

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

UNI-UNITED FACULTY (AAUP IHEA) and	)	
STEVE O’KANE,	)	
Complainant/Certified	)	
Employee Organization,	)	CASE NO. 102626
and	)	DECISION AND ORDER
STATE OF IOWA (BOARD OF REGENTS),	)	
Respondent/Public Employer.	)	

Complainant, UNI-United Faculty (AAUP IHEA) (“United Faculty”) and Professor Steve O’Kane filed a prohibited practice complaint on October 4, 2021, with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 20.11 and Iowa Administrative Code 621—3.1. The complaint alleges the Respondent, State of Iowa Board of Regents (Regents) committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(a).

The Regents filed a motion to dismiss contending the complainant failed to state a claim for which relief could be granted. United Faculty resisted the motion to dismiss. PERB denied the Regents’ motion on March 29, 2022.

PERB held an evidentiary hearing on April 20, 2022. Nathan Willems represented the Complainant. Kyle Fogt represented the Regents. The parties filed post-hearing briefs on June 3, 2022.

**1. Summary of the Arguments**

United Faculty contends the Regents committed a prohibited practice when it disciplined a professor at UNI, Professor O’Kane, for engaging in legally protected conduct under Iowa Code section 20.8. The Regents had a policy

prohibiting mask mandates on university campuses, and O’Kane required his students to wear masks in the classroom and stated that students would not receive daily lab credit if they failed to comply with this mandate. United Faculty argues that O’Kane engaged in legally protected conduct as he enacted the mask mandate in an attempt to induce other faculty members to do the same.

The Regents contend O’Kane’s actions were not concerted as he did not act on behalf of or on the authority of other faculty for their mutual aid or protection. The Regents therefore argue that O’Kane’s actions are not protected under Iowa Code chapter 20. The Regents also contend that even if O’Kane engaged in concerted activity for the mutual aid or protection of other faculty members, he lost chapter 20 protection when he engaged in insubordinate behavior and threatened his students’ grades.

Based upon the entirety of the record, and having reviewed and considered the parties arguments, PERB concludes the Complainant has not established the Regents committed a prohibited practice pursuant to Iowa Code section 20.10(2)(a). Although O’Kane engaged in concerted activity for the mutual aid or protection of other faculty members, O’Kane’s actions in threatening his students’ grades were so indefensible that he forfeited the law’s protection.

## **2. Findings of Fact**

The Regents are a public employer within the meaning of Iowa Code section 20.3(1) and the University of Northern Iowa is included as one of the Regents’ institutions. The University of Northern Iowa employs approximately 550 to 600 faculty.

United Faculty is a certified employee organization within the meaning of section 20.3(4). PERB certified United Faculty in 1976 as the exclusive representative for faculty members at the University of Northern Iowa (UNI). Appellant, O’Kane is included in the bargaining unit represented by United Faculty. O’Kane is a tenured professor in the department of biology, and has worked at UNI for over 25 years.

### **2.1 Events Prior to Commencement of 2021–2022 School Year**

Because of the ongoing COVID pandemic, UNI conducted courses online in the spring of 2020, and the students were off campus. In the 2020–2021 school year, UNI had students on campus, but masks were required for the majority of the school year. Even though students were on campus, many of the classes during the 2020–2021 academic year, including O’Kane’s classes, still occurred online. In one particular science lab class in the spring of 2021, the students were in person, but were required to use masks and face shields.

#### **2.1.1 May 20, 2021, Regents Policy Shift**

On May 20, 2021, the Regents implemented a new policy concerning COVID. Faculty and staff were required to return to campus on July 1, 2021; however, continued remote or hybrid work arrangements could be made in some situations. A statement from the Regents also provided: “Effective immediately, faculty, staff, students, and visitors to campus will not be required to wear a mask or other face covering.” The Regents’ statement noted that classrooms and other campus spaces would operate at their normal pre-pandemic capacity. UNI President Nook also sent an announcement regarding the new updates on May

20, 2021. The UNI email informed those on campus of the new physical distancing and face covering information contained in the Regents' statement. In this email, UNI also encouraged COVID vaccination.

United Faculty president, Becky Hawbaker, noted that United Faculty was not immediately opposed to the Regents' new policy. Although United Faculty did not support the Regents' policy, they did not panic about the implications of the guidelines in spring of 2021.

#### 2.1.2 August 10, 2021, UNI Email Regarding COVID Policy

Prior to the start of the fall 2021 semester, the UNI COVID response group steering committee sent an email to the campus reiterating the Regents' COVID policy. In the email, UNI stated that face coverings were encouraged, but were not required. This email further provided, "The Board of Regents, State of Iowa guidelines prohibit all public universities from requiring masks or vaccinations on campus. It is important not to ask individuals regarding their vaccination status due to privacy issues. Students, faculty, staff, and visitors to campus are not required to wear a mask or other face covering in our campus spaces, with the exception of particular health care settings or research labs." UNI faculty, including O'Kane, received this email. O'Kane understood, based on this email, that UNI would not allow him to require students to wear masks in his classroom.

#### 2.1.3 Faculty Reactions' to Regents' Policy

Over the summer of 2021, some faculty members felt that COVID had ramped up as new variants emerged. Union president, Hawbaker, said that

faculty were nervous about the Regents' prohibition on mask mandates. They understood that faculty could not require masks in their own classrooms, but United Faculty began to discuss the flexibility within this policy and the degree to which the policy would be implemented.

Due to their growing concerns about COVID and the Regents' policy, United Faculty filed an OSHA complaint. They also considered filing a lawsuit, but ultimately did not do so. United Faculty created a petition regarding masking and vaccination and sent it to the Board of Regents in mid-August. United Faculty discussed using voluntary student surveys to inquire about students' vaccination status, even though the administration had told them it was illegal.

During the summer, O'Kane and fellow biology department professor, McDade, discussed multiple times their ideas on how to manage their classrooms to keep themselves, colleagues, staff, and students safe. McDade told O'Kane she planned to share with both her lecture and lab classes about her health issues and request them to wear masks to respect her health concerns. O'Kane told McDade he planned to require masks in his classroom.

## **2.2 2021 Commencement of Fall Semester and O'Kane's Classroom Mask Mandate**

### 2.2.1 Faculty Reactions to Regents' Policy at Start of Fall Semester

At the start of the 2021 fall semester, none of the faculty members at UNI required masks in the classroom. Prior to the first day of class, McDade requested that her students wear masks. She reiterated this request to the students when classes began. In two of her lecture classes, almost all the students complied with her request. In a third class, roughly two thirds of the

class wore masks. McDade did not feel safe in that class and with the knowledge and approval from UNI administration, she moved that class online.

On August 27, about a week into classes, the United Faculty executive board met. United Faculty examined the range of options they had in responding to the Regents' COVID policy. During this meeting, United Faculty discussed how to essentially require masks in the classroom without literally requiring them. United Faculty believed that Iowa Code chapter 20 protected the faculty's right to require masks in the classroom, but were concerned about testing the theory and the potential consequences including discipline of the faculty members. Faculty in this meeting discussed how many faculty they could get to require masks. As of this meeting, Hawbaker was aware that O'Kane was considering requiring masks in his classroom. She was also aware that several other faculty members were considering it.

Hawbaker had additional conversations with O'Kane prior to his mask mandate on September 2. O'Kane believed faculty should be able to require masks in the classroom, and Hawbaker told him other faculty felt the same way. Hawbaker said O'Kane considered the mask mandate to keep everyone safe, and to stand up for other faculty that were in a more vulnerable position than he was as a tenured professor.

### 2.2.2 September 2, 2021, Professor O'Kane's Mask Mandate

In the fall 2021 semester, O'Kane taught Plant Systematics, an upper-level senior graduate course. The course focused on classification, identification, and evolution of plants on Earth within a laboratory setting. This class met twice a

week for three hours. During the course, O’Kane lectured between twenty minutes and an hour and twenty minutes prior to the hands-on laboratory portion of the class. During the laboratory portion of the class, the students and O’Kane worked closely, occasionally sharing microscopes.

Early in the semester, on September 2, O’Kane stopped merely considering requiring masks in the classroom, and implemented a mask mandate in the class. O’Kane felt he needed to take what he believed was the right and moral course of action. O’Kane told the students that a health crisis still existed and the public health measure to take to protect themselves and their community would be to wear a mask. O’Kane then told his students that if they did not wear a mask, the students would not get credit for that day’s work. One of the Plant Systematics class members testified that O’Kane told the students they could leave if they were uncomfortable with wearing a mask in his classroom, and leaving would result in not receiving points for the day. The class member also testified that O’Kane did not use a threatening tone when he made this announcement to the class.

On September 2, there were two students in the classroom not wearing masks. One of those students immediately put a mask on and the other was hesitant, but ultimately wore a mask. O’Kane reminded these students in subsequent days to wear a mask, but no student lost points for noncompliance with O’Kane’s mask requirement.

O’Kane stated he could not move the class online because the quality of the course would suffer and would be unfair to the students. So instead, he

implemented a mask mandate to protect the health and safety of his colleagues and students. O’Kane also believed the Regents’ policy was immoral and he should not be told how to run his own classroom.

### **2.3 2021 Fall Semester after O’Kane’s Classroom Mask Mandate**

After O’Kane imposed his mask mandate on the students, O’Kane had conversations with other faculty telling them what he had done. He also told several other faculty members to consider a mask mandate. O’Kane emailed some faculty members to let them know of his decision. Hawbaker told O’Kane that United Faculty would support him and would share his decision with others. O’Kane and Hawbaker also discussed their excitement about faculty members from the University of Georgia that similarly planned to mandate masks in the classrooms despite the state’s university system not mandating mask-wearing.

#### **2.3.1 O’Kane’s Faculty Senate Resolution**

After announcing his mask mandate to the students and fellow faculty members, O’Kane drafted a resolution for the University Faculty Senate. Once O’Kane submitted his resolution, all faculty senators had access to the document. In his resolution, O’Kane noted the dangers of COVID. He further stated his opinion that masks were a proven health measure to reduce the spread of the virus. In the resolution, O’Kane requested that faculty members “should manage their own classroom in a way that maximizes their own and their students’ health, and, by extension, the health of the broader university and local community. Faculty members should exercise this choice even if disallowed by state law, the Board of Regents, or University of Northern Iowa policy.”

During the Faculty Senate meeting on September 27, O’Kane offered this resolution and asked for the Faculty Senate’s endorsement. After a closed executive session meeting, the Faculty Senate postponed taking any action on the resolution.

### 2.3.2 Newspaper Article Outlining O’Kane’s Mask Mandate

Also, on September 27, O’Kane interviewed with an eastern Iowa newspaper. The article stated that O’Kane instituted the mask mandate in a University of Northern Iowa’s classroom and enforced the mandate through consequences to the students’ grades for failure to comply with his mandate. The article quoted O’Kane as saying that his “students, not surprisingly, now all wear masks as they know there will be consequences to their grades.” The article provided that faculty at all three campuses sent petitions to the Regents’ pleading with them to require masks and vaccines. The article also included information learned from the September 27, Faculty Senate meeting.

### 2.3.3 O’Kane’s Meeting with UNI Administration

After the Faculty Senate meeting, the publication of the newspaper article and receiving a complaint from the community at large about O’Kane’s mask mandate, UNI’s administration requested a meeting with O’Kane. On September 28 or 29, O’Kane met with various members of the UNI administration including the provost, the biology department head, and Professor Vallentine, the provost for faculty at UNI.<sup>1</sup> Union President, Hawbaker, also attended. The meeting was

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<sup>1</sup> O’Kane met with administration on at least one occasion on September 28 or 29. The record, however, is unclear whether O’Kane met with administration in one or two separate meetings.

generally collegial. During the meeting, O’Kane acknowledged the Regents and UNI had a policy prohibiting mask mandates on campus. O’Kane admitted to implementing a mask mandate in one of his classes, and to telling his students they would not receive credit for labs completed while not wearing a mask. The administration tried to work with O’Kane to devise solutions that would make O’Kane feel safer while teaching. In the meeting O’Kane discussed his rationale in imposing the mask mandate, and UNI administration asked O’Kane questions about his concerns. Although the administration offered other routes O’Kane could take to feel safer, O’Kane stated his purpose was “to inspire others,” and “to stand up against a policy that he felt was morally and ethically bankrupt,” while trying “to get others to fight back.” O’Kane also discussed his belief the Regents’ were politically motivated in enacting the prohibition on mask mandates.

## **2.4 O’Kane’s Discipline and its Effects**

### **2.4.1 UNI Administration Disciplined Professor O’Kane**

Dean Fritch, the dean of the College of Humanities, Arts, and Sciences at UNI emailed O’Kane a Notice of Disciplinary Action the evening of September 29, 2021. In the disciplinary notice UNI states that it disciplined O’Kane pursuant to two alleged policy violations: violation of the Regents’ policy when O’Kane required his students to wear masks, and violation of UNI’s policy when O’Kane “threaten[ed]” or graded students based on compliance with that mask mandate. In the disciplinary notice, UNI noted that O’Kane was quoted as imposing a mask mandate and “threatening” consequences to the students’ grades for failure to

comply with the mandate. The notice also acknowledged that O’Kane admitted in his meeting with UNI administrators that he understood the Regents’ policy, but implemented the mask mandate anyway, and told students they would not receive credit for labs completed while not wearing a mask. The notice specified that O’Kane violated the Regents’ policy by requiring masks and violated UNI Policy 6.10 regarding responsibilities to students when he “threaten[ed]” consequences to students’ grades for refusing to comply with his mask mandate. UNI Policy 6.10 addresses a professor’s academic freedom, shared governance, and academic responsibility. The policy states in relevant part:

A. Definition: Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that when one is speaking personally on matters of public interest, one is not speaking for the institution.

.....  
C. Faculty Responsibilities to Students:

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1. Faculty members have the responsibility for creating in their relations with students a climate that stimulates and encourages students to learn.

.....  
5. Faculty members have the obligation to make clear the objectives of each course or program and to establish requirements and standards of achievement. This includes attendance, participation, and opportunities for extra credit. Faculty members should teach their courses consistent with the course description in the catalogue and the syllabus.

6. The faculty member owes to the student and the University a fair and impartial evaluation of the student’s work. Evaluations should be consistent with recognized standards within the profession.

UNI administration contended that UNI Policy 6.10 does not permit faculty to base a student’s grade on something unrelated to the class or assignment or a test in the class. The dean of faculty, Vallentine testified that UNI’s primary

issue with O’Kane’s alleged violation of 6.10 was that O’Kane based students’ grades on whether those students were wearing masks. A secondary issue was that O’Kane violated this policy by not including his mask mandate as part of his grading standards in his syllabus.

Ultimately, the discipline letter stated that UNI determined discipline was warranted. UNI required O’Kane to complete training sessions addressing professional responsibilities, which he completed. O’Kane would receive a “Needs Improvement” on his performance evaluation for the 2021–2022 academic year and would not be eligible for merit pay. UNI also relieved O’Kane from teaching in-person courses for the remainder of the fall 2021 semester.

#### 2.4.2 Effect of Discipline on O’Kane’s Students and Other Faculty

Some students and faculty contend they were negatively impacted by UNI’s discipline of O’Kane. Some students in O’Kane’s Plant Systematics course complained about the course being partially taught online and made a list of requests to the administration. United Faculty maintained that after UNI’s discipline of O’Kane, faculty no longer discussed mask mandates.

#### 2.4.3 O’Kane’s Post-Discipline Actions

Although United Faculty no longer discussed or engaged in efforts to impose mask mandates in classrooms, O’Kane continued to discuss the Regents’ prohibition on mask mandates. At the beginning of October, O’Kane authored a blog titled “Disciplined for Requiring My Students to Wear Masks” that discussed the Regents’ policy, his reasoning for imposing a mask mandate and enforcing his mandate through his students’ grades, and his subsequent

discipline. In the blog, O’Kane stated that early in the semester he was in his classroom when he realized the students should be wearing masks and, despite university policy, he must personally ensure they do. In the blog, O’Kane writes: “Just as rapidly, in a flash really, I mentally did the calculus—stick or carrot? All university efforts to date, as near as I could tell were failing miserably in convincing students to wear masks. The carrot was out. The stick then.” In enforcing the mask mandate, O’Kane wrote that he hoped his “example would spread to other professors, other classrooms.”

O’Kane also was interviewed for another newspaper article, published October 4, 2021. In that article O’Kane stated the Regents’ prohibition on masks boiled down to Iowa politics. He also stated he knew he was disobeying the Regents’ policy when he enforced his mask mandate and he would continue to disobey in the next semester. O’Kane again stated that he wanted other faculty to follow in his footsteps.

At the time of the hearing, O’Kane had not yet suffered any economic loss. O’Kane requested that as a remedy for the Regents’ alleged prohibited practice, his discipline should be removed from his record. O’Kane is also pursuing a grievance under UNI’s faculty handbook challenging his discipline.

### **3. Conclusions of Law and Analysis**

United Faculty argues the Regents committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(a) which states:

20.10 Prohibited practices.

.....

2. It shall be a prohibited practice for a public employer or the employer's designated representative to:

a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

United Faculty asserts the Regents committed a prohibited practice by retaliating against O'Kane and United Faculty when O'Kane exercised his Iowa Code chapter 20 rights. Section 20.8(3) provides:

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 complaints, the complainant has the burden of establishing each element of the charge. *AFSCME Iowa Council 61 and State of Iowa*, 2020 PERB 102059 at 8. United Faculty contends the Regents committed a prohibited practice under section 20.10(2)(a) when it disciplined O'Kane for violation of the Regents' policy prohibiting mask mandates and UNI Policy 6.10 relating to a professor's responsibility to students.<sup>2</sup>

Section 20.10(2)(a) prohibits public employers from interfering with, restraining, or coercing a public employee exercising their section 20.8(3) rights. In

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<sup>2</sup> United Faculty argues it is not clear whether O'Kane violated UNI Policy 6.10 when he told the students their failure to wear masks would have consequences on their grades. We do not find it appropriate to analyze whether the UNI policy encompasses O'Kane's actions. The validity of the discipline is not an appropriate issue in this case and is being pursued in a separate grievance. For purposes of this case, UNI argues it disciplined O'Kane for violation of the Regents' prohibition on mask mandates and failing to fulfill his responsibilities to the students under UNI Policy 6.10. United Faculty does not argue that the Regents have ulterior motives for the discipline or that the Regents based the discipline solely on the violation of the Regents' prohibition on masks. As such, we conclude the issue of the nexus between O'Kane's actions and UNI Policy 6.10 is not a question before us in this case.

order to prevail on an unlawful interference, restraint, or coercion claim, the complainant must show first, the employee engaged in activity protected by chapter 20, and second, the employer engaged in conduct which tended to interfere with the employee's free exercise of his or her rights. *Chauffeurs, Teamsters & Helpers Local Union #238 and Muscatine County*, 2020 ALJ 102379 at 9. Disciplining an employee for exercising section 20.8 rights interferes with, restrains, or coerces an employee. See *Koehn and Indian Hills Cmty. College*, 2003 PERB 6414 at App. 19 (stating that discharge of an employee clearly interferes with, restrains, or coerces an employee in the exercise of section 20.8 rights). Thus, the crux of the parties' argument is whether O'Kane engaged in protected activity.

### **3.1 Protected Activity**

Section 20.8(3) under the Public Employment Relations Act (PERA) grants employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The National Labor Relations Act (NLRA) contains the same language to grant employees the right to engage in concerted activity. PERB has long held that National Labor Relations Board (NLRB) and federal court decisions are instructive as PERA and the NLRA contain this similar language. *Id.* at App. 20.

#### **3.1.1 Concerted Activity**

Iowa Code defines protected activity in part as engagement in concerted activities for the purposes of mutual aid or protection. The United States Supreme Court determined the term "concerted" describes activities of employees who have joined together to achieve common goals. *City Disposal Sys. Inc.*, 465 U.S. 822, 829, 104 S.Ct. 1505, 1511, 79 L.Ed.2d 839. However, the manner in which particular

actions of individual employees must be linked to actions of fellow employees to be deemed “concerted” is not clear from the statutory text. *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); *Nat’l Labor Relations Bd. v. Maine Coast Reg’l Health Facilities*, 999 F.3d 1, 9 (1st Cir. 2021).

Relying on NLRB case law, federal courts have determined that concerted activity can include conduct engaged in by a single employee. *Maine Coast Reg’l Health Facilities*, 999 F.3d at 9 (quoting *Meyers Industries, Inc. and Prill*, 281 N.L.R.B. No. 118, 281 N.L.R.B. 882, 885 (Sept. 30, 1986) (“*Meyers II*”). Concerted activities extend to an individual’s actions seeking to initiate or to induce or prepare for group action and bringing truly group complaints to the attention of management. There is no requirement that concerted actions be specifically authorized by others. *Id.* (quoting *Meyers II*, 281 N.L.R.B. at 886–87). The critical inquiry to determine whether an employee is engaged in a “concerted” activity is not whether the employee acted individually, but whether the employee’s actions were in furtherance of a group concern. *Id.* (quoting *Five Star Transp., Inc. v. Nat’l Labor Relations Bd.*, 522 F.3d 46, 51 (1st Cir. 2008)). It is sufficient that an employee intends or contemplates as an end result, group activity which will also benefit some other employees. *JCR Hotel, Inc. v. Nat’l Labor Relations Bd.*, 342 F.3d 837, 840 (8th Cir. 2003) (quoting *Koch Supplies, Inc., v. Nat’l Labor Relations Bd.*, 646 F.2d 1257, 1259 (8th Cir. 1981)).

The complainant has shown O’Kane engaged in concerted activity under the Act. Although O’Kane acted alone, United Faculty demonstrated O’Kane acted with the intention of inducing group action.

At the August 27 meeting, prior to O’Kane’s mask mandate, United Faculty discussed requiring masks in the classroom. Specifically, United Faculty members discussed how many faculty members might be willing to impose mask mandates to show that faculty disagreed with the conditions of their employment, namely the Regents’ COVID policy that prohibited them from taking such action. Further, prior to O’Kane implementing his mask mandate, he discussed with Hawbaker whether other professors were also interested in instituting a mask mandate. These facts demonstrate O’Kane considered whether he should impose a mask mandate to induce group action prior to the implementation of his mask mandate on September 2.

Additionally, after O’Kane implemented his mask mandate, he continued to demonstrate that he took this action to induce other faculty members to do the same. O’Kane told other faculty members about his classroom mask mandate, he emailed them about it, and even offered a Faculty Senate resolution requesting faculty members to “manage their own classroom in a way that maximizes their own and their students’ health.” O’Kane and Hawbaker discussed a similar mask mandate labor dispute at the University of Georgia, and how faculty members banded together on that campus. When O’Kane spoke with UNI administration prior to his discipline, he told them when he enacted the mask mandate, he was trying to get others to fight back against the Regents. Finally, after his discipline, O’Kane stated in his blog, “Disciplined for Requiring My Students to Wear Masks,” that he hoped his example would spread to other classrooms. He instituted a mask mandate with the intent of inducing other faculty to take the same measure.

United Faculty also demonstrated O’Kane took action in furtherance of a group concern. Although O’Kane’s actions took place when he was in his classroom without other colleagues, O’Kane implemented the mask mandate in furtherance of the concern of other faculty members as well as himself. O’Kane spoke to McDade, a fellow biology professor, over the course of the summer about her concerns with COVID and the prohibition on requiring masks and vaccines. O’Kane was also involved with United Faculty and their discussion on the different routes they could take due to their concern with the Regents’ prohibition on masks and vaccines. United Faculty sent a petition to the Regents in August detailing their concern with the prohibition on a mask mandate. At the August 27 United Faculty meeting, those involved discussed how to deal with this Regents’ policy, and talked about requiring masks in the classroom, but ultimately did not endorse that action because they recognized the potential employment consequences. O’Kane had personal motivations for his actions, including being able to manage his own classroom and his moral and ethical feelings about mask mandates, but O’Kane was also addressing fellow faculty member’s concern about the conditions of employment, the authority to control their classrooms and the health and safety of faculty, students, and others on campus.

The Regents argue O’Kane’s conduct was not protected because he did not implement a mask mandate in concert with other UNI faculty or on the authority of other UNI faculty. Case law clearly states O’Kane did not need to act on the explicit authority of other UNI faculty and his actions do not fall short of the definition of concerted merely because no other faculty member engaged in the same actions. *Maine Coast Reg’l Health Facilities*, 999 F.3d at 9 (citing *Meyers II*, 281 NLRB at 886–

87). Concerted activities extend to individual actions from an employee seeking to initiate or to induce or prepare for group action. *Id.*

The Regents also argue O’Kane instituted a mask mandate enforced by consequences to his students’ grades because of his personal belief that a prohibition on mask mandates was immoral. The Regents claim O’Kane’s actions were motivated by his own political and moral beliefs, not on behalf of other faculty members. United Faculty has shown O’Kane took action that furthered a group concern. Although O’Kane may have had his own political and moral beliefs, the evidence demonstrates other faculty members shared this concern. *See id.* (stating the critical inquiry is whether the employee’s actions were in furtherance of a group concern); *JCR Hotel, Inc.*, 342 F.3d at 840 (declaring it is sufficient that the employee intends or contemplates as an end result, group activity which will also benefit some other employees). United Faculty demonstrated O’Kane engaged in concerted activity.

### 3.1.2 Mutual Aid or Protection

A showing of concerted activity is not enough to demonstrate the conduct is protected under section 20.8(3). The concerted activity needs to be “for other mutual aid or protection.” United Faculty demonstrated O’Kane engaged in concerted activity for other mutual aid or protection.

The mutual aid or protection clause extends section 20.8(3) to include not just collective bargaining or self-organization, but also employee efforts to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. Nat’l Labor Relations Bd.*, 437 U.S. 556, 565, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978). However, the clause is not so broad as to protect concerted

activity whose relationship to employees' interest as employees is so distant that it does not come within the mutual aid or protection clause. *Id.* at 567–68.

O'Kane's actions fit within the mutual aid or protection clause. O'Kane implemented a mask mandate because he believed it would improve the safety of his colleagues and the university and community in general. O'Kane's actions, although not pertaining to collective bargaining or self-organization, still relate to the terms and conditions of employment as he was concerned with control within the classroom and for the health and safety of his colleagues as well as the university as a whole.

As such, United Faculty has shown O'Kane engaged in concerted activity for other mutual aid or protection. United Faculty has established O'Kane engaged in protected activity. United Faculty also demonstrated that the Regents' discipline of O'Kane interfered with, restrained, or coerced public employees in the exercise of protected rights.

### 3.1.3 Applicability of Dual Motive Analysis

Often after a complainant demonstrates the existence of protected activity and that the protected activity was a substantial or motivating factor in the employer's action, the burden then shifts to the employer under the NLRB's *Wright Line* analysis to establish that it would have taken the same action even in the absence of the protected conduct, and the employer's action was lawful and taken for valid reasons. *See, e.g., Koehn*, 2003 PERB 6414 at App. 19–20 (citing *Nat'l Labor Relations Bd. v. Wright Line, A Division of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981); approved in *Nat'l Labor Relations Bd. v. Transp. Mgmt. Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983)). For the *Wright Line* analysis to apply, the employer must have

a dual motive for taking the disciplinary action. In this case, however, neither party makes the argument that PERB should apply the *Wright Line* dual motive test. United Faculty asserts UNI's discipline of O'Kane was based on a single act by O'Kane. O'Kane's mask mandate, and his policy regarding grading based on compliance with that mandate, cannot be separated. The complainant specifically contends O'Kane's class policy in which students would not receive points on a day in which they refused to wear a mask was linked to the requirement that students wear a mask; and therefore, constituted a single act that cannot be separated. See *Maine Coast Reg'l Health Facilities*, 999 F.3d at 11 (similarly concluding *Wright Line* was inapplicable as the employer's reason for the discipline was the concerted action and a dual motive did not exist); see also *General Motors L.L.C. and Robinson*, 369 N.L.R.B. No. 127, 2020 L.R.R.M. 270474, 2020 WL 4193017, at \*1-2 (July 21, 2020) (expanding the applicability of *Wright Line* even in cases that previously analyzed whether the employee engaged in abusive, indefensible, or flagrant conduct and thereby forfeited the Act's protections). The Regents do not dispute United Faculty's assertion that the mask mandate and the compliance said mandate are to be considered a single act. As the parties do not argue for the application of the *Wright Line* analysis, we will not apply the dual motive test in this case.

### **3.2 Loss of Protected Status**

Although the parties do not argue for the *Wright Line* burden shifting analysis, the Regents do maintain that even if O'Kane's actions constitute protected activity, the method of engaging in this concerted activity resulted in the loss of protected status.

PERB and federal court case law have long held that an employee engaged in concerted activity may lose protection of the Acts due to improper conduct. *Media Gen. Operations, Inc. v. Nat'l Labor Relations Bd.*, 560 F.3d 181, 186 (4th Cir. 2009); *Five Star Transp. v. Nat'l Labor Relations Bd.*, 522 F.3d 46, 52 (1st Cir. 2008); *Fort Dodge Firefighters Ass'n and City of Fort Dodge*, 1997 PERB 5445, 5500 & 5526 at 2; *Davenport Educ. Ass'n and Davenport Cmty. Sch. Dist.*, 1984 HO 2490 at 13, 16; *AFSCME Local 1774 and Sioux County Bd. of Supervisors*, 1977 HO 847 at 6–7.

PERB and federal courts have determined that an employee loses the Act's protection when acting in an abusive manner through speech or conduct when having conversations with or about management. *See Media Gen. Operations Inc.*, 560 F.3d at 186–88 (stating that insulting, obscene, personal attacks by an employee against a supervisor need not be tolerated even when they occur during otherwise protected activity and concluding an employee's derogatory remarks about management lost the NLRA's protection); *Fort Dodge Firefighters Ass'n*, 1997 PERB 5445, 5500 & 5526 at 2 (stating that profanity and emotional language are not protected activity in every case while an employee is otherwise engaging in concerted activity for mutual aid or protection); *Davenport Educ. Ass'n*, 1984 HO 2490 at 13, 16 (stating an employee can lose PERA's protection if the employee makes complaints to management in an abusive manner, but concluding no evidence existed to establish the employee's conversation with the employer was abusive); *Sioux County Bd. of Supervisors*, 1977 HO 847, 6–7 (finding an employee lost PERA's protection when he physically grabbed the

supervisor during a conversation with him). Federal courts have looked at the following factors to determine whether the employee lost protection of the NLRA due to their conduct when engaging in conversations with or about their employer: the place of the discussion, the subject of the discussion, the nature of the employee's outburst, and whether the employer's unfair labor practice provoked the employee's outburst. *Media Gen. Operations, Inc.*, 560 F.3d at 186 (citing *Atlantic Steel Co. v. Chastain*, 245 N.L.R.B. 814 (1979) (overruled by *General Motors L.L.C.*, 369 N.L.R.B. No. 127, 2020 WL 4193017, at \*1-2 (concluding the dual motive test in *Wright Line* should be the applicable test rather than using a series of other tests to determine whether an employee's conduct lost protection of the NLRA))).

Federal courts have also concluded an employee's actions in third-party communications, such as communications to the consumers of the employer's products, "may lose the veil of protection" if carried out through reckless or disloyal means or if conducted in an excessive or indefensible manner. *Five Star Transp.*, 522 F.3d at 52; see *Sierra Pub. Co. v. Nat'l Labor Relations Bd.*, 889 F.2d 210, 220 (9th Cir. 1989) (opining that public disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute). Federal courts have determined that an employee's otherwise protected third-party communication loses NLRA protection if the communication is unrelated to the ongoing dispute between the employer and employee or if the communication to the third party is disloyal, reckless, or maliciously untrue. *Five Star Transp.*, 522 F.3d at 52.

### 3.2.1 Protection for Refusal to Follow Regents' Policy

The Regents contend that even if O'Kane engaged in protected activity under PERA, he lost protection of the Act when he acted insubordinately in violating the Regents' policy prohibiting mask mandates. The Regents' contention is based on a misinterpretation of PERB case law, and if adopted could lead to absurd results.

The Regents contend that PERB has determined other employees lost the protection of PERA when they acted insubordinately. As discussed above, PERB and federal case law have concluded that an employee's otherwise protected activity can lose the protections of PERA and the NLRA if improper conduct occurs. However, the Regents' definition of insubordination differs from how the term has been utilized in previous PERB cases. In this context, insubordination does not mean an employee violated an employer's rule or policy. Insubordination has been used to define actions in which the employee acted abusively toward management through words or conduct. For instance, in *Sioux County Board of Supervisors*, a case which the Regents rely on, the employee lost protection of PERA when he became so riled up during a conversation with his supervisor that he grabbed the supervisor. *Sioux County Bd. of Supervisors*, 1977 HO 847 at 6-7.

Additionally, finding that an employee loses PERA's protection merely for violating the employer's rule or policy is insubordination could lead to absurd results. The NLRB has stated that some policies of the employer may potentially interfere with the exercise of an employee's rights under the Act. *AT&T Mobility, LLC and Marcus Davis*, 370 N.L.R.B. No. 121, 2021 L.R.R.M. 162892, 2021 WL 1815083 (May 3, 2021). If an employee violated a policy that in itself interfered with the employee's protected rights, that employee could not challenge that discipline as the

employee acted “insubordinately” in violating the employer’s policy and would lose the Act’s protection under the Regents’ analysis. We decline to extend the definition of “insubordination” to include such circumstances.

The mere violation of a policy cannot be deemed so abusive as to lose PERA’s protections. Therefore, O’Kane’s action in violating the Regents’ policy, by itself, is not so abusive as to determine he lost the protection of PERA.

### 3.2.2 Protection for Enforcing Mask Mandate through Loss of Daily Points

The Regents also contend that even if O’Kane engaged in protected activity, he lost the Act’s protection when he threatened his students’ grades. We agree. Similar to the types of PERB and NLRB cases in which an employee has lost the protection of the Act, O’Kane’s actions toward his students were indefensible as he threatened his students and acted in a reckless manner toward third party consumers of the University system.

While O’Kane did not threaten violence, O’Kane did threaten harm to his students’ grades if they failed to conform to his mask mandate. O’Kane even described his actions as using a “stick” to enforce his mask mandate. He told the students they would not receive daily points if they refused to wear a mask. O’Kane’s threat to the students’ grades was a reckless action that cannot be condoned as protected activity.

O’Kane owed his students a responsibility as their professor to create an encouraging climate. He also owed the students a fair and impartial evaluation. He owed the students these responsibilities not only because of UNI policy, but because of the nature of his position as a professor. He placed both of these

duties at risk when imposing his mask mandate. In implementing his mandate, O’Kane put his students in the middle of the conflict between faculty and management. Since O’Kane told his students they would lose points for failure to comply with his mask mandate, they lost the ability to choose to wear a mask even though all other authority figures in the Regents’ system gave students that choice.

Although O’Kane engaged in protected concerted activity, he did so in a manner that lost him PERA’s protection. O’Kane attempted to increase the use of masks on campus for what he and other faculty members viewed as a necessary safety measure. However, in attempting to change these working conditions, O’Kane made the reckless decision to impose his political and moral beliefs on his students with a threat to their academic status through the loss of points for non-compliance with his self-imposed mask mandate. This extreme action is similar to the type of abuse that PERB and federal law have determined the employer does not need to accept. O’Kane’s threat to his students was an unreasonable way to pursue his labor dispute with the Regents and UNI.

Therefore, we conclude O’Kane lost the Act’s protections. United Faculty and O’Kane have not established the Regents committed a prohibited practice when disciplining O’Kane.

#### ORDER

IT IS HEREBY ORDERED that the Complainant, United Faculty’s prohibited practice complaint is DISMISSED.

The costs of reporting and the agency-requested transcript in the amount of \$940.40 are assessed against the Complainant pursuant to PERB rule 621—3.12. A bill of costs will be issued to the Complainant in accordance with PERB subrule 621—3.12(3).

DATED at Des Moines, Iowa this 20th day of July, 2022.

PUBLIC EMPLOYMENT RELATIONS BOARD

By:   
Erik M. Helland, Board Chair

  
Jane M. Dufoe, Board Member

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