

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME IOWA COUNCIL 61, Complainant,)	
)	
and)	CASE NO. 8693
)	
STATE OF IOWA (DEPARTMENT OF CORRECTIONS),)	
Respondent.)	

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PUBLIC EMPLOYMENT
RELATIONS BOARD

PROPOSED DECISION AND ORDER

On September 9, 2013, the Complainant, AFSCME Iowa Council 61 (AFSCME), filed the present prohibited practice complaint with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 20.11 (2013) and PERB rule 621—3.1(20). The complaint alleges that Respondent, the State of Iowa, Department of Corrections (the State), committed prohibited practices within the meaning of Iowa Code sections 20.10(1), and 20.10(2)(a), (e), and (f) by making a unilateral change to a mandatory subject of bargaining “contained in” the parties’ collective bargaining agreement. Alternatively, the complaint alleges that even if the change was to a mandatory subject of bargaining *not* “contained in” the collective bargaining agreement, the State still violated the above sections by not bargaining to impasse with AFSCME prior to implementing the change. Specifically, AFSCME claims the State posted job positions that current employees could transfer to in a manner inconsistent with the transfer procedures set forth in the parties’ collective bargaining agreement without obtaining AFSCME’s consent or giving AFSCME an

opportunity to bargain over the matter. The State denies committing any prohibited practice.

An evidentiary hearing was held at the PERB offices on February 4, 2014. AFSCME was represented by Mark Hedberg and the State was represented by Jeffrey Edgar. The parties submitted post-hearing briefs, the last of which was received on April 14, 2014. Having reviewed the record and arguments of the parties, I issue the following proposed findings of fact, conclusions of law and order.

FINDINGS OF FACT

The State is a public employer under Iowa Code section 20.3(10) and AFSCME is an employee organization under section 20.3(4). AFSCME is certified as the exclusive bargaining representative for a bargaining unit of State employees, including some working at the Iowa State Penitentiary in Fort Madison for the Iowa Department of Corrections. Danny Homan is the president of AFSCME Council 61 and its chief negotiator. Mike Fraise is the president of AFSCME Local 2989 and provides direct union leadership to AFSCME bargaining unit employees at the Iowa State Penitentiary.

Article VII of the collective bargaining agreement between AFSCME and the State sets forth procedures for employees to transfer from one position to another. Section 2 describes how the State shall post openings and how an employee shall submit a request for transfer. It states in relevant part,

Section 2 Transfers Within Employing Units

- A. The Employer shall post all openings indicating the specific location, shift, work unit and days off. Specific location shall be

defined as the organizational unit of the agency. Specific shift shall be defined as the hours of work. Specific work unit shall be defined as the area inside of the organizational unit where the employee performs his/her work. Specific work unit can be defined as rotating post or relief post. Specific days off shall be the days off that are assigned to the position.

A period of five (5) work days from the date of the announcement shall be allowed for interested employees to file a written request to be included in the group of applicants to be considered for that vacancy. At the close of the five (5) work day posting period, the Employer will review those requests from any employee in the same employing unit who is in the same classification as the vacancy. When an employee applies for a posted position and has not removed his/her name by the close of the posting, the employee must accept the job, if offered. The Employer shall offer the position to the most senior bargaining unit employee who has filed a transfer request. In the event an employee is the most senior bidder for more than one (1) position simultaneously, he/she shall immediately accept one (1) of the positions.

Prior to August 2011, open job positions were posted at the Iowa State Penitentiary in the following manner:

Assignment	SUN	MON	TUE	WED	THU	FRI	SAT
Unit Officer 218/318	5:30am/ 1:30pm	5:30am/ 1:30pm	5:30am/ 1:30pm	5:30am/ 1:30pm	Off	Off	5:30am/ 1:30pm
Tower #7	5:30am/ 1:30pm	5:30am/ 1:30pm	5:30am/ 1:30pm	5:30am/ 1:30pm	Off	Off	5:30am/ 1:30pm
A/O Relief	Off	9:30pm/ 5:30am	9:30pm/ 5:30am	9:30pm/ 5:30am	9:30pm/ 5:30am	9:30pm/ 5:30am	Off

Under the contract, postings must include four items: (1) specific location, (2) specific shift, (3) specific work unit, and (4) specific days off. The examples above show the specific location,¹ shift and days off. The contract states,

¹ Under the contract, “[s]pecific location [is] defined as the organizational unit of the agency.” Appendix B of the contract lists organizational units for purposes of transfers. For the Department of Corrections, the organizational units are listed as “Institutions” and “Central

“[s]pecific work unit shall be defined as the area inside of the organizational unit where the employee performs his/her work. Specific work unit can be defined as rotating post or relief post.” In the above examples, the work units appear to be listed as “Unit Officer 218/318,” “Tower #7” and “A/O Relief.” “Unit officer” identifies the position and “218/318” identifies the specific physical area or work station for the position, cell house 218/318. “Tower #7” also identifies a specific physical area. “A/O Relief” stands for “activities officer” and is a floating or relief position that provides staff coverage when others call in sick, are on vacation or when coverage is needed for other reasons. Because an activities officer position works in various physical locations, no specific cell house, tower or other work station is specified in the posting.

Bargaining unit members prefer postings to list a specific physical area or work station because it impacts their decision on whether to apply for a transfer to the position. For example, some cell houses are designated for inmates with disciplinary problems which require officers to have more physical contact with inmates while other cell houses are designated for inmates with a lower risk of disciplinary problems. Similarly, some towers are preferable to others depending on their location and corresponding responsibilities.

Office.” While the Iowa State Penitentiary is not listed for each individual job posting in the above example, the heading of the pre-August 2011 bid sheet admitted at hearing showed that all postings were for the Iowa State Penitentiary.

On August 24, 2011, the director of the Department of Corrections, John R. Baldwin, sent a letter to the director of the Department of Administrative Services, Mike Carroll, and Danny Homan. The letter stated,

The following is the Iowa [D]epartment of Correction's abrogation of a past practice that was not required by the provisions of the Collective Bargaining Agreement between the State of Iowa and [AFSCME].

Vacancies in the Iowa Department of Corrections will be posted in accordance with Article VII, Transfers and Appendix B, Organizational and Employing Units of the 2011-2013 Collective Bargaining Agreement.

Employing Unit, for purpose of transfer, is defined in Appendix B as the Institution in which the vacancy occurs or D.O.C. Central Office. Because of the physical distance between the Anamosa State Penitentiary main site and the Luster Heights Camp, vacancies at the Luster Heights Camp shall be posted as Anamosa State Penitentiary/Luster Heights.

Location is defined in Article VII of the Collective Bargaining Agreement as "the organizational unit of the agency." Organizational Units within the Department of Corrections include: Security, Treatment, Support, Health Services, and Administration.

Specific Work Unit is defined in Article VII of the Collective Bargaining Unit as "the area inside of the organizational unit where the employee performs his/her work." For purposes of transfers in accordance with Article V[II], ". . . area . . ." is considered "the scope of a concept, operation, or activity" (Merriam Webster Dictionary).

Examples of Specific Work Units include:

For Security; Activity Officer as assigned

For Treatment; Psychological Services, Recreation, etc.,

For Support; Food Services, Maintenance, Business Office, etc.,

For Health Services; Nursing, Pharmacy, Dental, etc.

For Administration; Human Resources, Safety, Records, etc.,

Please contact Susie Pritchard or Jeff Panknen if you have any questions or if you need additional information.

Although the letter did not expressly state what past practice the Department of Corrections was abrogating, it noted the department would be posting future vacancies according to what it understood was required by the contract. The implication of the letter was that the Department of Corrections would no longer identify specific physical locations or areas (e.g. cell house 218/318 or Tower #7) in postings for vacancies. After receiving the letter, AFSCME filed a grievance claiming that the State's revised method of posting vacancies was a violation of several provisions of the collective bargaining agreement, including the transfer procedures set forth in Article VII, section 2.

Nearly two years later, on June 6, 2013, an evidentiary hearing on the issue was held before arbitrator, Steven G. Hoffmeyer. Hoffmeyer issued an award on August 12, 2013. Although the arbitrator did not expressly conclude that the State violated any provisions of the contract, the arbitrator upheld the grievance. The arbitrator noted that the State's past practice of posting vacancies was inconsistent among the various corrections institutions. Thus, at some institutions a specific physical area or work station would be posted and at other institutions, the position would be generally described as a rotating, relief, vacation or activities officer position with no physical work area or work station specified. The arbitrator ordered that

from September 1, 2013 all future postings shall provide the specific information that had been provided in the past at the locations where specific information was posted in the past. Where positions had been posted as relief/rotating/activities as of August 23, 2011, those postings may continue in that manner.

The arbitrator did not require the State to re-post any job openings that had been posted between August 24, 2011 (the date of the Department of Corrections letter) and September 1, 2013.

Meanwhile, the State was in the process of constructing a new facility at the Iowa State Penitentiary. The new facility has a different physical design than the old facility and the administration intends to implement a different style of security management with the new facility. The old facility had cell houses and officers were stationed at an office in each cell house. The officers interacted with inmates for the most part when they performed periodic checks. The new facility has housing unit blocks organized like the spokes on a wheel. In the center of the wheel is a work station for officers but there is no office. Officers will be expected to have more ongoing supervision of inmates rather than periodic checks and they will also have more interaction with other security staff including counselors and psychologists. In the new facility, inmates will still be assigned to specific housing units based on their needs. Thus, one housing unit will be designated for those with disciplinary issues, one will be designated for those with medical issues, and two will be designated for the general inmate population. The administration hopes this style of management will give “staff the ability to keep small problems as small problems prior to escalating into larger problems.” The Department of Corrections also wants more flexibility to pull officers from one physical location to another as demands arise and thus resists designating jobs for specific physical areas.

In the summer of 2013, the State began planning for the posting of jobs to staff the new facility. This required the Department of Corrections to identify all of the jobs that needed to be filled, posting them, and allowing bargaining unit members to apply for transfers or “bid” for positions according to their seniority.

On August 12, the same day the arbitration award was issued, the Department of Corrections sent an email to Iowa State Penitentiary employees stating,

Effective 8/26/13, we will begin the process of bidding the new facility. Personnel staff will call each security staff person, by seniority, to ask them what shift and days off they would like. After this has been completed, the captains and unit managers will sit down with the staff on each shift and determine where the officer will be assigned.

On August 15, approximately fourteen positions were posted. The posting appeared in the following format:

Subject: Posting
EMPLOYING UNIT – IOWA STATE PENITENTIARY
ORGANIZATIONAL UNIT – SECURITY
SPECIFIC WORK UNIT – ACTIVITY OFFICER AS ASSIGNED

Also on August 15, AFSCME’s attorney, Mark Hedberg, sent correspondence to the arbitrator alleging that the Department of Corrections’ posting and bidding process for the new facility was in violation of the collective bargaining agreement. Hedberg further stated,

The delay in the effective date of the [arbitration] award will [a]ffect hundreds of employees. This harm is far greater than any disruption caused by not implementing the award sooner. At this time, the undersigned respectfully requests [] a supplemental hearing be scheduled and held to modify the award to reflect an

effective date of August 12, 2013. Furthermore, that all current postings be stayed pending resolution of this matter.

The next day the State responded to the arbitrator opposing AFSCME's request. The State argued that modification of the award was inappropriate, that AFSCME had alternate forums to pursue complaints about the posting and bidding process of the new facility, and that the arbitrator did not retain jurisdiction in its August 12 award.

Arbitrator Hoffmeyer issued a supplemental decision on August 18, 2013. He noted that at the time of the arbitration hearing, he was unaware that the State was preparing to post positions for the new facility. He determined that the State anticipated an unfavorable result in the arbitration award and therefore rushed to complete the posting and bidding process for the new facility before the award would go into effect. The supplemental award stated in part,

[A]t the time of the hearing and extensive briefings by the Parties, there was no indication such a major posting process was being contemplated by the Employer, especially with the first appearance of a new step in the process – personnel staff calling all Correctional Officers on a specified date and requesting an immediate response to their preferences for shift and days off. This step is new and not contained in the extensive testimony, exhibits, nor briefs of the Parties spanning about 25 years of collective bargaining history and past practice. This new step and the rush from August 15 to August 26 is apparent in attempting to achieve an ending to this posting process prior to the September 1, 2013 date specified in the award which will have other joint Party steps to undertake in regards [to] postings.

No supplemental hearing will occur. However, I will add that this Employer action was obviously in contemplation of an adverse arbitration award and the current grievance. This is directly contrary to the intent if not the specific language of the award based on that grievance and arbitration. The Employer's actions were based on the current grievance as Parties were notified on the

last hour of the hearing, on June 6, when a brief exchange date of July 15 was established that it is this arbitrator's practice to issue the award within 30 days of the receipt of the briefs. Thus, the Parties were well aware the award would be issued no later than August 15, 2013. The Employer would not have undertaken this action had they thought the award would be on their behalf. There is no other reasonable way to view such rushed action, with its own unique step of personnel staff conducting the bidding process, once again posted contrary to the very same issue of this grievance, and directly in contravention of this extensive grievance process just concluded.

As the Employer's actions are viewed as violative of the just concluded grievance process and arbitration award, they, and any same or similar pre-September 1, 2013 posting actions are stricken and shall not stand.

On August 23, the Department of Corrections sent an email to Iowa State Penitentiary staff stating,

With the arbitration decision rendered we will be postponing the rebid process. The new time table will be:

1. Tuesday August 27, 2013 information will go out to all staff noting more specified job assignments above and beyond shift and days off
2. The re-bid process for positions at the new institution will start on September 2, 2013

I would like to thank you all for your patience in this matter. I look forward [to] completing this step in the process so we can continue forward with the transition process to the new facility. Have a great weekend.

A follow-up email was quickly sent thereafter stating: "Correction. Rebid will start September 3, 2013 due to Labor Day."

On August 27 the Department of Corrections sent an email explaining the posting and bidding process. It stated,

Effective September 3, 2013, we will begin the process of bidding the new facility. Personnel staff will contact each security staff person, by seniority, to advise they are to report to Personnel to select what shift, days off and post they are requesting. An example of a bid

will be Housing Unit (all) – A/O [activities officer] (this will include HU [housing unit] 1 thru 4 and JBC); Programs – A/O (this would include library, chapel, industries, etc), etc. The (-) symbol indicates and/or. Attached [are] the bid sheets that show what is available.

IF you are scheduled to be on vacation for a period of time starting September 3 and feel we may not be able to get a [] hold of you, please let Personnel know of your top 3 choices for shift and days off on the attached New Facility Bid Sheet. You will be contacted one way or the other and we will not move to the next person in seniority until you are contacted.

Note: The night shift will be 10 hour shifts of 9:00 pm/7:00 am. In addition, you should also be aware that since we are rebidding the entire institution you will not be losing your bid rights. The seniority list is attached for your review.

The bid sheets attached to the email contained 283 position postings, and appeared in the following format:

DAY SHIFT (HOURS AS ASSIGNED)
SUNDAY/MONDAY OFF
HU (all) – A/O

AFTERNOON SHIFT 1:30 PM – 9:30 PM
SUNDAY/MONDAY OFF
TOWERS – A/O

NIGHT SHIFT 9:00 PM – 7:00 AM
THURSDAY/FRIDAY/SATURDAY NIGHTS
PERIMETER – A/O

Nearly all of the postings in the bidding sheets did not list specific physical locations or work stations. Instead of listing a specific housing unit or tower, the posting stated HU (all) or TOWERS. All but four of the positions were listed as relief positions, indicated by A/O or “activities officer.” Specific

physical areas or work stations were not listed because the department wanted to have flexibility to move officers to different locations in the facility and because it was the department's position that the arbitrator award did not apply to the new facility. The day shift positions did not list specific hours but specific hours were listed for afternoon and night shift postings. Starting September 3, the bid sheets were posted on the fourth floor of the Iowa State Penitentiary. Following the posting, employees were called in order of seniority to select positions from the bid sheets.

Prior to sending out the August 27 email, no one on behalf of the Department of Corrections contacted AFSCME's president, Danny Homan, to obtain AFSCME's consent for the manner of posting and bidding for the new facility or to bargain transfer procedures for the new facility. However, both sides were aware that there was disagreement about the job bidding process planned for the new facility. Both parties knew of the recently issued arbitrator decisions on the matter. Furthermore, through monthly labor relations meetings at the Iowa State Penitentiary and state-wide labor management meetings for the Department of Corrections, AFSCME representatives were aware that administrators were working on a plan for bidding the new facility. The warden for the Iowa State Penitentiary, Nick Ludwick, also had discussions with the local president, Mike Fraise, and local vice president, Diana Gerveler, about the bidding process.

On September 1, 2013, AFSCME filed a grievance alleging that the bidding process set out in the August 27 email was in violation of the collective

bargaining agreement. On September 9, AFSCME filed the present prohibited practice complaint stating that “[o]n August 27, 2013, the employer posted job bids in violation of Article[] VII of the Collective Bargaining Agreement” without first obtaining AFSCME’s consent or giving it an opportunity to bargain the subject to impasse. On September 10, AFSCME filed an “application to enforce and confirm arbitration award” at the Polk County District Court contending that the State’s posting and bidding process set out in the August 27 email was in violation of the arbitrator’s supplemental award and requesting the Court order the State to post jobs as described in the arbitrator’s awards.

On September 16, there was a meeting at the Iowa State Penitentiary about the grievance filed September 1. Participants included Warden Nick Ludwick, the deputy warden, Department of Corrections director of human resources Susie Pritchard, AFSCME President Danny Homan, Local President Mike Fraise, and Local Vice President Diana Gerveler. At that meeting, Warden Ludwick proposed to discuss the bidding process with President Homan and suggested the parties adopt a letter of understanding about the posting and bidding issue. Homan declined to negotiate. He believed that he should have been consulted prior to the department initiating a bidding process for the new facility different than that set out in the collective bargaining agreement and that at this stage, the proper course was for the department to repost the bid sheets in accordance with the contract and arbitrator awards. He also believed none of the administrators at the meeting had the authority to negotiate a letter or memo of understanding on behalf of the State.

On September 20, the Department of Corrections sent an email to the Iowa State Penitentiary correctional officers stating,

Just advising you that the hours below have been assigned for the day shift for the new institution bidding process:

All Transport Officers – AO: Hours as Assigned
All Activities Officers: Hours as Assigned
Housing Units (All) – AO: 6 am to 2 pm
Program Officer – AO: All but 2 will be posted as 7 am to 3 pm, two (2) will be posted as 6:30 am to 2:30 pm
Gatehouse – AO: 6:30 am to 2:30 pm
Food Service Security – AO: 4:30 am to 12:30 pm
Towers – AO: 6 am to 2 pm
Reception – AO: 6 am to 2 pm
Laundry – AO: 6 am to 2 pm
Clothing – AO: 6 am to 2 pm
Visitation Officer – AO: 7 am to 5 pm

Shortly after the email was sent, local president Mike Fraise replied stating, “I believe you will have to start the bidding process over because you have changed the original bid by placing hours on them[], there[]by changing the bid. [T]his would be a violation of the contract.”

CONCLUSIONS OF LAW

AFSCME, as the complainant, bears the burden to establish that the State committed a prohibited practice. *Service Employees Int’l Union, Local 199 & Broadlawns Med. Ctr.*, 05 PERB 6894 at 5; *United Elec., Radio & Mach. Workers of Am. Local 886 & Tama County*, 05 PERB 6756 at 6-7. AFSCME alleges the Department of Corrections’ email of August 27, 2013 announcing job positions and setting forth the bidding procedures for the new facility at the Iowa State Penitentiary is inconsistent with the transfer procedures “contained in” the parties’ collective bargaining agreement and the State’s failure to obtain

AFSCME's consent prior to implementing different transfer procedures is a prohibited practice. Alternatively, it argues that even if the posting and bidding procedures addressed in the email are matters not "contained in" the collective bargaining agreement, the State's failure to give AFSCME an opportunity to bargain the matter to impasse is a prohibited practice. It claims the State's action amounts to a unilateral change in a mandatory subject of bargaining in violation of Iowa Code section 20.10(1) and sections 20.10(2)(a), (e) and (f) (2013). 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 in this chapter.

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

....

It is well established that an employer's unilateral change in a mandatory subject of bargaining without fulfilling its required bargaining obligation constitutes a violation of Iowa Code sections 20.10(1), and 20.10(2)(a), (e), and (f). *AFSCME Iowa Council 61 & Louisa County*, 11 PERB 8146 at 10-11.² The Board has described the parties' responsibilities to negotiate changes during the term of a collective bargaining agreement as follows:

² Citing *Des Moines Educ. Ass'n & Des Moines Cmty. Sch. Dist.*, 78 PERB 1122; *Municipal Laborers, Local 353 & City of Waterloo*, 01 PERB 6171.

First, during the life of the contract, neither party has a duty to discuss any proposed modification of any term “contained in” that contract, and the Board has held it a corollary that neither party may lawfully insist on such a discussion. Thus, a mid-term modification of any such “contained in” term may be lawfully made only after the consent of the opposing party has been voluntarily given.

Second, even if not “contained in” the contract, neither party may lawfully during the contract term implement a change in wages or other working conditions³ unless it has first bargained with the other party, that is, has given notice of the change and an opportunity to negotiate about it to impasse. (Usually the employer will seek to make the change and the union to resist it). In short, the duty not to make unilateral changes on mandatory bargaining subjects subsists during the contract term as well as during negotiations. *Gorman*, Labor Law, Unionization and Collective Bargaining, at 457 (1976).

AFSCME/Iowa Council 61 & Louisa County, 2011 PERB 8146 at 11 (quoting *Des Moines Indep. Cmty. Sch. Dist.*, 78 PERB 1122).

“In order to prevail in a unilateral change case . . . the complainant 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.” *AFSCME Local 231 & Linn County*, 07 H.O. 7148 at 16.⁴ I will address each of these elements in turn.

³ Iowa’s mandatory topics of bargaining differ from those in the private sector. Whereas the National Labor Relations Act which governs private sector labor negotiations requires bargaining over “wages, hours, and other terms and conditions of employment . . .” Iowa’s law provides a specific list of mandatory topics of bargaining. Compare 29 U.S.C.A. § 158(d) with Iowa Code § 20.9. Therefore, in Iowa, notice and opportunity to bargain are not required for “other working conditions” but are required for any change in a mandatory topic of bargaining listed in section 20.9. Thus a more accurate statement of Iowa’s law would be,

Second, even if not ‘contained in’ the contract, neither party may lawfully during the contract term implement a change in wages or other *mandatory topic of bargaining* unless it has first bargained with the other party, that is, has given notice of the change and an opportunity to negotiate about it to impasse.

⁴ Citing *Des Moines Educ. Ass’n & Des Moines Indep. Cmty. Sch. Dist.*, 78 PERB 1122; *Charles City Cmty. Educ. Ass’n & Charles City Cmty. Sch. Dist.*, 90 PERB 3764; *Cedar Rapids Ass’n of*

Change Implemented

The first step in analyzing a unilateral change case is to identify what alleged change is at issue and when it was implemented. AFSCME's complaint alleges that the Department of Corrections implemented a change in posting and bidding procedures in its email of August 27, 2013.

In analyzing unilateral change cases, the Board and hearing officers have, at times, determined whether a change was made by first identifying the "status quo," or the procedures, policies and practices that were in operation at the time of the alleged change. See *Cedar Rapids Ass'n of Fire Fighters, Local 11 & City of Cedar Rapids*, 95 PERB 4898 at 11-13; *Greenwald & Muscatine Cmty. Sch. Dist.*, 12 H.O. 8419 at 6-7; *AFSCME Local 231 & Linn County*, 07 H.O. 7148 at 16.⁵ The determination of whether a change occurred often cannot be made solely by reference to terms in the collective bargaining agreement. In some instances, changes are made to procedures, policies and practices not addressed by the contract or are peripheral to the contract's terms. See *Cedar Rapids Ass'n of Fire Fighters, Local 11 & City of Cedar Rapids*, 97 PERB 5129 at 15 (stating that many aspects of the mandatory topic

Firefighters, Local 11 & City of Cedar Rapids, 95 PERB 4898; *City of Cedar Rapids & Cedar Rapids Ass'n of Firefighters Local 11*, 97 PERB 5129; *Waterloo Police Prot. Ass'n & City of Waterloo*, 01 PERB 6160.

⁵ This step is useful in determining whether a change actually occurred and whether the complaint was timely filed after the employer implemented the allegedly unlawful change. *Cedar Rapids Ass'n of Fire Fighters, Local 11*, 95 PERB 4898 at 11-12 (examining the status quo of an employer's sick leave policy to determine whether the employer's revision of the policy actually implemented any change); *Greenwald*, 12 H.O. 8419 at 7 (finding that a change in the status quo occurred over two years prior to the filing of the complaint and therefore, even if the change was unlawful, the claim would be time-barred); *AFSCME Local 231*, 07 H.O. 7148 at 16-17 (dismissing a case alleging an unlawful unilateral change when there was insufficient evidence of the "status quo" practice to aid the determination of whether the employer actually implemented a change).

at issue in the case were administered by guidelines and practices that were in place for years, yet never expressly included in the parties' contract); *Cedar Rapids Ass'n of Fire Fighters, Local 11*, 95 PERB 4898 at 11-12 (noting that some policies and procedures concerning mandatory subjects of bargaining may not be embodied in the contract and yet, the policies are not necessarily null and void). In other cases the procedures, policies or practices may be entirely inconsistent with the contract yet is the "status quo" that the parties have operated under.

Additionally, in making the determination of whether a change occurred, PERB's role is not to enforce collective bargaining agreements or decide when a contract is violated. See Iowa Code § 20.17(5) (providing that collective bargaining agreements may be enforced by a civil action in district court); § 20.18 (allowing parties to negotiate procedures for resolving grievances concerning interpretation and application of collective bargaining agreements, including submitting the issue to binding arbitration); *Greenwald*, 12 H.O. 8419 at 7. But PERB does have authority to interpret a contract's terms when necessary to resolve a prohibited practice. *AFSCME/Iowa Council 61 & State of Iowa*, 89 PERB 3499 at 13. Viewing the issue in order of the required elements reveals the question to be whether there was a change in the "status quo" on a matter that is "contained in" the contract. In evaluating whether the matter changed is "contained in" the collective bargaining agreement, identifying the "status quo" procedures, policies or practices is the starting point for evaluating whether a change was implemented by the employer. Thus, I will

consider the status quo procedures, policies and practices in determining whether there was actually a change as well as the terms of the contract in evaluating whether any change was to a matter “contained in” the contract.

The evidence shows that the employer implemented two changes, only one of which is at issue in this case. The first change occurred in August 2011 when the State changed its posting policy from including specific physical work areas or work stations to only listing general organizational units and work units in job postings. Although much of the testimony at hearing focused on how the Department of Corrections implemented a change in posting and bidding procedures in its August 24, 2011 letter and how the Department of Corrections allegedly failed to reinstate its prior method of posting positions after arbitrator awards instructed it to do so, this change is not at issue and will not be addressed for at least two reasons. First, this change is not at issue because AFSCME’s complaint does not identify this change and even if it did, this unilateral change claim would be untimely.⁶ Second, while the August 24, 2011 letter, the subsequent grievance, and the arbitrator’s awards give historical context to the current dispute and reasoning for the parties’ positions, this evidence is only relevant in the present case for determining what the status quo posting and bidding procedures were at given times. It is not PERB’s role to determine whether the State complied with the arbitrator

⁶ Prohibited practice complaints must be filed within ninety days of an alleged violation. Iowa Code § 20.11; 621 Iowa Admin. Code 3.1. Since this change occurred in August 2011, this complaint, filed September 9, 2013 is clearly outside the statute of limitations. If AFSCME filed a timely prohibited practice complaint on this change, it is not a part of the present record and, in any event, would be unnecessary to consider to resolve the present case.

awards or to enforce arbitrator awards. An arbitrator's award on a grievance may be enforced in the district court pursuant to Iowa Code section 20.17(5). *See Sergeant Bluff-Luton Educ. Ass'n v. Sergeant Bluff-Luton Cmty. Sch. Dist.*, 282 N.W.2d 144, 146-47 (Iowa 1979). Nonetheless, this evidence is pertinent to establish that between August of 2011 and August of 2013, the status quo policy and practice was for job postings to identify a specific location as the applicable institution, shift hours as starting and ending times, days off, and a general work unit assignment rather than designating a physical work area or work station.

The second change, which is at issue in this case, concerns how the Department of Corrections posted vacancies beginning in August 2013, and how these postings differed from the status quo established in August 2011. The August 15 posting was consistent with the status quo as it specified a location or organizational unit (Iowa State Penitentiary) and work unit (security - activities officer) in the same manner as had been established in August 2011. But the posting did not specify shift hours or days off, items that had been included in postings between August 2011 and August 2013.⁷

The August 27, 2013 emailed bid sheets were consistent with the status quo practice established in 2011 in that all postings listed a work unit (e.g., activities officer) and all bids listed days off. However, the bid sheets differed from the status quo in other ways. None of the bid sheets expressly stated the

⁷ The parties did not admit an exhibit with a copy of the August 15 posting, but the posting was reprinted in the arbitrator's supplemental award and neither party disputed its accuracy. Therefore, my finding of what was included in this posting is based on the description and reprinting of the posting in Arbitrator Hoffmeyer's supplemental award of August 18, 2013.

location or organizational unit (the Iowa State Penitentiary). Specific hours were listed for afternoon and night shifts but postings for day shift positions did not have specific hours listed.⁸ These items, institutional location or organizational unit and shift hours are items that had been included in postings between August 2011 and August 2013.

I therefore conclude that the State implemented a change in the manner of posting job positions in August 2013.

Mandatory Subject of Bargaining

The next step of analysis in cases alleging an unlawful unilateral change is whether the matter allegedly unilaterally changed constitutes a mandatory subject of bargaining. See *Louisa County*, 2011 PERB 8146 at 11. Mandatory subjects of bargaining include “transfer procedures.” Iowa Code § 20.9. AFSCME contends the State made a unilateral change to “transfer procedures” as that term is used in section 20.9.

The matter that the State allegedly unilaterally changed was the manner of posting open positions. The complaint alleges in part, “[o]n August 27, 2013, the employer posted job bids in violation of Articles VII of the Collective Bargaining Agreement. The posting failed to identify [a] specific shift and was

⁸ Although the Department of Corrections sent an email on September 20, listing the shift hours for most of the day shift positions, it did not identify the hours for all positions. For example, the bid sheets list one day shift position as “control center” and another as “control.” No day shift hours were listed for these positions in the August 27 bid sheets or in the September 20 email. And even if these hours were included in the September 20 email, it would be to no avail. The State’s later posting of the day shift hours, three weeks after the bidding process began, does not correct its prior conduct. See *Dike Educ. Ass’n & Dike Cmty. Sch. Dist.*, 79 H.O. 1344 at 4 (finding that an employer’s negotiation with the employee organization after implementing an unlawful unilateral change did not validate its prior unlawful conduct).

in violation of the bidding process itself.” The Board has historically found these matters to be within the meaning of “transfer procedures.”

Management, in conducting its business operations, must retain the authority to determine whether transfers are necessary to adequately staff its required functions. Management must also be free to determine what personnel qualifications are necessary to accomplish that function. But bargaining is required on the method used to effectuate those decisions, including such traditional factors as *notice and posting, bidding procedures* and, of course seniority, which is itself a mandatory subject of bargaining.

Bettendorf Cmty. Sch. Dist. & Bettendorf Educ. Ass’n, 76 PERB 598 & 602 at 17 (emphasis added). I therefore conclude the Department of Corrections’ August 27, 2013 email announcing the bidding process and posting job bid sheets for the new Iowa State Penitentiary facility directly addressed transfer procedures, a mandatory subject of bargaining.

Bargaining Obligation

The next step in analyzing a unilateral change case requires review of the contract “because 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” *Louisa County*, 2011 PERB 8146 at 12.⁹ If the subject is a mandatory topic of bargaining and “contained in” the

⁹ The State disputes PERB’s role in this regard. It argues that PERB should not interpret the collective bargaining agreement in this case because disagreements in the interpretation and application of the applicable contract provisions “are issues for a grievance arbitrator and not the function of PERB.” State’s brief at 7. Indeed, PERB’s role in most instances is not to interpret the contract or determine when provisions of the contract are violated. *See supra* at 18. However, it is also well settled that “PERB may interpret contract language where necessary to resolve prohibited practice issues.” *AFSCME/Iowa Council 61 & State of Iowa*, 89 PERB 3499 at 13; *AFSCME/Iowa Council 61 & State of Iowa*, 13 H.O. 8465 at 13. AFSCME’s allegation that the State implemented a unilateral change without fulfilling its bargaining duty requires analysis of certain contract provisions. Therefore, my review and interpretation of the parties’ collective bargaining agreement is permitted in this case.

parties' collective bargaining agreement, the employer must obtain the certified employee organization's consent prior to implementing the policy change. *Des Moines Indep. Cmty. Sch. Dist.*, 78 PERB 1122 at 3. If the subject is a mandatory topic of bargaining but not "contained in" the parties' collective bargaining agreement, the employer can implement the policy change after giving the certified employee organization notice and an opportunity to bargain the subject to impasse. *Id.* The Board determines whether a matter is "contained in" a collective bargaining agreement on a case by case basis by "examin[ing] the substance of the policies the employer adopts to determine whether the policies unlawfully change 'contained-in' provisions" *Cedar Rapids Ass'n of Fire Fighters, Local 11, Int'l Ass'n of Fire Fighters & City of Cedar Rapids*, 1995 PERB 4898 at 11. The Board does not assume a new or changed work policy is contained in a collective bargaining agreement simply because the policy's subject generally fits within a mandatory topic of bargaining and is remotely addressed in the contract. *See id.* at 10-12.

The relevant section of the collective bargaining agreement is Article VII, section 2(A): Transfers Within Employing Units. This section, quoted above, requires the employer to include certain information for each job opening and requires the employer to give employees a set period of time to apply for a transfer. The August 27, 2013 email and bid sheets from the Department of Corrections, also quoted above, substantively addressed these contractual provisions by giving notice of specific job openings at the new facility, posting the specifics for each position, and outlining the process for bidding on the

openings. I therefore conclude that the alleged unilateral change was to a matter “contained in” the collective bargaining agreement.

The State was only permitted to implement a change in these “contained in” transfer procedures if it obtained consent from AFSCME. *See City of Des Moines*, 78 PERB 1122 at 3. The employer must obtain the consent from the appropriate bargaining representative who has authority to negotiate on behalf of the certified employee organization. *See Iowa Code § 20.17(2)* (“The employee organization and the public employer may designate any individual as its representative to engage in collective bargaining negotiations.”); *North Tama Educ. Ass’n & North Tama County Sch. Dist.*, 80 H.O. 1691 at 9 (finding that an individual bargaining unit employee’s conversations with the employee organization was not sufficient notice by the employer of a change in wages). The State presented evidence at hearing showing that local AFSCME representatives were aware that administrators were planning to post bids for the new facility and AFSCME’s leadership was aware that the parties disagreed about what the contract and arbitrator awards required in terms of posting bids for the new facility. However, the State never contacted AFSCME’s designated bargaining representative, President Danny Homan, prior to implementing the bidding process for the new facility to obtain AFSCME’s consent. I therefore conclude the State failed to obtain AFSCME’s consent before initiating a change in transfer procedures contained in the parties’ collective bargaining agreement.

The Board has previously found that failure to obtain a certified employee organization's consent prior to implementing a unilateral change in a mandatory topic of bargaining contained in a contract to be a violation of Iowa Code sections 20.10(1) as a refusal to negotiate in good faith, 20.10(2)(a) as interference, restraint or coercion of public employees in the exercise of chapter 20 rights, 20.10(2)(e) as a refusal to negotiate with representatives of certified employee organizations, and 20.10(2)(f) as a denial of rights accompanying certification. *See AFSCME/Iowa Council 61*, 11 PERB 8146 at 10-11 (stating that "[a]n employer's implementation of a change in a mandatory subject of bargaining without first fulfilling its applicable bargaining obligation may constitute a prohibited practice under" sections 20.10(1), 20.10(2)(a), 20.10(2)(e) and 20.10(2)(f)). Accordingly, AFSCME has met its burden to establish that the State has committed a prohibited practice in violation of Iowa Code sections 20.10(1) and 20.10(2)(a), (e) and (f).

The ALJ consequently proposes entry of the following:

ORDER

IT IS HEREBY ORDERED that the State of Iowa (Department of Corrections) rebid all positions posted on August 15 and August 27, 2013. All postings shall specifically identify the location (i.e., organizational unit), shift hours and days off that were missing from the August 15 and August 27 postings. In addition, the State (Department of Corrections) shall cease and desist from any further violations of Iowa Code sections 20.10(1) and 20.10(2)(a), (e) and (f).

IT IS FURTHER ORDERED that the State of Iowa (Department of Corrections) post the attached Notice to Employees, for 30 days from the date this proposed decision becomes final, in the main office of the Iowa State Penitentiary and all other places customarily used for the posting of information to employees of the Iowa State Penitentiary.¹⁰

DATED at Des Moines, Iowa, this 25th day of June, 2014.



Ann M. Smisek, Administrative Law Judge

File original.

Copies to:

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¹⁰ This order is to remedy the prohibited practice violation established in this case and does not supersede, abrogate or reverse any other arbitration award or court order addressing alleged contract violations in the bidding process for the new facility at the Iowa State Penitentiary.

NOTICE TO EMPLOYEES OF THE DEPARTMENT OF CORRECTIONS AT THE IOWA STATE PENITENTIARY

POSTED PURSUANT TO A DECISION
OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

The Iowa Public Employment Relations Board (PERB) has determined that the State of Iowa (Department of Corrections) committed a prohibited practice within the meaning of Iowa Code section 20.10(1) and 20.10(2)(a), (e) and (f). The violation occurred on August 15 and August 27, 2013 when the State (Department of Corrections) unilaterally implemented changes in transfer procedures contained in the collective bargaining agreement between the State and AFSCME (Article VII, section 2) without first obtaining the consent of AFSCME.

The sections of the Public Employment Relations Act (Chapter 20) found to have been violated provide:

20.10 Prohibited practices.

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 in this chapter.

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

To remedy this violation, the State (Department of Corrections) has been ordered to cease and desist from any further violations and rebid all positions posted on August 15 and August 27. All postings shall specifically identify the location (i.e., organizational unit), shift hours and days off that were missing from the prior postings. The State has also been ordered to post a true copy of this Notice in the main office of the Iowa State Penitentiary and other places customarily used for the posting of information to employees, for 30 days.

Any questions concerning this Notice or the State's compliance with its provisions may be directed to the Public Employment Relations Board at 515/281-4414.