

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

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DES MOINES ASSOCIATION OF,
PROFESSIONAL FIREFIGHTERS, LOCAL 4,
Complainant,

Case No. 8535

and

CITY OF DES MOINES,
Respondent.

DECISION ON APPEAL

This case is before the Public Employment Relations Board (PERB or Board) upon Complainant Des Moines Association of Professional Fire Fighters, Local No. 4's (the Association) notice of appeal, filed pursuant to PERB rule 621—9.2(1), which seeks the Board's review of a Proposed Decision and Order issued by a PERB administrative law judge (ALJ) on January 22, 2014. In his Proposed Decision and Order, the ALJ concluded that the Association had failed to establish that Respondent City of Des Moines committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(a), (b), (c), (e), (f), and (g) when, in April 2012, the City required fire lieutenants in the Association-represented bargaining unit to be in charge of single-company fire stations without additional pay, all without notice to, bargaining with, or obtaining the consent of the Association. The ALJ further concluded the complaint should be dismissed.

Pursuant to PERB subrule 621—9.2(3), the Board has heard the case upon the record submitted before the ALJ. Counsel for the parties, Charles E.

Gribble for the Association and Carol J. Moser for the City, presented their oral arguments to the Board on May 14, 2014. Prior to oral arguments, the parties filed briefs outlining their respective positions.

On appeal, the Board possesses all powers which it would have possessed had it elected, pursuant to PERB rule 621—2.1, to preside at the evidentiary hearing in the place of the ALJ. Based upon its review of the record before the ALJ, as well as the parties' briefs and oral arguments, the Board agrees with the ALJ's Proposed Decision and Order and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the Proposed Decision and Order attached as "Appendix A," are fully supported by the record. The Board adopts the ALJ's factual findings as its own and they are, by this reference incorporated herein and made a part hereof as though fully set forth.

CONCLUSIONS OF LAW

The ALJ's conclusions of law, as set out in Appendix A, are correct, and the Board adopts them as its own. They are, by this reference incorporated herein and made a part hereof as though fully set forth.

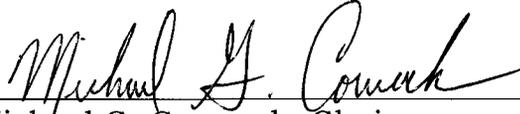
Having adopted the ALJ's findings and conclusions, it follows that the Board concurs in the result reached by the ALJ.

ORDER

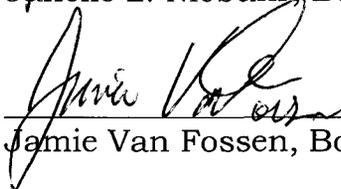
Complainant Des Moines Association of Professional Fire Fighters, Local No. 4's prohibited practice complaint is hereby DISMISSED.

Dated at Des Moines, Iowa this 2nd day of June, 2014.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: 
Michael G. Cormack, Chair


Janelle L. Niebuhr, Board Member


Jamie Van Fossen, Board Member

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DES MOINES ASSOCIATION OF
PROFESSIONAL FIRE FIGHTERS, LOCAL NO. 4,
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CASE NO. 8535

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RELATIONS BOARD

PROPOSED DECISION AND ORDER

Complainant Des Moines Association of Professional Fire Fighters, Local No. 4 (the Association) filed this prohibited practice complaint with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 20.11 and PERB rule 621–3.1(20). The complaint alleges that Respondent City of Des Moines committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(a), (b), (c), (e), (f) and (g) when, in April 2012, it required fire lieutenants in the Association-represented bargaining unit to be in charge of single-company fire stations (work previously performed by fire captains) without additional pay, all without notice to, bargaining with or obtaining the consent of the Association. The City denied its commission of a prohibited practice.

Pursuant to notice, an evidentiary hearing on the complaint was held before the administrative law judge in Des Moines, Iowa on June 20, 2013. The parties were both represented by counsel, the Association by Charles E. Gribble and the City by Carol J. Moser. Both filed post-hearing briefs on September 6, 2013.

Based upon the entirety of the record, the ALJ has concluded that the Association has not established the City's commission of a prohibited practice as

Appendix A

alleged in the complaint.

FINDINGS OF FACT

The relevant facts are not genuinely in dispute.

In December, 1976, the Association was certified by PERB as the exclusive bargaining representative of a bargaining unit of employees of the City which now includes fire fighters, fire engineers, fire lieutenants and fire captains, among others. The parties thereafter negotiated a continuous series of collective bargaining agreements, including a July 1, 2011 – June 30, 2013 agreement which was in effect at the time the instant complaint was filed and heard.

The City has maintained a fire department staffed by City employees since long before the Association's certification. The department employs a paramilitary organizational structure, the management hierarchy of which is currently made up of a fire chief, two assistant chiefs and a number of district chiefs and civilian superintendents who function at the district chief level.

This case revolves around employees involved in the department's in-the-field fire-suppression function — a 24-hour per day, 7-day per week operation performed by employees who operate from fire stations located throughout the City. Stations have, at various times, been commanded by either fire captains or fire lieutenants — both referred to within the department as "officers" or "company officers." Captains are the highest-ranking employees included within the Association-represented bargaining unit of over 260, and are directly below the district chiefs and directly above the lieutenants in the department's hierarchy of ranks.

The fire stations themselves are referred to as either “single-company” or “multi-company” (or at times, single-apparatus or multi-apparatus) stations. An apparatus is a motorized emergency response vehicle (such as a fire engine, ladder truck or ambulance) and a company is the group of employees who staff that apparatus. A single-company station is one from which only one apparatus operates while a multi-company station houses more than one apparatus.

For over 20 years prior to 1989, a period extending prior to the Association’s certification as the bargaining unit’s representative, lieutenants were the highest-ranking officers at and were in charge of the department’s single-company stations.¹ The lieutenants rode and commanded the station’s apparatus and the company which crewed it. But where there were two or more companies based at a station, and thus a need for more than one company officer, the department assigned a captain to be in charge of and responsible for the station, command a company, and serve as the direct supervisor of the lieutenant(s) who commanded the station’s other company or companies. Each employee thus had a “company officer” to whom they would report — either a captain or a lieutenant, depending upon the nature of the station or the particular apparatus to which they were assigned.

Since the Association’s certification and the parties’ negotiation of their first collective bargaining agreement, a pay differential has always existed

¹ “Single-company station” appears to have been, for some time beginning in the mid-1970’s, somewhat of a misnomer due to the department’s introduction of two-person medic squads and two-person “fire-attack” units which were not considered to be an apparatus or company and operated from (in addition to the station’s recognized company) “single-company” stations at which a lieutenant was in charge.

between captains and lieutenants. As of the date of hearing, captains' pay exceeded that of lieutenants by approximately \$5,500 annually.

The department's utilization of company officers changed in 1989. At that time the department operated from nine stations – three of which were single-company stations led by a lieutenant. In 1989, captains were assigned to head all fire stations, both single- and multi-company. This involved the addition or reclassification of employees to produce nine new captain positions – a rotation of three for each of the single-company stations which had previously been overseen by lieutenants.

Although the number of stations overall, as well as the number of single-company stations has changed over time, from sometime in 1989 until April, 2012, captains were continuously assigned to be in charge of each of the departments' fire stations, regardless of how many companies it housed. In a multi-company station, lieutenants were assigned to be in charge of the station's other company or companies, and reported to the captain, who in turn reported to the district chief serving as the day's shift commander overseeing all of the stations and the department's field operations generally. No lieutenants were assigned to the single-company stations, and the fire fighters making up the company there reported to their captain.

The written class specification (job description) for a fire lieutenant, which previously recognized that a lieutenant would serve as a company commander or a commander of a single-company station, was revised after the 1989 staffing change. The 2008 revision of the class specification, still in use as of the date of

hearing, reflects the post-1989 reality that lieutenants supervise a company and are under the general supervision of a captain, and makes no direct reference to commanding a single-company station. The specification does, however, provide that lieutenants may be assigned to perform all the duties normally associated with the position of fire captain.

From 1989 until the 2012 events which precipitated this complaint, lieutenants have been assigned to temporarily serve as “acting” captains when the normally assigned captain is absent. The Association and the City have negotiated and included in their collective bargaining agreement an article providing for additional compensation for employees in such “temporary upgrade” assignments, referred to as “acting pay” by the parties and their witnesses.

Under the post-1989 staffing pattern, the captain was responsible for making a number of discretionary decisions concerning the station’s operations. At multi-company stations, where a lieutenant was also assigned, the captain had the benefit of the lieutenant’s presence, with whom he or she could consult if desired, but was still ultimately responsible for the decisions made and the station’s operation. Most captains with a lieutenant under them appear to have used the lieutenant as a resource, and it appears that most, if not all, would delegate at least a portion of the captain’s responsibilities to the lieutenant. A portion of the required periodic inspections of commercial properties within the station’s geographic area of responsibility, for example, were typically delegated by a multi-company station’s captain to the station’s lieutenant. And in

accordance with the department's employee performance evaluation manual (which notes that the best practice is for performance to be rated by the employee's immediate supervisor) captains in multi-company stations typically delegated the evaluation of the employees in a lieutenant's company to the lieutenant, while retaining the ability to add comments to the lieutenant's work.

Captains were also responsible for various record-keeping, training, reporting and administrative tasks associated with the station's day-to-day operation, including the maintenance and repair of the station, its apparatus and its equipment, whether to be performed by station personnel or employees in the department's maintenance and logistics operation. While these tasks could be delegated to a lieutenant in a multi-company station, the ultimate responsibility for their performance rested with the captain.

In the fall of 2011, directors of the City's various departments began working with the city manager and finance department to identify possible solutions to the City's ongoing budget deficit which could be incorporated into its fiscal year 2013 budget. Fire Chief John TeKippe was directed to develop recommendations for reducing fire department expenditures while continuing to provide services effectively. TeKippe developed three cost-reduction recommendations he felt could be implemented without reducing the department's services to an unacceptable level. These recommendations, which were estimated to produce a \$600,000 reduction in expenditures, included a return to the pre-1989 staffing model by replacing the captains at single-company stations (paid at pay grade 25 of the collective bargaining agreement's

wage schedule) with lieutenants (pay grade 23).

The City's budget-making process involved a number of public meetings. TeKippe's recommendations first became public at an October 27, 2011 budget forum at the City's Botanical Center. Association President Denny Lewis was present and, after TeKippe's presentation, discussed with him whether the reduction of the nine captains (three at each of the three single-company stations) would be accomplished through attrition or layoff. There is no evidence that the Association requested bargaining over the recommended change at that time.

On November 30 and December 2, 2011, TeKippe, the City's human resources director and Lewis met with senior fire medics who would be impacted by another of TeKippe's recommendations (to eliminate one of the department's medic squads). TeKippe advised Lewis that his recommendations, including using lieutenants in place of captains at single-company stations, were going to be implemented. There is no evidence that the Association commented or requested bargaining over the contemplated change at either of those times.

On December 5, 2011, TeKippe presented his recommendations to the City Council at a public meeting at which members of the Association were present. There is no evidence that the Association requested bargaining over the contemplated change at that time.

On December 15, 2011, TeKippe presented his recommendations at a public budget forum at the Central Library at which Association members were present. There is no evidence the Association requested bargaining over the

contemplated change at that time.

On December 21, 2011, as a result of an Association request, TeKippe met with Association representatives to discuss the budget reductions and potential alternative revenue sources for the department. The Association representative did not inquire about the change from captains to lieutenants.

Another meeting with representatives of the Association, as well as its affiliated state and district organizations, was held at the Association's request on February 2, 2012, to discuss the contemplated budget reductions, the possible application for grants to fund departmental staffing, and other matters.

On February 27, 2012, a public hearing on the City's proposed budget was held, at the conclusion of which the City Council adopted the proposed budget which incorporated TeKippe's three recommendations, including the replacement of captains with lieutenants at single-company stations.² There is no evidence that the Association requested bargaining over the change at that time.

On March 1, 2012, TeKippe forwarded a memorandum to all fire department personnel which detailed the effect of the FY13 budget on the department's organizational structure and deployment, including the assignment of lieutenants to head single-company stations when the positions became available due to attrition in the captain ranks.

On April 2, 2012, Lieutenant Eric Huntoon reported for duty at Station 6, a single-company station, and became the first lieutenant to head a station on a

² Because the replacement of the nine captains was to occur by attrition rather than layoff, the initial effect of this staffing change was anticipated to be only the elimination of three captain positions.

“permanent” assignment basis since 1989. As of the date of hearing, five lieutenants were leading single-company stations during their regularly assigned shifts. As to those lieutenants, the written class specification, which indicates that a lieutenant works under the general supervision of and reports to a captain, is no longer accurate. Those lieutenants instead are under the supervision of and report to the shift’s commander — a district chief under normal circumstances.

As contemplated by TeKippe’s budget-reduction recommendations, the lieutenants leading single-company stations are paid at the lieutenant pay rate specified in the collective agreement (pay grade 23). Lieutenants at multi-company stations who are temporarily assigned to serve as acting captains continue to receive enhanced “acting pay” in accordance with the collective agreement.

At some point the Association filed a grievance over the assignment of lieutenants to single-company stations, and filed its prohibited practice complaint with PERB on June 29, 2012. On February 8, 2013, Arbitrator Richard Pegnetter denied the grievance, concluding that “[t]he City did not violate the collective bargaining agreement when it restructured part of the management of single-company fire stations in 2012.”

CONCLUSIONS OF LAW

The Association’s complaint alleges the City’s commission of prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(a),(b),(c),(e), (f) and (g), which 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.

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

c. Encourage or discourage membership in any employee organization, committee or association by discrimination in hiring, tenure, or other terms or conditions of employment.

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.

g. Refuse to participate in good faith in any agreed upon impasse procedures or those set forth in this chapter.

The City asserts that the Association's complaint was not timely filed and that PERB is thus without jurisdiction to entertain it. Alternatively, the City argues that principles of issue preclusion require the complaint be dismissed because the issue presented by the complaint was decided adversely to the Association by the grievance arbitrator.

Although plead and argued in a number of ways in its complaint and brief, the essence of the Association's claim is that the City committed prohibited practices (under a number of theories addressed below) when, on April 2, 2012, it implemented a change by using a lieutenant to be in charge of a single-company station on a permanent-assignment basis — work previously performed by captains — while continuing to pay the lieutenant at the lieutenant wage rate specified in the collective bargaining agreement, all without bargaining with the Association.

Timeliness of the complaint

Iowa Code section 20.11(1) provides, in relevant part:

1. Proceedings against a party alleging a violation of section 20.10 shall be commenced by filing a complaint with the board within ninety days of the alleged violation, causing a copy of the complaint to be served upon the accused party....

This section's limitation on when complaints shall be filed is mandatory and jurisdictional in nature. *Brown v. PERB*, 345 N.W.2d 88, 94 (Iowa 1984). The section 20.11(1) jurisdictional period begins to run after the occurrence of a prohibited practice; PERB is without jurisdiction over cases concerning prohibited practices which have not yet occurred by the date of the complaint's filing. *AEA 7 Education Assn.*, 91 PERB 4252. PERB has long recognized that the 90-day filing period commences (*i.e.*, that the prohibited practice occurs) at the time *final* action is taken. *Des Moines Police Bargaining Unit*, 87 HO 3649. *See also AEA 7 Education Assn.*, 91 PERB 4252; *Lomen v. AFSCME*, 99 PERB 5966 (10/26/99 decision).

The City argues that if any employee or Association rights were adversely affected by the City's actions, it was on February 27, 2012 when the City Council approved and "finalized" the FY13 budget which contemplated the change to lieutenants as the officer in charge of single-company stations. Since the complaint was not filed within 90 days of that date, the City maintains it must be dismissed. The Association maintains that the actual implementation of the change is the basis for its complaint, which was filed within 90 days of the event and is thus timely.

Both parties cite *Brown v. PERB*, 345 N.W.2d 88, in support of their position. In that case the union and employer had agreed to a midterm modification of the seniority provisions of their collective bargaining agreement, which effectively elevated another employee over Brown on the seniority list. When the other employee was later given a position for which Brown had also applied, on the basis of their respective seniority, Brown filed a prohibited practice complaint against her union alleging it had breached its duty of fair representation by agreeing to modify the collective bargaining agreement's seniority provisions.

The Iowa Supreme Court ultimately remanded the case to PERB to determine when the 90-day limitation period began to run on Brown's complaint. It instructed that PERB "decide when the midterm modification agreement effected a change in Brown's seniority status, because that is the date from which the ninety day time limit ordinarily would run." *Id.* at 94. The Court further indicated that the time for Brown to file her complaint "would ordinarily run from the date her status changed rather than from the date when her changed seniority resulted in her being denied a teaching position." *Id.* at 95.

The City maintains that the department's organizational change "became effective and bound to be implemented" when the City Council "finalized and approved" its budget more than 90 days prior to the filing of the Association's complaint, rather than when the change actually affected an employee. Accordingly, it likens the City's adoption of its FY13 budget to the parties' agreement to modify the collective bargaining agreement in *Brown*, and the

actual implementation of the change to the denial of Brown's application for the teaching position. This argument is unpersuasive.

When considering the timeliness of prohibited practice complaints, one needs to keep the stated basis for the complaint in mind. In *Brown* the employee claimed that her union had breached its duty of fair representation and committed a prohibited practice by agreeing to a modification of the seniority provisions of a collective bargaining agreement. Because this agreement became effective more than 90 days prior to the filing of the employee's complaint, the complaint was untimely. See *Brown v. Sioux City Education Assn.*, 84 PERB 1755 (decision on remand).

Here, the Association's central claim is that the City committed prohibited practices by implementing a change in the utilization of company officers without adjusting the compensation of those affected, on April 2, 2012. The Association does not allege that prohibited practices occurred when TeKippe hatched his budget-reduction recommendations, or when he presented them to the public and the City Council, or when the Council effectively approved them for FY13 by adopting its budget. The merits of the Association's claim are yet to be addressed, but its claim is what it is, regardless of its merit.

The time for filing a prohibited practice complaint begins to run from the date when the status of the employee(s) changed. *Brown*, 345 N.W.2d at 95. Here there is nothing which establishes that the change from captains to lieutenants at single-company stations was final and irrevocable, or that any employees status was actually changed, until April 2, 2012, when lieutenant

Huntoon reported for duty and took charge of single-company Station No. 6. The Association's complaint, filed within 90 days of that date, was timely.³

Issue preclusion

The City maintains that principles of issue preclusion bar PERB's consideration of this complaint. The City cites *Harrison v. State Bank of Bussey*, 440 N.W.2d 398 (IowaApp.1989) for the proposition that issue preclusion applies when: (1) the issue concluded is identical; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the disposition of the prior action; and (4) the determination of the issue in the prior action was necessary and essential to the resulting judgment. *Id.* at 401.

Even assuming that issue preclusion as a result of a grievance arbitration award could preclude proceedings under section 20.11, it is apparent that the doctrine would not bar the Association's complaint here.

The City asserts that "(t)he same parties presented the same evidence at arbitration regarding the issue of whether the [City] was obligated to collectively

³ Even assuming that the FY13 budget adopted on February 27, 2012 was "final" and "bound to be implemented," on July 1, 2012, as the City maintains, it was nonetheless a budget for FY13 beginning July 1, 2012. The Association does not, however, complain of events occurring during FY13, but instead of the implementation of change on April 2, 2012, during FY12. The idea that the FY13 budget required changes to fire department operations during FY12 has no support in the record.

TeKippe's March 1, 2012 memo to all departmental personnel indicates that on February 27, 2012, the City Council not only set the FY13 budget, but that it also voted to amend the current (FY12) budget. Although this second Council action is not corroborated by anything else in the record, even if it is accurate it seems doubtful this rendered the FY12 budget amendment "final" and "bound to be implemented so as to commence the running of the limitation period." Iowa Code section 384.18 plainly allows a city to amend its current fiscal year's budget for a number of purposes, one of which is to "permit transfers between programs within the general fund." Even if the Council did amend its FY12 budget on February 27, 2012, there appears to have been nothing which would have prevented a subsequent amendment affecting the fire department's FY12 budget allotment had the City decided or been persuaded to reverse course on the change from captains to lieutenants, or to delay its implementation of the change.

bargain regarding lieutenants who allegedly were performing different work. [The arbitrator] answered the question in the negative.” Review of the arbitrator’s award reveals the inaccuracy of this characterization.

The arbitrator identified the issue before him as “[d]id the City violate the collective bargaining agreement when it implemented a policy of assigning fire lieutenants to single-company stations . . . ?” The issue was not, as it is in this case, whether the City violated its statutory duty to bargain mandatory subjects of bargaining with the unit’s certified representative and thus committed a prohibited practice within the meaning of Iowa Code section 20.10.

Nor did the arbitrator decide the chapter 20 issue(s) presented by the Association’s complaint. The arbitrator concluded only that “[t]he City did not violate the collective bargaining agreement when it restructured part of the management of single-company fire stations in 2012.” The arbitrator did not determine that mandatory topics of bargaining were involved, whether the City had a duty to bargain under the circumstances, the extent of any bargaining duty the City did owe to the Association, or whether the City had fulfilled that duty.

Even if the doctrine of issue preclusion is an appropriate consideration, its elements are not present here and it does not bar PERB’s adjudication of the Association’s complaint.

Merits of the Association’s claims

Although plead and briefed by the Association in multiple divisions and in multiple ways, the essence of its claim is that the City committed prohibited

practices when it changed the *status quo* by placing lieutenants in charge of single-company stations as permanent assignments, while continuing to pay them at the lieutenant rate, without bargaining with the Association.

The law concerning such “unilateral change” cases is well settled and has been discussed and applied in a number of PERB decisions. An employer’s implementation of a change in a mandatory subject of bargaining without first 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., Des Moines Ind. Comm. School Dist.*, 78 PERB 1122. 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. If the proposed change is to a mandatory term contained in the contract, it may not lawfully be made without obtaining the consent of the other party to the agreement. If the proposed change is to a mandatory term not contained in the contract, the change may be lawfully implemented by the employer only after it has given the certified representative notice of the change and the opportunity to negotiate about it to impasse. *See, e.g., Des Moines Ind. Comm. School Dist.*, 78 PERB 1122; *Charles City Comm. School Dist.*, 90 PERB 3764; *Cedar Rapids Assn. of Firefighters*, 93 PERB 4610; *Cedar Rapids Assn. of Firefighters*, 95 PERB 4898; *City of Cedar Rapids*, 97 PERB 5129; *Waterloo Police Protective Assn.*, 01 PERB 6160.

In order to prevail in an unlawful change case as is alleged here, a complainant thus 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. Both parties acknowledge this established Board precedent.

I. Was there a change? For over 20 continuous years beginning in 1989, captains were the permanently assigned officers leading the City's fire stations, single-company and multi-company alike. The evidence is uncontroverted that change occurred in April, 2012, when a permanently assigned lieutenant, and subsequently other lieutenants, assumed leadership of the single-company stations in place of captains. The parties devoted substantial time attempting to demonstrate the magnitude (or the insignificance) of the changes, including whether the duties of captains leading multi-company stations are more or less onerous than those of lieutenants at single-company stations and whether lieutenants leading single-company stations have a more taxing job (and if so, how much more) than lieutenants at multi-company houses.

The change implemented on April 2, 2012, plainly was a change to not only the department's existing staffing pattern but also to the regular duties and responsibilities of the lieutenants permanently assigned to be in charge of the single-company stations. At a minimum, it meant those lieutenants assumed general responsibility and accountability for the operation of their respective stations, which manifests itself in various ways involving the company's training, the performance of house duties and inspections, and necessary administrative tasks. These changes really need not be detailed. The issue here is not whether the changes are onerous or trivial or deserving of additional compensation or not. Those matters are for bargaining or an interest arbitrator. Here, it is

enough to conclude that the change in the department's utilization of company officers implemented in April, 2012 also amounted to a change in the duties and responsibilities of the lieutenants permanently assigned to lead single-company stations in place of the captains who had previously been assigned.

II. Was it a mandatorily negotiable matter? An employer's implementation of a unilateral change in a permissive topic of bargaining is not a prohibited practice within the meaning of section 20.10. *See, e.g., Black Hawk County, 08 PERB 7929.* Thus, in order for a unilateral change implemented by a public employer to constitute a prohibited practice, the change must be to a mandatory topic of bargaining.

The Association's central claim is that the City's assignment of lieutenants to perform "captains' work" (*i.e.*, serving as the leader of single-company stations) without compensating them at the captains' pay rate, was a change in the wages and job classifications of those lieutenants. Both wages and job classifications are mandatory topics of bargaining. Iowa Code § 20.9. The record, however, does not support the Association's claim.

Wages has come to be defined as payment for labor or services, usually based on time worked or quantity produced, or as payment for labor or services on an hourly, daily or piecework basis. *Waterloo Education Assn. v. PERB*, 740 N.W.2d 418, 430 (Iowa 2007). The topic also includes fundamental aspects of wage payment, such as the time and place thereof. *Waterloo Comm. School Dist. v. PERB*, 650 N.W.2d 627, 634 (Iowa 2002).

The changes implemented by the City on April 2, 2012 did not alter the

wages of any lieutenants or any other members of the Association-represented bargaining unit. Prior to April 2, captains were compensated at pay grade 25 and lieutenants at pay grade 23, regardless of their standing assignment. After April 2, captains continued to be compensated at pay grade 25 and lieutenants at pay grade 23. There was no change to the wage of either rank.

The topic of job classifications, the Board has indicated,

. . . relates to the arrangement of jobs into categories, based on selected factors, for the primary purpose of establishing wage or salary rates. It does not relate to the assignment of employees, notification of those assignments, or the qualifications for employment (although those qualifications, *i.e.* "training, experience, or skill," may be the basis for the categorical arrangement of jobs). Nor does it include job content (the functions, requirements, and duties of a given job) or job description (a written record summarizing the main features or characteristics of a job, including description of duties, responsibilities, promotional opportunities, general working conditions, qualifications, materials handled, etc.).

Bettendorf Comm. School Dist., 76 PERB 598.

The changes implemented by the City on April 2, 2012 did not alter the *status quo* concerning job classifications. No job classification existing immediately prior to April 2 was eliminated or altered in any way. Nor was a new job classification created.

Instead, the changes implemented on April 2, 2012, plainly related to the assignment of captains and lieutenants, and the job content or duties of the lieutenants — matters not within the common and ordinary meaning of wages, job classifications or any other section 20.9 topic. While these changes might reasonably be expected to precipitate bargaining proposals by the Association that lieutenants assigned to lead single-company stations be compensated at a

premium rate (a wage proposal) or that a new job classification for lieutenants so assigned be created (a job classification proposal), or both, such does not alter the subject matter of the changes themselves.

One can certainly appreciate the facial appeal of the Association's argument from the equitable point of view. For many years, the City's manner of utilizing captains and lieutenants had remained the same, with an apparent recognition that it was appropriate that the officer in charge of a station, whether single or multi-company (for over 20 years a captain) warranted greater compensation than a lieutenant, who worked under a captain in a multi-company environment and was in charge of a company, but not the station itself. But then, in April 2012, the *status quo* was altered and some lieutenants were required to perform jobs, for lieutenants' pay, that had for years been performed by captains at a higher pay rate. Had the Association been aware of this while negotiating the collective agreement in effect at the time of the change, it might be assumed that, although it could not have forced bargaining on the change of duties itself (since that is not a mandatory subject of bargaining) it would have made wage and/or job classification proposals in an attempt to gain additional compensation for the affected lieutenants.

Perhaps the fact that under chapter 20 management has the right to control assignments and job content provides a disincentive to the negotiation of multi-year contracts, since one-year agreements would minimize the duration of any perceived inequitable effects of management's unilateral changes in assignments or job content. But the fact remains that those matters are not

included within the topics of wages or job classifications, or any other section 20.9 subject of bargaining.

Because the changes implemented by the City were not to mandatory topics, it had no duty to bargain over them with the Association and their implementation was not a prohibited practice within the meaning of Iowa Code sections 20.10(1) or 20.10(2)(a), (e) or (f), as alleged in the Association's complaint.

III. Individual Bargaining. In separate divisions of its complaint the Association alleges that the City "bypassed the union" when it unilaterally determined what the lieutenants in charge of single-company stations would be paid, and that it engaged in "individual bargaining" by placing the lieutenants in roles previously filled by captains, thus committing prohibited practices within the meaning of sections 20.10(1) and 20.10(2)(a), (b), (e), (f) and (g).

An employer violates sections 20.10(1) and 20.10(2)(a), (e) and (f) when it bypasses the certified bargaining representative and negotiates with an individual bargaining unit member concerning a section 20.9 topic of bargaining. *See, e.g., Thompson Education Assn.*, 81 HO 1782. And while the polling or solicitation of employees' opinions, as well as direct negotiations with individual employees, has also been found to constitute unlawful individual bargaining, the mere transmission of information to employees does not. *See, e.g., AEA 7 Education Assn.*, 91 PERB 4252.

While the record reveals a direct communication between Chief TeKippe and all departmental personnel concerning what were then anticipated changes,

it does not show that the communication was an attempt to bargain anything directly with employees or to undermine the Association's authority as the unit's bargaining representative. *See AEA 6 Employee Organization*, 82 PERB 1989.⁴ Instead, it appears to have been the mere transmission of information. And quite unlike the facts of the cases the Association cites in support of its individual bargaining theory, here the record reveals no direct-dealing between representatives of management and bargaining unit members at all.

The Association has consequently failed to establish that the City violated sections 20.10(1) and 20.10(2)(a), (e) and (f) as alleged.

IV. Other claimed violations. Although never articulated with any specificity in either its complaint or its brief, much less supported by argument or cited authority, the Association also lists sections 20.10(2)(b), (c) and (g) among those allegedly violated by the City.

A. Section 20.10(2)(b) provides that it is a prohibited practice for an employer to dominate or interfere in the administration of any employee organization. This section has not been extensively discussed in prior PERB decisions, but the Board made the following observation in rejecting a claim based on alleged employer domination or interference:

[Section 20.10(2)(b)] is similar to section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158 (a)(2). Federal decisions construing section 8(a)(2) of the federal statute are thus illuminating and instructive on the meaning of Iowa Code section 20.10(2)(b). *See City of Davenport v. PERB*, 264 N.W.2d 307, 313 (Iowa 1978). Those federal decisions are neither conclusive nor compulsory, but they nonetheless

⁴ Even had TeKippe's issuance of his March 1, 2012 memorandum constituted a prohibited practice in some fashion, that claim would be time-barred here since the Association's complaint was not filed within 90 days of the event as required by section 20.11(1).

constitute persuasive authority. *Id.*; *Mount Pleasant Comm'y School District v. PERB*, 343 N.W.2d 472, 480 (Iowa 1984).

The primary purpose of section 8(a)(2) of the NLRA was to eradicate company unionism, the practice whereby employers would establish and control in-house labor organizations in order to prevent organization by autonomous unions. *See generally* HARDIN, *THE DEVELOPING LABOR LAW*, pp. 391-439 (4th ed. 2001). Generally speaking, prohibited "domination" exists when the organization is controlled or directed by the employer, rather than by the employees. "Interference" is found when the employer does not, in the eyes of the employees, control the employee organization but nonetheless exercises some lesser form of influence in the determination of union policy. *Id.*; *see also* GORMAN, *LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING*, pp. 195-208 (1976).

PPME and Black Hawk County, 12 PERB 8216.

Here, as was the case in *Black Hawk County*, there is nothing which even suggests the City's domination of or interference with the administration of the Association or any other employee organization. The Association has thus failed to establish the City's commission of a prohibited practice within the meaning of section 20.10(2)(b).

B. Section 20.10(2)(c) forbids encouraging or discouraging membership in any employee organization by discrimination in hiring, tenure, or other terms or conditions of employment. This section is nearly identical to section 8(a)(3) of the NLRA, the meaning of which the U.S. Supreme Court discussed in *Radio Officers Union v. NLRB*, 347 U.S. 17, 74 S.Ct. 323; 98 L.Ed. 455 (1954):

The language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus, this section does not outlaw all encouragement or discouragement in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or

discourages membership in a labor organization is proscribed.

Id. at 347 U.S. 42-3.

As the Board member serving as the hearing officer interpreted this language in *Spencer Municipal Hospital*, 75 HO 354:

Thus, when an employer discriminates among his employees, his purpose determines whether an unfair labor practice has occurred. Proof of a specific anti-union purpose, however, is not an indispensable element in proving a violation. In addressing this issue, the Supreme Court stated, also in *Radio Officers*, “[a]n employer’s protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence.”

Here, even assuming that changing the duties of some lieutenants amounted to “discrimination” against them, there is no proof of a specific anti-union purpose on the City’s behalf. And the ALJ cannot conclude that the changes implemented by the City, (even if discriminatory) amounted to conduct which inherently encourages or discourages union membership. *See Radio Officers*, 347 U.S. at 45. The Association has failed to establish the City’s commission of a prohibited practice within the meaning of section 20.10(2)(c).

C. The Association’s unexplained claim that the City somehow violated section 20.10(2)(g) warrants little discussion. That section makes it a prohibited practice for an employer to refuse to participate in good faith in any agreed upon impasse procedures or those set forth in chapter 20.

Nothing in this record so much as suggests a situation where the City would have had an obligation to engage in impasse procedures. If we were

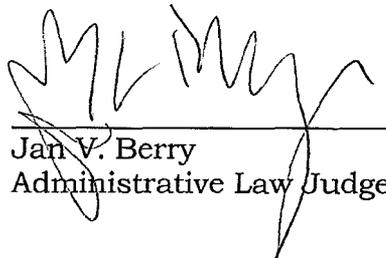
dealing with a change in mandatory topics contained in the collective bargaining agreement, no impasse procedures would apply — the City's duty would have been to secure the Association's consent to the changes. Were we dealing with mandatory topics not contained in the collective bargaining agreement, no impasse procedures would be required — the City's duty would have been to give the Association notice of the proposed change and, had the Association sought bargaining, to bargain with it to the point of impasse before implementing the change. Impasse procedures are not required. But here, where the changes were to permissive topics which the City had no obligation to bargain, impasse procedures were plainly not required. The Association has failed to establish the City's commission of a prohibited practice within the meaning of Iowa Code section 20.10(2)(g).

The ALJ consequently proposes entry of the following:

ORDER

The prohibited practice complaint filed by the Des Moines Association of Professional Fire Fighters, Local No. 4, is DISMISSED.

DATED at Des Moines, Iowa, this 22nd day of January, 2014.



Jan V. Berry
Administrative Law Judge

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