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 HUMAN SERVICES), Respondent.	CASE NO. 102340

ORDER NUNC PRO TUNC

It has come to the ALJ's attention that the order included within the Proposed Decision and Order issued on March 3, 2021, is incomplete, as the undersigned inadvertently failed to include the parties' appeal rights as well as assess the costs of reporting and of the agency-requested transcript.

IT IS THEREFORE ORDERED, nunc pro tunc, that the order contained therein is stricken and replaced with 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 $1,346.25 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 3rd day of March, 2021.

Patrick B. Thomas
Administrative Law Judge

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PROPOSED DECISION AND ORDER

The Complainant, American Federation of State, County and Municipal Employees, Iowa Council 61 (AFSCME)[1], 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 Human Services) (State or DHS), committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(*a*), (*b*), (*c*), (*d*), (*f*), and (*h*) when, on seven separate occasions over an approximately two-year period, the State allegedly denied Curt Salow's vacation requests to attend AFSCME Iowa Council 61 Executive Board meetings. The State denies the commission of any prohibited practice.

The undersigned administrative law judge (ALJ) held an evidentiary hearing in Buchanan County on January 14, 2020. Robin White represented AFSCME and attorney Nathan Reckman represented the State. Both parties filed

[1] The filed complaint included Curt Salow as a complainant. At the hearing, the parties agreed to remove Salow as a named party.

post-hearing briefs, the last of which was filed on March 31, 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 a bargaining unit of State of Iowa technical employees.[2] One of the technical positions AFSCME represents are state employed residential treatment workers (RTW). RTWs perform para-professional nursing or therapeutic work in the care or treatment of residents at state operated institutions for the elderly, intellectually disabled, or mentally ill.

The Independence Mental Health Institute (IMHI), operated by the Iowa Department of Human Services, is a health care facility for adults, adolescents, and children who are in need of acute psychiatric services. IMHI's primary facility consists of two treatment units: an adult unit with forty beds and a children/adolescent unit with twenty beds. IMHI provides its residents with 24-hour inpatient psychiatric services administered by a multi-disciplinary treatment team composed of doctors, nurses, social workers, activities

[2] *See* PERB Case Nos. 1071 and 1105. Subsequently amended in Case Nos. 1289, 1559, 2516, 4067, and 4132.

therapists, psychologists, and RTWs.

Curt Salow has been employed as an RTW in the nursing department at IMHI since January 1999. Salow, an active AFSCME union member, has served as president of his local union since 2003 and as a member of AFSCME's statewide Executive Board since 2005. The Executive Board is AFSCME's governing body between its biannual conventions. The Executive Board meets once every three months in Des Moines, Iowa. Members of the Executive Board are expected to attend the quarterly meetings, to work with the membership in their designated districts, and assist in AFSCME organizing campaigns. If a board member is unable to attend a meeting, the member is expected to notify AFSCME President Danny Homan prior to the meeting.

To attend AFSCME meetings, Salow must request time off from IMHI's nursing department. The nursing department assigns all nurses and RTWs to consistent, repeating monthly schedules to ensure sufficient around the clock staffing. The department operates three, eight-hour shifts—a day shift, an evening shift, and a night shift. At all times relevant to this case, Salow worked the evening shift.

The Administrator of Nursing, Georgeanne Cassidy-Wescott, directed the institution's nursing department and the Administrative Assistant, Cheryl Cobb, oversaw staffing and scheduling for the department. Cobb's duties included reviewing employee vacation requests, approving or denying those requests, and adjusting staff schedules to maintain balanced shifts.

Prior to July 1, 2017, and pursuant to the then-applicable collective bargaining agreement (CBA) between AFSCME and the State of Iowa, the nursing department granted employee vacation requests in order of seniority. Each shift had a designated number of vacation "slots," which the department was required to grant irrespective of the staffing situation. Additionally, under the terms of this pre-July 1, 2017 CBA, "union leave" was a separate form of leave available to employees to attend union activities and superseded other types of leave.

In February 2017, the Iowa Legislature amended Iowa Code chapter 20 with the passage of House File 291.[3] Pertinent to this case, the 2017 amendments to chapter 20 changed the topics of "vacation" and "leaves of absence" from "mandatory" topics of bargaining to "permissive" topics of bargaining for all units that do not have at least thirty percent of members who are "public safety employees."[4] *See* Iowa Code § 20.9. These amendments resulted in the elimination of all references to employee leave in the parties' subsequent CBA, effective from July 1, 2017 to June 30, 2019, including the elimination of all language concerning "union leave."

On July 3, 2017, IMHI revised its Nursing Operations Manual to no longer designate a certain number of vacation "slots" for each shift and to end its policy of granting employee leave requests by order of seniority. IMHI's revised leave policy reads, in relevant part:

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[3] The amendments included changes to "mandatory," "permissive," and "prohibited" topics of bargaining between public sector employers and unions representing public sector employees. *See* Iowa Code § 20.9.

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

Leave Requests

1. All leave requests, with the exception of those being charged to unscheduled sick leave, will be pre-scheduled and pre-approved.

2. The employee is responsible for ensuring that all time requested would be covered by accrued paid leave.

3. Scheduled leave requested will be approved on a "first come, first serve" basis, according to the date received. Requests may not be submitted until 6 months prior to the date of the request…

4. All leaves will be requested via the on-line Application for Leave form found in the IMHI Share under Forms.

5. When the request is answered, the copy will be returned to the employee for the employee's record. A copy is attached to the Daily Personnel Report when the scheduled time off begins.

6. Approval or disapproval of paid leave requests are based on management discretion, seniority, slots available, licensed coverage, and sufficient time on the books to cover requests.

7. Per DHS Leave Procedure: Scheduled leave(s) must be submitted at least (24) hours in advance of the requested absence. Requests received less than twenty-four (24) hours in advance, will be reviewed by the supervisors. These requests may be approved unless granting the request will cause overtime or insufficient coverage.

After the new CBA took effect, the nursing department revised its leave policy in order to ensure adequate patient care and to maintain the efficient operation of the institution, as required by Department of Administrative Services' (DAS) subrule 11—63.2(2)(*a*), which states:

> *a.* Vacation shall be subject to the approval of the appointing authority. The appointing authority shall approve vacation so as to maintain the efficient operation of the agency; take into

> consideration the vacation preferences and needs of the employee; and make every reasonable effort to provide vacation to prevent any loss of vacation accrual.

According to Administrator of Nursing Cassidy-Wescott, the policy promotes patient care and maintains operational efficiency by prohibiting shifts from falling below minimum staffing levels. Under the revised policy, the only factors the department considers when approving or denying leave requests are the minimum staffing level for each shift and the order in which the leave requests were received.

Pursuant to the revised policy, employees may submit leave requests up to six-months prior to the date of the requested leave. To submit a leave request, employees complete an online Application for Leave form. In the application, employees identify the number of hour requested, the dates requested off, their shift, and the type of leave, such as vacation or sick leave. The application also includes an "employee comments" section, where employees may voluntarily provide an explanation for requesting leave.

Once complete, employees email their applications to the nursing department's Administrative Assistant, Cheryl Cobb, who timestamps and logs the applications in order of receipt. Sixty-days prior to a requested leave date, Cobb reviewed the staffing levels for each shift to determine how many requests could be approved then answered the requests in the order they were received. Pursuant to the policy, Cobb approved and denied leave requests on a first-come, first-serve basis, explaining that if staffing levels were above minimum, she would approve the request, but if approving the request would result in a shift

falling below the minimum staffing level, she would deny the request.

Although it is a "somewhat frequent" occurrence for employee leave requests to be denied due to insufficient staffing levels, the nursing department provides employees alternative ways to try to secure time off. Specifically, if an employee's leave request is denied, the employee may trade shifts with another employee or may contact the institution's PRN staff—who are staff that are not regularly scheduled, but are available to cover shifts—to see if a PRN is available to work their shift. Whenever employees reached out to Cobb about vacation request denials, Cobb would work with the employees to try to help them find a way to secure the time off.

Both Cassidy-Wescott and Cobb testified that an employee's reason or explanation for requesting leave was never a factor in their decision whether to approve or deny a leave request. Further, both testified that since July 3, 2017, IMHI has treated leave requests involving union activities the same as all other leave requests and that they have never denied a leave request because it related to union activity.

Alleged leave request denials

AFSCME contends that on seven occasions over an approximately two-year period IMHI denied Salow's vacation requests to attend AFSCME Executive Board meetings. At issue are Salow's leave requests to attend AFSCME Executive Board meetings on the following dates: October 7, 2017; December 2, 2017; June 2, 2018; September 28, 2018; December 1, 2018; March 2, 2019; and July 26, 2019.

The State provided copies of Salow's 2018 and 2019 leave requests as well as a summary of those requests. Although the evidence contains a few inconsistencies, which were addressed at the hearing,[5] the record reflects that in 2018, Salow submitted approximately 55 leave requests, of which, IMHI approved 43 and in 2019, Salow submitted 41 leave requests, of which, IMHI approved 31.[6]

The parties provided testimony and evidence concerning the seven alleged denials listed in AFSCME's complaint. In addition, the State provided evidence concerning several of Salow's other leave requests submitted during the relevant period. Overall, the record shows IMHI both approved and denied several leave requests to attend union activities as well as approved and denied leave requests that did not involve union activities. The following leave requests were discussed at hearing and are relevant to the issues herein:

October 2, 2017 – October 12, 2017

AFSCME held an Executive Board meeting on October 7, 2017. On June 12, 2017, Salow submitted an Application for Leave requesting October 2-5 and October 7-11 off—October 6 was Salow's regularly scheduled day off. Salow did not include on his application any written explanation for requesting the time off and Salow testified that he never informed management that it was to attend a

[5] At the hearing, questioning revealed that the 2018 summary incorrectly included vacation denials for July 26, 2018 through July 28, 2018. Those denials were actually for July 26, 2019 through July 28, 2019. Further, the 2019 summary indicates 39 days of leave were approved and 10 days were disapproved. However, the record reflects only 31 days approved to 10-days disapproved.
[6] State Exhibit 1, pgs. 1-5.

union activity. On August 7, 2017, Cobb approved Salow's leave for October 2-5, but denied his request for October 7-10. The staffing sheet for October 7, 2017, reflects that other employees requested vacation for October 7 before Salow, but were also denied leave due to insufficient staffing levels.

November 30, 2017 – December 3, 2017

AFSCME held an Executive Board meeting on December 2, 2017. On October 27, 2017, Salow submitted an Application for Leave requesting November 30 and December 2-3 off—December 1 was Salow's regularly scheduled day off. Salow did not write in the employee comment section why he requested the time off. On October 30, 2017, Cobb approved Salow's leave for November 30, but denied his request for December 2 and 3 due to insufficient staffing. The record shows that two employees requested leave for December 2 and 3 before Salow submitted his application and their requests were approved.

March 1, 2018 – March 4, 2018

AFSCME held an Executive Board meeting on March 3, 2018. On January 8, 2018, Salow submitted an Application for Leave requesting vacation leave for March 1-4. Salow did not write in the employee comment section why he requested the time off. On January 10, 2018, Cobb approved Salow's request in full.

June 2, 2018

AFSCME held an Executive Board meeting on June 2, 2018. In the complaint, AFSCME alleged Salow was unable to attend because his leave

request was denied. However, Cassidy-Wescott testified that IMHI has no record of Salow submitting an Application for Leave for June 2, 2018, and the staffing sheet from June 2, 2018, does not reflect Salow requested leave for that day.[7]

September 28, 2018 – October 7, 2018

AFSCME held an Executive Board meeting on September 28, 2018. On June 25, 2018, Salow submitted an Application for Leave for September 28-October 7. Salow did not write in the employee comment section why he requested the time off. On August 1, 2018, Cobb approved Salow's request in full. However, Salow testified that he did not attend the Executive Board meeting on September 28 because he had traveled out of state to celebrate his wedding anniversary. At the hearing, Salow acknowledged that he made a mistake when he included September 28, 2018, in the complaint.

November 10, 2018 – November 11, 2018

On November 10 and November 11, 2018, AFSCME held negotiations for its next collective bargaining agreement in Des Moines, Iowa. On October 30, 2018, Salow submitted an Application for Leave for November 10 and 11 and wrote in the employee comment section, "Negotiations of new Contract in Des Moines." On October 31, 2018, Cassidy-Wescott approved Salow's request in full.

[7] Salow testified that he does not have a copy of the leave request because he cannot access the emails he sent prior to the summer of 2019, when the State switched its email system from Outlook to Google. At the hearing, Salow acknowledged he has no evidence corroborating his claim that he submitted a leave request for June 2, 2018. As the burden of proof is on the complainant and Cassidy-Wescott's testimony is consistent with the documentary evidence, the weight of the evidence supports a finding that Salow did not submit a leave request for June 2, 2018.

December 1, 2018

AFSCME held an Executive Board meeting on December 1, 2018. In the complaint, AFSCME indicated Salow was unable to attend because IMHI denied his leave request. However, Cassidy-Wescott testified that IMHI does not have an application from Salow requesting leave for December 1 and the staffing sheet does not reflect Salow requested leave for that day.[8]

January 26, 2019 – January 27, 2019

On January 26 and January 27, 2019, AFSCME continued negotiations over its CBA in Des Moines, Iowa. On January 3, 2019, Salow submitted an Application for Leave for January 26 and 27, wherein the employee comments section he wrote that the leave was for "Contract Negotiation in Des Moines." On January 4, 2019, Cassidy-Wescott approved the requested leave in full.

February 18, 2019

On February 18, 2019, AFSCME held a vote to ratify its CBA. On February 15, 2018, Salow submitted an Application for Leave for February 18, wherein the employee comments section he wrote that the leave was for "Contract Ratification Vote." That same day, Cassidy-Wescott approved Salow's requested leave in full.

March 2, 2019

AFSCME held an Executive Board meeting on March 2, 2019. In the complaint, AFSCME indicated Salow was unable to attend because IMHI denied

[8] Salow testified that he does not have a copy of the request because he cannot access his old emails. As IMHI's records support Cassidy-Wescott's testimony, the weight of the evidence supports a finding that Salow did not submit a leave request for December 1, 2018.

his leave request. However, Cassidy-Wescott testified that she does not have an application from Salow requesting leave for March 2, 2019, in her records and the staffing sheet for March 2 does not reflect Salow requested leave for that day.[9]

July 25, 2019 – July 29, 2019

AFSCME held an Executive Board meeting and Biennial Convention from July 25 through July 28, 2019. On March 24, 2019, Salow submitted an Application for Leave for July 26, 27, and 28—July 24 and 25 were Salow's regularly scheduled days off. In the employee comments section Salow wrote "Afscme E-Board, State Convention Des Moines." On May 30, 2019, Cobb denied Salow's request due to insufficient staffing.

The record reflects two evening shift employees submitted applications requesting leave for July 26 before Salow submitted his application on March 24, 2019. The first, Jennifer Meether, submitted an application on January 18, 2019, which Cobb approved. The second, Sara Kadolph, submitted an application on February 14, 2019, which Cobb denied. In her application, Kadolph also requested leave for July 27 and 28, which Cobb approved. Thus, Salow was the second employee denied leave for July 26 and the first employee denied leave for July 27 and 28.

[9] Salow testified that he does not have a copy of the request because he cannot access his old emails. As Cassidy-Wescott's testimony is consistent with the documentary evidence, the weight of the evidence supports a finding that Salow did not submit a leave request for March 2, 2019.

On June 10, 2019, AFSCME filed the instant prohibited practice complaint.

CONCLUSIONS OF LAW

AFSCME contends the State committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(*a*), (*b*), (*c*), (*d*), (*f*), and (*h*) when, on seven separate occasions over an approximately two-year period, IMHI denied Salow's vacation requests to attend AFSCME Executive Board meetings. Specifically, AFSCME alleges IMHI denied Salow's leave requests to attend AFSCME Executive Board meetings on the following dates: October 7, 2017; December 2, 2017; June 2, 2018; September 28, 2018; December 1, 2018; March 2, 2019; and July 26, 2019. 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 employee organization.
>
> ***

> *f.* Deny the rights accompanying certification granted in this chapter.
>
> ***
>
> *h.* Engage in a lockout.

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:
>
> 1. Organize, or form, join, or assist any employee organization.
>
> ***
>
> 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.

Timeliness of complaint

A preliminary issue in this case concerns the timeliness of AFSCME's complaint. Iowa Code section 20.11(1) restricts PERB's jurisdiction to acts committed within 90-days of the filing of a prohibited practice complaint. *See Area Educ. Agency 7 Educ. Ass'n & Area Educ. Agency 7*, 1991 PERB 4252 at 6. Section 20.11(1) provides, in relevant part:

> Proceedings against a party alleging a violation of section 20.10 shall be commenced by filing a complaint with the board within ninety days of the alleged violation…

The Iowa Supreme Court held, "The statute limiting the time for filing a complaint with an administrative agency is mandatory, not merely directory, and may not be waived by the agency." *Brown v. PERB*, 345 N.W.2d 88, 93-94 (Iowa 1989). As such, PERB has held, "it possesses no jurisdiction over complaints which were filed too late—more than 90-days following the alleged violation." *See AFSCME/Iowa Council 61 & State of Iowa (Dept. of Personnel)*, 1992 ALJ 4348 & 4440 at 35.

Therefore, the filing of a prohibited practice complaint operates only to call into question those events that occurred within the 90-day period ending with the complaints filing. *See id.*, at 36. Consequently, prohibited practices occurring before the commencement of the 90-day period cannot be remedied by proceedings on the complaint, which itself defines the 90-day jurisdictional period. *See id.*

In this case, AFSCME filed its complaint with PERB on June 10, 2019. Thus, the 90-day jurisdictional period defined by the complaint's filing began March 13, 2019. Therefore, PERB's jurisdiction is limited to events that occurred on or after March 13, 2019.

As discussed in the Findings of Fact, on July 3, 2017, IMHI revised its leave policy from a seniority-based system to "first-come first-serve." AFSCME alleges that, under the revised policy, IMHI has denied Salow's leave requests to attend AFSCME Executive Board meetings on the following dates: October 7, 2017; December 2, 2017; June 2, 2018; September 28, 2018; December 1, 2018; March 2, 2019; and July 26, 2019. Thus, with the exception of the July 26, 2019,

meeting, all of the alleged denials occurred more than 90-days before AFSCME filed its complaint. Consequently, PERB is without jurisdiction to adjudicate the merits of those alleged denials.

Concerning the leave request denial to attend the July 26, 2019, meeting, the record shows IMHI denied Salow's leave request on May 30, 2019, which was within the 90-day jurisdictional period. As this denial occurred fewer than 90 days before AFSCME filed its complaint, PERB has jurisdiction to determine whether the May 30, 2019, leave request denial constituted a prohibited practice within the meaning of Iowa Code sections 20.10(2)(*a*), (*b*), (*c*), (*d*), (*f*), and (*h*). 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 IMHI's denial of Salow's leave request to attend AFSCME's July 26 meeting interfered with, restrained or coerced Salow 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. PERB has held that attendance at AFSCME Executive Board meetings is protected activity because actions taken at the meetings could affect the rights of bargaining unit employees. *See AFSCME Iowa Council 61 & State of Iowa*, 2013 ALJ 8465 at 6. The undersigned agrees and concludes that Salow's attendance at AFSCME Executive Board meetings is protected activity.[10]

Having determined Salow's attendance at AFSCME Executive Board meetings is protected activity, the remaining issue is whether IMHI unlawfully interfered with Salow's protected rights when it denied his leave request to attend the July 26 Executive Board meeting. 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*, 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.*

As discussed in the Findings of Fact, the documentary evidence supports Cobb's testimony that she acted in accordance with IMHI's first-come, first-serve leave policy when she denied Salow's leave request to attend the July 26 meeting. Therefore, to establish unlawful interference, AFSCME must show either (1)

[10] AFSCME's complaint alleges July 26, 2019, was an Executive Board meeting. However, some evidence indicates the Executive Board meeting was the previous day, July 25, and that July 26 was AFSCME's Biannual Convention. In either case, the undersigned concludes the activity was protected and the same analysis applies. However, for narrative clarity, this decision refers to the activity on July 26 as AFSCME's Executive Board meeting.

IMHI's leave policy, on its face, unlawfully interferes with employees' section 20.8 rights or (2), IMHI's application of the policy unlawfully interfered with Salow's rights. *See, e.g., Kurt Rosenthal & City of Dubuque*, 2010 ALJ 8027 at 7. These issues will be addressed separately and in succession.

Facial lawfulness of leave policy

Although not stated in precisely this manner, AFSCME contends IMHI's leave policy is unlawful on its face because the policy does not consider whether an employees' leave request involves union activity. AFSCME argues that by not considering union activity, and thereby denying some requests involving union activity, IMHI's policy unlawfully interferes with employees' free exercise of section 20.8 rights.

PERB has not previously addressed the facial lawfulness of an employer's leave policy under these circumstances.[11] The principles of private sector cases under the National Labor Relations Act (NLRA) are instructive when its provisions are similar to chapter 20 and relevant to the rights at issue in the matter. *See City of Davenport v. PERB*, 264 N.W.2d 307, 313 (Iowa 1978); *see also Rosenthal*, 2010 ALJ 8027 at 8. Much like Iowa Code section 20.8, section 7 of the NLRA guarantees employees:

[11] In *AFSCME/Iowa Council 61 & State of Iowa*, 2013 ALJ 8465, the ALJ held the denial of an employee's union leave request unlawfully interfered with the employee's right to attend an AFSCME Executive Board meeting in violation of section 20.10(2)(*a*). However, while facially similar, the ALJ's holding was based on the terms of the parties' CBA, which provided "union leave" and clarified the circumstances under which union leave could be denied. *See id.*, at 6-7. In the instant case, the parties' CBA contains no language concerning employee leave. Thus, the issues presented in this case are distinct and of first impression.

> …the right to self-organization, to form, join or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…

29 U.S.C. § 157.

And 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).

Concerning an employer's power to control employee leave, the National Labor Relations Board (NLRB) has held, "There is no question but that an employer should be able to control leave, consistent with its collective-bargaining obligations, so that work can be done by available employees." *Civil Serv. Employees Ass'n*, 311 NLRB 6, 10 (1993). However, while IMHI has authority to control employee leave, its authority is not without limits. IMHI's leave policy cannot on its face, nor as applied, unlawfully interfere with, restrain, or coerce employees in the exercise of their section 20.8 rights.

In determining the facial lawfulness of work rules, PERB has generally followed NLRB precedent and balanced the magnitude of the rule's potential interference with the exercise of section 20.8 rights against the employer's legitimate justifications for the work rule. *See AFSCME, Local 751 & Davenport Cmty. Sch. Dist.*, 2002 PERB 6243 at 10-11; *see also Rosenthal*, 2010 ALJ 8027 at 8-10; *see also Serv. Emp. Int'l Union, Local 199 & State of Iowa (Bd. of Regents)*, 2000 ALJ 5978 at 6. Recently, in the case *Boeing Company*, the NLRB revised its two-part test used to determine whether a facially neutral work rule unlawfully interferes with, restrains, or coerces employees in the exercise of their Section 7

rights. *See Boeing Co.*, 365 NLRB 154 (2017).

Under *Boeing*, the Union first has the burden "to prove that a facially neutral rule would, when read in context, be interpreted by a reasonable employee as potentially interfering with the exercise of Section 7 rights." *LA Specialty Produce Co.*, 368 NLRB 93 (2019). If the Union fails to meet this burden, the rule is lawful and the analysis is complete.

However, if the Union meets its initial burden, the Board proceeds to the second step of the analysis, wherein it balances the "potential interference against the employer's legitimate justifications for the rule." *Id.* When "the balance favors the employer's interests, the rule at issue will be lawful… [However,] when the potential interference with Section 7 rights outweighs any possible employer justifications, the rule at issue will be unlawful…"*Motor City Pawn Brokers Inc., the Aubrey Grp. Inc., & Aubrey Bros., LLC, A Single Emp'r & Terrence Walker & Patricia Tilmon*, 369 NLRB 132 (2020).

The undersigned finds the two-part *Boeing* test sound and generally consistent with the balancing tests PERB has applied in prior cases. Further, the policy at issue in this case is facially neutral, as IMHI's leave policy applies to all nursing department employees. For these reasons, I conclude the *Boeing* test is appropriate and applicable in this case.

Applying the two-part test in this case, the first question is whether a reasonable employee, when reading IMHI's leave policy in context, would interpret the policy as potentially interfering with the exercise of section 20.8 rights. For the reasons discussed below, I conclude a reasonable employee would

not interpret the policy as potentially interfering with protected activity.

IMHI's leave policy, unlike most work rules at issue in section 20.10(2)(*a*) cases,[12] does not prohibit any employee conduct. Rather, the policy sets forth only procedural rules, *i.e.*, it instructs employees how to complete and submit leave requests; it sets forth the period for employees to submit leave requests; and it establishes the criterion upon which the department approves or denies those requests: "first-come, first-serve." Thus, any interference with section 20.8 rights caused by the policy arises incidentally from the application of the policy's neutral criteria and procedures.

As the policy is procedural, does not prohibit employee conduct, and establishes a neutral criterion by which the department approves and denies leave requests, an objectively reasonable employee would likely interpret the policy as such, merely a series of procedural rules. For this reason, I conclude an objectively reasonable employee would not interpret IMHI's leave policy as potentially interfering with the exercise of section 20.8 rights.

Even assuming arguendo one could reasonably interpret IMHI's leave policy as potentially interfering with section 20.8 rights, IMHI's business justifications for the policy outweigh the potential interference with the exercise of section 20.8 rights.

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[12] *See, e.g., Rosenthal*, 2010 ALJ 8027 (reviewing city policy prohibiting police department access to officers on administrative leave); *see also AFSCME, Local 751,* 2002 PERB 6243 (reviewing employer's prohibition of union pins with ambiguous message); *see also Service Employees International Union, Local 199 & State of Iowa (Board of Regents)*, 2000 ALJ 5978 (reviewing hospital policy prohibiting solicitation on hospital grounds).

As AFSCME contends, and as occurred in this case, IMHI's first-come, first-serve approval system sometimes results in the denial of employee leave requests to attend union activities. However, while these denials interfere with the employees' exercise of section 20.8 rights, as discussed in the Findings of Fact, the nursing department offers employees additional means by which to secure time off, *i.e.*, by trading shifts or arranging a PRN to cover their shift. Although these additional means do not guarantee employees will be able to secure time off, they make it more likely an employee can do so and, in so doing, reduce the policy's potential interference with section 20.8 rights.

As to IMHI's legitimate justifications, the policy's requirement of minimum staffing levels for all shifts and the first-come, first-serve approval system further IMHI's substantial interests in ensuring proper patient care and maintaining operational efficiency. In balancing these interests, I conclude IMHI's substantial interests in patient care and operational efficiency furthered by the policy outweigh the policy's incidental interference with employees' exercise of section 20.8 rights. For these reasons, I conclude IMHI's leave policy is facially lawful.

Application of policy to Salow's request

Having determined IMHI's leave policy is facially lawful, the final issue is whether IMHI's application of the policy interfered with, restrained, or coerced Salow in the exercise of section 20.8 rights in violation of section 20.10(2)(*a*).

As will be discussed below in the section addressing AFSCME's 20.10(2)(*c*) and (*d*) claims, AFSCME has not demonstrated IMHI denied Salow's leave request in retaliation for Salow's participation in union activities nor that the

denial was otherwise motivated by union animus. Rather, as discussed in the Findings of Fact, the documentary evidence supports Cobb's testimony that she denied Salow's leave request pursuant to the department's first-come, first-serve policy and the evidence does not indicate IMHI applied its policy inconsistently.[13]

Therefore, as the policy is lawful and IMHI acted in accordance with the policy when it denied Salow's request, AFSCME has failed to establish IMHI unlawfully applied its policy in a manner that interfered with, restrained, or coerced Salow in the exercise of his section 20.8 rights. Consequently, AFSCME has failed to establish the State (specifically IMHI) committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*a*) as alleged in its complaint.

Section 20.10(2)(*b*) claim

AFSCME contends that the denial of vacation leave by IMHI 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*).

[13] In addition to its other arguments, in its post-hearing brief, AFSCME appears to allege that IMHI intentionally understaffed shifts in order to deny employee leave and to "make an excuse to hide [its] interference with…public employees in the exercise of rights granted by chapter 20 of the Iowa Code." *See* AFSCME Brief pgs. 9-10. To the extent this is AFSCME's contention, it is inconsistent with the evidence—discussed on pages 7-12 above—showing IMHI approved many employee leave requests, including many of Salow's. This evidence indicates IMHI staffed most shifts above minimum levels. Accordingly, I conclude the evidence of record does not support AFSCME's contention.

Although it is conceivable that denying Salow's leave could have affected AFSCME's July Executive Board meeting, there is no evidence in the record that Salow's absence directly or indirectly affected the Board meeting, nor undermined AFSCME's ability to run its affairs. *See, e.g., AFSCME/Iowa Council 61*, 2013 ALJ 8465 at 8. Because of this lack of evidence, AFSCME has failed to establish that IMHI dominated or interfered in the administration of AFSCME Council 61 and, thus, failed to establish that the State (specifically IMHI) 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 alleges that IMHI denied Salow's leave in retaliation for participation in protected activity and that this retaliatory refusal was in violation of Iowa Code sections 20.10(2)(*c*) and 20.10(2)(*d*). The State asserts that the decision to deny Salow's leave was pursuant to its policy and based upon the operational needs of the institution.

Iowa Code sections 20.10(2)(*c*) and (*d*) 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).

Under *Wright Line*, the initial focus is on the elements of the *prima facie* case: the existence of protected activity, knowledge of that activity by the employer, and union animus. Proof of these elements supports the inference that the employee's protected activity was a motivating factor for the adverse employment action and that a violation of the statute occurred. *See Rosenthal*, 2010 ALJ 8027 at 14. Once this is established, the employer may rebut the *prima facie* case by either showing that the prohibited motivation played no part in its actions or demonstrating that the same personnel action would have taken place regardless of the protected activity. *See AFSCME/Iowa Council 61*, 2013 ALJ 8465 at 9.

In the instant case, Salow was engaged in protected activity as a member of AFSCME's Executive Board. Moreover, IMHI was aware Salow's leave request was to attend AFSCME's July 26 Executive Board meeting because it was noted it in the comment section of the application. Therefore, at issue is whether AFSCME proved union animus, the third element necessary to make a *prima facie* case.

Employer motivation (*i.e.*, the presence or absence of union animus) is a question of fact, the findings of which may be based upon both circumstantial and direct evidence. *See United Elec., Radio, & Mach. Workers of Am., Local 1145*, 2008 PERB 7252 at pp. 15-16. In this case, like in most cases before PERB, there is no direct evidence of union animus, thus a determination must be made

whether there is sufficient circumstantial evidence to establish union animus. Evidence of improper motivation may be inferred from a variety of factors, such as:

> The employer's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employee's union activities and their discharge.

AFSCME/Iowa Council 61, 2013 ALJ 8465 at 9.

AFSCME contends the seven leave request denials to attend AFSCME Executive Board meetings, taken together, demonstrate a pattern of discriminatory conduct that supports an inference of union animus. Although PERB is without jurisdiction to adjudicate the merits of Salow's six prior alleged denials, the undersigned has considered the evidence of the prior denials as it relates to IMHI's possible motivation for the July 26 denial. *See Dubuque Policeman's Protective Ass'n & City of Dubuque*, 2000 ALJ 6105 at 7. However, I cannot conclude that the evidence contained within the record supports a finding of improper motive behind IMHI's decision to deny Salow's July 26 leave request.

Although AFSCME has alleged IMHI denied Salow's leave requests on seven occasions, as discussed in the Findings of Fact, the record shows IMHI approved Salow's leave request for September 28, 2018, and the record does not support a finding that Salow submitted leave requests for the meetings held June 2, 2018, December 1, 2018, and March 2, 2019. Thus, AFSCME has established

that IMHI denied Salow's leave requests to attend Executive Board meetings on only two occasions prior to the July 26 denial.

As for those three denials, the documentary evidence supports Cobb and Cassidy-Wescott's testimony that the denials resulted from a proper application of IMHI's first-come, first-serve policy. Specifically, the evidence shows that on all three occasions—October 7, 2017, December 2, 2017, and July 26, 2019—other employees requested leave before Salow submitted his application. Moreover, for October 7 and July 26, Salow was not even the first employee denied leave: for both dates, other employees applied before Salow and were denied leave due to insufficient staffing. Therefore, as the record shows IMHI denied Salow's leave requests pursuant to its first-come, first-serve policy, I cannot conclude that the denials support an inference of union animus.

Based upon the record before me, AFSCME has failed to establish a *prima facie* case that IMHI's denial of Salow's July 26 leave request was motivated by union animus. As a result, AFSCME has failed to establish that the State (specifically IMHI) committed a prohibited practice within the meaning of Iowa Code sections 20.10(2)(*c*) or 20.10(2)(*d*).

Section 20.10(2)(*f*) claim

In its complaint, AFSCME alleged the State committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*f*), which states, "It shall be a prohibited practice for a public employer or the employer's designated representative to…[D]eny the rights accompanying certification granted in this chapter." Iowa Code § 20.10(2)(*f*).

AFSCME has not specified the basis of its claim pursuant to section 20.10(2)(*f*) and the record is absent any evidence the State denied AFSCME's rights accompanying certification. Accordingly, AFSCME has failed to establish that the State (specifically IMHI) committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*f*).

Section 20.10(2)(*h*) claim

In its complaint, AFSCME alleged that the State committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*h*), which states, "It shall be a prohibited practice for a public employer or the employer's designated representative to…[E]ngage in a lockout." Iowa Code § 20.10(2)(*h*).

In the instant case, neither AFSCME nor the State presented arguments concerning this section and the record is absent any evidence that the State engaged in a lockout. Accordingly, AFSCME has failed to establish that the State (specifically IMHI) committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*h*).

Having concluded AFSCME failed to establish the State (specifically IMHI) committed a prohibited practice within the meaning of Iowa Code sections 20.10(2)(*a*), (*b*), (*c*), (*d*), (*f*), or (*h*), I consequently propose entry of the following:

ORDER

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

DATED at Des Moines, Iowa this 3rd day of March, 2021.

Patrick B. Thomas
Administrative Law Judge

Filed electronically.
Parties served via eFlex.