STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME IOWA COUNCIL 61, Complainant, and STATE OF IOWA, Respondent.	CASE NO. 100068

RULING AND ORDER

Complainant AFSCME Iowa Council 61 (AFSCME) filed a prohibited practice complaint with the Public Employment Relations Board (PERB or Board) on September 17, 2015. AFSCME's complaint alleges that Respondent State of Iowa committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(a),(e) and (f) when it unilaterally implemented, effective July 1, 2015, what AFSCME characterizes as a new state-wide policy which amounted to a change in the mandatory bargaining topic of "leaves of absence" without first fulfilling its obligation to bargain with AFSCME.

On February 19, 2016, the State filed a motion for summary judgment which was resisted by AFSCME, which itself moved for summary judgment on March 8, 2016. Hearing on the motions was held April 20, 2016.[1]

The State and AFSCME seek summary judgment pursuant to Iowa Rule of Civil Procedure 1.981. Although the rules of civil procedure are not universally

[1] Due to the existence of a common and potentially dispositive issue of law also presented by motions for summary judgment filed in Case Nos. 100053 & 100056, *UE Local 893/Iowa United Professionals and State of Iowa* and Case No.100065, *State Police Officers Council and State of Iowa*, all parties appeared and participated in the joint hearing on the motions.

applicable to PERB proceedings, it often follows them when its own rules are silent on a procedural matter, and has long recognized and ruled upon motions for summary judgment in cases before it. *See, e.g., West Des Moines Educ. Ass'n*, 81 H.O. 1805; *Riddle & State (DIA)*, 02-MA-06 (PERB 2003); *Frost & State (DAS)*, 06-MA-01, 06-MA-02 & 06-MA-04 (PERB 2006) *Walsh & State (DIA)*, 14-MA-10 (PERB 2015).

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007). "In other words, summary judgment is appropriate 'if the record reveals a conflict only concerns the legal consequences of undisputed facts.'" *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96 (Iowa 2012) *quoting City of Cedar Rapids v. James Props., Inc.*, 701 N.W.2d 673, 675 (Iowa 2005).

Undisputed Facts

No depositions, answers to interrogatories or admissions were filed in support of or opposition to either party's motion. The record for purposes of summary judgment thus consists of the pleadings and one affidavit, together with the stipulation of fact entered by the parties at hearing on the motions. The undisputed facts revealed by that record include the following:

The State is a public employer. AFSCME is the certified representative of public employees of the State's executive branch in eight distinct bargaining

units. At all material times, AFSCME and the State were parties to a collective bargaining agreement affecting these represented employees.

On June 8, 2015, the State notified AFSCME of a revision to the State of Iowa Employee Handbook, which details rules and policies applicable to State employees, and advised AFSCME that the revision would become effective July 1, 2015. This revised policy, part of a section of the Employee Handbook entitled "Leaves," provided:

> ***Absence Reporting***
>
> All absences related to your own medical condition, your family member's medical condition, and/or military duty must be reported to Reed Group, the State of Iowa's third-party FMLA administrator. In addition, you must also follow your agency's absence reporting requirements.
>
> Reed Group can be notified 24 hours per day, 7 days per week. You can notify Reed Group by calling 844-507-5393 (toll free) or by entering your absence in the self-service portal website at stateofiowa.leavepro.com.

This policy became effective July 1, 2015.

On that date a private company, the Reed Group, began providing third-party administration for the State's FMLA (Family and Medical Leave Act) and military leave programs, including the receipt of employee absence notifications, the determination of whether an absence is FMLA-qualifying and the tracking of FMLA use—administrative tasks which had previously been performed by State agencies.

The policy required for the first time that AFSCME-represented employees report absences due to the circumstances described in the policy to the Reed Group.

AFSCME's Complaint and Applicable Law

AFSCME's complaint alleges the State committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(a), (e) and (f) by unilaterally implementing the new absence reporting policy—which it characterizes as a change in a mandatory subject of bargaining—without negotiating the matter with AFSCME.[2] The provisions of section 20.10 relevant to this claim 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.

The law concerning "unilateral change" cases such as AFSCME's is well settled. An employer's implementation of a change in a mandatory subject of bargaining without first fulfilling its bargaining obligation constitutes a prohibited practice within the meaning of sections 20.10(1) and 20.10(2)(a), (e)

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[2] AFSCME's complaint also alleges, in the alternative, that the State's unilateral implementation of the new policy was prohibited by provisions of the parties' collective bargaining agreement. While the breach of an employer's duty to bargain changes to mandatory topics of bargaining may constitute a violation of the parties' collective bargaining agreement as well as a prohibited practice, contract violations are remedied through contractual grievance procedures or the courts and are not themselves prohibited practices. *See, e.g., City of Keokuk,* 75 PERB 433; *City of Waterloo,* 01 PERB 6256; *City of Ottumwa,* 03 PERB 6294.

and (f). *See, e.g., Des Moines Indep. Cmty. Sch. Dist.*, 78 PERB 1122; *Des Moines Ass'n of Prof'l Fire Fighters,* 14 PERB 8535. In order to prevail in an unlawful change case such as this, a complainant thus must show that (1) the employer implemented a change; (2) the change was to a mandatorily negotiable matter, and (3) the employer had not fulfilled its bargaining obligation before making the change.[3]

Key to the resolution of the parties' motions is the purely legal issue of whether the absence reporting policy implemented by the State is, as AFSCME maintains, a matter within the scope of the Iowa Code section 20.9 mandatory bargaining topic of "leaves of absence." If it is, questions concerning whether the summary judgment record establishes that the implementation amounted to a change in the *status quo* concerning the matter, the nature of the State's bargaining obligation under the circumstances, and whether it fulfilled that duty in this case are presented. But if the policy is not within the scope of mandatory bargaining, those questions become irrelevant because an employer's implementation of a unilateral change in a permissive topic of bargaining is not a prohibited practice. *See, e.g., Black Hawk Cnty.,* 08 PERB

[3] The nature of the employer's bargaining obligation differs depending upon whether the mandatorily negotiable term is "contained in" the parties' 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, if requested, the opportunity to negotiate about it to impasse. *See, e.g., Des Moines Educ. Ass'n, 75 PERB 516; Des Moines Indep. Cmty. Sch. Dist.*, 78 PERB 1122; *W. Delaware Educ. Support Employees Ass'n, 88 PERB 3246; Charles City Cmty. Sch. Dist.*, 90 PERB 3764; *City of Cedar Rapids,* 97 PERB 5129; *Waterloo Police Protective Ass'n,* 01 PERB 6160; *Des Moines Ass'n of Prof'l Firefighters,* 14 PERB 8535.

7929.

Although the question of the negotiability status of the absence reporting policy arises here in the context of a prohibited practice proceeding, the question itself, and its proper analysis, is the same as those presented in petitions filed pursuant to PERB rule 621 IAC 6.3 for the expedited resolution of negotiability disputes arising during collective bargaining. In order to determine the negotiability status of a proposal (or here, the absence reporting policy), PERB and the courts apply the two-pronged approach described in *State v. PERB,* 508 N.W.2d 668 (Iowa 1993) and *Northeast Cmty. Sch. Dist. v. PERB,* 408 N.W.2d 46 (Iowa 1987), and reiterated in *Waterloo Educ. Ass'n v. PERB,* 740 N.W.2d 418 (Iowa 2007):

> The first prong for determining whether a proposal is subject to collective bargaining, the threshold topics test, is ordinarily a definitional exercise, namely, a determination of whether a proposal fits within the scope of a specific term or terms listed by the legislature in section 20.9. If that threshold test has been met, the next inquiry is whether the proposal is preempted or inconsistent with any provision of law. Ordinarily, this two-step process is the end of the matter.

Waterloo Educ. Ass'n, 740 N.W.2d at 429.

In the first prong of this analysis the task is to determine whether the proposal (here, the policy), on its face, fits within a definitionally fixed section 20.9 mandatory bargaining subject. *State v. PERB,* 508 N.W.2d at 673. In order to make that determination, one does not merely look for the topical work listed in section 20.9. *Id.* at 675. Rather, one looks to what the proposal would bind the employer (or here, the represented employees) to do. *Charles City Cmty.*

Sch. Dist., 275 N.W.2d 766, 774 (Iowa 1979). The answer to this inquiry reveals the subject, scope or predominant characteristic of the proposal. *Id.* If the proposal's predominant characteristic is within the meaning of a section 20.9 mandatory topic and is not illegal, it is mandatory. If the proposal's predominant characteristic is not within the meaning of a section 20.9 mandatory topic and the proposal is not illegal, it is permissive. *See, e.g., W. Iowa Tech Cmty. Coll.*, 10 PERB 8148.

Negotiability Status of the Policy

The policy at issue requires AFSCME-represented employees to report absences related to their own or family member's medical condition or military duty to the Reed Group, in addition to following their employing agency's existing absence reporting requirements. Its predominant characteristic, subject or scope is thus the reporting of certain employee absences from work.

To determine whether this predominant characteristic is within the mandatory topic of "leaves of absence," we examine the meaning of that section 20.9 term, keeping in mind the Supreme Court's instructions that the section 20.9 topics are to be given their common and ordinary meaning and are to be interpreted within the context of the statute, with the proviso that they cannot be interpreted so expansively that other topics become redundant. *Waterloo Educ. Ass'n*, 740 N.W.2d at 429-30.

PERB and court decisions have described the leaves of absence topic as including factors such as when an employee may be absent, how often these absences are allowed, whether a leave of absence is with or without pay,

conditions on the use of the leave of absence and conditions under which an employee may return to work from a leave of absence. *See, e.g., Saydel Educ. Ass'n,* 79 PERB 1500 & 1504 (proposal that employer grant specified number of days of leave of absence for purpose of conducting union business held mandatory); *City of Burlington,* 80 PERB 1633 (proposal that employer grant specified number of employees time off work for purpose of negotiating collective bargaining agreement held mandatory); *City of Marion,* 81 PERB 1913 (proposal that no accumulated sick leave be deducted due to on-the-job illness or injury held mandatory); *Scott Cnty.,* 87 PERB 3418 (proposal that employees receive additional vacation or personal leave of absence if sick leave not used held mandatory); *Cedar Rapids Firefighters,* 93 PERB 4610, 4712, 4715 & 4729 (leaves of absence includes not only type of the leave and its duration, but also the conditions under which an employee is permitted to return); *State v. PERB,* 508 N.W.2d 668 (Iowa 1993)(whether a leave of absence for a stated purpose must be granted, and if so, whether it is with or without pay, are within the mandatory topic); *Waterloo Cmty. Sch. Dist.,* 00 PERB 6014, 6023 & 6017 (proposals for additional personal leave of absence if sick leave not used and for transfer of sick leave among employees mandatory); *Fort Madison Fire Fighters,* 03 PERB 6588 (compensatory leave of absence for employees not using sick leave during specified period held mandatory).

The policy at issue addresses none of these matters. On its face, it simply requires that employees report specified absences to the Reed Group. The policy in no way specifies circumstances under which an employee is

granted permission (*i.e.,* leave) to be absent; the duration or frequency of the permitted absence; whether the permitted absence is compensated and if so, at what rate; any conditions on the use of the benefit, or any conditions on the employee's return to work from the permitted absence.

AFSCME maintains that the policy's absence reporting requirement "deals with" the mandatory bargaining topic of leaves of absence. But even if one views the policy as somehow "dealing with" leaves of absence, it would not necessarily render it mandatory. The Iowa Supreme Court has criticized past PERB decisions which it viewed as having been based on matters such as whether a mandatory subject is substantively implicated by a proposal or whether the proposal "deals with" a mandatory subject. *See State v. PERB,* 508 N.W.2d at 675.

On its face, the policy at issue here does not address a leave of absence (*i.e.,* permission to be absent).[4] Only the most indirect reference to a leave of absence—the rule's description of the Reed Group as the State's third-party FMLA administrator—is contained in the work rule. But, since the Reed Group is involved in administering the leaves of absence required by the federal

[4] Dictionary definitions, which both the courts and PERB have consulted in order to determine the meaning of section 20.9 topics, make it clear that a central characteristic of a leave of absence is the element of permission. *See, e.g.,* ROBERT'S DICTIONARY OF INDUSTRIAL RELATIONS (rev. ed. 1971)(leave of absence is a grant to an employee of time off from his job, generally without loss of seniority and with the right to reinstatement); NEW WORLD DICTIONARY (2nd college ed. 1974)(meaning of "leave" includes permission to be absent from duty or work, esp. such permission given to personnel in the armed services, as well as the period for which such permission is granted); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1994)("leave of absence" defined as permission to be absent from duty or employment); WEBSTER'S II NEW COLLEGE DICTIONARY (1995)(meaning of the noun "leave" includes official permission to be absent from work or duty, esp. that granted to military personnel, as well as the absence granted by such permission), and WEBSTER'S NEW WORLD DICTIONARY (4th ed. 2003)("leave of absence" defined as permission to be absent from work or duty, esp. for a long time, as well as the period for which this is granted).

statute, AFSCME argues that the rule deals with the FMLA, and cites *City of Newton,* 94 PERB 5079, in support of the proposition that PERB has held that the FMLA falls within the mandatory topic of leaves of absence.

City of Newton addressed an employer's proposal that, in cases where a FMLA-mandated leave applies, paid leave shall be substituted for unpaid leave except that an employee may retain 48 hours of his or her paid leave accrual. The union argued that bargaining about FMLA leave is preempted by the FMLA and that because the proposal could be applied in a manner inconsistent with the FMLA, it was an illegal (prohibited) topic of bargaining.

The Board did not disagree with the union's premise that the FMLA statutory scheme "preempts" negotiations on its terms and cannot be altered by public employers and employee organizations (*i.e.,* that the leaves of absence mandated by FMLA are not themselves within the meaning of the section 20.9 term "leaves of absence"). But upon examination of the actual language of the proposal PERB held that it was compatible with FMLA, which allows an employer to require the employee to substitute accrued vacation, personal, medical or sick leave for the medical leave required by FMLA. The Board thus concluded that the proposal, which addressed the matter of whether that substitution would be required, was thus not illegal, but was a matter of mandatory negotiation. This result is consistent with those reached in other PERB decisions because the subject or predominant characteristic of the proposal was the use of a paid, non-FMLA leave or leaves of absence. *City of Newton* does not support the broad proposition that proposals (or policies, for

that matter) which "deal with" the FMLA are mandatory subjects of bargaining.

If the section 20.9 list of mandatory subject of bargaining included the topic of "absences" or "employee absences," one might conclude that the policy involved here, the predominant characteristic of which is the reporting of employee absences, was a matter of mandatory bargaining because reporting them could be viewed as a fundamental aspect of "absences."[5] But section 20.9 lists no such topic. Parties are required to bargain over "leaves of absence," not "absences."

The absence reporting policy implemented by the State on July 1, 2015, does not address whether a leave of absence will exist, the application for, grant or denial of the leave of absence, the conditions or limitations on the leave of absence, the conditions on which an employee may return from a leave of absence, or any other aspect of a leave of absence which PERB has held to be within the meaning of the section 20.9 topic.

Neither party argues that the policy is an illegal (prohibited) topic of bargaining. I conclude that it is a permissive, rather than mandatory topic. Thus, even assuming that the State's adoption of the policy was a change in the *status quo* and that it made the change without bargaining with AFSCME, the State is entitled to prevail as a matter of law in this case because the policy is not a mandatory topic of bargaining.

Accordingly, AFSCME's motion for summary judgment is DENIED. The

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[5] *See Waterloo Cmty. Sch. Dist.*, 650 N.W.2d 627 (Iowa 2002) in which the Iowa Supreme Court held proposals which specified the time and place for the employer's payment of their wages was included within the section 20.9 "wages" topic because bargaining as to wages encompasses all of the fundamental aspects thereof.

State of Iowa's motion for summary judgment is GRANTED and I propose the following:

ORDER

AFSCME's prohibited practice complaint is hereby DISMISSED.

DATED at Des Moines, Iowa, this 17th day of June, 2016.

Jan V. Berry
Administrative Law Judge