

motion of a party under the circumstances present here, and the State's motion does not cite any such authority or any statute or rule under which its motion was purportedly filed.

The Board is well aware of Iowa Code section 17A.16(2), which provides, in relevant part:

2. Except as expressly provided otherwise by another statute referring to this chapter by name, any party may file an application for rehearing, stating the specific grounds for the rehearing and the relief sought, within twenty days after the date of the issuance of any final decision by the agency in a contested case. . . .

Although the State's motion made no reference to the statute and did not label its filing as such, it may be that its intent was to seek rehearing pursuant to section 17A.16(2). But even if that is the case, the filing of an application for rehearing is not an available option in this matter because our May 30 declaratory order, while final, was not a final decision "in a contested case." See Iowa Code § 17A.2(5). ("Contested case' means a proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.")

United Faculty points out Iowa Code section 17A.9(4), which states that "[t]he provisions of sections 17A.10 through 17A.18 apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order." Agencies thus appear to possess the authority to make section 17A.16(2) motions for rehearing available to parties to declaratory order proceedings. But as United Faculty also points out, no provision of PERB rule has done so, nor has the Board issued an order to such effect.

II.

Although it is thus unnecessary to address the grounds for reconsideration (or rehearing, if that was what was intended) advanced by the State in its motion, it is appropriate to comment briefly on one of the grounds asserted because, under the circumstances here, it could avoid the necessity of a remand by a reviewing court should the court reach certain conclusions on review of our declaratory order.

In its motion the State asserts, *inter alia*, that during the proceedings on the petition for declaratory order it maintained that the ESIP was an illegal subject of bargaining and that PERB failed to address this issue in its declaratory order. The Board thinks it thoroughly debatable whether the State truly raised this issue during the earlier proceedings, and did not view it as having been presented in light of the totality of the State's arguments. But recognizing the possibility that a reviewing court might view the matter differently and might thus find it necessary to remand the matter for the Board's consideration of that claim, it is addressed here in order to avoid the delay and additional investment of time and effort a remand would entail.

In its motion, the State argues that the ESIP "is a retirement benefit" and is therefore an illegal subject of bargaining based upon *City of Mason City v. PERB*, 316 N.W.2d 851 (Iowa 1982). The Board does not agree.

The issue is not really whether the ESIP is a "retirement benefit," but whether the ESIP is an illegal/prohibited/excluded subject of bargaining because of the Iowa Code section 20.9 provision that "[a]ll retirement systems shall be excluded from the scope of negotiations." *City of Mason City* addressed a proposal which would have required the employer to continue to provide health insurance for retired employees. The Court found that the legislative intent behind the quoted sentence from section 20.9 was "to exclude from negotiations under chapter 20 any proposal that directly

augment or supplement the benefits a public employee would receive under a retirement system under other provisions of the Code.” *Id.* at 854. Because the retiree insurance sought by the proposal would augment the pension benefits the retired police officers were entitled to under Iowa Code chapters 410 and 411, the proposal was excluded from collective bargaining by the “retirement systems” exclusion. *Id.*

Accordingly, PERB has held that proposals which would augment or supplement statutory retirement benefits are illegal subjects of bargaining. *See, e.g., City of Fort Dodge*, 83 PERB 2415 (proposal that departed employees be allowed to remain on an employer’s plan at their own expense until reaching Medicare eligibility); *City of Des Moines*, 85 PERB 2920 (proposal that employer contribute to trust fund to be used to provide post-retirement insurance benefits); *Black Hawk County*, 06 PERB 7219 (proposal for conversion of unused sick leave and vacation into a retirement account to be used to pay for retirees’ continued coverage under employer’s insurance plan).

However, proposals that merely provide for a one-time payment to employees upon the termination of their employment have not been held to augment or supplement statutory retirement benefits. *See Professional Staff Association of AEA 12 v. PERB*, 373 N.W.2d 516 (Iowa App. 1985)(proposals for reimbursement of unused sick leave at termination and for severance pay were permissive topics of bargaining); *Taylor County*, 02 PERB 6490 (proposal for conversion of unused sick leave into a one-time payment of money upon separation from employment is permissive subject of bargaining).

The ESIP incentive payment at issue here is much more akin to the one-time-at-separation payments sought by the proposals in *Professional Staff Association* and *Taylor County* than to the direct and continuing retiree benefits at issue in *Mason City*,

City of Fort Dodge, City of Des Moines and Black Hawk County, and does not directly augment or supplement a retiree's statutory retirement benefits. It is apparent that retirement is not required in order for one to be eligible for the ESIP incentive payment. The incentive payment received by an employee who resigns, but does not retire, plainly does not augment or supplement statutory retirement benefits because none are being received. And even if an employee who accepts the ESIP incentive does retire, the payment does not augment or supplement the employee's statutory retirement benefits any more than would the sick leave conversion payments or severance pay called for by the proposals found to be permissive in *Professional Staff Association* and *Taylor County*. The incentive no more augments or supplements statutory retirement benefits than does employees' post-separation receipt of their final paychecks or severance benefits which may be required by a collective bargaining agreements or employer policies.

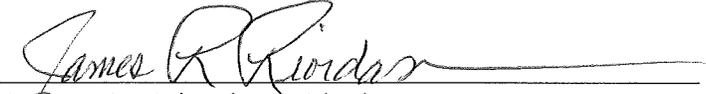
Accordingly, had the Board viewed the issue as having been presented during the earlier proceedings in this matter, it would have rejected the argument that the ESIP directly augments or supplements the benefits a public employee would receive under a retirement system under other provisions of the Code and ruled that the ESIP was not an illegal subject of bargaining.

RULING

The State's motion for reconsideration is DENIED.

DATED at Des Moines, Iowa, this 29th day of June, 2012.

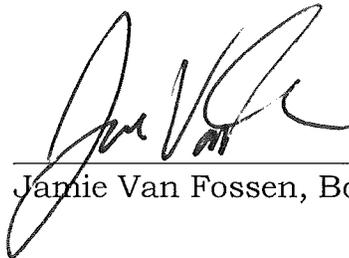
PUBLIC EMPLOYMENT RELATIONS BOARD

By: 
James R. Riordan, Chair


Janelle L. Niebuhr, Board Member

VAN FOSSEN, Member, concurring specially:

I concur with the analysis and result reached in Division I of this ruling. Because I was not a member of the Board when arguments on the substantive question presented by the petition were presented, I took no part in the Board's declaratory order and likewise take no part in Division II here.


Jamie Van Fossen, Board Member

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