STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, IOWA COUNCIL 61, Complainant, and STATE OF IOWA (DEPARTMENT OF CORRECTIONS – IOWA STATE PENITENTIARY), Respondent.	CASE NO. 102128

DECISION AND ORDER

This case is before the Public Employment Relations Board (PERB or Board) on American Federation of State, County and Municipal Employees, Iowa District Council 61's (AFSCME) appeal of a proposed decision and order issued by an administrative law judge (ALJ) following an evidentiary hearing on AFSCME's prohibited practice complaint. AFSCME filed its complaint alleging the Respondent, State of Iowa, Department of Corrections – Iowa State Penitentiary (State or ISP) committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(*a*), (*b*), (*c*), and (*d*), when Warden Patti Wachtendorf, informed AFSCME Local 2989 President Neil LeMaster that she would not discuss matters involving the health and safety of facility staff with him or Vice President Todd Eaves in their capacity as union representatives. In his proposed decision, the ALJ dismissed the complaint after concluding AFSCME failed to establish the State's, specifically ISP's, commission of prohibited practices as alleged.

Prior to oral arguments, AFSCME filed a brief for the Board's review and the State relied on its post-hearing brief. Attorney Mark Hedberg for AFSCME and attorneys Annie Hoth and Nathan Reckman for the State presented oral arguments to the Board.

Pursuant to Iowa Code section 17A.15(3), on appeal from an ALJ's proposed decision, we possess all powers that we would have possessed had we elected, pursuant to PERB rule 621—2.1(20), to preside at the evidentiary hearing in the place of the ALJ. Pursuant to PERB rules 621—11.8(8A,20) and 621—9.5(17A,20), 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 an addition and we adopt the ALJ's conclusions with additional discussion. We concur with the ALJ and conclude AFSCME failed to establish the State's commission of prohibited practices as alleged.

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the proposed decision and order attached as "Appendix A," are fully supported by the record. We adopt the ALJ's factual findings as our own, with the following addition:

The record is unclear regarding the September 2017, staff communication meeting. Before this meeting, it appears that AFSCME Local President LeMaster and Vice-President Eaves did not request to meet or have prior communications with Warden Wachtendorf. LeMasters

testified that, at the September 2017, staff communications meetings, he told the warden that he represented union members and indicated generally he "needed to talk to her about some issues." The record is absent of any further explanation of the issues. LeMaster further testified that if they were called on, their questions would be re-diverted to someone else." There is no explanation what these questions were.

CONCLUSIONS OF LAW

We agree with the ALJ's conclusions as set out in Appendix A and adopt them as our own, with the following additional discussion:

In its appeal, AFSCME asserts the ALJ erred in failing to consider the warden's conduct at the September 2017, staff communication meeting. We concur with the ALJ's analysis and conclusions to the extent AFSCME alleged that the warden's failure to answer questions during the staff communication meeting constituted a separate prohibited practice.

However, we did consider evidence of the warden's conduct in our analysis of whether her later refusal to meet with LeMaster and Eaves in their capacity as union representatives to discuss workplace health and safety concerns constituted a prohibited practice. The evidence is insufficient to ascertain what the issues were at the time other than to conclude they were part and parcel of what LeMaster and Eaves later described as health and safety concerns. For the reasons set out by the ALJ, we concur with his conclusion that AFSCME failed to establish the State (specifically ISP) committed a prohibited practice within the meaning

of Iowa Code sections 20.10(2)(*a*), (*b*), (*c*), or (*d*). Accordingly, we enter the following:

ORDER

The prohibited practice complaint filed by AFSCME, Iowa Council 61 is hereby DISMISSED.

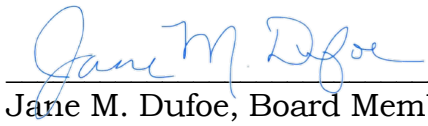
The cost of reporting and of the agency-requested transcript in the amount of $263.70 are assessed against AFSCME pursuant to Iowa Code section 20.11(3) and PERB rule 621—3.12(20). A bill of costs will be issued to AFSCME in accordance with PERB subrule 3.12(3).

This decision constitutes final agency action.

DATED at Des Moines, Iowa, this 18th day of February, 2022.

PUBLIC EMPLOYMENT RELATIONS BOARD

Erik M. Helland, Board Chair



Jane M. Dufoe, Board Member

Original filed EDMS.

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, IOWA COUNCIL 61, Complainant, and STATE OF IOWA (DEPARTMENT OF CORRECTIONS – IOWA STATE PENITENTIARY), Respondent.	CASE NO. 102128

PROPOSED DECISION AND ORDER

The Complainant, American Federation of State, County and Municipal Employees, Iowa Council 61 (AFSCME), filed a prohibited practice complaint with the Public Employment Relations Board (PERB or Board) pursuant to Iowa Code section 20.11 and PERB rule 621—3.1(20). AFSCME contends the Respondent, State of Iowa, Department of Corrections – Iowa State Penitentiary (State or ISP), committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(*a*), (*b*), (*c*), and (*d*) when, on October 16, 2017, the State, though Warden Patti Wachtendorf, informed AFSCME Local 2989 President Neil LeMaster that she would not discuss matters involving the health and safety of staff at the facility with either him or Vice President Todd Eaves in their capacity as union representatives.[1] The State denies the commission of any prohibited practice.

[1] In its post-hearing brief, AFSCME clarified its complaint that sections 20.10(2)(*e*) and 20.10(3) were not at issue. *See* AFSCME Post-Hearing Brief, pg. 8.

After mediation failed, the undersigned administrative law judge (ALJ) was assigned and an evidentiary hearing was held in Des Moines, Iowa, on August 18, 2020. Attorney Mark Hedberg represented AFSCME and attorney Nathan Reckman represented the State. Both parties filed post-hearing briefs, the last of which was filed on October 15, 2020.

Based upon the entirety of the record, as well as the parties' arguments, I conclude AFSCME has failed to establish the State's commission of a prohibited practice.

FINDINGS OF FACT

Background

The State of Iowa is a public employer within the meaning of Iowa Code section 20.3(10) and AFSCME is a certified employee organization within the meaning of Iowa Code section 20.3(4). PERB has certified AFSCME as the exclusive bargaining representative of certain State of Iowa security employees. One of the security positions AFSCME represents are state employed correctional officers.[2]

The Iowa State Penitentiary (ISP), part of the Iowa Department of Corrections, is a maximum and minimum-security correctional institution located in Fort Madison, Iowa. Correctional Officers Neil LeMaster and Todd Eaves have each worked as correctional officers at ISP for more than twenty years. Throughout their careers at ISP, LeMaster and Eaves have been active

[2] *See* PERB Case Nos. 294 and 942. Subsequently amended in Case Nos. 3507 and 3513.

AFSCME union members, each having served as officers in their local union and members of AFSCME Council 61's Executive Board. In October 2017, LeMaster was elected President, and Eaves Vice-President, of AFSCME Local 2989.

LeMaster testified that as President and Vice President, it was their job to help employees with their problems, both individually and in a group setting. In describing their duties as officers, LeMaster explained:

> …[P]eople become members to have us represent them because they feel intimidated by administration and they feel like maybe they'll be retaliated against if they bring up certain issues. So they can kind of cloak themselves behind us and we'll get in there and we can push their concerns without them having to worry about being retaliated against.

Prior to July 1, 2017, and pursuant to the then-applicable collective bargaining agreement (CBA) between AFSCME and the State of Iowa, representatives of management and AFSCME Local 2989 held Labor/Management meetings to discuss, and work to resolve, workplace concerns.[3] Specifically, the CBA required the parties to attempt to resolve all issues concerning employees' health and safety through Labor/Management meetings before pursuing other actions.[4]

In February 2017, the Iowa Legislature amended Iowa Code chapter 20 with the passage of House File 291.[5] Pertinent to this case, the 2017

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[3] At the hearing, with the agreement of the parties, the undersigned took judicial notice of the parties' past two CBAs, the first, effective July 1, 2015 through June 30, 2017, and the second, effective July 1, 2017 through June 30, 2019. Electronic copies of the CBAs are included in the record.

[4] *See* 2015-2017 AFSCME & State CBA pgs. 96-97, 103-104.

[5] The amendments included changes to "mandatory," "permissive," and "excluded" topics of bargaining between public sector employers and unions representing public sector employees. *See* Iowa Code § 20.9 (2017). All Code references are to Iowa Code (2017).

amendments to chapter 20 changed the topics of "health and safety matters" from a "mandatory" topic of bargaining to a "permissive" topic of bargaining for all units that do not have at least thirty percent of members who are "public safety employees."[6] *See* Iowa Code § 20.9. These amendments resulted in the elimination of all references to health, safety, and Labor/Management Committees from the parties' subsequent CBA, effective July 1, 2017 through June 30, 2019.

In early 2017, Patti Wachtendorf was appointed Warden of ISP. At some point after July 1, 2017, Wachtendorf ended ISP's practice of Labor/Management meetings and replaced them with monthly "staff communication meetings." The staff communication meetings, which were open to all ISP employees, were an opportunity for ISP staff to voice their concerns and ask questions of management.

In fall 2017, several employees reported to LeMaster and Eaves heighted tension between inmates and officers, which had resulted in a recent increase in staff assaults. Concerned about these reports, in September 2017, LeMaster and Eaves attended a staff communication meeting to discuss their concerns with Warden Wachtendorf.

Both LeMaster and Eaves testified that at the meeting employees were told that to ask a question they must raise their hands and wait to be called upon. However, when LeMaster asked a question on behalf of the union's members,

[6] The AFSCME represented State security bargaining unit is a non-public safety unit, as it does not have at least thirty percent of members who are "public safety employees" within the meaning of Iowa Code § 20.3(11).

Wachtendorf informed him that she would only speak to him as an individual, not as a union representative. For the rest of the meeting, management allegedly ignored their questions or redirected their questions to other employees.

After the staff communication meeting, LeMaster briefly met with Wachtendorf in the hallway. LeMaster told Wachtendorf the union had health and safety concerns and he asked to meet with her in his capacity as president of AFSCME Local 2989 to discuss the union's concerns. However, Wachtendorf responded that she would not meet with LeMaster or Eaves as union representatives, but would meet with them as officers/staff at the staff communication meetings.

On October 14, 2017, LeMaster sent Wachtendorf an email, which read, in relevant part:

> Warden Wachtendorf,
>
> Todd Eaves and I were elected president, and vice president of local 2989 and would like to sit down with you to discuss the health and safety of our staff. I believe that due to the changes in the local union leadership, we should sit down and discuss some of our concerns. Can you please let me know what would be a good time to discuss these matters with you?

On October 16, 2017, Wachtendorf responded:

> Congratulations! Are you Pres and Todd VP?
>
> Neil, I will meet with any staff; I'm very open about that. I will meet with you and Todd as officers/staff not as union representatives. The new forum for that is the Staff Communications meeting that I would like to see both of you attend. We've had good turnouts at each monthly meeting and great discussions. As you know, we rotate between 630am, 800pm and 1230pm to give more staff opportunities to attend. The next one is Nov 14 @ 800pm.

Let me know what you decide. Thanks! [7]

On November 21, 2017, AFSCME filed the instant prohibited practice complaint.

CONCLUSIONS OF LAW

In its complaint, AFSCME contends the State committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(*a*), (*b*), (*c*), and (*d*) when, on October 16, 2017, Warden Wachtendorf informed AFSCME Local 2989 President Neil LeMaster that she would not discuss matters involving the health and safety of staff at the facility with either him or Vice President Todd Eaves in their capacity as union representatives. The provisions of section 20.10 relevant to this claim provide:

> **20.10 Prohibited practices.**
>
> ***
>
> 2. It shall be a prohibited practice for a public employer or the employers designated representative to:
>
> *a.* Interfere with, restrain, or coerce public employees in the exercise of rights granted by this chapter.
>
> *b.* Dominate or interfere in the administration of any employee organization.
>
> *c.* Encourage or discourage membership in any employee organization, committee, or association by discrimination in hiring, tenure, or other terms or conditions of employment.
>
> *d.* Discharge or discriminate against a public employee because the employee has filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has formed, joined, or chosen to be represented by any

[7] Union Exhibit A.

employee organization.

Iowa Code section 20.8(3) is also central to AFSCME's claims in this case, which provides, in relevant part:

> **20.8 Public employee rights.**
>
> Public employees shall have the right to:
>
> ***
>
> 3. Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the state.

In prohibited practice proceedings, the complainant bears the burden of establishing each element of the charge. *Serv. Emp. Int'l Union, Local 199 & Broadlawns Med. Ctr.*, 2005 PERB 6894 at 5; *United Elec. Radio & Mach. Workers of Am. Local 886 & Tama Cnty.*, 2005 PERB 6756 at 6-7.

Notice of conduct at issue

A preliminary issue in this case concerns AFSCME's notice of alleged violations and the scope of conduct at issue. On its face, AFSCME's complaint seemingly challenges only Wachtendorf's October 16, 2017, response to LeMaster and Eaves, wherein she stated, "I will meet with you and [Eaves] as officers/staff not as union representatives." Although not mentioned in the complaint, as discussed in the Findings of Fact, testimony was received concerning Wachtendorf's alleged refusal to answer LeMaster and Eaves' questions during a staff communication meeting in September 2017. Further, in its post-hearing brief, AFSCME appears to argue—in addition to its argument concerning the October 16 email—that Wachtendorf's refusal to answer

questions during the staff communication meeting constituted a separate prohibited practice.[8]

Although PERB requires only notice pleading, AFSCME's complaint provided the State no notice of the existence of any issues regarding Wachtendorf's conduct at the meeting. Thus, the complaint fails to comply with PERB subrule 3.2(3) as to any such issues and AFSCME has made no motion to amend its complaint to conform to the proof as allowed by PERB rule 621—2.9. *See Haugland v. Schmidt*, 349 N.W.2d 121, 123 (Iowa 1984) (explaining a pleading is sufficient if it apprises of the incident out of which the claim arose and the general nature of the action). What is more, the State did not present any evidence at hearing concerning the staff communication meeting nor provide any arguments concerning the meeting in its post-hearing brief.

Under these circumstances, where AFSCME's complaint failed to provide the State notice of the existence of potential issues regarding the meeting and where the State did not present evidence or arguments concerning the meeting, the undersigned concludes that the State has not impliedly consented to the trial of potential issues arising from Wachtendorf's conduct at the staff communication meeting. *See AFSCME/Iowa Council 61 & State of Iowa (Dep't of Personnel)*, 1992 ALJ 4348 & 4440 at 2-3. Consequently, this decision is limited to the specific issue raised in AFSCME's complaint: whether Wachtendorf's refusal to meet with LeMaster and Eaves in their capacity as union representatives to discuss health and safety issues constituted a prohibited

[8] *See* AFSCME Post-Hearing Brief, pg. 8.

practice within the meaning of Iowa Code sections 20.10(2)(*a*), (*b*), (*c*), or (*d*). Each claim will be addressed in succession.

Section 20.10(2)(*a*) claim

AFSCME alleges an independent violation of section 20.10(2)(*a*), arguing that Wachtendorf's refusal to meet with LeMaster and Eaves in their capacity as union representatives to discuss workplace health and safety concerns interfered with, restrained or coerced LeMaster and Eaves in the exercise of protected, concerted activity and, thus, was a prohibited practice within the meaning of section 20.10(2)(*a*).

In order to prevail in an unlawful interference, restraint, or coercion case, a complainant must show (1) employees were engaged in activity protected by chapter 20 and, if so, (2) the employer engaged in conduct which tended to interfere with the employees' free exercise of their rights guaranteed by the statute. *See Scott Cnty. Sheriff's Ass'n & Scott Cnty. Brd. of Supervisors*, 1982 ALJ 2162 & 2163 at 6-7; *See also General Drivers & Helpers Union, Local 421 & City of Epworth*, 1993 ALJ 4826 at 5.

Iowa Code section 20.8(3) defines protected activity, in part, as the engagement in concerted activities for the purpose of mutual aid or protection. While the statute does not define "concerted activity," the Supreme Court has established that the term describes activities of employees who have joined together to achieve common goals. *See Nat'l Labor Relations Bd. v. City Disposal Sys. Inc.*, 465 U.S. 822, 829, 104 S. Ct 1505, 1511, 79 L. Ed. 2d 839 (1984).

Although section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, is not identical to section 20.8, both statutes grant employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Accordingly, PERB has found decisions of the National Labor Relations Board (NLRB) and the federal courts construing this portion of section 7 illuminating and instructive on the meaning of section 20.8(3). *See Roger Koehn & Indian Hills Cmty. Coll.*, 2003 PERB 6414 at 9.

Generally, in order to be "concerted," employee activity must be undertaken together by two or more employees, or by one employee on behalf of or on the authority of others. *See, e.g., Meyers Indus.*, 268 NLRB 493 (1984). For instance, the NLRB has held that employees were engaged in protected activity when several employees jointly presented complaints to management concerning wages and workplace conditions. *See Swearingen Aviation Corp.*, 227 NLRB 228, 236 (1976) (citing *Hugh H. Wilson Corp. v. N.L.R.B.*, 414 F.2d 1345 (3rd Cir. 1969)). The NLRB has generally held employees' efforts to ask questions or present grievances on behalf of themselves and others to be protected, concerted activity. *See Prescott Indus. Prod. Co.*, 205 NLRB 51 (1973).

In this case, LeMaster and Eaves, together, requested to meet with Wachtendorf, they made their request in their capacity as union representatives, and the matter they wished to discuss concerned the health and safety of all ISP correctional officers. Thus, LeMaster and Eaves' request to meet with Wachtendorf was a concerted act intended to improve the health and safety of themselves and others. Accordingly, I conclude LeMaster and Eaves' request to

meet with Wachtendorf was protected, concerted activity under Iowa Code section 20.8(3).

Having determined LeMaster and Eaves engaged in protected, concerted activity when they requested to meet with Wachtendorf, the remaining issue is whether Wachtendorf's refusal to meet with them in their capacity as union representatives unlawfully interfered with LeMaster and Eaves' exercise of protected activity in violation of Iowa Code section 20.10(2)(*a*).

To establish interference under section 20.10(2)(*a*), "a complainant need only to establish that the employer engaged in conduct which tended to interfere with the employee's free exercise of rights guaranteed by the statute." *AFSCME/Iowa Council 61 & State of Iowa*, 2013 ALJ 8465 at 6. With these violations, "an employer's motivation is not material nor does it matter whether the employee was in fact interfered with, restrained or coerced." *Id*.

In this case, at issue is Wachtendorf's refusal to meet with LeMaster and Eaves in their capacity as union representatives to discuss workplace health and safety concerns. Thus, the alleged interfering action was actually a refusal to act, a deliberate form of inaction. PERB case law establishes that the refusal to perform an act can violate section 20.10(2)(*a*) when an individual has a duty or obligation to act and, by so refusing, interferes with the rights of others.[9]

[9] *See Serv. Emp. Int'l Union, Local 199 & Broadlawns Medical Ctr.*, 2005 PERB 6894 at 4 (holding employer's refusal to fulfill statutory bargaining obligations and refusal to provide union relevant bargaining information a violation of sections 20.10(2)(*a*), (*e*) and (*f*)); *see also Commc'n Workers of Am. & Mississippi Bend Area Educ. Agency*, 2006 PERB 6765 at 7 (holding employer violated section 20.9 duty to bargain in good faith by refusing to provide relevant information to union and thereby violated sections 20.10(2)(*a*), (*e*) and (*f*)).

Therefore, to establish interference in this case, AFSCME must show that, under the circumstances, Wachtendorf was obligated, either contractually or statutorily, to meet with LeMaster and Eaves in their capacity as union representatives to discuss workplace health and safety issues. For the reasons discussed below, AFSCME has failed to establish Wachtendorf had any such obligation.

Regarding Wachtendorf's obligations under the CBA, as discussed in the Findings of Fact, prior to July 1, 2017, the parties' CBA contractually obligated management to meet with AFSCME representatives in Labor/Management meetings to discuss workplace health and safety matters. However, the parties' subsequent CBA, which took effect July 1, 2017, contained no reference to health, safety, or Labor/Management meetings. As such, on October 16, 2017—when Wachtendorf refused LeMaster and Eaves' request—the parties' CBA no longer required management to meet with AFSCME's representatives to discuss workplace health and safety matters. Accordingly, under the circumstances, Wachtendorf had no contractual obligation to meet with LeMaster and Eaves and, therefore, violated no contractual duty when she refused to meet.

Having concluded Wachtendorf had no contractual obligation to meet with LeMaster and Eaves, the next question is whether, under the circumstances, Iowa Code chapter 20 obligated Wachtendorf to meet with LeMaster and Eaves to discuss workplace health and safety matters. From a review of PERB's case law, it does not appear the Board has addressed this specific issue. However, the NLRB has addressed an employer's obligation to meet with employees under the

NLRA in at least two prior cases: *Swearingen Aviation Corp.,* 227 NLRB 228 (1976) and *Charleston Nursing Center,* 257 NLRB 554 (1981).

As discussed above, both Iowa Code section 20.8 and section 7 of NLRA protects employees' rights to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…" 29 U.S.C. § 157. Moreover, like Iowa Code section 20.10(2)(*a*), section 8(a)(1) makes it an unfair labor practice for an employer "to interfere, restrain, or coerce employees in the exercise of rights guaranteed in [section 7]." 29 U.S.C. § 158(a)(1). As these statutory provisions are similar in form and content, PERB considers federal interpretations of these provisions persuasive and instructive on the interpretation and application of Iowa Law. *See City of Davenport v. Pub. Emp't Relations Bd.*, 264 N.W.2d 307, 313 (Iowa 1978); *see also Kurt Rosenthal & City of Dubuque*, 2010 ALJ 8027 at 8.

In *Swearingen Aviation Corp.*, an employer was alleged to have violated section 8(a)(1) when he refused to allow an unrepresented employee present grievances to management on behalf of himself and other employees and have the grievances adjusted. *See* 227 NLRB 228 (1976). The NLRB affirmed the underlying ALJ decision concluding the employer's actions did not violate section 8(a)(1), which stated, in relevant part:

> But in neither of these cases, nor in any other case I know of, has it been held violative of Section 8(a)(1) for an employer to refuse to entertain and adjust grievances in circumstances such as those present here where there is no collective-bargaining agreement with an exclusive representative of employees in an appropriate unit *requiring it to do so*.

Id. at 236 (emphasis added).

Similarly, in *Charleston Nursing Center*, an employer was alleged to have violated section 8(a)(1) when he refused to meet with a group of unrepresented employees who demanded a meeting to discuss wages and work conditions. *See* 257 NLRB 554 (1981). In holding the employer's refusal to meet not a violation of section 8(a)(1), the NLRB stated:

> While it is clear that Section 8(a)(1) prohibits an employer from retaliating against employees for engaging in protected concerted activities such as the presentation of grievances, it is also clear that generally an employer is under no obligation to meet with employees or entertain their grievances upon request where there is no collective-bargaining agreement with an exclusive bargaining representative *requiring it to do so*.

Id. at 555, *reversed on other grounds*, 710 F.2d 1280, 1287 (7th Cir. 1983) (emphasis added).

Although the employees in *Swearingen* and *Charleston* were unrepresented, the Board's holding in *Charleston* was not limited to unrepresented employees. Rather, by including the language "requiring it to do so" the Board made clear that an employer's obligation to meet with employees generally arises from, and is conditional upon, the *terms* of the parties' CBA, rather than arising from the mere existence of a CBA or from the NLRA. Thus, section 8(a)(1) generally imposes no duty on employers to meet with employees or entertain their grievances upon request where there is no CBA requiring it to do so.

The NLRB's holding in *Charleston* is consistent with PERB's case law concerning permissive topics of bargaining. For instance, PERB has held, "a party has the right to adamantly and consistently refuse to bargain over permissive subjects of bargaining…" *Sioux City Educ. Ass'n & Sioux City Cmty. Sch. Dist.*, 1998 PERB 5842 at 10. Moreover, PERB has held that an employer's unilateral change in a permissive subject of bargaining is not a prohibited practice within the meaning of section 20.10. *See Black Hawk City & Pub. Prof'l & Maint. Emp., Local 2003*, 2008 PERB 7929 at 9; *see also Cedar Rapids Police Bargaining Union & City of Cedar Rapids*, 2020 ALJ 102144 & 102145 at 10. Thus, as chapter 20 does not obligate employers to bargain with union representatives over permissive topics of bargaining, it is reasonable to conclude, consistent with the NLRB's holding in *Charleston*, that chapter 20 also does not generally obligate employers to meet and discuss permissive topics of bargaining with union representatives absent a CBA requiring it to do so.

The undersigned finds the NLRB's holding in *Charleston* persuasive and applicable. Accordingly, I conclude section 20.10 generally imposes no obligation on employers to meet with employees or entertain their grievances upon request absent a CBA requiring it to do so. Consequently, under the circumstances, I conclude Wachtendorf had no obligation under chapter 20 to meet with LeMaster and Eaves in their capacity as union representatives to discuss health and safety matters. As such, Wachtendorf violated no statutory duty when she refused to meet with LeMaster and Eaves.

As AFSCME has failed to establish Wachtendorf was obligated to meet with LeMaster and Eaves, AFSCME has consequently failed to establish that Wachtendorf's refusal to meet unlawfully interfered with, restrained, or coerced LeMaster and Eaves in their exercise of section 20.8 rights. Therefore, AFSCME has failed to establish the State (specifically ISP) committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*a*).

Section 20.10(2)(*b*) claim

AFSCME contends Wachtendorf's refusal to meet with LeMaster and Eaves in their capacity as union representatives interfered with the administration of AFSCME Council 61 in violation of Iowa Code section 20.10(2)(*b*), which provides, "It shall be a prohibited practice for a public employer…to…[D]ominate or interfere in the administration of any employee organization." Iowa Code § 20.10(2)(*b*).

As discussed above, because Wachtendorf was under no obligation to meet with LeMaster and Eaves, her refusal to meet in no way interfered with their exercise of protected activity. Moreover, the record is absent of any evidence that Wachtendorf's refusal to meet with LeMaster and Eaves undermined AFSCME Council 61's ability to run its affairs. *See, e.g., AFSCME/Iowa Council 61*, 2013 ALJ 8465 at 8. Thus, AFSCME has failed to establish that the State dominated or interfered in the administration of AFSCME Council 61. Accordingly, AFSCME has failed to establish the State (specifically ISP) committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*b*).

Section 20.10(2)(*c*) and 20.10(2)(*d*) claims

AFSCME contends Wachtendorf's refusal to meet with LeMaster and Eaves in their capacity as union representatives violated Iowa Code sections 20.10(2)(*c*) and (*d*), which address unlawful motive and prohibit employer conduct which encourages or discourages union membership or which constitutes retaliation for an employee's union activities. *See Rosenthal*, 2010 ALJ 8027 at 12; *see also AFSCME/Iowa Council 61*, 2013 ALJ 8465 at 8. In cases where there is a question whether the employer acted because of an employee's union activities or due to some factor unrelated to protected activity, PERB and the courts apply a "dual-motive" analysis, also known as the *Wright Line* test. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983); *see also Cerro Gordo Cnty. v. PERB*, 395 N.W.2d 672 (Ia. Ct. App. 1986).

In this case, however, resort to a *Wright Line* analysis is unnecessary, because, as discussed above, Wachtendorf's refusal to meet with LeMaster and Eaves did not interfere with their exercise of protected activity. Just as Wachtendorf's refusal did not interfere with protected activity, it also did not adversely affect LeMaster and Eaves' terms and conditions of employment nor is there any evidence of retaliatory conduct. *See, e.g., AFSCME/Iowa Council 61 & State of Iowa*, 1999 ALJ 5879 at 5-6. As Wachtendorf did not commit any adverse or retaliatory actions, AFSCME has failed to establish that the State (specifically ISP) committed a prohibited practice within the meaning of Iowa Code sections 20.10(2)(*c*) or 20.10(2)(*d*).

Having concluded AFSCME failed to establish the State (specifically ISP) committed a prohibited practice within the meaning of Iowa Code sections 20.10(2)(*a*), (*b*), (*c*), or (*d*), I consequently propose entry of 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 $157.00 are assessed against AFSCME pursuant to PERB rule 621—3.12(20). A bill of costs will be issued to AFSCME in accordance with PERB subrule 3.12(3).

The proposed decision will become PERB's final decision in accordance with PERB rule 621—9.1 unless, within 20 days of the date below, a party aggrieved by the proposed decision files an appeal to the Board or the Board, on its own motion, determines to review the proposed decision.

DATED at Des Moines, Iowa this 13th day of April, 2021.

Patrick B. Thomas
Administrative Law Judge

Filed electronically.
Parties served via eFlex.