

**STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD**

IN THE MATTER OF:)

STATE OF IOWA (DEPARTMENT OF)
ADMINISTRATIVE SERVICES),)
Petitioner/Public Employer,)

and)

AFSCME IOWA COUNCIL 61,)
Certified Employee Organization.)

Case No. 8604

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PUBLIC EMPLOYMENT
RELATIONS BOARD

RULING ON NEGOTIABILITY DISPUTE

On January 15, 2013, the State of Iowa (Department of Administrative Services) filed its third amended petition for expedited resolution of negotiability dispute with the Public Employment Relations Board (PERB or Board)¹ pursuant to PERB rule 621—6.3, seeking a ruling on whether certain contract proposals offered by AFSCME Iowa Council 61 (Union) during the course of collective bargaining with the State are mandatory subjects of bargaining under Iowa Code section 20.9. The Board heard oral arguments on January 16, 2013, Leon Schearer and Ryan Lamb for the State and Mark Hedberg for the Union. Both parties submitted briefs.

On January 23, 2013, the Board issued a preliminary ruling on the negotiability petition. The State subsequently filed a timely request for a final ruling on each of the proposals set forth in its petition.

¹ Board member Jamie Van Fossen takes no part in this ruling.

I. STANDARD AND SCOPE FOR NEGOTIABILITY DISPUTES

Subjects of bargaining are divided into three categories: (1) mandatory subjects listed in section 20.9² on which bargaining is required if requested; (2) permissive subjects on which bargaining is permitted but not required (“other matters mutually agreed upon”); and (3) illegal subjects which are excluded by law from negotiations or which, if included in a collective bargaining agreement, would require or allow the violation of some other provision of law. *See, e.g., Charles City Cmty. Sch. Dist. v. PERB*, 275 N.W.2d 766, 769 (Iowa 1979) (hereinafter *Charles City CSD*). A proposal’s negotiability status is significant because only mandatory subjects of bargaining may proceed through statutory impasse procedures to binding arbitration, unless the parties agree otherwise. *Decatur County v. PERB*, 564 N.W.2d 394, 396 (Iowa 1997).

When determining whether a proposal is a mandatory subject of bargaining, the Board uses the two-pronged approach set forth in *State v. PERB*, 508 N.W.2d 668 (Iowa 1993) (hereinafter *State*), and *Northeast Community School District v. PERB*, 408 N.W.2d 46 (Iowa 1987), and endorsed

² Iowa Code section 20.9 provides that public employers and certified employee organizations representing public employees shall:

negotiate in good faith with respect to wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training and other matters mutually agreed upon. Negotiations shall also include terms authorizing dues checkoff for members of the employee organization and grievance procedures for resolving any questions arising under the agreement

in *Waterloo Education Association v. PERB*, 740 N.W.2d 418 (Iowa 2007) (hereinafter *Waterloo II*). First, the Board engages in a definitional exercise to determine whether the proposal fits within the scope of a specific term listed in section 20.9.³ *Waterloo II*, 740 N.W.2d at 429. If this threshold topics test is met, the next inquiry is whether the proposal is preempted or inconsistent with any provision of law. *Id.* Ordinarily, this two-step process resolves the question of negotiability. *Id.* However, in the unusual case where the predominant topic of the proposal cannot be readily determined, the Board will engage in a balancing-type analysis to resolve the issue. *Id.*

In determining whether a proposal comes within the meaning of a section 20.9 mandatory bargaining subject, PERB looks only at its subject matter and not its merits. *Charles City CSD*, 275 N.W.2d at 769. PERB must decide whether the proposal, on its face, fits within a definitionally fixed section 20.9 mandatory bargaining subject. *Waterloo II*, 740 N.W.2d at 429; *Clinton Police Dep't v. PERB*, 397 N.W.2d 764, 766 (Iowa 1986). In order to determine that, PERB does not merely search for a topical word listed in section 20.9. *State*, 508 N.W.2d at 675. Rather, PERB looks to what the proposal, if incorporated through arbitration into the collective bargaining agreement, would bind an employer to do. *Charles City CSD*, 275 N.W.2d at 774; *State*, 508 N.W.2d at 673. The answer to this inquiry reveals the subject, scope, or predominant characteristic or purpose of the proposal. *State*, 508 N.W.2d at 673; *Waterloo*

³ In *Waterloo II*, the Court explicitly rejected the “impingement” or “threshold balancing” test used in prior cases and specifically disapproved those cases to the extent they had employed such an approach. *Waterloo II*, 740 N.W.2d at 428.

II, 740 N.W.2d at 427. If the proposal's predominant characteristic, topic, or purpose is within a listed section 20.9 category, and the proposal is not illegal, it is mandatory. If the proposal's predominant characteristic, topic, or purpose is not within a listed section 20.9 category, and the proposal is not illegal, it is permissive.

When resolving a question of negotiability, the Board has no duty or right to judge the merits of a proposal. See *Waterloo II*, 740 N.W.2d at 431 (citing *Charles City CSD*, 275 N.W.2d at 769). It is up to the parties through negotiations, or arbitrators in impasse resolution proceedings, to adjudge whether any given proposal should be included in a collective bargaining agreement. *Id.* Nor does a ruling which concludes that a proposal is mandatory compel its inclusion in a collective bargaining agreement. Iowa Code § 20.9. Section 20.9 only requires that the parties negotiate mandatory topics in good faith.

Early Supreme Court cases espoused giving a narrow and restrictive meaning to the section 20.9 mandatory topics. See, e.g., *City of Fort Dodge v. PERB*, 275 N.W.2d 393, 398 (Iowa 1979); *Marshalltown Educ. Ass'n v. PERB*, 299 N.W.2d 469, 470 (Iowa 1980). Most recently, the Court has clarified that the section 20.9 mandatory topics are to be given their common and ordinary meanings, rather than their narrowest possible interpretations. *Waterloo II*, 740 N.W.2d at 429-30. They cannot, however, be interpreted so expansively that other mandatory topics become redundant. *Id.*

II. ANALYSIS

As stated above, the State has requested the Board issue a final ruling on the negotiability status of each of the proposals in the third amended petition. Following are the proposals and the Board's ruling on each.

PROPOSAL 1

Section 2 Dues Deduction

A. Upon receipt of a voluntary written individual order from any of its employees covered by this Agreement, on forms provided by the Union, the Employer will deduct from the pay due such employee those dues required as the employee's membership dues in the Union and fees for Union insurance programs.

The State requested a ruling on the underlined portion of this proposal only, conceding that the remaining portion of the proposal is mandatory under "dues checkoff." The Union argues that the underlined language is a mandatory subject of bargaining under the section 20.9 topics of "dues checkoff" and "insurance." The Board disagrees and concludes the underlined language is permissive.

The predominant topic of the underlined language is a payroll deduction for a Union-sponsored insurance program. The mere fact that a deduction is made from an employee's paycheck does not make a proposal addressing such deduction mandatory under dues checkoff. A deduction to pay for Union-sponsored insurance is not a Union membership due. Thus, the underlined language of the proposal is not mandatory under dues checkoff.

Nor is it mandatory under insurance. PERB has consistently held that insurance matters must reasonably relate to the employment relationship to be mandatory under the section 20.9 topic of insurance. *See Area IV Cmty. Coll.*

Educ. Ass'n & Merged Area IV Sch. Dist., Nos. 663 & 674, at p. 4 (PERB Apr. 9, 1976); *City of Waterloo & Waterloo Police Protective Ass'n*, Case Nos. 4168 & 4238, at p. 4 (PERB July 20, 1990) *aff'd Waterloo Police Protective Ass'n v. PERB*, 497 N.W.2d 833 (Iowa 1993). Here, the insurance program is not related to the employment relationship, but rather the employee's relationship with the Union. The underlined language of proposal 1 is, therefore, permissive.

PROPOSAL 2

Section 2 Dues Deduction

* * *

H. The Employer agrees to deduct from the wages of any employee who is a member of the Union a PEOPLE⁴ deduction as provided for in a written authorization. Such authorization must be executed by the employee and may be revoked by the employee at any time by giving written notice to both the Employer and the Union. The Employer agrees to remit any deductions made pursuant to this provision promptly to the Union, together with an itemized statement showing the name of the employee from whose pay such deductions have been made and the amount deducted during the period covered by the remittance. Reporting shall be consistent with Article II, Section 2(F).

The State contends that proposal 2 is illegal because it conflicts with Iowa Code section 20.26. PERB has previously ruled that a deduction similar to that described in proposal 2 did not conflict with section 20.26. *See In re*

⁴ At oral argument, the parties agreed PEOPLE is a political action committee.

*Pub. Prof'l & Maint. Employees, IUPAT Local 2003, Case No. 6678 (PERB July 28, 2003).*⁵

The Union argues that proposal 2 is mandatory under “dues checkoff.” The proposal’s primary purpose is to deduct a contribution to a political action committee from an employee’s paycheck. As addressed above, only proposals concerning dues deductions are mandatory under dues checkoff. Because proposal 2 is not illegal and does not fall under any of the section 20.9 subjects of bargaining, it is permissive.

PROPOSAL 3

Section 12 New Employee Orientation

The Employer will notify the local Union President/Chapter Chair within fourteen (14) calendar days that a new employee has been hired. The Employer will provide the name(s) and work location(s) of all new employee(s). One (1) representative of the local Union shall be part of the Employer's formal orientation and shall be granted up to thirty (30) minutes for Union orientation during the formal orientation for new employees either as a group or with individuals. New employees who are members of the bargaining unit will be required to attend the thirty (30) minute Union orientation in paid status. Non-bargaining unit employees will not be allowed to attend the Union orientation.

Where the Employer does not have a formal orientation program, the Employer will notify the Local Union President/Chapter Chair, within fourteen (14) calendar days, that a new employee(s) has been hired. The Employer will provide the name(s) and work location(s) of the new employee(s). The Employer will allow, as the Union may elect, either up to thirty (30) minutes for Union orientation with the new employee to be scheduled by the Employer within thirty (30) days of the date of hire, or the distribution to new employees represented by the Union a packet of information material furnished to the Employer by the local Union.

⁵ The Union’s position that section 20.26 violates the United States Constitution pursuant to the ruling in *Citizen United v. Federal Election Commission*, 558 U.S. 310 (2010), is not relevant to the negotiability analysis of the proposal at hand.

The Employer retains the right to review materials provided for new employees by the Union and refuse to distribute any political campaign literature or material detrimental to the Employer.

The Union representative shall be in pay status for the thirty (30) minute Union orientation only if the representative is on duty at the time the orientation is presented. No local Union representative shall receive overtime, call-back pay, etc., for participating in the employee orientation program while off duty. This does not supersede the current agreement on New Employee Orientation between the Union and the Department of Corrections. That agreement remains in effect.

Proposal 3 requires the employer to maintain or allow a union-conducted program to give new employees "union orientation." The Union urges the Board to rule it mandatory because the Union-run orientation described therein educates new employees on the mandatory topics of bargaining listed in section 20.9.

The maintenance or allowance of a union-conducted new employee orientation program, for whatever purpose, is not within the scope of any of the section 20.9 mandatory topics of bargaining. *Cf. State*, 508 N.W.2d at 675. Proposal 3 is a permissive subject of bargaining.

PROPOSAL 4

Section 9 Discipline and Discharge

* * *

Any disciplinary action or measure imposed upon an employee may be processed as a grievance through the grievance procedure. The Employer shall not discipline an employee without just cause, recognizing and considering progressive discipline where applicable. (See Appendix K for discipline related to attendance) Written reprimands, clarifications of expectations, or other similar memoranda shall be removed from the employee's personnel file after one (1) year provided no further disciplinary action has been taken against the employee.

The State requests the Board conclude that the underlined parenthetical is permissive and does not request a ruling on the remaining portion of the proposal. The parenthetical references “Appendix K,” which is addressed herein as proposal 10. For the reasons proposal 10 is permissive, so too is proposal 4.

PROPOSAL 5

Section 2 General Layoff Procedures

When a layoff or hours reduction occurs, the following general rules shall apply:

* * *

B. Layoff shall be by organizational unit.

(General Government, Board of Regents, and Community Based Corrections, see Appendix B; Department of Revenue, see Appendix Q)

The State requested that the underlined parenthetical of proposal 5 be deemed non-mandatory, arguing that this language impermissibly binds the State to an organizational structure. The Union argues this proposal falls squarely within the ambient of “procedures for staff reduction” and is mandatory.

The predominant purpose of this proposal is to define the groups of employees within which layoffs will occur. Defining such groups concerns the order and manner of layoffs and is well within the mandatory topic of procedures for staff reduction. *See Bettendorf & Dubuque Cmty. Sch. Dists.*, Case Nos. 598 & 602, at pp. 16-17 (PERB Feb. 3, 1976).

Contrary to the State's position, nothing in this proposal requires the State to maintain any particular organizational structure. While laying off employees by groups which do not coincide with the employer's actual organizational structure may result in cumbersome administration, such a concern goes to the merits of the proposal, not its negotiability. The underlined parenthetical is a mandatory subject of bargaining.

PROPOSAL 6

Section 2 General Layoff Procedures

When a layoff or hours reduction occurs, the following general rules shall apply:

* * *

C. An agency may not layoff permanent employees until they have eliminated all non-permanent employees within the layoff unit in the same classification in the following order: emergency, temporary, provisional, intermittent, trainee, and probationary. Employees in the layoff unit may volunteer for layoff with the most senior volunteer(s) being accepted. Employees may volunteer only with the agreement of the President of AFSCME Iowa Council 61.

Proposal 6 addresses the order and manner by which a staff reduction will be carried out, a topic routinely held mandatory as a procedure for staff reduction. *See, e.g., Bettendorf-Dubuque CSD*, Case Nos. 598 & 602, at pp. 16-17. However, in *Western Iowa Tech Community College and United Electrical, Radio & Machine Workers of America*, the Board held that "the scope of the mandatory bargaining duty is limited to the section 20.9 subjects as they apply to employees included in the bargaining unit." Case No. 8148, at pp. 5-6 (PERB Apr. 15, 2010) *aff'd United Elec., Radio & Mach. Workers of Am. v. PERB*, 810 N.W.2d 24 (Table), 2011 WL 6062038 (Iowa Ct. App. Dec. 7, 2011).

During oral arguments and in their briefs, the parties disputed whether “non-permanent employees within the layoff unit”, “emergency”, “temporary”, “provisional”, “intermittent”, “trainee”, “probationary”, and “employees in the layoff unit [that] volunteer for layoff” are employees included in the bargaining unit. For the reasons articulated in *Western Iowa Tech*, proposal 6 is mandatory to the extent the employees referenced therein are included in the bargaining unit and permissive to the extent they are not.

PROPOSAL 7

Section 3 Temporary Layoff Procedures

* * *

B. Prior to implementing a temporary layoff, the Employer will first terminate all non-permanent employees who perform similar duties including temporary service (i.e. Manpower, Olsten, etc.) employees.

Unlike proposal 6, the parties agreed that “temporary service (i.e. Manpower, Olsten, etc.) employees” are not employees within the bargaining unit. But like proposal 6, the parties disputed whether “non-permanent employees” are employees included in the bargaining unit. Because the scope of mandatory bargaining is limited to employees included in the bargaining unit, the underlined language in proposal 7 is permissive. The remaining portion of proposal 7 is mandatory to the extent the “non-permanent employees” are included in the bargaining unit and permissive to the extent they are not.

PROPOSAL 8

Section 12 Contracting and Job Security

A. When a decision is made by the Employer to contract or subcontract work which would result in the layoff of bargaining unit members, the State agrees to a notification and discussion with the local Union not less than sixty (60) days in advance of the implementation.

B. If, as a result of outsourcing or privatization following an Employer initiated competitive activities process, positions are eliminated, the Employer shall offer affected employees other employment within Iowa State government. Other employment shall first be sought within the affected employee's department and county of employment. Affected employees accepting other employment shall not be subject to loss of pay nor layoff pending placement in other employment under this Section. Neither shall such employees be subject to a decrease in pay in their new position. However, affected employees will not be eligible for any pay increase until such time as their pay is within their new pay grade range. In the alternative, employees may elect to be laid off.

Employees placed in other employment under this Section, as well as those electing to be laid off, will be eligible for recall to the classification held at the time of outsourcing or privatization, in accordance with Article VI of this Agreement.

The predominant purpose of subsection A of proposal 8 is to give notification and discussion about an employer's decision to outsource work. The Board has interpreted "procedures for staff reduction" to include matters involving the order and manner of how a staff reduction will be carried out, but has determined that the ultimate decision about outsourcing, privatizing, or subcontracting is not within the meaning of that mandatory topic. *Bettendorf-Dubuque CSD*, Case Nos. 598 & 602, at pp. 16-17. Because the discussion of the ultimate decision about outsourcing is not within the topic of procedures for staff reduction, subsection A of proposal 8 is a permissive subject of bargaining.

However, subsection B of proposal 8 reveals a different predominant purpose. Subsection B requires the employer to offer employees, whose positions would be eliminated due to outsourcing, the choice of either being laid off or being employed elsewhere within Iowa State government. It includes other procedures and restrictions on where the displaced employee can be employed and how the employee shall be paid. At its core, its predominant purpose is to designate a process for implementing a staff reduction that occurs due to outsourcing. It addresses what will happen to bargaining unit members once the employer has determined it will eliminate positions within the bargaining unit.

The State argues that the proposal's predominant purpose is not "procedures for staff reduction" because it requires the "[e]mployer to retain the size of its workforce." It contends that, in operation, the proposal makes outsourcing economically infeasible because it must maintain employment for displaced employees under the proposal. This argument relates to the merit of the proposal rather than the test of negotiability. While one possible consequence of this proposal may be that outsourcing becomes too costly to implement, in ruling on the negotiability of proposals,

it is not within our province to judge the merits of any proposal or the desirability of including it in a contract. A proposal may be eminently reasonable, and yet permissive under Section 9 of the Act, or may be outrageously unreasonable, yet mandatory. Our role must continue to be limited to judgments on the negotiability of proposals and not their merit. Whether they are included in a collective bargaining agreement is a matter which the act has appropriately left beyond our purview.

State of Iowa & AFSCME, Case No. 1000, at p. 7 (PERB May 12, 1977).

The reason for the staff reduction does not change the analysis here. Just as procedures for a staff reduction for financial reasons or reorganization must be bargained under section 20.9, so too must procedures for a staff reduction resulting from outsourcing work. That the proposal seeks a different type of procedure for the latter from the former goes to the merits of the proposal, not its negotiability.

The State alternatively argues the proposal is not mandatory because it fails the second part of the negotiability test. It claims the proposal is preempted and inconsistent with other law, specifically certain subsections of Iowa Code section 20.7. The State claims that the issue of subcontracting work has historically been determined to not be a mandatory subject due, in part, to the extensive management rights set forth in this statute. As previously stated, the Supreme Court has renounced the balancing of section 20.7 management rights with employee rights when determining the negotiability status of a proposal. *Waterloo II*, 740 N.W.2d at 428-29. It would be inappropriate to consider any inconsistency with section 20.7.

The State does cite to two PERB cases in which hearing officers concluded that the decision to outsource was not a mandatory subject of bargaining.⁶ The instant ruling on subsection B of the proposal does not alter PERB's position on the right to decide to outsource work. As reflected by the ruling on subsection A of proposal 8, the State may still do so. Subsection B

⁶ The State cites *Stagehands Local No. 67 & Veterans Memorial Auditorium Commission & F. Roger Newton*, Case No. 3311 (H.O. Feb. 2, 1987), and *Iowa City Education Association v. Iowa City Community School District*, Case No. 2049 (H.O. Apr. 13, 1982).

focuses on what happens once a decision to reduce staff has been made. Because the predominant purpose of subsection B of proposal 8 is to set out a process for implementing procedures for a staff reduction, it is mandatory.

PROPOSAL 9

Section 15 Labor/Management Meetings

A. The Employer and the Union agree to establish monthly Labor/Management meetings when requested by the appropriate Local/Chapter. The request to meet must be made no less than two (2) weeks in advance. The parties will agree to a date the meeting will be held. Each party may submit agenda items to the other no later than one (1) week prior to the meeting. The meeting will last no longer than two (2) hours, but may be extended by mutual agreement. Up to six (6) representatives from the Union and up to an equal number of Management will attend the meetings. The purpose of the meetings shall be to afford both Labor and Management a forum in which to communicate on items that may be of interest to both parties. The meetings are established as a communication vehicle only and shall not have authority to bind either the Union or Management with respect to any of the items discussed. Union representatives will be in pay status for all time spent in Labor/Management meetings. The Employer is not responsible for any travel expenses or other expenses incurred by employees for the purpose of complying with the provisions of this Article, except as provided by statewide Labor/Management meetings.

B. The Employer and the Union agree to establish quarterly meetings on a statewide level when requested by the Union for discussion of issues which were unresolved at the Local/Chapter level and which affect employees in AFSCME bargaining units. Agenda items shall be exchanged at least two (2) weeks prior to the meeting. One (1) Union representative from each Local/Chapter and up to an equal number from Management will attend the meetings in pay status. Any employee who must travel more than twenty (20) miles will be reimbursed for mileage expense only. Such reimbursement shall be at the rate established by the Iowa Department of Administrative Services policy. Union members will attempt to car pool when possible. (Motor Vehicle Enforcement and Drivers [sic] License Stations, see Appendix I; Community Based Corrections, see Appendix S; Iowa Workforce Development, see Appendix T)

A facial review of proposal 9 reveals its predominant purpose is to establish and maintain labor management committees. The Supreme Court has held that the establishment and operation of labor management committees for any purpose is not a mandatory subject of bargaining. *State*, 508 N.W.2d at 675. Proposal 9 is a permissive subject of bargaining.

PROPOSAL 10

APPENDIX K ATTENDANCE POLICY

This document constitutes a letter of understanding between AFSCME Iowa Council 61 and the Employer regarding attendance policies. The parties agree that attendance policies that are currently in place will remain intact unless mutually agreed upon otherwise.

Policies which may be developed during the term of this Agreement will be done with Union input.

The Union argues that the attendance policy outlined in proposal 10 *implicitly* affects employee evaluations and/or safety. On its face, the predominant purpose of the proposal is the maintenance of an attendance policy. Attendance policies do not fall under any of the section 20.9 subjects, and therefore, proposal 10 is a permissive subject of bargaining.

PROPOSAL 11

APPENDIX M BOARD OF REGENTS (BOR)

A. Board of Regents Institutions

1. On a monthly basis, the Employer will provide the local Unions with a list of all employees considered to be confidential. The list shall include each employee's name, classification, seniority date and work location.

The Employer will furnish the data fields specified in Article II, Section 2(F), monthly to both AFSCME Iowa Council 61 and the Regents local Unions on standard microcomputer disk at no cost to the Union.

The Union argues proposal 11 is mandatory because the monthly list provides seniority and job classification information. The Board disagrees. The primary purpose of the proposal is to provide a list of confidential employees to the Union. Seniority and classification are merely two of the data points included on the list. A list of confidential employees does not fit into any of the mandatory topics of bargaining, and therefore, proposal 11 is permissive.

PROPOSAL 12

APPENDIX U--MEMORANDUM OF UNDERSTANDING #7 Union Security Provisions

If "fair share" type legislation is passed and signed by the Governor for State of Iowa employees, the Employer agrees to implement the legislation as mandated.

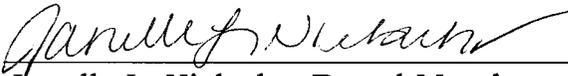
The Union understands and agrees that the Governor has a constitutional obligation to consider and determine whether or not to sign any legislation presented to him, that no fair share legislation has been passed by the Legislature at this time, and that this proposal (and any contract into which this proposal may be incorporated) does not limit or impair in any way the exercise of the Governor's constitutional obligation regarding the enactment of legislation.

Proposal 12 requires the State to implement legislation if it becomes law. Its primary purpose is not, as the Union argues, to address dues checkoff. Although such a provision may do no more than outline the State's duty to follow the law, section 20.9 does not require an employer to bargain over the inclusion of such a statement. Proposal 12 is therefore permissive.

DATED at Des Moines, Iowa, this 8th day of February, 2013.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: 
James R. Riordan, Chair


Janelle L. Niebuhr, Board Member

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