

State's commission of a prohibited practice with regards to Iowa Code section 20.10(2)(a) but has failed to establish the State's commission of a prohibited practice with regards to Iowa Code sections 20.10(1) and 20.10(2)(b) through (f).

FINDINGS OF FACT

The State is a public employer as defined by Iowa Code section 20.3(10) and AFSCME Council 61 is an employee organization within the meaning of section 20.3(4). AFSCME has been certified as the exclusive bargaining representative for several State bargaining units, one of which has bargaining unit members located at the Iowa Veterans' Home (IVH).

Danny Homan is President and chief executive officer of AFSCME Council 61 and has held this position since July 2005. Council 61 is governed by an Executive Board which has 25 board members; 23 district representatives, 1 state-wide vice-president and 1 state-wide treasurer. The Executive Board is Council 61's governing body and it conducts the Council's business, including setting policy and the budget. This Board meets quarterly to receive updates and review what has occurred in the previous quarter.

Lynne Pothast has been employed at IVH since 1980 and is currently employed as a Licensed Practical Nurse (LPN) in the nursing department. Pothast, at all relevant times, was the AFSCME Local 2984 president, a position she held since April 2002. As Local president, Pothast's duties include contract administration, grievance processing as well as serving on various committees (i.e. safety and labor-management committees).

Pothast is also a member of AFSCME Council 61's Executive Board serving as District IV's vice-president for the past 8 years. The employees and management of IVH are aware of Pothast's leadership position within the AFSCME Local and her membership on Council 61's Executive Board.

Although the record is far from clear as to the date, during the summer of 2011, David Worley, IVH Commandant, told Pothast that "the union has ran this local, this facility far too long and changes were going to be made." In late August, Pothast was informed that she was going to be moved into a nursing rotation effective September 8, 2011. On August 23rd and 24th, six grievances were filed against IVH related to the change in Pothast's work schedule. In August and continuing through November, IVH made policy changes without the Local's input. AFSCME filed eleven grievances, between August 30th and November 22nd, related to these policy changes as AFSCME believed the changes constituted violations of the collective bargaining agreement.¹ Based upon these facts, I do not find Commandant Worley's statement necessarily evincing anti-union sentiment. This comment reflected management's view that certain policy decisions were going to be made without labor's input.

AFSCME had a quarterly Executive Board meeting scheduled for December 2, 2011. Because the meeting was scheduled to begin at 9:00 a.m. on December 2nd and there was a social function later that day, Homan requested two days for the Executive Board meeting. On November 18, 2011,

¹ Exhibit D.

Homan sent a union leave request to DAS representative Jeff Panknen on behalf of Pothast.

Homan's union leave request for Pothast stated:

Mr. Panknen,

Please release Lynne Pothast (Iowa Veterans Home) on Paid Union Leave starting on the employees scheduled shift of Friday (December 2, 2011) and Saturday (December 3, 2011).

As per Article II - RECOGNITION AND UNION SECURITY, Section 4 - Union Leave, Paragraph C, Upon the request of the President of AFSCME Iowa Council 61 to the Chief Operating Officer of the Department of Administrative Services - Human Resources Enterprise, employees shall be granted a Union leave for other Union activities.

As per Article II - RECOGNITION AND UNION SECURITY, Section 4 - Union Leave, Paragraph D, 2nd Paragraph - At the Union President's written request, during periods of leave of thirty (30) calendar days or less, the Employer will continue to pay the employee's wages so that the employee's retirement contributions will be uninterrupted.

Please notify the appropriate supervisors and reply with approval at your earliest convenience.
Thank you.²

Article 2, section 4 of the collective bargaining agreement governs union leave and provides in relevant part:

Section 4 Union Leave

A. Elected constitutional officers of the Union and/or its affiliated locals/chapters shall, upon written request of the Union and/or its affiliated locals/chapters, be granted a leave of absence without pay for the term of office, not to exceed two (2) years.

² Exhibit B.

Appointed officials of the Union and/or its affiliated locals/chapters shall, upon written request of the Union and/or its affiliated locals/chapters, be granted a leave of absence without pay for the term of office, not to exceed two (2) years unless the absence of the employee would cause a substantial hardship on the operating efficiency of the employing unit.

The Employer agrees to provide the Union an explanation of why the request constitutes a hardship. Grievances involving the issue of whether a substantial hardship does, in fact, exist may be appealed directly to arbitration pursuant to Article IV of this Agreement.

Notwithstanding the above, elected or appointed officials of the Union and/or its affiliated locals/chapters may elect to take vacation or earned compensatory time in lieu of a leave of absence without pay.

B. These same elected officers shall be released for monthly local/chapter meetings and quarterly Council 61 meetings under the same rules as above. The employee will provide the employee's supervisor with ten (10) calendar days written notice for these meetings. A Union officer's leave supersedes any other scheduled leave of bargaining unit members. Any special meeting requiring less than ten (10) calendar days notice must be arranged through the Department of Administrative Services-Human Resources Enterprise (DAS-HRE). Union leave with less than ten (10) calendar days advance notice shall be limited to ten (10) days per employee per year.

C. Upon the request of the President of AFSCME Iowa Council 61 to the Chief Operating Officer of the Department of Administrative Services - Human Resources Enterprise, employees shall be granted a Union leave for other Union activities. Such leave(s) shall be limited to ninety (90) calendar days per person in each fiscal year. Pursuant to subsection A of this Section, the leave may be denied if the absence of the employee would cause a substantial hardship on the operating efficiency of the employing unit.

D. During Union leave without pay for thirty (30) calendar days or less, employees shall continue to accrue sick leave and annual (vacation) leave and the Employer will continue to pay the Employer's share of all insurances.

At the Union President's written request, during periods of leave of thirty (30) calendar days or less, the Employer will continue to pay the employee's wages so that the employee's retirement contributions will be uninterrupted. The Employer shall submit a billing including the dates of the leave and the number of hours used to AFSCME within thirty (30) calendar days of the end of the pay period in which the leave occurred. The billing will include gross wages including the Employer's share of retirement and federal payroll taxes paid during such periods of Union leave without pay. The Employer shall receive reimbursement from the Union within thirty (30) calendar days following receipt of the Employer's billing.³

Although the union leave provision did not change, the parties changed notification procedures in 2005 when Homan became Council 61 President. Instead of an employee requesting union leave pursuant to the collective bargaining agreement, Homan sent the request to a designated DAS representative. The request was then forwarded to the applicable State entity. During the 2011 – 2013 contract, Homan sent the request to Jeff Panknen with a copy to Carrie May, the DAS grievance coordinator.

As to IVH, May sent the email request to Kathy Bair, assistant to Penny Cutler-Bermudez, support services division administrator. If the leave request was for union leave, Bair would forward the email to both Cutler-Bermudez and Commandant Worley. Although the Commandant and Cutler-Bermudez

³ Exhibit A.

would meet and discuss whether the leave would create a hardship at IVH, it was the Commandant alone who determined whether union leave was approved or denied.

This notification procedure was used in the instant case. Homan emailed the union leave request to Panknen and May. May emailed the request to Bair who forwarded the request to Cutler-Bermudez and the Commandant. It is unclear as to when the meeting took place between the Commandant and Cutler-Bermudez. There is no question that IVH knew that the union leave request was for a "union function." Although there was extensive testimony with regards to whether DAS and IVH knew that the leave request was for the AFSCME's December Executive Board meeting, it is not relevant since Homan filed the request under section C (other union leave) instead of section B (quarterly Council 61 meetings). Cutler-Bermudez testified that when she and the Commandant met, staffing concerns were discussed and the various grievances played no role in the decision to deny the leave.

Five days later on November 23rd, Homan emailed Panknen a second time, noting that he had "not heard about this leave" request and asked that Panknen please check on it. There is no evidence in the record that this was done.

Six days later on November 29th, Commandant Worley emailed Cutler-Bermudez denying Pothast's union leave for December 2. The email stated:

This request is denied for Friday the 2nd. Lynne is not scheduled to work Saturday the 3rd. Lynne cannot be put into the normal staff rotation for her position which creates overtime and scheduling issues for the

hardship on IVH in terms of overtime payments and “keeping the budget in line.”

On December 1st, AFSCME filed the instant prohibited practice complaint with PERB.

CONCLUSIONS OF LAW

AFSCME alleges that the State committed prohibited practices within the meaning of Iowa Code sections 20.10 (1) and 20.10(2)(a) through (f) when it denied AFSCME Council 61 President Homan’s union leave request for Lynne Pothast, AFSCME Council 61, District IV’s representative.

In prohibited practice proceedings, the complainant bears the burden of establishing each element of the alleged prohibited practice. *See, e.g., AFSCME/Iowa Council 61*, 11 PERB 8146; *Sherrie Peters*, 10 PERB 8218. The State incorrectly argues that AFSCME must establish the element of “willfulness.” Due to a statutory change, “willfulness” was removed from the statute for prohibited practices that occurred subsequent to July 1, 2010. Consequently, AFSCME does not have to establish the “willful” element in this case. *See Iowa Code §20.10(2) (2011)*.

Alleged Unilateral Change:

AFSCME alleges that leave is a mandatory subject of bargaining contained within the collective bargaining agreement and that by denying union leave, IVH violated Iowa Code section 20.10(1). Although not specifically argued, it appears that AFSCME is claiming that by denying union leave, IVH unilaterally changed the union leave provision found in the collective

bargaining agreement without bargaining the change with AFSCME Council 61. The State did not advance an argument with regards to this alleged violation.

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). *See, e.g., Neil Kenneth Greenwald, Jr., 12 ALJ 8419; AFSCME/Iowa Council 61, 11 PERB 8146; Des Moines Independent Community School District, 78 PERB 1122.*

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:
 - 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 by this chapter.
 - f. Deny the rights accompanying certification granted in this chapter.

PERB case law concerning "unilateral change" is well settled. A public employer's bargaining obligation differs depending upon whether the mandatorily negotiable term is "contained in" or "not contained in" the collective bargaining agreement. If the proposed change is "contained in" the 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 given an opportunity to negotiate the proposed change to impasse. *See, e.g., Greenwald, supra; AFSCME/Iowa Council 61, 11 PERB 8146; Des Moines Independent Community School District, supra.*

Thus, the question before me is whether the State (specifically IVH) in denying the union leave request unilaterally implemented a change in the union leave provision of the collective bargaining agreement and thus violated the above-referenced sections. In order to prevail, AFSCME must prove (1) that the State implemented a change, (2) the change was to a mandatorily negotiable term in the collective bargaining agreement, and (3) that the State did not fulfill its bargaining obligation before making the change. *See, e.g., Greenwald, supra.*

It is clear from the evidence presented that the language did not change in the collective bargaining agreement nor did the State implement a change in the procedure used for union leave request. The procedure utilized in the instant case is the procedure adopted in approximately 2005. Council 61 President Homan made the request to a designated DAS-HRE representative who in turn forwarded the leave request to IVH.

The change that occurred was the result; IVH denied the union leave request. Whether IVH misinterpreted or misapplied the collective bargaining agreement are issues for a grievance arbitrator and not the function of PERB.

See, e.g., Greenwald, supra; College Community Education Association, 81 ALJ 1953.

Having found no change in either the collective bargaining agreement or in the procedure used, I cannot conclude that by denying union leave the State (specifically IVH) unilaterally altered the collective bargaining agreement in violation of Iowa Code section 20.10(1). Accordingly, AFSCME's allegations concerning sections 20.10(1), 20.10(2)(a), (e) and (f) are without merit.

Alleged Interference, Restraint, or Coercion of Chapter 20 Rights:

AFSCME has also alleged an independent violation of section 20.10(2)(a); that the denial of union leave interfered with, restrained or coerced Pothast in the exercise of her section 20.8(3) rights and thus constituted a prohibited practice within the meaning of section 20.10(2)(a). Independent violations occur when an employer violates subsection 20.10(2)(a) independent of other 20.10(2) subsections. *See, e.g., AFSCME/Iowa Council 61, 12 ALJ 8161.* AFSCME argues specifically that Pothast, by her duties as Local President and a member of the AFSCME Executive Board, was engaged in concerted activities for the purpose of mutual aid or protection. It further argues that IVH denied Pothast union leave for which she was entitled because she exercised her section 20.8(3) rights; and that the denial of union leave interfered with, restrained or coerced Pothast from exercising her rights guaranteed by the statute. The State did not advance an argument with regards to this allegation.

Section 20.8(3) guarantees the right to “[e]ngage in other concerted activities for the purpose of ... mutual aid or protection” PERB has not

specifically addressed whether attendance at a union board meeting is protected activity. Because the actions taken at AFSCME's Executive Board meetings could affect the rights of bargaining unit employees, I conclude that attendance at the December 2nd Executive Board meeting is concerted activity for the purpose of mutual aid or protection.

To establish interference under section 20.10(2)(a) a complainant need only to establish that the employer engaged in conduct which tended to interfere with the employee's free exercise of rights guaranteed by the statute. With these violations, an employer's motivation is not material nor does it matter whether the employee was in fact interfered with, restrained or coerced. *See, e.g., Greenwald, supra; General Drivers & Helpers' Union, Local 421, 93 ALJ 4826.*

In this case, Pothast had the contractual right to attend the AFSCME's Executive Board meeting pursuant to section 20.8(3). That right could be denied, however, under the collective bargaining agreement's union leave provision; Article 2, section 4(c) provides in relevant part that union leave may be denied "if the absence of the employee would cause a substantial hardship on the operating efficiency of the employing unit."

Although it is not within PERB's purview to determine whether the collective bargaining agreement has been breached, PERB may interpret contract language where necessary to resolve prohibited practice issues. *See, e.g., AFSCME/Iowa Council 61, 89 PERB 3499.* In order to legitimately deny leave under this provision, the leave must create "substantial hardship on the

operating efficiency of the employing unit.” Using the contractual standard of “substantial hardship,” I cannot conclude that the denial would in fact have created substantial hardship.

The Commandant denied Pothast’s leave because it created “overtime and scheduling issues for the facility.” There is no doubt that the nursing department in which Pothast was assigned struggled with staff call-ins. Staff were mandated frequently which resulted in overtime expenditures that could affect IVH’s budget parameters. In fact, the struggle was almost “on a daily basis.” However, on December 2nd, the date of Pothast’s leave, there were no extraordinary circumstances which would cause staff shortage to spike and significant overtime costs accrued.

Because it appears that December 2nd was typical, like any other day, I cannot conclude that her absence on this particular day would have affected the operating efficiency of IVH. Although the leave would create hardship due to staffing issues and overtime expenses, I do not find that granting this specific leave request would have resulted in substantial hardship. Without there being a finding of substantial hardship, I conclude there was no permissible reason to deny the leave request. Consequently, the denial of this leave request violated section 20.10(2)(a) and this denial of union leave interfered with Pothast’s right under the Act to attend AFSCME’s December Executive Board meeting in violation of section 20.10(2)(a).

PERB has previously held that a violation of Iowa Code section 20.10(2)(f) also occurs if the employer threatens an employee with adverse consequences

for engaging in protected concerted activities. *See, e.g., AFSCME/Iowa Council 61*, 89 PERB 3499. Because there is no evidence of any sort of threats made by IVH, I cannot conclude that the State (specifically IVH) violated section 20.10(2)(f).

Alleged Domination or Interference in Administration:

AFSCME alleges that the denial of union leave by IVH interfered with the administration of AFSCME in violation of Iowa Code section 20.10(2)(b) which provides:

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.

In the instant case, no arguments were advanced either by AFSCME or the State with regards to this section. The complaint appears to assert that the mere fact of denying Pothast's union leave constituted proof that IVH dominated or interfered with the administration of AFSCME Iowa Council 61.

Although it is conceivable that the denial of union leave could have affected AFSCME Council 61's December Executive Board meeting, there is no evidence in the record that Pothast's absence directly or indirectly affected the Board meeting, nor undermined AFSCME's ability to run its affairs. Because of this lack of evidence, AFSCME has failed to establish that the IVH dominated or interfered in the administration of the AFSCME Council 61 and thus failed to establish that the State (specifically IVH) committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(b).

Alleged Discrimination and Retaliation:

AFSCME also alleges that IVH denied Pothast's union leave in retaliation for participation in protected activity and that this retaliatory refusal was in violation of Iowa Code section 20.8(3), 20.10(1), 20.10(2)(a) through (f). The State asserts that the decision to deny union leave was based upon the operational needs of IVH.

Iowa Code sections 20.10(2)(c) and (d) address an employer's motive and prohibited conduct which encourages or discourages union membership or constitutes retaliation by an employer for an employee's union activities. See, e.g., *Kurt W. Rosenthal*, 10 ALJ 8027; *United Electrical, Radio and Machine Workers of America, Local 1145*, 08 PERB 7252. These two sections provide:

2. It shall be a prohibited practice for a public employer or the employer's designated representative to:
 - c. Encourage or discourage membership in any employee organization, committee or association by discrimination in hiring, tenure, or other terms or conditions of employment.
 - d. Discharge or discriminate against a public employee because the employee has filed an affidavit, petition or complaint or given any information or testimony under this chapter or because the employee has formed, joined or chosen to be represented by any employee organization.

In cases where there is a question whether the employer acted because of the employee's activities or due to some factor unrelated to protected activity, PERB applies the approach adopted by the National Labor Relations Board in *NLRB v. Wright Line (1980)* and later upheld by the United States Supreme Court in *NLRB v. Transportation Management Corporation*⁵ to determine whether the alleged discrimination was motivated by a desire to retaliate

⁵ 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed2d 667 (1983)

against an employee for having engaged in protected activities. *See, e.g., Cerro Gordo County v. PERB*, 395 N.W.2d 672 (Ia. Ct. App. 1986).

Under *Wright Line*, the initial focus is on the elements of the *prima facie* case; the existence of protected activity, knowledge of that activity by the employer and union animus. Proof of these three elements warrants at least an inference that the protected conduct was a motivating factor in the adverse personnel action and that a violation of the statute has occurred. The employer may rebut the *prima facie* case by either showing that the prohibited motivation played no part in its actions or demonstrates that the same personnel action would have taken place regardless of the protected activity. *See, e.g., Public Professional and Maintenance Employees, Local 2003*, 12 PERB 8216; *United Electrical, Radio and Machine Workers of America, Local 1145*, *supra*; *AFSCME/Iowa Council 61*, 04 PERB 6673 (all citing *Transportation Management Corp. supra*).

In the present case, Pothast was engaged in protected activity through her duties as president of the Local and District IV's vice-president. Furthermore, IVH was aware of these activities. Thus the focus is on IVH's motive for its actions and whether AFSCME has established the existence of union animus in order to establish a *prima facie* case.

It has long been established by PERB that employer motivation (i.e., the presence or absence of union animus) is a fact question with the findings based upon either direct or circumstantial evidence. *See, e.g., United Electrical, Radio and Machine Workers of America, Local 1145, supra; Public Professional and*

Maintenance Employees, Local 2003, supra. Like most cases before PERB, there is no direct evidence of union animus, thus a determination must be made whether there is sufficient circumstantial evidence to establish union animus. Evidence of motivation may be inferred from a variety of factors, such as:

The employer's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employee's union activities and their discharge (citations omitted).

See, e.g., Public Professional and Maintenance Employees, Local 2003, supra; United Electrical, Radio and Machine Workers of America, Local 1145, supra; AFSCME/Iowa Council 61, 04 PERB 6673; (all citing W.F. Bolin Co. v. NLRB, 150 LRRM 2833, 2837 (6th Cir. 1995)).

I cannot conclude that the evidence contained within the record supports a finding of improper motive behind IVH's decision to deny Pothast union leave. To establish union animus, AFSCME relies on the history of the litigious relationship between IVH and the Local as well as IVH's change in the reasoning for the denial of union leave.

AFSCME argues that the litigious relationship between IVH and AFSCME supports the inference of union animus and presents as evidence the seventeen grievances filed between late August and late November on behalf of or involving Pothast. PERB has previously found that pending grievances in and of themselves, are not conclusive evidence of animus, but can be probative to

show a strained relationship between the parties. *See, e.g., Fort Dodge Firefighters Association*, 97 PERB 5445, 5500 and 5526; *Melcher-Dallas Education Association*, 84 PERB 2467. Based upon the number of grievances filed, I conclude that there is a strained relationship between the parties. However, as to these grievances, there was no evidence that IVH refused to process these grievances or any evidence with regards to the way in which IVH processed these grievances which would support an inference that IVH's actions were improperly motivated.

AFSCME also argues that the testimony at hearing and the reason given in the denial were inconsistent and union animus can be gleaned from these inconsistencies. The reasons given in the denial (“creates overtime and scheduling issues”) and the testimony are not identical. However, I do not conclude that the testimony is inconsistent, but rather clarified the statement given in the denial. The nursing department struggled with staff call-ins on a daily basis. Even though volunteers were requested, employees were still being mandated to work and as a result overtime occurred which had budget implications. As a result, I cannot conclude that the differences in the explanations given infers union animus.

Based upon the record before me, AFSCME has not established a *prima facie* case that IVH's denial of union leave was motivated by union animus. As a result, I cannot conclude that the State (specifically IVH) committed prohibited practices within the meaning of Iowa Code sections 20.10(c) or (d).

In summary, I conclude that AFSCME has failed to establish that the State (specifically IVH) violated Iowa Code section 20.10(1) or 20.10(2)(b) through (f) as alleged in the complaint. However, I do find that AFSCME has established that the State (specifically IVH) violated Iowa Code section 20.10(2)(a) when it denied union leave for Lynne Pothast. Consequently, I propose the following:

ORDER:

The portion of AFSCME's prohibited practice complaint with regards to Iowa Code section 20.10(1) or 20.10(2)(b) through (f) is DISMISSED.

In order to remedy its violation of section 20.10(2)(a), the State (specifically IVH) shall cease and desist from interfering, restraining or coercing public employees by denying union leave unless "the absence would cause a substantial hardship on the operating efficiency of the employing unit" as provided in Article 2, section 4(c) of the 2011-2013 collective bargaining agreement.

DATED at Des Moines, Iowa this 20th day of March, 2013.

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