



621—1.9(8) and 1.9(9), PERB provided notice of the petition to the listed public employer’s representative, Executive Director Kevin Blanshan, for an opportunity to participate in all proceedings. The public employer does not oppose the waiver.

On October 8, 2018, counsel for ATU Local 1192, Jay Smith, presented oral argument to the Board. Kevin Blanshan represented INRCOG and was present for the telephonic conference call.

By previous order and in accordance with Iowa Code section 17A.9A and PERB subrules 621—1.9(10) through 621—1.9(16), we take official notice of the following declaratory order and rulings:

(1) *In the Matter of Amalgamated Transit Union Locals 312, 441, 638, 779, and 1192 and State of Iowa and Des Moines Area Regional Transit Authority*, 2018 PERB 102203;

(2) *In the Matter of Des Moines Area Regional Transit Authority and Amalgamated Transit Union, Division 441*, 2018 PERB BU-0281;

(3) *In the Matter of Sioux City Transit System and Amalgamated Transit Union, Division 779*, 2018 PERB BU-0549; and

(4) *In the Matter of City of Cedar Rapids and Amalgamated Transit Union, Local 638*, 2018 PERB BU-0886.

Iowa Code section 17A.9A provides any person may “petition an agency for a waiver or variance from the requirements of a rule” if the agency has an established procedure by rule which permits waivers and variances.<sup>1</sup> Iowa Code § 17A.9(1). PERB has an established procedure for waiver or variance of rules that is set forth in PERB rule 621—1.9(17A,20). Among other requirements, the petition for a waiver or

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<sup>1</sup> All references are to Iowa Code (2017).

variance must set forth a statement of relevant facts. Iowa Admin. Code r. 621—1.9(6)(d).

**Relevant Facts.**

The facts, as set forth by the petitioner in this case, can be summarized as follows:

ATU Local 1192 is an employee organization certified by PERB as the exclusive bargaining representative for a bargaining unit of public employee transit workers employed by INRCOG. ATU Local 1192 was originally certified on July 19, 1990, in PERB Case No. 4191. The bargain unit is comprised of 100 percent transit workers.

On behalf of the unit, ATU Local 1192 and INRCOG are parties to a collective bargaining agreement (CBA), which agreement is due to expire June 30, 2019. The impending expiration of the CBA triggered ATU Local 1192's requirement to undergo a retention and recertification election.

Pursuant to Iowa Code section 20.15(2) and PERB subrule 5.6(2), on August 27, 2018, PERB issued a Notice of Intent to Conduct a Retention and Recertification Election of ATU for the bargaining unit referenced as BU-0635. On or about August 30, 2018, INRCOG filed with PERB a list of eligible voters as required by PERB subrule 621—5.6(4). ATU Local 1192 subsequently paid its election fee required by PERB subrule 621—5.6(5). Pursuant to PERB's Order dated September

19, 2018, PERB will conduct a retention and recertification election of ATU Local 1191 between October 15 and 29, 2018.

**Relevant Agency Proceedings.**

In accordance with PERB subrule 621—1.9(6)(e), the petition specifies a number of recent PERB proceedings related to this matter.

- A. *In the Matter of Amalgamated Transit Union Locals 312, 441, 638, 779, and 1192 [Metropolitan Transit Authority of Black Hawk Cnty.] and State of Iowa and Des Moines Area Regional Transit Authority*, 2018 PERB 102203 (09/21/2018).

On July 3, 2018, five other ATU locals filed a petition with PERB seeking a declaratory order stating whether certain unions are exempt from retention and recertification elections. The five ATU locals represent bargaining units of 100 percent public employee transit workers employed by public employers that receive Federal Transit Authority funds. The receipt of (FTA) funds by an employer is conditioned upon the Department of Labor's (DOL) certification that certain protective arrangements for transit workers are in place that meet the requirements of 49 U.S.C. § 5333(b). After 2017 Iowa Acts, House File 291 amended chapter 20, the DOL determined that the newly required section 20.15(2) retention and recertification elections conflict with 49 U.S.C. § 5333(b) requirements and jeopardize federal funding should the elections occur.

When any provision of chapter 20 jeopardizes the State or political subdivision's receipt of federal funding, Iowa Code section 20.27 deems the provision inoperative to the extent funding is jeopardized. Thus,

under the facts presented in *In the Matter of Amalgamated Transit Union Locals 312, 441, 638, 779, and 1192 [Metropolitan Transit Authority of Black Hawk Cnty.]*, 2018 PERB 102202, we concluded the Iowa Code section 20.15 retention and recertification requirements were inoperative with respect to the five ATU locals. We also acknowledged the absence of rule or other mechanism for parties to notify the agency and petition for relief when federal funding may be jeopardized by a provision of chapter 20. In the absence of any such rule we stated in part, “If the conduct of a retention and recertification election would jeopardize federal funding, such as the facts presented in this petition, a party must file an objection to the notice of intent to conduct an election pursuant to PERB subrule 621—5.6(3).

*B. In the Matter of Des Moines Area Regional Transit Authority and Amalgamated Transit Union, Division 441*, 2018 PERB BU-0281; *In the Matter of Sioux City Transit System and Amalgamated Transit Union, Division 779*, 2018 PERB BU-0549; and *In the Matter of City of Cedar Rapids and Amalgamated Transit Union, Local 638*, 2018 PERB BU-0886.  
(All rulings issued 09/28/2018).

During the pendency of the declaratory order proceeding in Case No. 102202, ATU Locals 441, 638, and 779 each filed an objection to its respective Notice of Intent to Conduct a Retention and Recertification Election filed by PERB. On September 28, 2018, we sustained the objections in light of our declaratory order. As a result, PERB will not conduct retention and recertification elections of ATU Locals 441, 638, and 779.

**Facts Warranting Waiver.**

In this case, ATU Local 1192 filed its petition requesting a waiver of PERB subrule 621—5.6(3) to the extent necessary to file an objection to the upcoming retention and recertification election. ATU Local 1192 seeks an opportunity to present evidence demonstrating why the section 20.15 retention and recertification requirements should be deemed inoperative to it as well. ATU Local 1192 asserts all of the relevant facts pivotal to our declaratory order in PERB Case No. 102202 are similarly present in its situation.

ATU Local 1192 represents a bargaining unit comprised of 100 percent public employee transit workers. The public employer, INRCOG, receives federal funds and is subject to the same requirements of 49 U.S.C. § 5333(b) requirements as the ATU locals in *In the Matter of Amalgamated Transit Union Locals 312, 441, 638, 779, and 1192 [Metropolitan Transit Authority of Black Hawk Cnty.]*, 2018 PERB 102203.

As a condition of its receipt of federal transit funds, INRCOG agrees to comply with the terms and conditions of a Section 13(c) Arrangement, referred to as the Special Warranty Arrangement, applicable to “non-unionized” public transit recipients. The Special Warranty Arrangement is a Section 13(c) Arrangement certified by the U.S. Department of Labor, Office of Labor Management Standards (OLMS) as satisfying the transit employee protection requirements required by 49 U.S.C. § 5333(b).

As a “non-urbanized” recipient, INRCOG receives its federal funds from the Iowa Department of Transportation (IDOT). Federal transit funds are first awarded to the IDOT, the grantee, which must secure INRCOG’s agreement to comply with the terms of the Special Warranty Arrangement as a condition for INRCOG’s receipt of the federal transit funds through the IDOT. INRCOG and IDOT executed the “Transit Joint Participation Agreement to Implement a Federal Transit Administration (FTA) Non-Urbanized Formula Program (Flex fund Projects).” The Joint Participation Agreement references INRCOG’s agreement to all terms and conditions established by the Federal DOT, including the Special Warranty Arrangement.

The Special Warranty Arrangement requires in part that INRCOG preserve the rights, privileges, and benefits under existing collective bargaining agreements, as well as the obligation to continue collective bargaining rights. Absent a waiver of PERB subrule 621—5.6(3) and an opportunity for ATU Local 1192 to object to and present evidence as to why the election should not occur, ATU Local 1192 asserts that neither INRCOG, as a recipient, nor the IDOT, as a guarantor, would be able to comply with the collective bargaining obligations of the Special Warranty Arrangement. Additionally, ATU Local 1192 points out that OLMS has unequivocally stated that application of Iowa Code section 20.15(2) retention and recertification elections to bargaining units comprised of transit workers would jeopardize the receipt of federal funding. See



OLMS Letter, dated June 19, 2017, regarding City of Davenport Grants (IA-2017-010) and (IA-2017-011). Thus, ATU Local 1192 maintains a waiver is required to file an objection to the retention and recertification election and seek a determination from PERB that deems the election requirements inoperative so the parties can ultimately comply with the Special Warranty Arrangement.

### **Relevant Statute and Rules.**

ATU Local 1192 seeks a waiver of PERB subrule 621—5.6(3), which provides,

#### **5.6(3) *Objection to notice of intent to conduct an election.***

*a.* The certified employee organization or public employer may file an objection asserting that the election should not be conducted for reasons set forth in the objection. The objection shall be in writing and electronically filed no later than seven days following the date of the notice of intent to conduct an election.

*b.* The agency may conduct a preliminary investigation of the objection and determine if the objection has merit. The agency will dismiss objections without merit and schedule hearings for all other objections. Hearings on objections shall be conducted pursuant to 621—Chapter 2. The objecting party shall present its evidence first.

Based on our recent declaratory order in PERB Case No. 102202, ATU Local 1192 claims the provisions of section 20.15(2) retention and recertification elections are inoperative to it as well. Iowa Code section 20.27 provides,

#### **20.27 Conflict with federal aid.**

If any provision of this chapter jeopardizes the receipt by the state or any of its political subdivisions of any federal grant-in-aid funds or other federal allotment of money, the



provisions of this chapter shall, insofar as the fund is jeopardized, be deemed to be inoperative.

**Waiver of PERB subrule 621—5.6(3).**

ATU Local 1192 seeks a waiver of subrule 621—5.6(3) to the extent necessary to allow it an opportunity to object to the PERB-scheduled retention and recertification election and present evidence that the election will jeopardize the public employer's receipt of federal funding.

Pursuant to Iowa Code section 17A.9A(2) and PERB subrule 621—1.9(4), the Board may, at its sole discretion, issue an order waiving requirements of a rule if the Board finds, based on clear and convincing evidence, all of the following:

- a.* The application of the rule would pose an undue hardship on the person for whom the waiver or variance is requested.
- b.* The waiver or variance from the requirements of a rule in a specific case would not prejudice the substantial legal rights of any person.
- c.* The provisions of a rule subject to a petition for a waiver or variance are not specifically mandated by statute or another provision of law.
- d.* Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver or variance is requested.

Iowa Code § 17A.9A(1); Iowa Admin. Code r. 621—1.9(4).

The burden of persuasion rests with the petitioner. Iowa Code § 17A.9A(3). “The petitioner bears the burden of demonstrating, by clear and convincing evidence, that the board should exercise its discretion to grant a waiver pursuant to this rule.” Iowa Admin. Code r. 621—1.9(12).

Clear and convincing “means there are no serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence.” *Smith v. State*, 845 N.W.2d 51, 56 (Iowa 2014) (quoting *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000)).

ATU Local 1192 has demonstrated, by clear and convincing evidence, that the Board’s waiver of limited portions of PERB subrule 621—5.6(3) on this one occasion is warranted. We agree with ATU Local 1192 and find that the absence of a waiver would pose a hardship on this local. There are serious consequences if a retention and recertification election occurs. Neither ATU, Local 1192, INRCOGS, nor IDOT would be in compliance with the Special Warranty Arrangement and the receipt of federal funds would be jeopardized.

We find that the waiver of the rule would not prejudice the substantial legal rights of any individual or entity. INRCOG is the only identified interested party to this proceeding. INRCOG does not have substantive rights in the election process. INRCOGS rights would not be harmed if we granted the waiver and allowed ATU Local 1192 to file an objection. INRCOG’s interest is in ensuring that its receipt of federal funds is not jeopardized. INRCOG is an active participant in this proceeding and does not resist ATU Local 1192’s petition for a waiver.

We find that the provisions of the rule to which the waiver request applies are not specifically mandated by statute or other provision of law. PERB subrule 5.6(3) governs the only method available to object to

PERB's conduct of a retention and recertification election. The objection is not one mandated by law and is a product of rule only.

We find that substantial equal protection of public health, safety, and welfare will be afforded by a means other than that proscribed in the rule to which the waiver applies. The waiver will provide substantial equal protection of public health, safety, and welfare by providing ATU Local 1192 with an opportunity to present its objections to the BU-0635 Election in light of PERB's decision in Case Nos. 2018 PERB 102202, BU-0549, BU-0886, and BU-0281.

Thus, ATU Local 1192 has met its burden of demonstrating that a waiver of PERB subrule 621—5.6(3) meets all of the required criteria. We have considered all relevant factors, including the unique, individual circumstances set out in the petition. For several reasons, this situation is unique. As we indicated in our declaratory order in PERB Case No. 102202, PERB does not have a rule or mechanism for parties to object or file a petition for relief when a chapter 20 provision jeopardizes federal funding. Moreover, we had only antidotal information regarding transit employees when House File 291 was enacted. These recent cases are ones of first impression. We take this and the absence of a “mechanism” to address Iowa Code section 20.27 situations into account in making our determination.

We are also cognizant of our requirement in PERB subrule 621—1.9(7) that a petition for waiver of a time limit must be filed before the

lapse of the deadline set forth in the rule. However, we do not view this particular petition as a request to simply waive the time to file an objection to Notice of Intent to Conduct an Election. Rather, we view it as a waiver of the specific mechanism for objecting on these very narrow grounds set forth in the rule, *e.g.*, to the Notice of Intent to Conduct an Election. A waiver would allow filing of a general objection and its filing date further along in the election process.

In this election case, the Notice of Intent to Conduct an Election, the voter list, and Order for PERB to Conduct an Election have all been filed. ATU Local 1192 paid its election fee. Unfortunately, this ATU local was not aware of its rights and the federal funding issue until our rulings and orders brought to light very specific instances when a retention and recertification election would jeopardize federal funding. However, the only available mechanism for asserting the application of Iowa Code section 20.27 and an objection to the election is through PERB subrule 621—5.6(3). This subrule limits the filing of the objection to (1) PERB's Notice of Intent to Conduct an Election; and (2) within seven days of PERB's filing of its notice.

By virtue of Iowa Code section 20.27, provisions of PERB subrule 621—5.6(3) which would impede ATU Local 1192's ability to file an objection to the election and avoid a retention and recertification election are deemed inoperative. Iowa Code section 20.27 supports our waiver of these provisions to the extent they jeopardize federal funding. As a

result, under the limited facts presented in this petition and on this one occasion, provisions of PERB subrule 5.6(3) which limit ATU Local 1192's filing of an objection to (1) PERB's Notice of Intent to Conduct an Election; and (2) within seven days from the filing of PERB's notice, are waived on this one-time occasion. ATU Local 1192 shall comply with all other provisions of PERB subrule 621—5.6(3). Accordingly, ATU Local 1192 is allowed to file a general objection to the election in PERB Case No. BU-0635 within seven days from the below date.

Accordingly, we enter the following:

### **RULING**

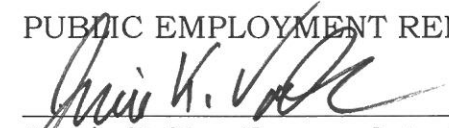
The Amalgamated Transit Union, Local 1192's petition for a waiver of PERB subrule 621—5.6(3) is GRANTED with the above-described limitations.

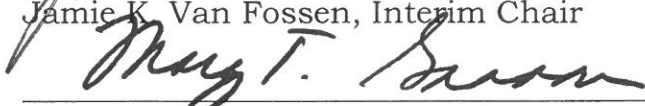
### **ORDER**

The Amalgamated Transit Union, Local 1192 shall file a general objection, pursuant to PERB subrule 621—5.6(3) to the election in PERB Case No. BU-0635 within seven days of the below date.

DATED at Des Moines, Iowa, this 9th day of October, 2018.

PUBLIC EMPLOYMENT RELATIONS BOARD

  
\_\_\_\_\_  
Jamie K. Van Fossen, Interim Chair

  
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Mary T. Gannon, Board Member

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