial proposals. H.F. 291 also changed the scope of bargaining available to the unit represented by UE, a "non-public-safety" unit under the amended designations. The only mandatory subject of bargaining for this unit now was "base wages," a new subject not defined by the amendments.

The parties met on February 21, the date originally planned for mediation, and exchanged their initial bargaining positions under the amended chapter 20.

UE's initial bargaining position deleted Article 3 (Dues Deduction), Article X (Health Insurance), Article XVIII (Performance

Evaluations), Appendix A (Health Plan Provisions), Appendix B (Dental Plan Provisions) and Appendix E (tuition scholarship letter of agreement).[4] UE proposed increasing the minimum salary about four percent in year one and about two percent in year two of the contract. For returning employees, UE proposed a 1.1 percent salary increase. UE also proposed keeping the rest of the existing contract provisions.

The Board of Regents' initial bargaining position proposed to delete all provisions of the existing agreement that involved permissive and excluded subjects of bargaining, as defined under the amended chapter 20, and affirmatively stated the Board of Regents does not agree to submit any non-mandatory impasse items to arbitration. The Board of Regents' proposal included a copy of the parties' current contract with a strike through every provision the Board of Regents considered non-mandatory and a comment noting whether the provision was permissive or excluded. The Board of Regents proposed a minimum salary increase close to UE's proposal of about four percent in year one and about two percent in year two of the contract. For returning employees, the Board of Regents proposed what it characterized as a "base wage" increase of 1.1 percent in year one and year two of the contract.

Following the exchange of initial proposals, the parties had about a two-hour discussion regarding the proposals with mediator Machir present. Neither party made any further movement and the meeting concluded without an agreement. On February 27, 2017, the parties electronically exchanged arbitration offers, which were identical to the initial proposals the parties exchanged on February 21, with UE still including proposals that the Board of Regents considered non-mandatory.

On February 28, 2017, the Board of Regents filed the complaint docketed as PERB case number 100814 alleging UE's arbitration offer was illegal because the Board of Regents did not agree to submit non-mandatory impasse items to arbitration and UE was aware of its position.

The arbitration hearing was held on March 1, 2017. At the hearing, Galloway presented the arbitrator with an objection to the submission of provisions in UE's final offer that the Board of Regents considered non- mandatory and that the Board of Regents did not agree to submit those items to arbitration.

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[4] Under the amended chapter 20, dues deduction, insurance and evaluation procedures became excluded subjects of bargaining for non-public-safety units.

The Board of Regents subsequently filed a petition for expedited resolution of a negotiability dispute on March 6, 2017. In the negotiability proceeding, UE's position was that the new subject of "base wages" encompassed the provisions it included in its arbitration offer. The Board of Regents maintained that every provision of the contract except the select provisions under the "Wages" article of the existing contract were either permissive or excluded.

Following PERB's preliminary ruling on the negotiability dispute on March 9, 2017, the arbitrator issued his award on March 14 consistent with PERB's determination on the negotiability status of the impasse items before him.

CONCLUSIONS OF LAW

Case Number 100800, COGS and Board of Regents

In PERB Case Number 100800, UE argues the BOR committed prohibited practices within the meaning of Iowa Code sections 20.10(1), (2)(*a*), (*e*), and (*f*) when it failed to move from its initial bargaining position, failed to reach agreement on any item of negotiation even when no disagreement existed, and deliberately delayed impasse procedures, which included its refusal of multiple mediation dates. UE alleges the BOR's conduct constituted a failure to bargain in good faith and a refusal to bargain. Thus, BOR interfered with the employees' Iowa Code section 20.8 right to negotiate with the BOR through its certified representative UE and also denied UE's rights accompanying certification.

The Iowa Code section 20.10 prohibited practices alleged state:

> 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.
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> 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.

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

Also relevant to the discussion in this matter is Iowa Code section 20.9 (2017)[5], which provides in relevant part:

20.9 Scope of negotiations.

The public employer and the employee organization shall meet at reasonable times, including meetings reasonably in advance of the public employer's budget-making process, to negotiate in good faith with respect to wages . . . and other matters mutually agreed upon.

Iowa Code § 20.9.

In prohibited practice complaints, the complainant has the burden of establishing each element of the charge. *Int'l Ass'n of Prof'l Firefighters, Local 2607 and Cedar Rapids Airport Comm'n*, 2013 PERB 8637, at 10.

PERB addresses allegations of a party failing to engage in good faith bargaining on a case-by-case basis, reviewing the facts and circumstances to determine if a prohibited practice occurred. *Cedar Rapids Airport Comm'n*, 2013 PERB 8637, at 11-12. The duty to bargain in good faith is generally seen as the obligation to actively participate in deliberations with a present intention

[5] This section was subsequently amended by House File 291, but still requires the public employer and employee organization to "meet at reasonable times."

to find a basis for agreement and with a sincere effort to reach common ground. *Id.* at 11 (citing *Nat'l Labor Relations Bd. v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943)). Because a party's intention or sincerity is a subjective characteristic, the presence or absence of "good faith" must be inferred from the circumstantial evidence found in the record as a whole, i.e., the "totality of conduct" must be examined. *AFSCME Council 61 and Howard Cnty. Pub. Safety Center*, 1989 PERB 3776 at 6 (citation omitted). *See also AFSCME/Iowa Council 61 and Carroll Cnty. Conserv. Bd.*, 2004 PERB 6918 at 3 (totality of the party's conduct is examined).

The totality of conduct examined includes the employer's behavior at the bargaining table, but also its conduct away from the table that may affect negotiations. *UNI-United Faculty (AAUP IHEA) and State of Iowa*, 2019 PERB 100798 at 15 (citing *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1381 (8th Cir. 1993) (employer committed unfair labor practice when it cancelled bargaining sessions and refused union's request for more frequent sessions)). It is unnecessary to determine if each individual act of the employer is unlawful "in and of itself" if the conduct "as a whole" supports the conclusion that the employer had not bargained in good faith. *See* Steven D. Wheeless, Patrick E. Deady. Barry J. Kearney, *The Developing Labor Law*, ABA Sect. Labor & Emp't Law, at 13-11 (6th ed. 2016 Supp.).

After reviewing the facts, circumstances, and the totality of the BOR's conduct, we conclude UE established the BOR failed to negotiate in good faith and refused to negotiate. The BOR refused to agree to earlier negotiations,

mediation, or arbitration dates; the BOR failed to present a counteroffer; and the BOR acknowledged it would not enter into any agreement prior to the passage of collective bargaining legislation. Separately, these may not amount to a prohibited practice, but the totality of the BOR's conduct demonstrate its failure to actively participate in deliberations with a present intent to reach an agreement and with a sincere effort to reach common ground.

Beginning on January 17, UE repeatedly requested for negotiation sessions and mediation to occur by the beginning of February. Marsh emailed Galloway on January 17 requesting negotiation sessions on February 3 or 10. Galloway responded that it was unlikely the financial package would increase due in part to the anticipated substantial changes to chapter 20. He further stated,

> If UE is unwilling to accept the total package we have offered, I think it will be waste of time to engage in additional negotiation sessions. I would suggest that we schedule a mediation. If you would still like to meet on the 25th for a regular session please let me know.

Marsh confirmed that negotiation session and proposed February 3 or 10 for mediation. Galloway responded that those two dates did not work for him, but they could talk more about that at the January 25 negotiation session.

The BOR did not discuss additional negotiation dates or mediation dates until the parties met for their one-hour negotiation session on January 25. The BOR emailed the PERB mediator the following day and stated the parties were available for mediation February 9 or February 21. When the PERB mediator responded, the BOR's chief negotiator Galloway then said he was unavailable on February 9 due to a scheduling conflict.

On January 30, UE's attorney Nate Willems emailed Galloway and the PERB mediator. Willems indicated that UE wanted to set arbitration for February 21 and find a prior date for mediation. In response, Galloway stated, "I have no authority to agree to set the arbitration on February 21st." The parties did not meet between January 25 and February 21, even though UE had requested earlier meetings. Although the BOR's chief negotiator had scheduling conflicts during this time, he also communicated that he was not given the authority to set dates for impasse procedures. This alone may not indicate a failure to negotiate in good faith, but it does provide some evidence of such a failure.

In *UNI-United Faculty*, we reiterated that deliberate delay of bargaining and impasse procedures and other tactics that undermine the collective bargaining process are indicative of bad faith and may constitute prohibited practices within the meaning of Iowa Code section 20.10. 2019 PERB 100798 at 16. In the present case, the BOR's repeated conflicts and inability to schedule mediation demonstrate a pattern of delay that undermined the parties' negotiations and thwarted the parties' participation and progression in statutory impasse procedures. In their October meeting, Galloway himself had indicated that, if the parties were not in agreement after two to three bargaining sessions, his expectation was to request mediation services.

The BOR also refused to provide any counter offer throughout negotiations and impasse. Again, this by itself may not demonstrate a failure to engage in good-faith bargaining, but in the context of the BOR's actions and words

throughout January and February, the BOR's refusal to make a counteroffer provides evidence the BOR lacked commitment to the process.

The BOR proposed a 1.8% wage increase in its initial proposal presented on November 15. Although the December negotiation session did result in some other agreements about the contract, the BOR did not move from its 1.8% proposal during the course of the parties' pre-HF 291 negotiations and impasse.

Parties must refrain from behavior "which reflects a cast of mind against reaching agreement" and behavior "which is in effect a refusal to negotiate or which directly obstructs or inhibits the actual process of discussion." *UNI-United Faculty*, 2019 PERB 100798 at 17 (quoting *NLRB v. Katz*, 369 U.S. 736, 747 (1962)). A party failing to provide a counteroffer is not in itself a failure to bargain in good faith, but the reason behind that party's failure to present a counteroffer may be evidence of failure to bargain with a sincere effort to reach common ground. *Nat'l Labor Relations Bd. v. Montgomery Ward & Co.*, 133 F.2d 676, 687 (9th Cir. 1943) (stating a party is not bound to submit a counterproposal, but if the party submitted a counterproposal it would place that party's willingness to bargain beyond question).

During negotiations in December, although the BOR did not provide a counteroffer, Galloway indicated the BOR may be able to offer or possibly accept a wage proposal that was slightly higher than its initial proposal of 1.8%. However, in January, when anticipated legislation concerning collective bargaining came closer to fruition, the BOR failed to present a counteroffer. In January, Galloway communicated with Marsh that he doubted the financial

package would increase at least in part because of the anticipated legislation. At the January 25 negotiation session, the BOR's chief negotiator was not authorized to make any additional proposals.

The BOR claims that one of the reasons it did not make any counteroffers regarding wages was because the initial offer was reasonable in light of the comparables and the history of the contracts between these two parties. The BOR contends it came into bargaining with a reasonable offer in order to limit the number of negotiation sessions; whereas, the BOR argues that comparatively, UE came into negotiations with a high wage proposal that it intended to decrease over a series of negotiations. This rationale may be true and this bargaining style may be valid, but the BOR also stated one of the reasons it would not deviate from its negotiation position was because of the impending legislation. The closer the collective bargaining legislation came to reality, the more entrenched the BOR became in its position. The BOR's actions were not active participation in deliberations with UE with a present intention of finding agreement. Instead, the further along the parties came in the negotiation season, the less the BOR would engage in the process.

Finally, the BOR's chief negotiator told UE the State could not agree to enter into any agreement prior to the passage of the collective bargaining legislation. This statement occurred in late January and was preceded by and followed by a lack of substantive conversation about the negotiations. As of January 25, Galloway was not authorized to make additional proposals. On January 31, Galloway emailed UE's representative explaining the reason for his

lack of authority when stating that "my client has informed me that I cannot agree to anything until the introduction and subsequent passage of the reforms to Chapter 20. They believe this will occur in mid-February." The BOR's actions constituted a refusal to negotiate.

The BOR's words and actions from January 25 on indicate the BOR refused to engage in negotiations or any substantive conversation due to the anticipated legislation. The BOR's failure to actively and substantively discuss the 2017-2019 contract during this time period demonstrates a lack of commitment to the process from late January through the passage of HF 291 in February 2017. The anticipated legislation is not justification for the BOR's delays and refusal to engage in the collective bargaining process.

A party cannot unilaterally refuse to negotiate or unreasonably delay negotiations solely because legislation may be forthcoming that is conducive to its objectives. *UNI-United Faculty*, 2019 PERB 100798 at 18 (financial considerations or pending legislation did not justify delays). *See Sioux City Educ. Assn. and Sioux City Cmty. Sch. Dist.*, 80 PERB 1560 at 5–6 (stating reasons such as the school board's pending election, unknown growth figures, the number of teachers advancing on a salary schedule, or other factors affecting an employer's desire to proceed to bargaining cannot form a sufficient basis to "unreasonably delay bargaining" or to "postpone bargaining until those matters are finally known."), *see also Int'l Bhd. of Elec. Workers, Local 965 v. Pub. Util. Comm'n of the City of Richland Center*, Case 71, No. 70666, MP-4655, Decision No. 33281-B (Wisconsin Employment Relations Commission June 13, 2012) (Neumann,

dissenting) (arguing the fact that the law was in flux "has never been and fundamentally cannot be a lawful justification, because uncertainties, confusion, and contingencies are commonplace in collective bargaining and can be handled effectively in that forum."). The BOR's communications followed by its failure to engage in substantive conversations demonstrate a failure to negotiate in good faith.

Based on the BOR's communications with UE and its subsequent actions, beginning in January 2017, the BOR failed to actively participate in deliberations with the present intention to find a basis for agreement and a sincere effort to reach common ground. The BOR demonstrated a lack of commitment to the process through its refusal to agree to earlier negotiations, mediation, or arbitration dates; the BOR demonstrated a lack of sincere effort to reach common ground when it failed to present a counteroffer; and the BOR acknowledged it would not enter into any agreement prior to the passage of collective bargaining legislation.

In totality, the BOR's conduct constituted a failure to bargain in good faith and a refusal to bargain. Thus, the BOR interfered with the employees' Iowa Code section 20.8 right to negotiate with the BOR through its certified representative UE and denied UE its rights accompanying certification. Therefore, UE established the BOR's commission of prohibited practices within the meaning of Iowa Code sections 20.10(1), 20.10(2)(*a*), (*e*), and (*f*).

Case Number 100814, Board of Regents and COGS

We adopt the ALJ's conclusions of law as set forth below and followed by our additions:

> The Board of Regents' complaint against UE arises under the amended chapter 20. Pursuant to the H.F. 291 transition and implementation language, UE and the Board of Regents were required to restart their contract negotiations since they did not have a ratified successor agreement by February 17, 2017, the amended statute's effective date. H.F. 291 amended section 20.9, which now provides, in part:
>
> **20.9 Scope of bargaining**
>
> 1. ... For negotiations regarding a bargaining unit that does not have at least thirty percent of members who are public safety employees, the public employer and the employee organization shall meet at reasonable times ... to negotiate in good faith with respect to base wages and other matters mutually agreed upon. Such obligation to negotiate in good faith does not compel either party to agree to a proposal or make a concession. Mandatory subjects of negotiation specified in this subsection shall be interpreted narrowly and restrictively.
>
> ***
>
> 3. All retirement systems, dues checkoffs, and other payroll deductions for political action committees or other political contributions or political activities shall be excluded from the scope of negotiations. For negotiations regarding a bargaining unit that does not have at least thirty percent of members who are public safety employees, insurance, leaves of absence for political activities, supplemental pay, transfer procedures, evaluation procedures, procedures for staff reduction, and subcontracting public services shall also be excluded from the scope of negotiations.

Pursuant to section 20.9, a party has a duty to negotiate in good faith over mandatory and other "mutually agreed upon" proposals. Proposals over "permissive matters shall be excluded from arbitration unless submission of the matter has been mutually agreed upon by the parties." PERB rule 621—6.1. The Board of Regents contends it made UE aware of its position not to submit any non-mandatory impasse items to arbitration but UE still insisted on including non-mandatory impasse items in its offer before the arbitrator. The Board of Regents argues such submission, absent mutual agreement, amounts to a prohibited

practice within the meaning of Iowa Code 20.10(3)(*b*) and (*d*), which state:[6]

3. It shall be a prohibited practice for public employees or an employee organization or for any person, union or organization or their agents to:

***

(*b*) Interfere, restrain, or coerce a public employer with respect to rights granted in this chapter or with respect to selecting a representative for the purposes of negotiating collectively or the adjustment of grievances.

***

(*d*) Refuse to participate in good faith in any agreed upon impasse procedures or those set forth in this chapter.

In response, UE contends it disagreed with the Board of Regents over the negotiability status of the proposals at issue. Because PERB had made no determination on the meaning of "base wages" by the time the parties exchanged arbitration offers, UE asserts it was taking a legal position on its interpretation of the amended statute and arguing that "base wages" encompassed all the provisions included in its arbitration offer.

Under the record presented here, I find that UE's conduct does not amount to a prohibited practice within the meaning of 20.10(3)(*b*) or (*d*). Had chapter 20 not been amended in such a "monumental and historical" way, as characterized by the Board of Regents, its complaint may be founded. However, the scope of bargaining had significantly changed; particularly for non-public-safety units such as the one at issue here. Furthermore, the parties were going to arbitration less than two weeks after the legislative amendments were enacted and before PERB issued any negotiability rulings defining "base wages."

The Board of Regents may have considered UE's legal position unpersuasive, arguing the proposals UE included were "obviously not" included in "base wages" and highlighting that UE's position was ultimately unsuccessful in the negotiability dispute. But subsequent legal rulings do not negate that UE and the Board of Regents had a legal disagreement on the negotiability status of proposals at issue following significant amendments to chapter 20.

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[6] The complaint filed by the Board of Regents on February 28, 2017 contained three separate allegations. The Board of Regents amended its complaint during the evidentiary hearing by dismissing two of the allegations, leaving only the allegation pertaining to the submission of impasse items the Board of Regents characterized as non-mandatory.

> The parameters of "base wages" had yet to be defined and the core of the parties' disagreement was whether the proposals at issue were included within "base wages." The only way for UE to preserve its legal position before the arbitrator was to include the proposals it considered to be encompassed within "base wages" while the parties awaited PERB's negotiability ruling.
>
> For those reasons, the Board of Regents has not demonstrated that UE's submission of impasse items the Board of Regents considered non-mandatory violated either paragraph (*b*) or (*d*) of section 20.10(3).

Regarding PERB Case Number 100814, the BOR argues on appeal that UE submitted non-mandatory impasse items in its offer before the arbitrator, which amounts to a prohibited practice. The BOR contends UE could not have plausibly believed the 26 items submitted fell within the impasse item of "base wages," and the BOR clearly made UE aware that it would not agree to submit non-mandatory impasse items to the arbitrator.

The ALJ found that UE's conduct did not amount to a prohibited practice because of the monumental and historical way that chapter 20 was amended. We agree. The parties were faced with mediating and arbitrating a contract regarding the undefined term of "base wages" with no precedent to guide them. This all occurred less than two weeks after historic legislation was enacted. UE's legal argument regarding the status of the proposals at issue was tenuous, and ultimately, unsuccessful. Nonetheless, we find that UE had the right to make such argument, and the submission of the 26 proposals was necessary to preserve UE's legal argument.

Based on the facts, circumstances, and the totality of UE's conduct, the BOR has not established UE's commission of prohibited practices within the meaning of Iowa Code sections 20.10(3)(*b*) and (*d*).

Remedy for PERB Case Number 100800

In fashioning an appropriate remedy, the Board attempts to place the parties in the position they would have been, but for the prohibited practice that occurred. *See Brotherhood of Clayton Cnty. Secondary Road Emps. and Clayton Cnty.*, 1987 PERB 3218 at 12. There are several factors in this case that are similar to the *UNI-United Faculty* case that make this task difficult. *See UNI-United Faculty*, 2019 PERB 100798 at 20-21. The passage of time, the change in law, and the underlying facts are critical factors in fashioning this remedy. The nature of the underlying prohibited practices complicates the timing of where to place the parties. Our conclusion that prohibited practices were committed is not based on any one act, but based on the totality of the BOR's actions. Additionally, significant time has lapsed and the parties have been subject to the new law for some time. Taking all of this into account, the appropriate remedy is a cease and desist order.

Consequently, we issue the following:

ORDER

As a remedy for the prohibited practices found in PERB Case Number 100800, the State of Iowa (Board of Regents) shall post, at the beginning of the fall 2019 University of Iowa school year, the attached notice and comply with

its provisions, and shall cease and desist from further violations of the public employment relations act.

The prohibited practice complaint filed by the Board of Regents in case number 100814 is DISMISSED.

The costs of reporting and the agency-requested transcript in the amount of $1,362.35 are assessed against the Board of Regents pursuant to PERB rule 621—3.12. A bill of costs will be issued to the parties in accordance with PERB subrule 621—3.12(3).

The Board retains jurisdiction to enter whatever orders may be necessary or appropriate to address any remedy-related matters which may hereafter arise.

DATED at Des Moines, Iowa this 14th day of June, 2019.

PUBLIC EMPLOYMENT RELATIONS BOARD

Jamie K. Van Fossen, Interim Chair

Mary T. Gannon, Board Member

Filed electronically.
Parties served via eFlex.

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A DECISION OF THE PUBLIC EMPLOYMENT RELATIONS BOARD

The United Electrical, Radio & Machine Workers of America, Local 896 (COGS) filed a prohibited practice complaint with the Public Employment Relations Board in PERB Case No. 100800, alleging the State of Iowa (Board of Regents) committed a prohibited practice within the meaning of Iowa Code section 20.10(1) and 20.10(2)(*a*), (*e*), and (*f*).

Those sections provide:

> 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.

The Public Employment Relations Board has determined the State of Iowa (Board of Regents) committed a prohibited practice within the meaning of the above sections by failing to negotiate in good faith and refusing to bargain during the negotiations for the 2017-2019 contract.

To remedy the prohibited practice, the State has been ordered to:

-Cease and desist from further violations of Iowa Code chapter 20;

-Post this notice in a prominent place in its main offices accessible to the general public and in conspicuous places customarily used for the posting of information to employees in the affected bargaining unit, for a period of not less than 30 days.

Any questions should be directed to:

Public Employment Relations Board
510 East 12th Street • Suite 1B
Des Moines IA 50319-0203
515/281-4414

Dated 6/14/2019 (To be posted August 27, 2019)