

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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AFSCME/IOWA COUNCIL 61, Complainant,	)	
	)	
and	)	CASE NO. 8161
	)	
CITY OF LECLAIRE, Respondent.	)	
	)	

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PROPOSED DECISION AND ORDER

This is a prohibited practice proceeding filed by Complainant AFSCME/Iowa Council 61 (AFSCME) pursuant to Iowa Code section 20.11 and PERB rule 621 IAC 3.1(20). AFSCME's complaint alleged that the City committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(a), (c) and (d) when it denied AFSCME-represented employee Wendy Bloomingdale's request to transfer to a position in the City's police department due to her having engaged in concerted activity protected by Iowa Code chapter 20.

The City denied its commission of any prohibited practice and moved for summary judgment on each of AFSCME's claims. The administrative law judge denied the City's motion concerning AFSCME's section 20.10(2)(a) and (c) claims, but granted summary judgment on its section 20.10(2)(d) claim. Pursuant to notice, an evidentiary hearing on the surviving aspects of the complaint was held before the ALJ in LeClaire, Iowa, on January 13 and 14, 2011. AFSCME was represented by Ty Cutkomp and the City by Jeffery McDaniel. Both parties submitted post-hearing briefs and AFSCME a reply brief, which was filed April 15, 2011. Based upon the entirety of the record, and having considered the

arguments in the parties' briefs, the ALJ has concluded that AFSCME has failed to establish the City's commission of a prohibited practice.

#### FINDINGS OF FACT

The City is a public employer as defined by Iowa Code section 20.3(10). It negotiates collectively under Iowa Code chapter 20 with two employee organizations which have been certified to represent separate bargaining units of City employees. The LeClaire Iowa Public Safety Association (an affiliate of Teamsters Local 238) represents a bargaining unit of the City's full and part-time police officers, and since 1989 AFSCME has been the certified representative of a unit of the City's remaining bargaining-eligible employees, with the exception of those in its fire department.

In 1996 the City retained James Pfeiffer as its chief of police. Sometime in 1997 Wendy Bloomingdale was hired as the police department's records clerk, a position under Pfeiffer's supervision which is within the AFSCME-represented bargaining unit. At all relevant times, Bloomingdale has been an AFSCME member and a trustee of its Local 3725.

Over time, the responsibilities of the police department increased. This, coupled with employee turnover in the department, resulted in an increase in Bloomingdale's work load. Pfeiffer viewed Bloomingdale as a valued and important departmental employee and a key player in the operation of the department's evolving computerized record-keeping system. Because of her performance in 2004, Pfeiffer recommended that a new position — police administrative services coordinator — be created. He also recommended that

Bloomington be appointed to the new position, with an increase in pay. The City Council subsequently approved the creation of the new position (which the parties agreed was included within the AFSCME-represented bargaining unit), as well as Bloomington's appointment to it.

Integral to the factual scenario underlying the instant complaint are the relationships and interactions between Pfeiffer, Bloomington and another (former) City employee — Police Sergeant Chris Harmsen. The record does not reveal precisely when Harmsen became a City employee, but it appears that at some time in fiscal year 2005, while in the City's employ, Harmsen suffered a work-related injury to her thumb which prevented her from performing her usual duties. Harmsen's absence required other officers to fill in, apparently with an increase in the amount of their overtime, which resulted in the police department exceeding its original budget allocation.

Although evidence concerning its genesis is conspicuously absent from the record, it is clear that by some time not later than mid-2005 the relationship between Pfeiffer and Harmsen had become strained, apparently as a result of what Pfeiffer later generally described as Harmsen's involvement in "a major act of insubordination." At some time before July 5, 2005, Pfeiffer confronted Harmsen at LeClaire's City Hall, demanding (unidentified) papers Harmsen had in her possession.<sup>1</sup> Pfeiffer raised his voice angrily, took the papers in question from Harmsen, and told her she was not following the proper chain of command and would be disciplined if it ever happened again.

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<sup>1</sup> In its post-hearing brief, AFSCME suggests this event took place in early June, 2005, but the evidentiary record will not support a finding that specific as to the date of the event.

A day or two later, Pfeiffer contacted City Administrator Ed Choate and indicated that he wanted to talk to City employees Jo Phares and Deb Buskirk, who worked at City Hall and had witnessed Pfeiffer's interaction with Harmsen. Choate voiced no objection. Phares somehow learned that Pfeiffer wanted to talk to her about his interaction with Harmsen, and asked Choate if she had to talk to Pfeiffer. Choate advised that she didn't if she didn't want to.

Pfeiffer went to City Hall and asked Phares if they could talk privately. Phares was reluctant to discuss the matter, indicating that she really didn't want to and was busy, but there is no evidence she told Pfeiffer of her conversation with Choate. Pfeiffer indicated he really didn't want to discuss it either, but that it had to be done. Phares felt intimidated by Pfeiffer's insistence, and recounted for him her recollection of his interaction with Harmsen. Pfeiffer gave Phares a paper, indicating she needed to fill it out with her recollection of the event she had witnessed. Phares did not feel that she was treated unfairly or that Pfeiffer was mean to her during their interview, only that he wanted to know what she remembered.

Phares told Pfeiffer that she did not have time to fill out the paper at that point, but would do it later at her home. But when she later saw that it was entitled "voluntary statement," she asked Choate if she had to fill it out if she didn't want to and was told that she did not. When Pfeiffer called her the day after their conversation and asked for the form, Phares advised that she was not going to fill it out and that Choate had told her she did not have to. Pfeiffer made no further attempt to obtain a written statement from Phares. The record reveals

nothing about Pfeiffer's contact (if any) with Buskirk, the other employee who purportedly witnessed Pfeiffer's confrontation of Harmsen.

On June 16, 2005, Bloomingdale was in Pfeiffer's office, with the door closed, when an interaction between them occurred which is central to the evaluation of AFSCME's claims. Pfeiffer and Bloomingdale were the only people present, and their testimony concerning what occurred is sharply divergent. For reasons discussed in greater detail below, the ALJ credits Pfeiffer's testimony concerning the event to the extent it is inconsistent with Bloomingdale's.

Bloomingdale and Harmsen were close personal friends, the friendship extending beyond the workplace. Pfeiffer had heard that Harmsen was either going to take disability status due to her injury or sue the City, based upon some theory not revealed by the record. Because Bloomingdale had related to him a statement by Harmsen to the effect that Harmsen was going to leave the City with "a boatload of money," Pfeiffer anticipated there was going to be a lawsuit of some kind, and wanted to gather information which might later prove to be relevant to Harmsen's credibility. Pfeiffer told Bloomingdale that he understood there were things in Harmsen's past that might bear on her credibility in a future suit, and that he wanted to know what they were.

Bloomingdale proceeded to matter-of-factly tell Pfeiffer four things about Harmsen's past — that she had been disciplined for sleeping on the job when employed in another city's police department; that she had also been disciplined by that department for insubordination due to her having gone to the scene of an incident despite her supervisor's directive to stay where she was; that after

having been injured in a fight with a friend she falsely reported to a neighboring police department that she had been the victim of a mugging at a shopping center, and that an earlier query of the National Crime Information Center database had revealed that there had been an active arrest warrant for Harmsen in Illinois.

When Pfeiffer asked if there was anything else, Bloomingdale indicated there was not. The conversation, which had been conducted in an unemotional, normal conversational tone, ended and Bloomingdale left Pfeiffer's office. During the conversation Bloomingdale had not expressed any reluctance to answer Pfeiffer's questions, nor had she suggested in any way that his inquiry was improper or inappropriate.

Later that day Bloomingdale prepared two separate letters – one to City Administrator Choate, the other to Chief Pfeiffer. The letter to Choate, which Bloomingdale delivered the next day, expressed her wish to transfer from her police department job to a vacant AFSCME-represented position at City Hall which had been posted in accordance with the transfer procedures specified in AFSCME's collective bargaining agreement with the City. In her letter to Pfeiffer, Bloomingdale advised of her intent to transfer to City Hall and continued:

I thought that I could stay in my current capacity as the Administrative Support Services Coordinator for our Department, and still remain neutral in the dispute between you and [Harmsen], but now I know that isn't possible.

As it seems that an equitable solution to the differences between you two is not possible, and the gap between you widens daily, I find that I cannot remain in my current position as it places me between the two of you; you as my boss, and [Harmsen] as my friend.

Neither letter contained an accusation or even a suggestion that Bloomingdale felt her conversation with Pfeiffer the day before had been coercive, improper or inappropriate in any way. Pfeiffer was aware that people knew of his problems with Harmsen, and knowing that she and Bloomingdale were friends, perceived Bloomingdale's desire to transfer as an effort to avoid being involved in the conflict.

Choate reviewed Bloomingdale's request, the other applications and the transfer provisions of the AFSCME contract, and determined that she was the most qualified applicant for the vacant City Hall position. In a memo dated June 24, 2005, he advised Bloomingdale that her request was accepted and that her transfer would become effective not later than August 29, 2005.

Because of events not fully revealed by the record, the status of Harmsen's employment with the City was of interest to a number of City Council members, some of whom had directly asked Pfeiffer questions about it. Pfeiffer consulted with Choate who, at Pfeiffer's request, arranged that a portion of the Council's July 5, 2005 meeting be closed in order for Pfeiffer to respond to a letter Harmsen had written and to advise the Council of disciplinary action which had been taken against her — matters which were viewed by the City as confidential.

Bloomingdale learned of the planned "executive session," and on July 1, 2005, addressed a memo to the mayor, Council members and Choate, asking that she and Ty Cutkomp, her AFSCME staff representative, be allowed to attend. Among the reasons Bloomingdale advanced for her request was that her name

had been mentioned to the Council “regarding the issues and circumstances that I believe Chief Pfeiffer will be addressing . . . .”

At somewhere around 4 p.m. on July 5 (the date of the Council’s meeting) Bloomingdale came to Choate’s office and gave him a document entitled “City of LeClaire, Complaint against Employee.” The document, prepared with the assistance of Cutkomp and AFSCME local steward Coleen Rhoades, recited that it was submitted pursuant to a provision of the City’s Human Resources Guidelines Manual and complained that Pfeiffer had violated various provisions of the manual in connection with his treatment of City employees. Most relevant to the instant case were the claims that the manual had been violated in the following instances:

. . . .

2. An interrogation of a City of LeClaire employee, Wendy Bloomingdale was conducted by Chief Pfeiffer and the questions asked centered on knowledge gained from an interpersonal relationship with another City employee, and were concerning activities not connected with the City of LeClaire. The activities in question occurred prior to City of LeClaire employment. The City of LeClaire employee was ordered to answer the questions. The tactics employed and the demeanor expressed by Chief Pfeiffer in verbal communications have been intimidating and/or threatening to City of LeClaire employee(s).
3. City of LeClaire employee(s), and Wendy Bloomingdale have “ordered” by Chief Pfeiffer to comply with his demands even when advised by the employee(s) that he/she has no wish to become involved in the situation. The tactics employed and the demeanor expressed by Chief Pfeiffer in verbal communications have been intimidating and/or threatening to City of LeClaire employee(s).

4. Chief Pfeiffer requested information regarding conversations be put in written form by City of LeClaire employee(s), and was advised by those employee(s) that they did not wish to do so. Chief Pfeiffer sidestepped the appropriate "Chain of Command", and requested this information directly, and repeatedly from the City of LeClaire employee(s), despite said employees being informed by their supervisor and/or other appropriate City officials, that they were not required to submit the information. The tactics employed and the demeanor expressed by Chief Pfeiffer in verbal communications have been intimidating and/or threatening to City of LeClaire employee(s).

After receiving Bloomingdale's complaint, Choate called Pfeiffer to advise him of it, and provided Pfeiffer with a copy. Pfeiffer was upset by the complaint because it was not true in many significant respects and put him in a bad light. He had not "interrogated" Bloomingdale, who had not expressed any reluctance to respond to his inquiry about Harmsen, had not "ordered" her or any other City employee to do anything or made any "demands" and had not done anything intentionally intimidating or threatening during any of the referenced interactions with City employees. Nor had he sidestepped the chain of command or "repeatedly" asked anyone for written statements, as Bloomingdale's complaint asserted (presumably in reference to Pfeiffer's interactions with Phares and Buskirk), and had instead let the matter drop when Phares told him that Choate had said she did not have to provide Pfeiffer with a written statement.

Bloomingdale and Cutkomp attended the City Council meeting that evening, but were not allowed to attend the closed session. But both addressed the Council during the open portion of its meeting. Bloomingdale's comments before the relatively large crowd in attendance that evening included her

sometimes-emotional assertions she had been “interrogated” by Pfeiffer and “ordered” to tell him things he knew she did not want to be involved with, and that she had felt threatened and would not have provided Pfeiffer with information about Harmsen had she not feared being disciplined for disobeying Pfeiffer’s order. Pfeiffer felt that he was under attack, that Bloomingdale was attempting to defame him, and that his job was in jeopardy because of Bloomingdale’s false allegations.

Following public discussion of how Bloomingdale’s complaint would be handled by the City, the Council asked that Choate investigate the complaint. Choate subsequently asked both Bloomingdale and Pfeiffer to submit written statements about what had occurred. Both eventually provided statements. In hers, Bloomingdale again asserted her claims that she had been interrogated by Pfeiffer about Harmsen and ordered to provide information when she expressed her desire to stay out of their conflict; and that she had felt intimidated and threatened by Pfeiffer but provided the information because she knew she would be subject to discipline if she did not.

Pfeiffer’s written statement painted an entirely different picture of what had occurred. Pfeiffer acknowledged that he was concerned about Harmsen potentially suing the City and leaving with a “boatload of money” and that, in an effort to secure information he felt would bear on Harmsen’s credibility should suit be filed, he asked Bloomingdale about Harmsen’s past employment problems – indicating that he had heard three things had happened when Harmsen had been employed by another police department. Pfeiffer’s statement recited that

Bloomington had advised him there were four, rather than three incidents in Harmsen's past, and that when he asked what those were, Bloomington readily and willingly identified the events noted earlier.

Choate reviewed the statements and formed the view that there was a personality conflict but that the matter would essentially resolve itself because Bloomington had been temporarily assigned to assist the City's fire department as a result of the fire chief's request and would then move to her new position at City Hall. Although Bloomington's complaint against Pfeiffer had recited it had been filed pursuant to section 10.1 of the City's HR Guidelines Manual, which provides in part that "[t]he City Council's decision shall be final in all cases, unless otherwise provided for in collective bargaining agreement provisions," Choate made no report or recommendation to the Council on the matter, and no further action on Bloomington's complaint was taken.

The receptionist/secretary position into which Bloomington transferred in 2005 was a new position which the parties, when negotiating its wage rate, had apparently assumed would be filled by a new hire. In view of Bloomington's transfer into the position from her higher-paid job at the police department, AFSCME requested that the negotiated wage matrix for the new City Hall position be adjusted upward. After once rejecting the proposal in September, 2005, the City Council passed a resolution which effectively increased Bloomington's wage rate by approximately 20% over the negotiated rate.

Over three years passed, during which Bloomington continuously occupied the position at City Hall. Although Pfeiffer and Bloomington did not

speak for some time following her transfer from the police department, they eventually got back on speaking terms, although their relationship never was the same as it had been before Bloomingdale made her 2005 complaint.

At some point in early 2009 the police administrative services coordinator position from which Bloomingdale had transferred in 2005 became vacant. In accordance with the transfer provisions of its collective bargaining agreement with AFSCME, the City posted a notice of the vacancy on May 6, 2009. By this time Harmsen had left the City's employ, but Pfeiffer continued to serve as its chief of police.

Bloomingdale learned of the vacancy in her former position, and on the afternoon of May 7 went to the police station to speak with Pfeiffer about it. Bloomingdale expressed her desire to apply for her old job and told Pfeiffer that she wanted his input – that he needed to tell her whether he wanted her to apply for it or not. During their lengthy conversation they discussed everything that had happened between them, including the hard feelings which had resulted and Pfeiffer's perception of the attitudes of the police officers who had formerly worked with Bloomingdale. Pfeiffer talked about why he didn't think Bloomingdale's return to the police department position would work, and Bloomingdale expressed why she felt it would. Eventually, Bloomingdale pressed Pfeiffer for a "yes or no" response, indicating that if he said he didn't want her to do it, she would not seek the position. Pfeiffer told her he didn't want her to. The conversation ended and Bloomingdale left.

Later that evening Bloomingdale discussed the situation with members of her family, reconsidered, and decided to seek the position despite what she had told Pfeiffer, at least in part due to the higher wage paid the police department position. Accordingly, the next day Bloomingdale prepared a letter to Choate and Pfeiffer formally requesting transfer to the police department position. She delivered it to Choate that morning, predicting that Pfeiffer would not be happy when she gave him his copy. Choate told her not to give Pfeiffer a copy, that such applications were to be directed to him, and that he would let Pfeiffer know of her request.

Choate advised Pfeiffer of Bloomingdale's transfer request. When Pfeiffer saw the request he was upset and told Choate about his May 7 conversation with Bloomingdale, how she had said she wouldn't apply for the transfer if he didn't want her to, and how he felt she had (again) not been truthful. The following Monday, May 11, 2009, Pfeiffer sent an email to Bloomingdale in which he recounted that Bloomingdale had told him she would not apply for the transfer if he did not want her to, and that he had indicated he did not. Pfeiffer concluded:

You told me one thing then you did the opposite. This was a basic matter compared to the type of sensitive information that you could have been handling in the administrative assistant position. In light of the issues from four years ago when you left the department, I do not believe you can effectively work under my supervision. Therefore, I ask that you withdraw your request for transfer.

The next day, Bloomingdale responded with an email of her own, confirming her request for the transfer and indicating that she had "several reasons, including financial" for making the request and would not be withdrawing it.

According to the job description/specification for the police administrative services coordinator position, the Chief of Police is the position's appointing authority. Among the listed minimum qualifications for the position is the "[a]bility to establish and maintain effective working relationships with other employees, other departments, other public officials, and the public at large...."

Pfeiffer felt that although Bloomingdale had previously performed satisfactorily in the administrative services coordinator position, she was no longer qualified because he could not maintain an effective working relationship with her as his subordinate because of the untruthful accusations she had made against him in her 2005 complaint, her reiteration of those untruthful accusations before the Council and the public, and the lack of credibility he felt she continued to display by telling him she would not seek transfer to the police department position, then doing exactly that the next day. Consequently, Pfeiffer did not trust Bloomingdale to be honest and did not want her working under him. Accordingly, on May 21, 2009, Pfeiffer wrote to Bloomingdale, denying her request to transfer to the vacant police department position.

Bloomingdale filed a grievance alleging that the denial of her transfer request was in violation of the collective bargaining agreement. Following denial of the grievance at steps one and two of the contractual grievance procedure, AFSCME filed the instant prohibited practice complaint with PERB.

### **Conflicting Evidence/Credibility**

Central to a determination of the merits of AFSCME's claims is the interaction between Pfeiffer and Bloomingdale on June 16, 2005, Bloomingdale's

description of which formed a major part of her 2005 complaint and public statements about Pfeiffer. As noted above, the evidence concerning what happened during this encounter was in irreconcilable conflict. The credibility of the witnesses to the event must consequently be evaluated in order to make the necessary findings of material fact. Although other findings would be supported by relevant evidence had the ALJ viewed their credibility differently, the facts found above concerning the event are supported by the testimony of Pfeiffer, who the ALJ viewed as more worthy of credit for a number of reasons.

Having observed the demeanor of the witnesses, the ALJ viewed Pfeiffer as candid, reasonable and consistent. Bloomingdale's demeanor was far less convincing. She was at times unduly confrontational and disagreeable, even when testifying on matters of little or no import. At times, she appeared unwilling to listen fully or respond to the question being posed, and accordingly answered in ways which were not responsive to the question actually asked. She at times appeared overtly evasive and displayed a selective memory, as when she initially testified that she was unable to recall an encounter with Pfeiffer the day before the commencement of the hearing, then promptly reversed course and testified to details of the conversation she had claimed to have no recollection of moments before.

Bloomingdale's testimony was not wholly consistent. For example, at one point she testified that her June 16, 2005 conversation with Pfeiffer had begun with a discussion of some other topic (but not budget matters, as Pfeiffer had testified) and turned into a discussion of Harmsen, but then later testified she

was in Pfeiffer's office to discuss Harmsen. At another point she testified that she hadn't known if Harmsen planned to file a disability claim, but later testified that she told Pfeiffer that Harmsen was not going to file one.

Nor was Bloomingdale's testimony corroborated on material points where corroboration appears to have been possible, had the testimony been true. She testified that when she left Pfeiffer's office after their June 16 interaction, she was upset and crying and passed Officer Todd Johnson on her way to the ladies' room, where she attempted to compose herself. Corroboration of such an emotional state would have tended to support her version of the events and undermine Pfeiffer's testimony that the discussion was matter-of-fact and unemotional. But Johnson was not called to testify, and the record contains nothing which would so much as suggest his unavailability.

Bloomingdale claims to have made statements to others on June 16 which were consistent with the content of her complaint against Pfeiffer. She testified she reported Pfeiffer's supposed bullying to AFSCME steward Rhoades soon after it occurred, and that she and Rhoades promptly went to Choate's office and reported it to him. While it would not necessarily have been dispositive on the record here, a showing that Bloomingdale made roughly contemporaneous consistent reports about what had supposedly been such a distressing and emotional event for her could have been viewed as supporting the veracity of her version of what had happened. But Rhoades was never called to corroborate Bloomingdale's testimony, although there was no suggestion that her testimony was unavailable. And although Choate did testify at hearing, he was never asked

to confirm or deny Bloomingdale's claim that she and Rhoades had reported Pfeiffer's supposed misconduct to him that afternoon.<sup>2</sup>

It is unnecessary to detail all of the testimony and aspects of the witnesses' demeanor involved in the assessment of their credibility. The findings set out above concerning the events of June 16, 2005 are supported by Pfeiffer's testimony, which the ALJ viewed as more credible than Bloomingdale's.

### CONCLUSIONS OF LAW

The portions of AFSCME's complaint which survived the City's summary judgment motion allege that the City committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(a) and (c) when it denied Bloomingdale's

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<sup>2</sup> The ALJ's factual findings concerning what happened between Pfeiffer and Bloomingdale on June 16, 2005, are not reliant on the testimony of City Councilwoman Mary Farmer, whose testimony, if credited, would have tended to undermine Bloomingdale's version of the event.

Bloomingdale testified that Farmer came to her house sometime after the July 5 City Council meeting, to discuss what had happened at Bloomingdale's "interrogation" by Pfeiffer more fully. Farmer also testified that she went to Bloomingdale's home to talk with her, but that at that time Bloomingdale's characterization of what had occurred between her and Pfeiffer was very different than what Bloomingdale included in her complaint, her statements to the Council and her testimony at hearing. Farmer's testimony is unclear about precisely when her visit to Bloomingdale's home occurred, although it can only be construed as maintaining that the visit occurred sometime between June 16 and the Council's meeting on July 5. At one point, however, Farmer seemed to suggest that the visit occurred weeks before Bloomingdale requested transfer to City Hall. Farmer clearly fixes the date of her visit as prior to July 5, because she testified that Bloomingdale's version of her interaction with Pfeiffer, and of what she did after that meeting, was in stark contrast with what she heard from Bloomingdale at the July 5 Council meeting. But it would have been impossible for Farmer to have discussed Bloomingdale's interaction with Pfeiffer weeks before Bloomingdale requested the transfer, because the supposed interrogation occurred the day before the transfer was sought.

While a witness' confusion about dates and time periods involved in events which occurred more than five years earlier is not surprising, a major feature of Farmer's testimony is the differences in Bloomingdale's demeanor and story between Farmer's visit to her home and what Bloomingdale displayed and related at the July 5 public meeting. Farmer characterized Bloomingdale as being confrontational and as having herself conducted an "interrogation" of Pfeiffer at the July 5 meeting, but this characterization is not supported by the portions of the audio recording of the Council meeting which were admitted into evidence, and is not corroborated by any other witness.

Because of these considerations and ambiguities, no inferences have been drawn from Farmer's testimony concerning what occurred between Bloomingdale and Pfeiffer on June 16, 2005.

requested transfer due to her having engaged in concerted activity protected by Iowa Code chapter 20. Those sections provide:

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.

c. Encourage or discourage membership in any employee organization, committee or association by discrimination in hiring, tenure, or other terms or conditions of employment.

Also central to AFSCME's claims in this case is Iowa Code section 20.8(3), which 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.

**The section 20.10(2)(a) claim**

Iowa Code section 20.10(2)(a) is closely modeled on section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). Federal interpretations of this similar statute are therefore illuminating and instructive on the interpretation and application of the Iowa law. *See, e.g., City of Davenport v. PERB*, 264 N.W.2d, 307, 313 (Iowa 1978); *Sergeant Bluff-Luton Education Association v. Sergeant Bluff-Luton Comm. Sch. Dist.*, 282 N.W.2d 144, 146 (Iowa 1979).

As is the case with 29 U.S.C. § 158(a)(1), violations of Iowa Code section 20.10(2)(a) are either derivative or independent. A violation by an employer of other subdivisions of section 20.10(2) is also a derivative violation of section 20.10(2)(a). But some acts violate section 20.10(2)(a) only, independent of other subdivision of section 20.10(2). *See, e.g., General Drivers & Helpers Union, Local 421*, 93 H.O. 4826. In considering independent 29 U.S.C. § 158(a)(1) (and Iowa Code section 20.10(2)(a)) claims, it is well settled that the test of interference, restraint or coercion does not turn on the employer's motive or on whether the coercion actually succeeded or failed. Instead, the test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with employees' free exercise of rights guaranteed by the statute. *See generally Hardin, The Developing Labor Law*, BNA Inc., 4<sup>th</sup> Ed. (2001) at 82-84.

AFSCME asserts a straightforward independent section 20.10(2)(a) theory: When Bloomingdale complained in writing and to the Council about Pfeiffer's alleged behavior toward her and other City employees, she was engaged in concerted activity for the purpose of mutual aid or protection; the City denied her a transfer to which she would have otherwise been entitled because of this exercise of her section 20.8(3) rights; such adverse employment action tends to interfere with, restrain or coerce employees' free exercise of their statutory rights and constitutes a prohibited practice within the meaning of section 20.10(2)(a), irrespective of the employer's motivation or whether employees were in fact interfered with, restrained or coerced.

The City asserts that Bloomingdale's request to transfer was denied because she was unqualified for the position due to her inability to "establish and maintain effective working relationships with other employees, other departments, public officials, and the public at large" — one of the minimum qualifications for the position which Bloomingdale sought. It is clear, however, that this "qualification" deficiency is itself based wholly upon and is inextricably intertwined with Bloomingdale's complaint and statements to the Council — the activities which AFSCME asserts were protected under section 20.8(3). Despite its characterization of the reason for the denial, the City does not really maintain that the denial was unconnected to the allegedly protected, concerted activities. Although at times expressed differently, the City's real argument is that, even if Bloomingdale's complaint and statements were protected concerted activities, their untruthfulness amounted to misconduct which stripped them of that protection.

Under these circumstances, where the employer's rationale for its action is the employee's alleged misconduct committed in the course of allegedly protected activity, the appropriate analysis uses the framework approved by the U.S. Supreme Court in *NLRB v. Burnup & Sims*, 379 U.S. 21, 85 S.Ct. 171, 13 L.Ed.2d 1 (1964), which PERB has also previously employed. See *Clay County and IUOE Local 234*, 07 PERB 7007, *reversed on other grounds*, 784 N.W.2d 1 (Iowa 2010).

Under *Burnup & Sims*, the statute is violated "if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of

misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.” 397 U.S. at 23, 85 S.Ct. at 172.<sup>3</sup>

Assume, for the moment, that the first two parts of the *Burnup & Sims* inquiry have been satisfied—that Bloomingdale’s complaint and statements were protected activities, and the City knew they were such. The ALJ has found as fact that the basis for the denial of Bloomingdale’s request for transfer, although at times couched in terms of her lack of a necessary qualification, was the untruthfulness of portions of her complaint and statements to the City Council. AFSCME thus satisfied the third of the four parts of the *Burnup & Sims* inquiry. But AFSCME has failed to establish the fourth element— that Bloomingdale was not guilty of the misconduct which was the basis for the denial of the transfer, as explained above.

AFSCME, of course, advances Bloomingdale’s version of the events of June 16 as the true state of the facts, and thus maintains that no misconduct occurred which could have caused her complaint and statements about Pfeiffer’s bullying of City employees to lose their protected status. But apparently recognizing that the facts might be found differently, AFSCME argues that in order for “misconduct” to deprive an otherwise-protected activity of its protected status it must be extreme or severe, thus suggesting that any inaccuracies in Bloomingdale’s assertions did not rise to that level. AFSCME advances cases concerning employee removal, demotion or suspension under Iowa Code chapter

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<sup>3</sup> Although *Burnup & Sims*, like *Clay County*, involved employee discharge and is thus couched in those terms, neither party has cited authority or even suggested that its analysis is inapplicable in cases of less-severe forms of employer conduct, and no reason for such a distinction is apparent.

400 (civil service) procedures as appropriate guides for judging whether protection-stripping misconduct in the *Burnup & Sims* sense occurred.

In the absence of NLRB or PERB authority on the issue, interpretations of what constitutes misconduct in the Iowa Code section 400.18 sense might conceivably be helpful in determining what types of behaviors would cause otherwise-protected activities to lose their protected status. But the issue has been explored in a number of “false statements” cases under section 8(a)(1) of the private-sector statute, and at least one PERB case has touched on the question.

AFSCME is certainly correct in asserting that something more than mere employee mistakes or misunderstandings are necessary for protected activity to lose its protected status:

Employees do not forfeit the protection of the Act if, in voicing their dissatisfaction with matters of common concern, they give currency to inaccurate information, provided that it is not deliberately or maliciously false.

*Walls Mfg. Co.*, 137 NLRB 1317 (1962), *enforced*, 321 F.2d 753 (D.C.Cir. 1963), *cert denied*, 375 U.S. 923 (1963), *citing Marlin Firearms Co.*, 116 NLRB 1834 (1956). *See also Altex Ready Mixed Concrete v. NLRB*, 542 F.2d 295 (5<sup>th</sup> Cir. 1976), *citing Big Three Industrial Gas & Equip. Co.*, 212 NLRB 800 (1974), *enforced*, 512 F.2d 1404 (5<sup>th</sup> Cir. 1975) (false testimony not “knowingly and willfully given with intent to deceive concerning a material fact” remains protected); *KBO, Inc.*, 315 NLRB 570 (1994) (statement made in good faith that employer was misusing money in employee profit sharing accounts did not lose its protection because not made “with knowledge of its falsity, or with reckless

disregard of whether it was true or false”). And in *AFSCME Local 1774 and Sioux County*, 77 H.O. 847, the PERB hearing officer relied upon *Schnell Tool & Die Corp.*, 144 NLRB 385 (1963) for the proposition that false statements by an employee about the employer made in the course of an otherwise-protected newspaper interview would not strip the concerted activity of its protection unless the statements were “deliberately false.”

Regardless of which expression of the test one applies — “deliberately or maliciously false,” “knowingly and willfully given with intent to deceive,” “made with knowledge of its falsity or with reckless disregard of whether it was true or false,” or simply “deliberately false”—it is apparent that Bloomingdale’s complaint and statements to the City Council lost their presumed protected status.

In view of the facts found above, Bloomingdale plainly knew that her deliberate assertions that Pfeiffer had “interrogated” her and “ordered” her to answer his questions, despite being advised that she wanted to avoid involvement in the matter, were false. One can argue that Bloomingdale never specifically asserted that Pfeiffer intentionally intimidated or directly threatened anyone, but instead couched her complaints in terms of the effects his tactics and demeanor had on her and the other employees. One might also argue that Bloomingdale’s assertions about Pfeiffer’s making “demands” of other employees, sidestepping the appropriate City chain of command, and repeatedly seeking statements from employees after they were advised by higher-ups that they did not have to do so,

were not knowingly false because Bloomingdale was relying in good faith on reports of others.<sup>4</sup>

But even were one to presume that these assertions by Bloomindale were not knowingly and deliberately false, her claims about being interrogated and ordered to provide information were knowingly false and consequently unprotected. No matter how one parses the words employed in Bloomingdale's complaint and statements to the City Council, their clear import was that Pfeiffer had bullied her in an intimidating, threatening manner, ordered her to answer, and persisted until he got the information he was seeking — assertions which can only be viewed as deliberate falsehoods in view of the facts found above.

Pfeiffer denied Bloomingdale's transfer because of the falsity of accusations she made against him in 2005. Because those knowing, deliberate falsehoods stripped what is presumed to have been concerted, protected activity of its protected status, AFSCME has failed to establish the City's commission of a prohibited practice within the meaning of Iowa Code section 20.10(2)(a) as alleged in its complaint.

**The section 20.10(2)(c) claim**

As with claims of discrimination under 29 U.S.C. § 158(a)(3), most Iowa Code section 20.10(2)(c) claims (unlike claims of independent 20.10(2)(a) violations) turn on the issue of employer motivation. Not all discrimination in

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<sup>4</sup> This is not an acknowledgement or conclusion that these statements were in fact made in good faith without knowledge of their falsity. The record does not reveal the circumstances under which Bloomingdale might have formed a good faith belief in the truth of those assertions, which were not supported by Phares' testimony or AFSCME Exhibit 3 – Phares' undated statement concerning her interactions with Pfeiffer.

employment is prohibited—only if the discrimination is motivated by an antiunion purpose and has the foreseeable effect of either encouraging or discouraging union membership does it violate the statute. *See generally* Hardin, *The Developing Labor Law*, *supra*, at 248-50.

Accordingly, the issue in section 20.10(2)(c) cases usually becomes one of identifying the employer's real motive for the challenged action. Because in the typical case the employer asserts that the reason for its action was something unconnected to protected activity, in those cases PERB and the courts employ the familiar *Wright Line* test<sup>5</sup> in order to ferret out the real motive for the employer's action. *See, e.g., Cerro Gordo County v. PERB*, 395 N.W.2d 672 (Iowa App. 1986); *Melcher-Dallas Comm. Sch. Dist.*, 84 PERB 2465; *Des Moines County*, 88 PERB 3493 & 3502.

In this case, however, resort to a *Wright Line* analysis is unnecessary, because the City does not maintain that the denial of Bloomingdale's requested transfer was unconnected to protected activity, but instead maintains the denial was due to the untruthful allegations she had made against Pfeiffer in the course of what has been presumed to be protected activity. *See, e.g., E.W. Grobbel Sons, Inc.*, 322 NLRB 304 (1996). The factual finding that the untruthfulness of Bloomingdale's assertions made in the course of that activity

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<sup>5</sup> *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1053 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

(rather than any antiunion purpose) was the motivation for the City's action thus effectively forecloses AFSCME's section 20.10(3)(c) claim.<sup>6</sup>

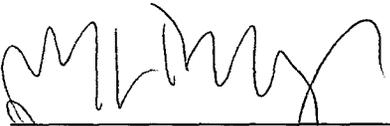
**Conclusion**

Because AFSCME has failed to establish the City's violation of either Iowa Code section 20.10(2)(a) or 20.10(2)(c) as alleged in its complaint, the ALJ proposes entry of the following:

ORDER

AFSCME's prohibited practice complaint is DISMISSED.

DATED at Des Moines, Iowa, this 31st day of August, 2012.



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Jan V. Berry  
Administrative Law Judge

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<sup>6</sup> Even were one to apply *Wright Line*, on this record the ALJ would conclude that because of AFSCME's failure to establish the existence of anti-union animus, it failed to establish a *prima facie* case that protected activity was a motivating factor in the City's denial of Bloomingdale's transfer request.