

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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| AFSCME LOCAL 2048, Complainant, |) | CASE NO. 8423 |
| and |) | |
| DR. NANCY SEBRING, SUPERINTENDENT, AND DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, Respondents. |) | |

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PROPOSED DECISION AND ORDER

Complainant AFSCME Local 2048 (AFSCME OR Union) filed this prohibited practice complaint with the Public Employment Relations Board (PERB or Board) pursuant to Iowa Code Section 20.11 and PERB rule 621 IAC 3.1(20). The complaint was initially filed against Superintendent Sebring, but at hearing was amended to include the Des Moines Independent Community School District. AFSCME's complaint alleged that the Des Moines Independent Community School District (District) committed prohibited practices within the meaning of Iowa Code sections 20.10 (1), (2)(b), (e) and (f) and section 20.17 when the District failed to provide the Union with meaningful negotiations on mandatory subjects of bargaining during the District's reorganization of its Operations Department. The District has denied its commission of any prohibited practice.

Pursuant to notice, an evidentiary hearing on the merits was held before me on July 25, 2012 and February 25, 2013 in Des Moines, Iowa. AFSCME

was represented by Rick Eilander and the District was represented by attorney Peter Pashler. Both parties submitted post-hearing briefs which were filed on or before May 28, 2013. Based upon the entirety of the record, and having considered the arguments in the parties' briefs, I conclude that AFSCME has failed to establish the District's commission of prohibited practices as alleged in the complaint.

FINDINGS OF FACT

The Des Moines Independent Community School District is a public employer as defined by Iowa Code section 20.3(10) and AFSCME Local 2048 is an employee organization within the meaning of section 20.3(4). AFSCME is certified as the exclusive bargaining representative for several departments within the District, one of which is the Operations (custodial) Department which positions include, in relevant part, Operations Engineer, Chief; Operations Engineer, 1st Assistant; Operations Engineer, 2nd Assistant; Operations Pool and Stationary Engineer. Each of these positions include a number of job classifications:¹ Chief (job classifications 1 through 9); 1st Assistant (job classifications 6 through 9); 2nd Assistant (job classifications 6 through 8); Operations Pool (job classifications 0 through 5) and Stationary Engineer (job classifications 1 through 4). The Operations Department provides custodial services to approximately 60 buildings. Additionally it maintains the building's mechanical system (heating source) which includes

¹ The job classifications were termed "class" in both Appendix A of the collective bargaining agreement and the bargaining unit description.

high pressure steam, low pressure steam, geo thermal, hot water and variable refrigerant.

Prior to the District's reorganization plan, the assignment of job classifications were determined by school size, square footage, enrollment and work duties. Job classifications determine the positions assigned to a particular building located within the District. For example, the job classifications assigned to the Hoover/Meredith complex were Chief, class 9; 1st Assistant, class 9; Operations Pool, class 3, and Stationary Engineer, class 4.

Discussion regarding changes in the Operations Department began in 2010. Custodial restructuring in this department was discussed at the April 27, 2010 labor-management committee meeting. As part of the "recalibration/realignment of employees post July 1, 2010," discussion, the District distributed its working document of Appendix A for the contract year 2010-2011 which differed significantly from Appendix A contained in the 2010-2011 collective bargaining agreement. Next to each job classification, in Appendix A, the District included descriptors such as building type (high school complex, high school/middle school complex, middle school, and elementary school) as well as when the work occurred ("works days" or "works nights"). Although the record is silent as to the meeting's substance regarding this topic, it is clear that AFSCME objected to descriptors being part of the District's working document regarding Appendix A.

For the current collective bargaining agreement,² the parties reached a tentative agreement on April 21, 2011. As to Appendix A, there was no change with regards to classifications.³ For the 2011-12 year, Appendix A provided in relevant part:

| OPERATIONS ENGINEER, CHIEF - | HOURLY WAGE |
|--|--------------------|
| Class 9 | 18.12 |
| Class 8 | 17.37 |
| Class 7 | 16.93 |
| Class 6 | 16.37 |
| Class 5 | 16.27 |
| Class 4 | 16.13 |
| Class 3 | 16.05 |
| Class 2 | 15.63 |
| Class 1 | 15.19 |
| OPERATIONS ENGINEER, 1st ASSISTANT - | |
| Class 9 | 16.69 |
| Class 8 | 16.50 |
| Class 7 | 16.31 |
| Class 6 | 15.31 |
| OPERATIONS ENGINEER, 2nd ASSISTANT - | |
| Class 8 | 15.72 |
| Class 7 | 15.72 |
| Class 6 | 15.40 |
| OPERATIONS POOL - | |
| Class 5 – Engineer’s license required for assignment | 15.83 |
| Class 4 – Fireman’s license required for assignment | 15.46 |
| Class 3 – No license required | 14.93 |
| Class 2 – After 13 weeks | 14.56 |
| Class 1 – Entry level | 14.27 |
| Class 0 – Light Duty – 50% of previous wage | |
| PREVENTATIVE MAINTENANCE ENGINEER | 17.15 |
| STATIONARY ENGINEER - | |
| Class 4 – High School Complex | 16.36 |
| Class 3 – High School/Middle School Complex | 16.06 |
| Class 2 – Middle school | 15.76 |
| Class 1 – | 15.31 |
| STATIONARY ENGINEER, ASSISTANT - | 15.68 |

² The agreement runs from July 1, 2011 through June 30, 2016. Each year, the parties may reopen Appendix A, including longevity, and insurance.

³ District Exhibit 1.

In late April, the parties signed a Memorandum of Understanding which allowed the District to reassign employees “in order to realign work assignments as a result of empty positions” (in accordance with the applicable provisions of the current contract). . . .⁴

In early May, 2011 the District began internal discussions about the reorganization of the Operations Department which included staffing levels, and building structure.

At the May 10th, labor-management committee meeting, custodial restructuring was discussed as reflected in the committee’s minutes under the topic area “custodial.” These minutes provide in relevant part:

Assignment of custodial staff (Steve Barnes)
Union requests Pool III be able to request that open positions be re-bid. Celeste stated that we will not fill the 10 vacant custodial positions. District is in the process of restructuring again like last summer. We are looking at the structure of all positions and re-evaluating what schools need. Bumping will be involved. Union would be supportive of after a person has been in a position for ___ months, the position would become permanent.⁵

On Friday, July 15, 2011, the District’s reorganization plan was presented to the Union. Essentially, the plan realigned the assignment of classifications contained within the various positions (Chief, 1st Assistant, 2nd Assistant, Operations Pool and Stationary Engineer) to match the building’s mechanical system (geo thermal, variable refrigerant, hot water, high pressure

⁴ Union Exhibit 11 and District Exhibit 2. The District’s representative signed the memorandum on April 26, 2011 and the Union’s representative signed it on April 30.

⁵ District’s Exhibit 4. Additionally, the restructuring was mentioned under the “previous labor issue responses: (Group) topic area and stated “Priority list for what needs to be accomplished when one custodian is absent. (This could be addressed through the custodial restructuring that is going on now).”

steam and low pressure steam). At the meeting, the following memorandum was distributed:⁶

Rationale for Change

During the last ten years, numerous mechanical systems in the District have been changed from high and low pressure steam boilers to more efficient systems, including but not limited to geothermal, boiler tower and variable refrigerant. In an effort to support this shift, the custodial management team and human resources have developed a staffing structure that matches mechanical systems with license requirements. At the same time a more consistent building by building staffing assessment was conducted which included the reduction of ten custodial positions due to budget cuts. The following changes will be implemented effective August 15, 2011.

General Custodial Staffing Patterns

| Elementary | Middle School | High School |
|---------------------------------|----------------------|------------------------------------|
| Chief | Chief | Chief or 2 nd Assistant |
| 1 st Asst if non Geo | 1 st Asst | Stationary Engineer |
| Operations Pool | Operations Pool | 1 st Assistant |
| | | Operations Pool |

Notes:

- All current 2nd Assistant Class 6 positions will be re-classified as Operations Pool Class 4. This results in a \$.06 per hour raise.
- Chief 1 hourly rate will be increased from \$15.19 to \$15.53 per hour.
- Employees who are displaced or whose position classification is reduced, will have the opportunity to “bump” according to the Comprehensive Agreement.
- If the hourly rate of an employee will be decreased due to re-classification of their current position the current hourly rate will be maintained at the 11-12 Wage Schedule through June 30, 2012.
- If an employee bumps to another position, you will receive the rate of pay for that position.
- Employees who bid on positions after the bumping process has taken place, will move to the pay rate for the new position.

Timeline

| | |
|-----------------------|--|
| Friday, July 15, 2011 | Notify the Union of plan to reorganize |
| Monday, July 18, 2011 | Notify Principals of reorganization possibilities |
| July 18-22 | Share general reorganization guidelines with custodial staff |
| Thursday, July 28 | Bump Day #1 |
| Friday, July 29 | Bump Day #2 |
| August 15, 2011 | Employees Start in new positions |

⁶ Union Exhibit 8 or District Exhibit 5.

The effect of the realignment resulted in some of the District's buildings and positions within these buildings being reclassified. For example, since the Hoover/Meredith complex uses low pressure steam to heat the building, the Chief 9 position was realigned to Chief 8, whereas at the CNC/Welcome Center, which uses a high pressure boiler, the Chief 7 position was realigned to Chief 9.⁷

AFSCME did not voice any disagreement with the District's plan which realigned the job classifications to the various mechanical systems. In fact, the Union's representatives are adamant no bargaining took place in this meeting. Instead, the Union asserts it was being notified of changes being made by the District solely for informational purposes. Further, AFSCME did not request bargaining with respect to the reorganization plan. AFSCME believed that the Finality and Effect provision contained in the collective bargaining agreement did not allow the District to make changes in the collective bargaining agreement. Consequently, there were no discussions between AFSCME and the District with regards to the realignment in job classifications nor did AFSCME request bargaining with respect to the reorganization plan.

Discussions regarding the effects of the District's plan, however, did take place during this meeting with AFSCME suggesting a scenario and the District countering. In an email sent the following Monday by Human Resources Director Kelling to AFSCME staff representative Rick Eilander, Local President Frith, Vice-President Barnes and Chief Steward Bell, Kelling explained that the

⁷ District Exhibit 6, pg. 5 and District Exhibit 9.

both scenarios resulted “in higher costs to the District which will not work.”⁸ Additionally, she informed the Union the District “will be moving ahead with the original plan that we shared with you.”⁹ Indeed, the plan was shared with the custodial staff during the week of July 18th as outlined in the July 15th memorandum.

On August 2, 2011, the District met with Local President Frith and staff representative Eilander. At that meeting, the District presented a “2nd Review/Revised Plan” (dated July 26th). The structure of the revised plan remained the same; the realignment was based upon the various classifications being matched with the building’s mechanical system, however, the plan’s effect was different. The revised plan was coined by District as the “attrition” model since current employees would not be laid off due to the reorganization, which might have occurred in the July 15th plan, and the reorganization only involved “current and future vacancies and reassignment due to the reduction of ten FTE’s.”¹⁰

On August 22, 2011, AFSCME filed the instant prohibited practice complaint with PERB.

CONCLUSIONS OF LAW

AFSCME alleges that the District committed prohibited practices within the meaning of Iowa Code sections 20.10 (1), (2)(b), (e) and (f) and section

⁸ District Exhibit 8.

⁹ District Exhibit 8.

¹⁰ Union Exhibit 9 and District Exhibit 10.

20.17¹¹ when it reorganized the Operations Department. These sections provide:

1. It shall be a prohibited practice for any public employer, public employee, or employee organization to refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.

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

* * * *

b. Dominate or interfere in the administration of any employee organization.

* * * *

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.

AFSCME alleges that the District interfered with the administration of the Local in violation of Iowa Code section 20.10(2)(b). In the instant case, no arguments were advanced by AFSCME with regards to this allegation nor does the record contain evidence that the District dominated or interfered with the administration of AFSCME Local 2048. As a result, AFSCME has failed to establish that the District committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(b).

AFSCME's other claim, generally stated, is that the District in reorganizing the Operations Department unilaterally realigned the job classifications contained within the various positions. AFSCME argued that

¹¹ Prohibited practices are, by definition, limited to acts specified in some provision of Iowa Code section 20.10. Therefore, AFSCME's allegation of the commission of a prohibited practice within the meaning of section 20.17 cannot be the basis for relief under Chapter 20. *Harvey L. Kunzman Jr.*, 03 HO 6412, 6413 at 13.

the realignment of job classifications is a mandatory subject of bargaining and that the District violated the Act when it unilaterally realigned the job classifications to match the buildings' mechanical systems.

The District, on the other hand, argued that the changes do not adversely affect current employees as the District has utilized an attrition model. However, the Board has previously found that this argument is not relevant to the determination of an unlawful change. *Public, Professional and Maintenance Employees, Local 2003*, 91 PERB 3794 (HO at 12).

Implementation by the employer of a change in a mandatory subject of bargaining without fulfilling its bargaining obligation may constitute a prohibited practice under sections 20.10(1) and 20.10(2)(a), (e) and (f). *Neil Kenneth Greenwald, Jr.*, 12 HO 8419 at 5; *AFSCME/Iowa Council 61*, 11 PERB 8146 at 10-11.

The District argued that its reorganization plan was not a mandatory subject of bargaining. Even if one assumes, for the purpose of this case, without deciding that the changes made in job classifications are mandatorily negotiable,¹² AFSCME has failed to establish the District's commission of an alleged prohibited practice with regards to Iowa Code sections 20.10(1), (2)(e) and (f).

PERB case law concerning an employer's bargaining obligations is well settled. A public employer's bargaining obligation differs depending upon

¹² This assumption is made only for the purpose of analyzing whether AFSCME has established the District's breach of its bargaining obligations with regards to unilateral change and should not be construed as a finding or conclusion that the District's reorganization plan is in fact mandatorily negotiable.

whether the mandatorily negotiable term is “contained in” or “not contained in” the collective bargaining agreement. If the proposed change is “contained in” the collective bargaining agreement, the change may not lawfully be made by the employer without obtaining the consent of the certified employee organization to the proposed change. If the proposed change is “not contained in” the agreement, then the change may be lawfully implemented by the employer only after the certified employee organization’s representative has received notice of the change and been given an opportunity to negotiate the proposed change to impasse. *Neil Kenneth Greenwald Jr., supra*, at 10-11; *AFSCME Local 231, 07 HO 7148* at 12-13.

As to whether the matter is “contained in” a collective bargaining agreement, the Board has rejected the view that if a provision relates to a particular section 20.9 topic, then all matters concerning that topic are “contained in”. *Teamsters Local Union No. 147, 00 HO 6004* at 8-9; *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters, 95 PERB 4898* at 11. Instead, the challenged action and the parties’ collective bargaining agreement are examined to determine whether, under the circumstances and in light of the substantive nature of the issue at hand, the matter is “contained in” the collective bargaining agreement. *Teamsters Local Union No. 147, supra*, at 9; *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters, supra*.

Upon examination of the collective bargaining agreement, it is apparent that Appendix A only contains the listing of job classifications for each position.

In fact, AFSCME had previously resisted any type of descriptor being added to these job classifications as evidenced by its objection at the April 27, 2010 labor-management meeting to the building classifications being included in the District's working document of Appendix A. Thus, the realignment of job classifications contained within the District's reorganization plan was a change "not contained in" the collective bargaining agreement.

AFSCME relied upon the assumption that the finality and effect (zipper) provision contained in the parties' collective bargaining agreement prevented the District from making any changes during the duration of the collective bargaining agreement. However, this is an incorrect assumption as the Board in *Cedar Rapids Association of Fire Fighters, Local 11, International Association of Fire Fighters, supra*, found that a zipper clause does not address mandatory topics of bargaining "not contained in" a collective bargaining agreement. The Board in that decision stated:

We do not interpret the zipper clause here as anything more than an acknowledgment that all of the agreements reached by the parties during negotiations are embodied in the contract. It does not, as the Association urge, in any way address mandatory matters not contained in the contract.¹³

Thus, the finality and effect provision relied upon by AFSCME does not prevent the District from making changes in the collective bargaining agreement "not contained in" a collective bargaining agreement so long as the party desiring the change has given the other notice of the change and an opportunity to negotiate about the change to impasse. *Neil Kenneth Greenwald*

¹³ Id. at 15-16.

Jr., supra, at 10-11; *Public, Professional and Maintenance Employees, Local 2003*, 06 HO 7109 at 9.

In prohibited practice proceedings, the complainant carries the burden of establishing each element of the alleged prohibited practice. *AFSCME/Iowa Council 61, supra*, at 9. On this record, I cannot conclude that AFSCME Local 2048 has carried its burden of establishing that the District failed to perform its bargaining obligations.

The District desired and intended to reorganize the District's custodial services to match the job classifications with various mechanical (heating) systems. Before an employer implements a mid-term change, the union must receive "actual notice" of the impending change. The notice does not need to be in any particular form or delivered in any particular manner. *Teamsters Local Union No. 147, supra*, at 10; *American Federation of State, County and Municipal Employees, Local 870*, 82 HO 1980 at 10. In the instant case, the District's notice to AFSCME was sufficient. Contrary to the Union's assertion, the meeting and memorandum notified AFSCME of an actual change to the job classification structure, not a potential change. The record clearly reveals that AFSCME received actual notice of the impending change at the July 15 meeting when the District presented AFSCME with the reorganization plan.

Once the employer provides actual notice of the contemplated mid-term change, the employee organization bears the burden of requesting bargaining on the change. The employer is not required to propose bargaining. *Teamsters Local Union No. 147, supra*, at 10-11; *Chauffeurs, Teamsters & Helpers, Local*

Union No. 238, and Communication Workers of America, Local 7175, 94 HO 4954 at 10.

AFSCME's case focused largely on whether the District engaged in "meaningful" negotiations. However, based upon the record before me, the District was not obligated to engage in "meaningful negotiations" as AFSCME did not request bargaining.

The Union admits in its brief that it "never requested negotiations, but only responded to the employers (sic) meeting requests which turned out to be informational at best."¹⁴ However, by not requesting bargaining, AFSCME Local 2048 waived its opportunity to exercise any right it had to negotiate with the District over the realignment of the job classifications. Further, the District was not obligated to engage in any meaningful negotiations nor precluded from implementing its reorganization plan when the Union failed to request bargaining. Consequently, I conclude that even if the District's reorganization plan was mandatorily negotiable, AFSCME Local 2048 has failed to establish that the reorganization plan was implemented by the District without having provided AFSCME with notice and opportunity to bargain.

In summary, I conclude that AFSCME has failed to establish that the District violated Iowa Code section 20.10(1) or 20.10(2)(b), (e) and (f) as alleged in the complaint. Consequently, I propose the following:

¹⁴ Union Brief/Closing Statement at 2

ORDER:

The prohibited practice complaint filed by AFSCME Local 2048 is
DISMISSED.

DATED at Des Moines, Iowa this 30th day of July, 2013.

PUBLIC EMPLOYMENT RELATIONS BOARD

Susan M. Bolte

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Administrative Law Judge

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