

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

NEIL KENNETH GREENWALD, JR.,
Complainant,

and

MUSCATINE COMMUNITY SCHOOL DISTRICT,
Respondent.

CASE NO. 8419

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PROPOSED DECISION AND ORDER

Complainant Neil Kenneth Greenwald, Jr., filed this prohibited practice complaint with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 20.11 and PERB rule 621–3.1(20). The complaint alleges that Respondent Muscatine Community School District committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(a), (e) and (f) when Greenwald’s supervisor in the District’s transportation department included comments on the employee performance evaluation Greenwald received on May 10, 2011. The District denied its commission of a prohibited practice.

Pursuant to notice, an evidentiary hearing on the complaint was held before the administrative law judge in Muscatine, Iowa, on June 19, 2012. Greenwald appeared *pro se* and the District by its human resources director and counsel, Wes Fowler. Both parties filed post-hearing briefs, the last of which was received July 31, 2012.

Based upon the entirety of the record, the ALJ has concluded that Greenwald has failed to establish the District’s commission of a prohibited practice as alleged in his complaint.

FINDINGS OF FACT

Greenwald has been employed by the District since at least 1994 as a school bus driver, a position within a PERB-determined bargaining unit which has been represented since 1987 by AFSCME/Iowa Council 61. Greenwald is part of a complement of what was approximately 30 bus drivers during 2011.

Bus drivers have long been evaluated in writing by the District's transportation supervisor. From 1992 until 2009, the supervisor prepared a driver's evaluation on a standardized form which rated the driver's skills and behaviors, on a number of performance criteria, as a 1 (regularly performs satisfactorily) or 2 (does not regularly perform satisfactorily). The form included a section entitled "driver's comments and response to evaluation," for the driver's use following receipt of the evaluation. Although the form did not include a dedicated section for the inclusion of comments by the supervisor, comments on driver performance were included by supervisors when the supervisor thought they were warranted, would be helpful, or were requested by the driver. Because of the absence of a specific "supervisor's comments" section on the form, these comments were, depending on the practice of the supervisor at the time, made on a separate sheet and attached to the evaluation form, made in the margins of the form, or noted in the "driver's comments" section of the form.

Sometime before May, 2009, Lori Dusenberry became the District's transportation supervisor. Dusenberry had previously worked in the transportation department as a clerk, had seen many completed evaluation forms, was familiar with their format, and was aware that supervisors had

included handwritten comments despite the absence of a specific place on the form for that purpose. At least in part because she anticipated doing her evaluations using a computer program, rather than preparing them by hand, Dusenberry revised the driver evaluation form by adding a “supervisor’s comments” section, and began using the revised form for the driver evaluations she prepared in May, 2009, all of which included supervisor comments.

Notwithstanding Dusenberry’s use of the revised form, the evaluation article of the July 1, 2009 through June 30, 2011 collective bargaining agreement between AFSCME and the District adopted as an appendix and prescribed the use of the 1992 version of the driver evaluation form. The evaluation article’s section concerning the procedures to be employed in an employee’s evaluation makes no reference to written comments by the supervisor, but does provide that the supervisor, “upon request of the employee, shall explain each ‘number 2’ ranking” on the driver’s evaluation form. The provision does not specify whether the explanation be oral or in writing.

In May, 2009, after receiving his evaluation from Dusenberry, Greenwald filed a grievance with the District complaining, *inter alia*, that Dusenberry had changed the 1992 evaluation form (also incorporated into the then-effective July 1, 2007 through June 30, 2009 collective agreement) by adding the supervisor’s comments section.

Dusenberry continued her use of the revised form in 2010, and included comments on all the evaluations she prepared, despite the 1992 form’s incorporation into the 2009-2011 agreement. On May 17, 2010, following

receipt of his performance evaluation, Greenwald filed another grievance, alleging, *inter alia*, that the addition of supervisor's comments to the evaluation form violated the collective agreement.

On May 6, 2011, Dusenberry prepared another evaluation of Greenwald's performance, again using the revised evaluation form and again including comments, as she did on all the other drivers' evaluations. On May 11 Greenwald added comments and a response to his evaluation in which he complained that it was unfair, untimely, and contained supervisor comments, which he asserted was contrary to an understanding he had reached with the District during proceedings on his 2010 grievance.

Greenwald's prohibited practice complaint was mailed to PERB, post-marked August 6, 2011, and is deemed to have been filed that date pursuant to Iowa Code section 17A.12(9).

CONCLUSIONS OF LAW

Greenwald's complaint alleges the District's commission of a prohibited practice within the meaning of Iowa Code sections 20.10(2)(a), (e) and (f), which 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.

e. Refuse to negotiate collectively with representatives of certified employee organizations as required in this chapter.

f. Deny the rights accompanying certification granted in this chapter.

The complaint alleges that Dusenberry's inclusion of supervisor's comments on the evaluation Greenwald received on May 10, 2011 was a "unilateral change to the performance evaluation" and thus a prohibited practice. In his brief, Greenwald expresses this theory differently, arguing that because the evaluation form incorporated into the collective bargaining agreement has no space provided for supervisory comments, Dusenberry's use of a different form constitutes a "unilateral change to the contract." At another point in his brief, Greenwald more specifically argues that adding a supervisor's comments section to the evaluation form was a unilateral change to a mandatorily negotiable matter which is contained in the collective bargaining agreement which the District implemented without fulfilling its bargaining obligation.

The law concerning "unilateral change" cases is well settled and has been discussed and applied in a number of PERB decisions. An employer's implementation of a change in a mandatory subject of bargaining without first fulfilling its bargaining obligation may constitute a prohibited practice under sections 20.10(1) and 20.10(2) (a), (e) and (f). *See, e.g., Des Moines Independent Comm'y School District*, 78 PERB 1122. The nature of the employer's bargaining obligation differs depending upon whether the mandatorily negotiable term is "contained in" the collective bargaining agreement or not. If the proposed change is to a mandatory term contained in the contract, it may not lawfully be made without obtaining the consent of the other party to the agreement. If the proposed change is to a mandatory term not contained in the contract, the

change may be lawfully implemented by the employer only after it has given the certified representative notice of the change and the opportunity to negotiate about it to impasse. *See, e.g., Des Moines Independent Comm'y School District, supra; Charles City Community School District, 90 PERB 3764; Cedar Rapids Association of Firefighters, 93 PERB 4610; Cedar Rapids Association of Firefighters, 95 PERB 4898; City of Cedar Rapids, 97 PERB 5129; Waterloo Police Protective Association, 01 PERB 6160.*

In order to prevail in a unilateral change case as is alleged here, a complainant thus must show that (1) the employer implemented a change; (2) that the change was to a mandatorily negotiable matter, and (3) that the employer had not fulfilled the applicable bargaining obligation before making the change.

It is not necessary to consider whether Greenwald established the second and third of these elements, because he has clearly failed to establish that Dusenberry's inclusion of comments on his May, 2011 evaluation, or her use of the revised evaluation form, constituted any sort of change in the status quo concerning the evaluation of the District's bus drivers.

It is apparent that unsolicited supervisor comments have been made on or attached to driver evaluations since at least 1994. Dusenberry's insertion of comments on Greenwald's 2011 evaluation was a continuation of the evaluation procedure status quo, rather than a change to it. Nor was Dusenberry's 2011 use of the revised evaluation form a change in status quo concerning driver evaluations.

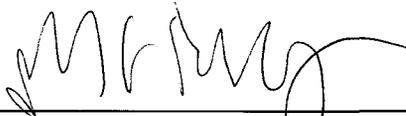
A change in the driver evaluation process did take place in 2009, when Dusenberry revised the evaluation form. But even assuming, without deciding, that this was an unlawful unilateral change to a mandatory topic of bargaining, that prohibited practice occurred in 2009. The 90-day limitation period to file a prohibited practice complaint based upon Dusenberry's alteration of the evaluation form began to run not later than May, 2009, when Greenwald discovered the change and complained of it in his first grievance. His August, 2011 complaint that the change to the form constitutes a prohibited practice is thus plainly time-barred.

Greenwald at times refers to the District's alleged "unilateral change to the contract," noting that the collective bargaining agreement incorporates the 1992 form which did not include a "supervisor's comments" section and that his 2011 evaluation did not use the prescribed form. Arguably, this constituted a misapplication of the collective agreement's evaluation article, and could have conceivably formed the basis for a successful grievance. But the ALJ is not a grievance arbitrator faced with the question of whether the collective agreement has been misinterpreted or misapplied. Instead, the question here is whether the District implemented a unilateral change in the evaluation status quo when Dusenberry used the revised form and included comments on Greenwald's 2011 evaluation. It is clear from the record here that no such change took place during the 90-day jurisdictional period preceeding the filing of Greenwald's complaint. The ALJ consequently proposes entry of the following:

ORDER

Greenwald's prohibited practice complaint is DISMISSED.

DATED at Des Moines, Iowa, this 24th day of October, 2012.



Jan V. Berry
Administrative Law Judge

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