

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICED EMPLOYEES INTERNATIONAL
UNION, LOCAL 199,
Complainant,

and

STATE OF IOWA (BOARD OF REGENTS),
Respondent.

CASE NO. 100772

PROPOSED DECISION AND ORDER

Service Employees International Union, Local 199 ("SEIU") filed the complaint initiating this prohibited practice proceeding with the Public Employment Relations Board ("PERB" or "the Board") on October 11, 2016. The complaint alleges that Respondent, through its Board of Regents, committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(a), (c) and (d) when it hindered or entirely prevented SEIU representatives from holding discussions with its members (employees at the University of Iowa Hospitals and Clinics) in non-patient-care areas within the hospital on no fewer than six occasions between July 18 and August 5, 2016. Respondent denied its commission of any prohibited practice.

Pursuant to notice, an evidentiary hearing was held before me in Iowa City, Iowa, on April 11, 2017. SEIU was represented by Attorney James Jacobson and the State/Regents by Attorney Timothy Cook. Both parties filed post-hearing briefs on June 12, 2017. Based upon the entirety of the record, and having considered the arguments of the parties, I have concluded that the State/Regents committed prohibited practices within the meaning of Iowa Code section 20.10(2)(a).

FINDINGS OF FACT

The State is a public employer within the meaning of Iowa Code section 20.3(10) and SEIU is an employee organization within the meaning of section 20.3(4). In 1998 SEIU's predecessor, Service Employees International Union Local 150, was certified as the bargaining representative of what is often referred to as the tertiary health care or professional patient care unit of employees employed under the Board of Regents' classification system. SEIU (Local 199) became the unit's certified representative in 2000 as a result of a PERB amendment of certification proceeding. As of the dates of the events relevant to the present complaint, the unit was composed of over 3,000 professional employees engaged in tertiary health care at the University of Iowa Hospitals and Clinics (UIHC), including nurses in a number of distinct job classifications.

UIHC is a large health care center renowned for its research and the treatment and complex, high-intensity care of seriously ill patients in need of organ transplants, cardiac surgery and cancer treatment, as well as a large variety of other health-care specialties. This case arises from a dispute concerning the right of a bargaining unit employee and SEIU member to discuss employment-related matters and solicit new members at certain locations within a number of UIHC patient-care units.

The present dispute is not the first involving UIHC's stance concerning SEIU's solicitation of employees or distribution of materials at various locations in the UIHC complex. In late 2000, in a proposed decision on an SEIU prohibited practice complaint, a PERB administrative law judge concluded, *inter*

alia, that UIHC's staff solicitation and material distribution policy was impermissibly overbroad as applied to SEIU and that UIHC had committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(a) when it prohibited off-duty bargaining unit employees from distributing informational flyers concerning the status of collective negotiations at locations inside UIHC which were not immediate patient-care areas or locations where the distribution would adversely impact patient care. UIHC appealed the ALJ's proposed decision to the Board, preventing it from becoming the agency's final action on the matter. See Iowa Code section 17A.15(3).

At the time, the parties were also involved in two other prohibited practice proceedings, which ultimately resulted in the issuance of proposed decisions which were both also appealed to the Board. But prior to further proceedings on any of the appeals, the parties entered into a settlement agreement which resolved all three cases. SEIU requested the Board's consent to the withdrawal of its complaints in accordance with what was then PERB rule 621—3.6, and the parties jointly sought an order dismissing the underlying prohibited practice complaints without review of the proposed decisions issued by the ALJs.

The Board granted the requests and dismissed the complaints, neither affirming nor reversing any of the proposed decisions, and specifically noted in its order that the intra-agency appeals having prevented the proposed decisions from becoming final agency action, they were thus of no force and effect in view of the dismissal of the underlying complaints and could not be cited as or relied upon as authority by any party, the Board or its ALJs.

As to the settlement of the dispute over solicitation and distribution, the parties' agreement provided that UIHC would amend its staff solicitation and distribution of materials policy as reflected in an attachment to the agreement. Although subsequently reformatted and renumbered in UIHC's policies and procedures manual, the actual language of the policy attached to the settlement agreement is substantively identical to the policy in effect at the time of the events which precipitated the present case. To the extent relevant to a party's claim or defense in this case, other specific provisions of the parties' settlement agreement or UIHC's policy will be quoted or described in the discussion of that issue.

While the activities of a SEIU representative on individual UIHC units in early 2008 spawned a series of communications which reveal that the parties harbored divergent interpretations of the revised solicitation and distribution policy, as did at least two incidents in 2012 where off-duty employees acting on behalf of SEIU were told to leave on-unit breakrooms, there is nothing in the record which shows there was any grievance, administrative or judicial litigation between the parties concerning the subject until the filing of the present complaint.

SEIU and the Regents were parties to a collective bargaining agreement effective from July 1, 2015 through June 30, 2017. During the summer of 2016, SEIU began a campaign to engage its bargaining unit's employees in an effort to build its membership and hear employees' thoughts or concerns on workplace issues, including those which might be relevant to the parties' upcoming

collective bargaining.

UIHC management became aware of SEIU activity at the complex no later than July 18, 2016. At 7:48 that morning the director of nursing professional development and advanced practice emailed Director of Nursing Services Cindy Dawson, advising that “SEIU reps were handing out flyers in the west transportation center this AM” and that she was not able to get one. Dawson forwarded the email to 12 other managers or supervisors, adding her own message that they needed to “[m]ake sure that SEIU reps are not on the units.”

Later that morning Judy Kurtt, one of the management representatives who had received Dawson’s email (but whose precise position is not apparent from the record), forwarded the emails to an expanded list of over 35 other supervisors or managers, drawing their attention to the earlier messages. Kurtt asked to be provided with one of the SEIU flyers if one of the others had one, and added:

And just a reminder. SEIU does not have the right [to] be any place on you[r] units/areas, including your break rooms. If they come on to your areas, ask them to leave. If they refuse to leave, please call the legal office and also Jackie, Angie and/or me.

Jessica Kratofil, a bargaining unit RN employed in UIHC’s medical intensive care unit who was also a member of SEIU’s executive board, had obtained a leave of absence from her job in order to assist in SEIU’s effort. During her leave from June 13 through August 5, 2016, most of Kratofil’s time was spent at UIHC, most of that devoted to talking with employees in the UIHC cafeteria and the employee breakrooms on individual UIHC units. Kratofil

estimates she made between 60-80 visits to over 20 different inpatient units, during each of the three employee work shifts, to discuss employment issues with unit employees and solicit members.

On her visits to individual units, Kratofil followed a standard procedure. She would go the unit's nursing station, introduce herself as a nurse to the nurse or nursing clerk, indicate she was with SEIU and would be there for some stated period of time, and ask to be directed, taken, or on units where the room was locked, let into the employee breakroom.¹ While walking to the breakroom, Kratofil would not stop along the way, attempt to distribute any materials or engage in any conversation with anyone in the unit's corridors.

Once inside a unit's breakroom, Kratofil would routinely close the door if it was standing open and talk with on-break employees who were already present or who would come in on their breaks. It is undisputed that patients are not brought to or given treatment in the breakrooms, and they are not open for use by patients or their visiting family members, although there is evidence that on one unit family members of patients have on occasion gone into the employee breakroom seeking privacy for a conversation. Instead, breakrooms are typically used as places where employees eat lunch and take breaks and where, on at least some units, work-related meetings or training by vendors on the use of new products may at times take place. Social gatherings for employee potlucks, birthdays or retirements also occur in at least some breakrooms, and family or friends of staff visit some breakrooms on occasion to have lunch or speak with a

¹ In cases where the unit itself was locked, Kratofil would use the available doorbell to gain admittance and proceed to the nursing station or would introduce herself and convey her

staff member.

While the majority of Kratofil's visits to individual units were seemingly without incident, SEIU's complaint addresses six instances where Kratofil was either denied access to or evicted from employee break rooms in three of UIHC's main sections—the John Colloton Pavilion (JCP), John Pappajohn Pavilion (JPP) and Roy Carver Pavilion (RCP).

1. The first of these incidents occurred in the early afternoon of July 18, 2016, when Kratofil visited 2JCP—a locked general pediatric unit. Kratofil rang the unit's doorbell and when the doors opened she approached the unit's clerk, introduced herself in her usual manner and asked to be admitted to the unit's breakroom. The clerk walked Kratofil to the locked breakroom, used her badge to open the door, and let Kratofil in.

Kratofil spent the next hour or so visiting with bargaining unit members who were there having lunch, and others who came into the room, about employment-related issues including those which might be the subject of the parties' upcoming collective bargaining.

At some point another nurse came in and asked who she was. Kratofil identified herself as a UIHC nurse who was with SEIU and explained what she was doing there, and was told it wasn't her unit, the unit is locked, and that she couldn't be there. Kratofil indicated she knew the unit was locked and explained how she had been admitted. The nurse said she was letting "legal" know Kratofil was there and asked her if she would wait in the family waiting area while legal was consulted. Kratofil complied.

message by means of a phone located outside the entrance to some units.

While in the family waiting area Kratofil telephoned SEIU representative and organizer Zach Peterson, who was supervising SEIU's effort, and explained the situation. Peterson indicated that since Kratofil had already been in the breakroom for the time she had planned to devote to that unit, she might as well leave, which she did.

2. The next incident occurred during the late morning of July 20, 2016, when Kratofil visited 4JPP, an unlocked adult hematology-oncology unit. Kratofil walked onto the unit and spoke with a nurse at the nursing station, delivering her usual introduction and message and asking to be let into the breakroom. The nurse agreed, but asked Kratofil to wait a minute, indicating she'd be right back.

When the nurse returned several minutes later she said she had talked with her nurse manager and could not let Kratofil in the breakroom because of "patient confidentiality," and indicated that if Kratofil had issues with that, she should talk with the director. Kratofil left the unit.

3. During the late afternoon of July 25, 2016, Kratofil visited the locked neonatal intensive care unit (NICU) at 6JPP. After ringing the unit's doorbell and conveying her usual introduction, message and request, the clerk at the nursing station indicated that Kratofil could go to the breakroom, told her where it was located and gave her the code to get into the room.

The NICU is subject to a written UIHC policy which requires visitors to some units to complete a health screening form concerning whether the visitor has had any of a list of symptoms or has been exposed to any of a list of

symptoms or illnesses during specified periods of time. The policy requires that visitors who have had such symptoms or exposures not be permitted to visit on the unit and requires that visitors be instructed on proper hand hygiene technique upon their admission. Kratofil, however, was not asked to complete the form, nor was hand hygiene mentioned before she was admitted to the breakroom.

Kratofil had been in the breakroom a short time, speaking with a nurse who came in on break, when the unit's assistant nurse manager arrived and indicated that NICU was a locked unit and that Kratofil was not allowed to be there. Kratofil expressed her view that the law allowed her to be in the breakroom and the nurse threatened to have her escorted out by security before leaving the room.

During the manager's absence, Kratofil spoke with a staff nurse who came in about a workplace issue until the manager returned and told Kratofil she needed to leave—she was not a NICU staff member and it was a security issue. Discussion about whether she was entitled to be there ensued between Kratofil, the manager and Peterson, who Kratofil had telephoned. The manager indicated she had been directed to call security, mentioning an email from upper management about SEIU representatives not being allowed in breakrooms.

Peterson and Kratofil decided she would leave the unit, and Kratofil so advised the manager, indicating that although she was not being escorted out by security, she was nonetheless leaving involuntarily. When she opened the breakroom door Kratofil found a UIHC security guard standing outside, and she

was escorted out of the unit by the manager, followed by the security guard.

4. The fourth incident addressed by SEIU's complaint occurred a few hours after her NICU experience, in the adjacent labor and delivery unit. Kratofil walked onto the unlocked unit at approximately 9:00 p.m., approached the clerk with her usual introduction, message and request to go the breakroom, and was directed to a room which Respondent describes as a report/workroom.²

Kratofil found a number of on-break nurses in the room, introduced herself and spoke to the nurses about workplace issues, including some she had discussed with others on previous visits to the unit. While talking with the nurses the night-shift supervisor of children's and women's services came into the room, asking Kratofil who she was. Kratofil introduced herself and indicated what she was doing there.

Asked if she had an appointment, Kratofil indicated that she did not, and the supervisor told her that she consequently couldn't be there. Discussion between the two ensued, the supervisor eventually indicating that she would call security if Kratofil didn't leave. Kratofil said that was fine, and continued to talk to on-break employees, signing at least one up as a new SEIU member.

While there, Kratofil received a message advising her of the death of a family member. Upon receiving this news, she left the room on her way out of the unit and found the supervisor at the clerk's desk. Kratofil told her of the death in her family and indicated she was leaving. In the corridor outside the

² Kratofil had previously visited the unit on a number of occasions, asking to go to the breakroom each time, and had been directed to this same room on all occasions. Although this unit does not have a dedicated "breakroom," there is evidence that the room is used as such by staff, and it was referred to as the unit's breakroom by the house operations manager in an email she sent up the chain later that night concerning Kratofil's earlier presence there.

unit she encountered the same security guard she had seen earlier in the NICU.

The guard told her she had been told to leave before, and that he would escort her out. Kratofil provided the guard with her name as requested, and when she asked the guard what the issue was he told her she was disrupting business, didn't have a badge to prove she was an employee and that it was a locked-down unit. After she was allowed to retrieve the lunch she had brought with her and had left at another location, the guard escorted Kratofil to the elevators to the parking ramp where she had left her car.

5. The next incident noted in SEIU's complaint took place in 4RCP, an unlocked adult cardiac stepdown unit, during the early afternoon of August 2, 2106. Upon introducing herself to the clerk and delivering her standard message and request, the unit's assistant nurse manager, having overheard, told Kratofil she didn't think she could be in the breakroom and asked Kratofil to wait while she checked with the nurse manager.

The nurse manager arrived and told Kratofil she was not allowed in the breakroom because of patient information, that the breakroom was locked, that people kept belongings in there and there had been issues with things being stolen, and that Kratofil would need to walk through the unit to reach the breakroom. In response to Kratofil's assurances that she was familiar with her duty to maintain the confidentiality of any patient information she might encounter and that she had no intention of disturbing employees' possessions or disrupting anything on her way to the breakroom, the manager indicated that she was passing on information provided by a superior and that she would go

chat with her. While waiting, Kratofil telephoned Peterson and they decided that the manager's superior was not going to grant access to the breakroom. Kratofil then left to visit another unit.

6. The final incident cited in SEIU's complaint occurred on the afternoon of August 3, 2016, when Kratofil again visited 2JCP—the unit she had been asked to leave on July 18. Kratofil rang the unit's doorbell, was let onto the unit by the clerk and, after relaying her standard introduction, message and request, was let into the breakroom by the clerk.

Kratofil introduced herself to the staff who were present, indicating she was with SEIU. Soon after her arrival, the unit's assistant nurse manager, who had heard Kratofil was in the breakroom, came in and said she was not allowed to be there on authority of the director of children's and women's service and the legal department. Kratofil indicated she would prefer not to leave and the manager left to get her director.

Upon her arrival the director told Kratofil she needed to leave—that the breakroom was a patient-care area. Kratofil disputed this assertion and asserted that it was her right to be there. Following further discussion, including references to supposed provisions of the parties' collective bargaining agreement and settlement agreement, the management representative persisted in her position that Kratofil had to leave. Kratofil advised that she would leave, not by choice but because it was useless to sit there and argue with the manager, then left the unit.

On October 10, 2016, SEIU filed a petition at law in the Iowa District

Court for Johnson County which named the Board of Regents, the University of Iowa and UIHC as defendants. SEIU's petition alleged that it had entered into a "contractual agreement" (the parties' 2001 settlement agreement), that it had fully performed its duties under that agreement, and that the defendants' revised solicitation and distribution policy incorporated into the agreement allowed bargaining unit members to engage in conversations with other bargaining unit employees in non-patient-care areas. The petition further alleged that the defendants had breached the agreement by denying SEIU's representative, Kratofil, the contractual right to engage employees in conversations outside the immediate vicinity of patients or visitors or by requiring SEIU representatives to obtain defendants' permission before engaging in such conversations.³

The following day SEIU filed its prohibited practice complaint with PERB.

CONCLUSIONS OF LAW

SEIU's complaint alleges Respondent committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(a), (c) and (d), which provide:

20.10 Prohibited practices.

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.

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

d. Discharge or discriminate against a public

³ The defendants filed a motion to dismiss SEIU's petition on a number of grounds, which motion was denied by the Court on November 30, 2016. The record does not reveal the status of that litigation as of the date of hearing in this proceeding.

employee because the employee has filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because the employee has formed, joined or chosen to be represented by any employee organization.

I. Subject Matter Jurisdiction

In its brief Respondent argues that PERB does not have subject matter jurisdiction in this case. This assertion is premised on the idea that the parties agreed to the content of the UIHC staff solicitation and distribution policy in 2001 as part of their settlement agreement, that any issue concerning the proper interpretation and enforcement of their settlement is a matter for resolution by the courts, and that SEIU's breach of contract action in the Johnson County District Court, based upon many of the same facts as is its prohibited practice complaint, evinces its tacit admission that the district court, rather than PERB, is the forum with jurisdiction over the parties' dispute.

"Subject matter jurisdiction" refers to a tribunal's power to hear and determine cases of the general class to which the proceedings in question belong. Subject matter jurisdiction is conferred by constitution or statute. It is not dependent upon whether the claim asserted in the petition or complaint is meritorious. *See, e.g., Smith v. Smith*, 646 N.W.2d 412, 414-15 (Iowa 2002).

PERB plainly has subject matter jurisdiction to hear and determine prohibited practice cases. Iowa Code section 20.1(2)(b) specifically provides that PERB's powers and duties include adjudicating prohibited practice complaints—a class of case to which the instant proceeding belongs.

Respondent's point that PERB has no statutory authority to adjudicate claims that a party has merely violated a contract (either a collective bargaining agreement or another contract, such as the parties' 2001 settlement agreement) is well supported by authority. *See, e.g., Scurr v. State (Dept. of Corrections)*, 02-MA-05 (2002). But Respondent's claim that PERB is somehow deprived of subject matter jurisdiction because SEIU has sought to enforce the 2001 settlement agreement through a breach of contract action in the district court ignores the fact that the two proceedings seek enforcement of different legal rights.

SEIU's district court action is based upon the claims that the 2001 settlement agreement is an enforceable contract between the parties and that the Respondent breached that contract by its responses to Kratofil's activities in 2016. The very different legal theory underlying SEIU's prohibited practice complaint is that those same actions interfered with, restrained or coerced Kratofil in her exercise of her Iowa Code section 20.8(3) right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

While Respondent advances its interpretation of the 2001 settlement agreement as a defense to SEIU's complaint, that agreement and the solicitation and distribution policy it incorporated are really only tangentially involved here, and only because Respondent attempts to use the agreement and policy as a shield. While SEIU does maintain that UIHC misinterpreted and misapplied the policy and is pressing that claim in the district court, its

complaint here is that Respondent interfered with or restrained Kratofil's exercise of her Iowa Code section 20.8(3) right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection—a claim squarely within PERB's subject matter jurisdiction over prohibited practice complaints.

II. Concerted Activity in Health Care Facilities

Kratofil's solicitation of new SEIU members and discussions with bargaining unit members concerning workplace issues and matters which might become subjects of SEIU's collective bargaining in the parties' upcoming negotiations are concerted activities within the meaning of section 20.8(3). *See, e.g., City of Cedar Falls*, 83 H.O. 2351 (organizational efforts by employee are protected concerted activity); *Spencer Municipal Hospital*, 75 H.O. 354 (activities of spokesperson for other employees in complaint concerning conditions of employment are protected concerted activities). Respondents do not deny that Kratofil was engaged in concerted activity protected by section 20.8(3). The real issue in this case is instead where an employer may lawfully prohibit such activities on its premises.

Iowa Code sections 20.8 and 20.10(2)(a) are closely modeled on sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158(a)(1). Federal interpretations of these similar statutes are therefore illuminating and instructive on the interpretation and application of the Iowa law. *See, e.g., City of Davenport v. PERB*, 264 N.W.2d 307, 313 (Iowa 1978); *Sergeant Bluff-Luton Educ. Ass'n. v. Sergeant Bluff-Luton Cmty. Sch. Dist.*, 282

N.W.2d 144, 146 (Iowa 1979). As PERB has done in any number of cases, I think it appropriate to follow private-sector precedent developed under the analogous federal statutes.

The extent of the employer's right to restrict employee solicitation and distribution has been a subject of many private-sector cases. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) the Supreme Court sustained the NLRB's rule that, absent special circumstances, an employer's restriction on employee solicitation during nonworking time and distribution during such time in nonworking areas is presumptively an unreasonable interference with rights granted by section 7 of the NLRA and an unfair labor practice under section 8(a)(1).

However, in *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976), the NLRB acknowledged that a distinction existed between health care facilities and other employers, and that since the primary function of a hospital is patient care and a tranquil atmosphere is essential to the carrying out of that function, a hospital may be justified in imposing somewhat more stringent prohibitions on solicitation than are permitted other employers. The NLRB accordingly modified its usual presumption, indicating:

For example, a hospital may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas. Solicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind.

Id. at 1150.

The Supreme Court summarized the *St. John's Hospital* decision as holding:

. . . that prohibiting solicitation in [immediate patient-care areas] was justified and required striking the balance against employees' interests in organizational activity. The [NLRB] determined, however that the balance should be struck against the prohibition in areas other than immediate patient-care areas such as lounges and cafeterias absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas.

Beth Israel Hospital v. NLRB, 437 U.S. 483, 495 (1978).

In *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203 (2007), a case with substantial similarities to the present one, the NLRB affirmed an ALJ's conclusion that the employer had violated section 8(a)(1) by applying its no solicitation/no-distribution rules to breakrooms/lounges/multi-purpose rooms/reporting rooms which (as in the instant case) were located within patient-care units. The ALJ had succinctly summarized the NLRB approach to health care facilities:

Any rules, which prohibit employees' solicitation in . . . areas, which are not considered immediate patient care areas, are presumptively invalid. [*Beth Israel Hospital*] at 508. Significantly, it is well settled that "immediate patient care areas" have been described as "patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas." *St. John's Hospital*, 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1977), and cited in *Baptist Hospital*, 442 U.S. 773, 781 (1979). For example, a rule prohibiting "soliciting or distributing materials during working time or in any work area or resident care areas" was held to be overly broad, because such a ban must be limited to immediate patient care areas. *Healthcare & Retirement Corp.*, 310 NLRB 1002, 1005 (1993).

St. Margaret Mercy Healthcare Centers at 209.

III. Application of Law to Facts

Although not phrased in precisely this manner, in its brief Respondent seemingly suggests that the parties' 2001 settlement agreement and incorporated solicitation/distribution policy constitutes SEIU's waiver of its ability to now challenge the policy's application, arguing that SEIU had the right as the bargaining unit's representative to enter into an agreement that limits the areas where concerted activity may take place and that it did so in 2001.

But Respondent has not pointed out any language in the agreement or incorporated policy that waives employees' section 20.8(3) rights, much less any that does so in the clear and unequivocal language which the NLRB has required in order for such a waiver to be effective. *See Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989); *Textron Puerto Rico*, 107 NLRB 583, 587 (1953).

To the contrary, the parties' 2001 agreement specifically recites that it is a compromise settlement of their disputed claims, that neither party admits the validity of the other's legal contentions, and that entering into the agreement does not prejudice the right of either to assert any legal claim in other proceedings before PERB or any other forum. And the policy which resulted from the parties' settlement, which has broader applicability than merely to solicitation and distribution by union members or representatives, specifically recites that it is intended to be consistent with employee rights under Iowa Code chapter 20 and provides for an "exception" to its policy statement and

guidelines “for employees and employee organizations as defined by Iowa Code, Chapter 20, who are engaged in collective bargaining or other union related activities.”

On the record in this case, it is apparent that UIHC’s solicitation and distribution policy, at least as applied by UIHC, is presumptively overbroad and interferes with and restrains employee concerted activity such as Kratofil’s, because as so applied it bans employee solicitation in breakrooms (or report/workrooms) which are not immediate patient-care areas.

The question thus becomes whether UIHC has rebutted the presumption by showing that disruption of patient care would necessarily result if solicitation were permitted in those areas. Respondent has failed to make such a showing.

Much of the evidence concerning the claimed disruption to patient care which would result from breakroom solicitation is premised on activities which have not been shown to have occurred in this case. A union solicitor who asked people to stop work, interrupted on-duty employees, or made a unit-wide call for a meeting of employees could well be disruptive of patient care. But there is no evidence here that Kratofil engaged in any such conduct when she asked clerks to be directed to or admitted to breakrooms and walked directly to them without interacting with anyone along the way.

And the testimony concerning the effect that a solicitor’s “unfettered access to patient-care units” would have on patient care similarly misses the mark. SEIU does not seek unfettered access to any unit—only to rooms within

units which are not immediate patient-care areas.

The apparent claim that the mere presence of a union solicitor walking silently through common corridors to an employee breakroom is disruptive of patient care, without a single example of this having occurred or even how this could be so, is similarly unpersuasive. In another context involving employer restriction of workplace concerted activity—the wearing of union insignia—the employer has the burden, as is the case here, to show that the activity is disruptive in order to justify the restriction. At least in that context, it is well settled that general, speculative, isolated or conclusory evidence of potential disruption is not sufficient to justify the restriction. *See, e.g., Boise Cascade Corp.*, 300 NLRB 80, 82 (1990). This is an apt description of the testimony offered by Respondent in support of its claim of disruption.

And the view of one manager that nurses engaged in high-intensity patient care need to use their breaks to briefly “disengage” from their trying work, rather than spend them talking to a union solicitor in a closed breakroom, while surely expressing that manager’s view on how her subordinates should use their breaks, totally overlooks the fact that breaks are off-duty time of the employees and that what goes on in the minds of off-duty employees is rightfully beyond the employer’s control.

The idea that a disruption of patient care would occur simply on the basis of a union solicitor silently walking through a unit on the way to a closed breakroom is belied by the undisputed fact that other people not employed on the unit regularly move through a unit’s corridors from place to place, passing

patient rooms in the process. Patient family members and other patient visitors, as well as outside staff who maintain and supply breakroom vending machines (where they exist) all move through the units as do, on at least some units, staff members' visiting family and friends, all of whom potentially engage in conversation or at least create sounds on their way to the breakroom. Yet there is no claim or evidence that those regular activities disrupt patient care, even though they are more potentially distracting than an employee union representative's silent and direct walk to a breakroom.⁴

I conclude that Respondent interfered, restrained or coerced Kratofil in her exercise of rights granted by Iowa Code section 20.8(3) when it denied her access to or directed her to leave rooms on patient-care units which were not immediate patient-care areas, and thus committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(a).⁵

Although SEIU's petition also alleges that the Respondent committed prohibited practices within the meaning of sections 20.10(2)(c) and (d), it makes no mention of those sections in its brief, and I cannot conclude on this

⁴ This is not to suggest that employees visiting areas on patient-care units which are not immediate patient-care areas are not subject to the procedures required of other visitors, as is the case in the NICU where hand hygiene and health screening are supposed to be conducted with every visitor. Refusal of a union representative to adhere to established infection-control procedures and the like which are uniformly applied and enforced and are directly related to the safety of the unit's patients would, in my view, warrant the exclusion of the representative.

⁵ Unlike the incidents which occurred after July 18, 2016, in which it is clear that the denial of access or demand Kratofil leave was made by a supervisor or manager representative of UIHC, it is not clear that the nurse who evicted Kratofil from the 2JCP breakroom on July 18 was a representative of management. But in view of the emails from management representatives which had been broadly circulated prior to Kratofil's early-afternoon visit, which instructed that SEIU was not to be on the units and directed that SEIU representatives be asked to leave and that the legal office and managers were to be called if they refused, I attribute Kratofil's eviction from 2JCP to management's directive, regardless of the position of the individual who carried out the directive.

record that SEIU has established Respondent's commission of prohibited practices as defined in those sections.

While a number of the reported cases on the topic of solicitation and distribution directly address the facial validity of the employer's solicitation/distribution policies, I think such an examination unnecessary and perhaps inappropriate in this case. Depending upon one's interpretation of the policy, one could certainly argue that it is overbroad on its face in that, at a minimum, its paragraph B limits solicitation during non-work time to areas to which patients and visitors do not have access, rather than to immediate patient-care areas, it having been established that visitors are at times allowed access to on-unit breakrooms. But, depending on one's interpretation, it could also be argued that the exception contained in paragraph G of the policy for employees and employee organizations engaged in union-related activities eliminates any facial overbreadth which might exist.

Although the facial validity of the policy is not a matter before the court in SEIU's breach of contract action, it will seemingly be necessary for the court to interpret the policy's provisions to determine whether UIHC has breached the agreement as alleged by SEIU. The conclusion reached in this case is simply that UIHC's application of the policy to Kratofil, regardless of the merit of its interpretation of the policy, interfered, restrained or coerced Kratofil in the exercise of her section 20.8(3) rights, and constituted a prohibited practice within the meaning of section 20.10(2)(a).

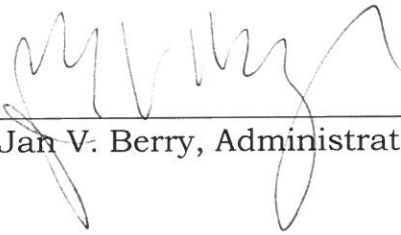
I consequently propose entry of the following:

ORDER

Respondent shall cease and desist from any further like violations of Iowa Code section 20.10(2)(a).

Respondent shall post the attached Notice to Employees, for 30 days from the date this proposed decision becomes final, in those locations within UIHC customarily used for the posting of management-issued information and notices to employees in the SEIU-represented bargaining unit.

DATED at Des Moines, Iowa, this 28th day of December, 2017.

A handwritten signature in black ink, appearing to read 'Jan V. Berry', is written over a horizontal line.

Jan V. Berry, Administrative Law Judge

NOTICE TO EMPLOYEES

OF

The State of Iowa (Board of Regents)

Employed at the University of Iowa Hospitals & Clinics

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 (Board of Regents) committed prohibited practices within the meaning of Iowa Code section 20.10(2)(a).

The violations occurred between July 18 and August 3, 2016, when officials of the University of Iowa Hospitals & Clinics denied an employee acting in support of or on behalf of Service Employees International Union Local 199 access to certain rooms on patient-care units which were not immediate patient-care areas, or required the employee to leave such rooms. PERB has concluded that these actions by the employer interfered with, restrained or coerced the employee's exercise of her right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection as granted by Iowa Code section 20.8.

The section of the Iowa Public Employment Relations Act, Iowa Code chapter. 20, found to have been violated provides:

20.10 Prohibited practices.

- ...
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.

To remedy this violation, the State (Board of Regents) has been ordered to cease and desist from any further like violations of the law and to post a true copy of this Notice for 30 days in those places customarily used for the posting of information to employees at the University of Iowa Hospitals & Clinics in the bargaining unit represented by SEIU Local 199.

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