STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME IOWA COUNCIL 61, Complainant,	)	
and	)	CASE NO. 100817
STATE OF IOWA, Respondent.	)	

DECISION ON APPEAL

This matter is before us on appeal from a proposed decision and order issued by an administrative law judge (ALJ) of the Public Employment Relations Board (Board or PERB) concerning a prohibited practice complaint filed by AFSCME Iowa Council 61 (AFSCME) pursuant to Iowa Code section 20.11. The ALJ concluded that AFSCME had failed to establish the State's commission of a prohibited practice.

AFSCME timely appealed to the Board pursuant to PERB rules. AFSCME did not appeal a companion case, PERB Case No. 100797, with which this case was consolidated. Therefore, our review on this appeal is limited to the ALJ's factual findings and conclusions of law with respect to this case only, Case No. 100817. Accordingly, our review is not an affirmance of determinations or conclusions reached by the ALJ in her proposed decision in Case No. 100797.

Pursuant to Iowa Code section 17A.15(3), in this appeal, the Board possesses all powers it would have possessed had it elected, pursuant to PERB rule 621—2.1, to preside at the evidentiary hearing in place of the

ALJ. The Board has heard the case upon the record submitted before the ALJ. On March 13, 2019, both parties' representatives presented oral arguments to the Board, attorney Jeff Edgar for the State and attorney Mark Hedberg for AFSCME.

Based upon its review of the record before the ALJ, and having considered the parties' arguments, the Board DISMISSES AFSCME's prohibited practice complaint and states as follow:

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in her proposed decision and order, are attached as "Appendix A," and are fully supported by the record. The Board adopts them as its own.

CONCLUSIONS OF LAW

The ALJ's conclusions of law, as set out in Appendix A with respect to PERB Case No. 100817 only, are correct, and the Board adopts them as its own with the following addition:

1. We note that subjects are no longer referenced as "prohibited," and subjects are either mandatory, permissive, or "excluded."

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

ORDER

The prohibited practice complaint of AFSCME is DISMISSED.

All references to the findings of fact or conclusions of law in this case, PERB Case No. 100817, shall be cited as, "*AFSCME Iowa Council 61 and State of Iowa*, 2019 PERB 100817." All references to the findings of fact or conclusions of law in the companion case, PERB Case No. 100797, shall be cited as, "*AFSCME Iowa Council 61 and State of Iowa*, 2018 ALJ 100797."

The costs of reporting and the agency-requested transcript in the amount of $276.65 remain assessed equally against the State of Iowa and AFSCME Iowa Council 61 pursuant to PERB rule 621—3.12. AFSCME remains liable for its share of those costs. The bill of costs for AFSCME's share will be issued in accordance with PERB subrule 621—2.12(3).

DATED at Des Moines, Iowa this 10th day of June, 2019.

PUBLIC EMPLOYMENT RELATIONS BOARD

Jamie K. Van Fossen, Interim Chair

Mary T. Gannon, Board Member

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STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME IOWA COUNCIL 61, Complainant, and STATE OF IOWA, Respondent.	)	CASE NO. 100797
AFSCME IOWA COUNCIL 61, Complainant, and STATE OF IOWA, Respondent.	)	CASE NO. 100817

PROPOSED DECISION AND ORDER

AFSCME Iowa Council 61 ("AFSCME") filed a prohibited practice complaint with the Public Employment Relations Board (PERB) on February 1, 2017 pursuant to Iowa Code section 20.11 and PERB rule 621—3.1. The complaint, PERB case number 100797, alleges that in negotiating the parties' 2017-2019 collective bargaining agreement the State of Iowa's initial bargaining position on insurance, as presented on November 23, 2016, did not meet the specificity requirements imposed by section 20.17(3). AFSCME contends this failure amounts to a prohibited practice within the meaning of Iowa Code sections 20.10(1), 20.10(2)(*e*) and (*f*). The State of Iowa denies the commission of a prohibited practice as alleged in case number 100797.

On February 17, 2017, the Public Employment Relations Act (PERA), chapter 20 of the Iowa Code, was amended by 2017 Iowa Acts House File 291.

The transition and implementation language of H.F. 291 required all parties who had not ratified a successor bargaining agreement by February 17, 2017 to cease and commence bargaining anew under the amended PERA. Following that directive, AFSCME and the State exchanged their initial bargaining positions on February 22, 2017 under the amended chapter 20.

On March 10, 2017, AFSCME filed the latter prohibited practice complaint at issue here pursuant to Iowa Code section 20.11 and PERB rule 621—3.1. The complaint, PERB case number 100817, alleges that the deletions the State proposed in its initial bargaining position, as presented on February 22, 2017, did not meet the specificity requirements imposed by 20.17(3) because the proposal failed to indicate whether the State considered the deleted provisions permissive or excluded subjects of bargaining. AFSCME contends this failure amounts to a prohibited practice within the meaning of Iowa Code sections 20.10(1), 20.10(2)(*e*) and (*f*). The State denies the commission of a prohibited practice as alleged in case number 100817.

By Order dated March 27, 2017, complaints in 100797 and 100817 were consolidated pursuant to PERB rule 621—2.16.

Pursuant to notice, an evidentiary hearing on the consolidated complaints was held before me on July 26, 2017 in Des Moines, Iowa. AFSCME was represented by Mark Hedberg and the State of Iowa was represented by Jeffery Edgar. Both parties submitted post-hearing briefs, which were received on August 28, 2017.

Based upon the entirety of the record, and having considered the parties' arguments, I make the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

The State of Iowa is a public employer within the meaning of Iowa Code section 20.3(10). AFSCME is an employee organization within the meaning of section 20.3(4). AFSCME is certified by PERB as the exclusive bargaining representative for the following bargaining units of the State's executive branch employees: Clerical; Technical; Blue Collar; Professional Fiscal and Staff; Security/Community Based Corrections; Education; and Patient Care.

At the time AFSCME filed the instant complaints, the State and AFSCME were parties to a two-year bargaining agreement that was due to expire on June 30, 2017. The agreement spanned over 200 pages, containing provisions over both mandatory and permissive subjects of bargaining as those subjects were characterized in 2015 when the agreement was negotiated. In negotiating the 2013-2015 and 2015-2017 bargaining agreements, the parties extensively discussed insurance benefits, specifically the available insurance plans and the cost to employees for having employer-provided insurance benefits. The parties ultimately reached agreement over the insurance plans but arbitrated the amount employees have to contribute toward the cost of the insurance premiums.

The parties' 2015-2017 agreement included numerous provisions and appendices on the subject of insurance, a mandatory subject of bargaining in 2015. Article IX, Section 4 (Health Benefits) indicated the State will "continue to

provide group health benefits to all eligible bargaining unit members" and identified the specific "health plan options" that would be available to employees. The contract language further specified both the employees' and the State's contribution toward insurance premium costs for single plans, family plans, double-spouse plans as well as the employees' out-of-pocket costs for each available plan. Appendix C of the agreement outlined information pertaining to enrollment and changes during the plan year.

Article IX, Section 5 (Dental Benefits) of the agreement indicated the State will "provide dental benefits to all eligible bargaining unit members as set forth in Appendix D," which outlined the specific coverage information. Like with the health benefits, the contract language also specified the State's and the employees' contribution toward premium costs for the only available single and family dental plan.

In November 2016, the parties started negotiating the successor July 1, 2017 to June 30, 2019 agreement. AFSCME presented its initial bargaining position on November 9, 2016 and the State presented its initial bargaining position on November 23, 2016. The exchange of proposals occurred in a public meeting as required by section 20.17(3). Both parties used the existing 2015-2017 agreement as the basis for their proposals, striking through sections they proposed deleting, adding new provisions in bold underlined language and noting "current contract language" next to provisions they proposed keeping the same for the successor agreement.

In its initial proposal, AFSCME sought substantive changes to about eleven sections and fourteen of the twenty six appendices of the existing agreement. AFSCME's wage proposal sought across-the-board increases between two and two and a quarter percent to be provided both years of the contract term on July 1 and January 1. In terms of insurance benefits, AFSCME proposed "current contract language" for the successor agreement.

In its initial bargaining position as presented on November 23, 2016, the State proposed substantive changes or deletions to about twenty sections and twelve appendices of the existing agreement. The State proposed a zero percent across-the-board wage increase. For its proposal on insurance, the State proposed deleting the entirety of current contract provisions regarding insurance and replacing it with only the following language:

> The State agrees ~~to continue~~ to provide ~~group~~ health **and dental** benefits**, as determined by the State,** to ~~all~~ eligible bargaining unit members.

The State provided no other information to AFSCME regarding its insurance proposal. The State's initial bargaining proposal on insurance is at the crux of AFSCME's complaint in case 100797. AFSCME contends the proposal was not specific enough because it provided no information regarding the plan design or the cost to employees.

Following the exchange of initial proposals, the parties met on January 14, 2017 for their first closed bargaining session. AFSCME presented the State with a counterproposal, now seeking to amend only the wages section and eleven of the appendices of the existing agreement. AFSCME reduced its

proposed wage increase to one percent to be provided on July 1 of both years of the agreement. In terms of insurance, AFSCME again proposed "current contract language."

The parties next met on January 30, 2017 for their second closed bargaining session. The State did not present a counterproposal at this session. When AFSCME inquired about the State's counterproposal, the State indicated it was still waiting for direction from the Governor and had no counterproposal ready to present. During the January 30 session, the parties only discussed the contract appendices but not those relating to insurance. The State did not provide any other information pertaining to its insurance proposal during the January 14 or January 30 bargaining session.

On February 1, two days after the parties' second bargaining session, AFSCME filed the complaint docketed as PERB case number 100797, alleging the State's insurance proposal did not meet the specificity requirements imposed by section 20.17(3).[1]

On February 13, 2017, the State provided its first counterproposal to AFSCME. The State's February 13 proposal sought to delete the entirety of the parties' current agreement except: Article I, Agreement, identifying the parties to the agreement and the date agreement was reached; Article II, the "recognition" clause that AFSCME is the exclusive bargaining representative and the parties will negotiate with respect to the scope of bargaining as outlined in 20.9, but proposing to delete existing language that the State will

[1] AFSCME amended its complaint in case number 100797 during the evidentiary hearing, limiting it to only alleged violations of 20.17(3), 20.10(1), 20.10(2)(*e*) and (*f*) as it pertains to the State's November 23, 2016 initial bargaining position on insurance.

negotiate over the "terms and conditions of employment covered by the Agreement"; Article IX, Section 1, proposing an across-the-board wage increase of six-tenths of one percent (0.6%) for each year of the agreement; and the "Termination of Agreement" that provided the duration of the agreement. The insurance provisions previously outlined were among those the State sought to delete from the successor agreement. On February 13, 2017, when the State presented its counterproposal, insurance was still a mandatory subject of bargaining under chapter 20.

During the week of February 13, the Iowa Legislature was debating proposed legislation filed as House File 291, a bill that sought to significantly amend chapter 20, which governs the scope and procedures of the parties' negotiations. The bill was passed by the Iowa Legislature on February 16 and signed by the Governor on February 17, 2017. The amendments became effective upon enactment.

H.F. 291 amended many aspects of chapter 20, but two are particularly relevant to the instant complaints. The implementation and transition language required all parties who had not ratified a contract by February 17 to cease and commence bargaining anew pursuant to the amended chapter 20, starting with an exchange of initial proposals. H.F. 291 also significantly narrowed the scope of bargaining for the AFSCME-represented units at issue here, the "non-public-safety" units. "Base wages," a subject not defined by the amendments, was now the only mandatory subject of bargaining for these units. Subjects that were mandatory prior to the H.F. 291 amendments, such as wages, vacations, and

holidays, were now permissive and the previously-mandatory subject of insurance was now an excluded subject of bargaining.

Following the enactment of H.F. 291 amendments, the parties ceased bargaining and exchanged initial bargaining positions pursuant to the amended chapter 20. On February 22, the date originally set for interest arbitration, the parties met to exchange initial bargaining positions.

In presenting their February 22 initial bargaining positions, the parties again used the 2015-2017 agreement as the basis for their proposals. AFSCME proposed to retain the "current contract language" for all the existing provisions except the wages and insurance provisions. AFSCME proposed a one percent wage increase for both years of the contract term. In regards to insurance, AFSCME proposed to keep the current contract language but increase the employees' contribution toward the cost of the insurance premiums.

The State's February 22 initial bargaining position was identical to its February 13 counterproposal with the exception of the proposed across-the-board wage increase, which was now at one percent compared to the one-sixth of one percent (0.6%) as presented on February 13. For the provisions the State sought to delete from the successor agreement, it listed each article and section affected and wrote "DELETE" next to those provisions. Prior to the public exchange of initial bargaining positions on February 22, the State verbally informed AFSCME that it will not agree to negotiate or submit to arbitration any permissive proposals. In the written initial proposal, as presented on

February 22, the State did not indicate whether it considered the proposed deletions to be permissive or excluded subjects of bargaining. The State's failure to include such designation is at the crux of AFSCME's complaint in case number 100817.

The parties exchanged arbitration offers shortly after exchanging initial bargaining positions on February 22 and proceeded to arbitration the same day.

On March 10, 2017, AFSCME filed the complaint docketed as PERB case number 100817 alleging the State's failure to identify the negotiability status of the provisions it sought to delete in its February 22 initial bargaining position did not meet the requirements imposed by 20.17(3).

CONCLUSIONS OF LAW

The issue to be resolved in the instant complaints is whether the State's initial bargaining position as presented on November 23, 2016 and February 22, 2017 violated Iowa Code section 20.17(3), and if so, whether such violation amounts to a prohibited practice within the meaning of sections 20.10(1), 20.10(2)(*e*) and(*f*). The statutory provisions central to both complaints provide, in relevant part:[2]

> **20.17 Procedures.**
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> * * *
>
> 3. Negotiating sessions, strategy meetings of public employers, mediation, and the deliberative process of arbitrators shall be exempt from the provisions of chapter 21. However, the employee organization shall present its initial bargaining position to the public employer at the first bargaining session. The public employer shall present its initial bargaining position to the employee organization at the second bargaining session, which

[2] Code of Iowa (2017) (quoted 20.17 and 20.10 language was not amended by H.F. 291).

shall be held no later than two weeks following the first bargaining session. Both sessions shall be open to the public and subject to the provisions of chapter 21.

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:

***

(*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.

PERB has considered an employer's compliance with 20.17(3) in instances where the employer does not provide any proposal on a subject of negotiation or fails to respond to a specific proposal put forth by the employee organization. *Oelwein Cmty. Educ. Ass'n and Oelwein Cmty. Sch. Dist.*, 80 H.O. 1593 (employer's initial bargaining position did not provide a wage proposal and failed to respond to the employee organization's proposal to change existing contract language); *Fort Dodge Educ. Ass'n and Fort Dodge Cmty. Sch. Dist.*, 83 H.O. 2373 (employer's initial bargaining position did not respond to the employee organization's proposal to add new articles to the successor agreement). In such instances, PERB has concluded that the employer's failure to provide a proposal or respond to the employee organization's proposals does not comply with section 20.17(3).

Oelwein established that an initial bargaining position requires an employer, at a minimum, to "clearly set forth its position on all areas at issue

between the parties in negotiations," which includes both its own initial bargaining proposals and a specific response to all proposals contained in the employee organization's initial bargaining position. 80 H.O. 1593 at 8. *Oelwein* was the first case interpreting 20.17(3) following a statutory amendment to require the parties to present their initial bargaining positions in a public meeting. The hearing officer found the legislative intent behind the public meeting requirement is to provide the public with information regarding the starting point of negotiations and the dispute between the parties. *Id.* at 7. As such, requiring parties to make their position clear at the opening meeting allows "the public an opportunity to most clearly understand the nature and extent of the disagreement between the parties." *Id.* at 8.

PERB has also considered an employer's compliance with 20.17(3) when the employer's initial bargaining position expresses a general intent to negotiate rather than offering concrete proposals.

In a declaratory ruling concerning the Davenport Community School District, the Board considered a factual scenario where the employer's initial bargaining position expressed "a willingness to negotiate in good faith with respect to the proposals offered by the [employee organization]," but failed to provide specific responses to the proposals made by the employee organization's initial bargaining position. *Davenport Cmty. Sch. Dist. and Davenport Educ. Ass'n*, 83 PERB 2458 at 1. The Board recognized, like the hearing officer in *Oelwein*, that the legislative purpose of 20.17(3) is for "the public to know the initial bargaining positions, and thus, the outside

parameters of the [parties'] dispute, without opening the entire bargaining process." *Id.* at 4. The Board adopted the *Oelwein* standard that an employer must set forth its position on all issues between the parties and specifically respond to the employee organization's proposals. *Id.* The Board further held that proposals contained in a party's initial bargaining position "must be made in accordance with the customary language used by the negotiating teams and must be specific enough for the parties to agree on the proposals at the moment they are introduced." *Id.* The Board concluded that a "willingness to negotiate in good faith" as an initial bargaining position was not specific enough to comply with the provisions of 20.17(3).

In a separate declaratory ruling concerning the Iowa State Education Association, the Board considered an initial bargaining position where the employer indicated that certain contract provisions were "open for discussion" and were "tied in" with the employer's salary schedule, which was not provided as part of the employer's initial bargaining position. *Iowa State Educ. Ass'n*, 89 PERB 4020 at 1-2. The Board found such "proposals" to be similar to those considered and found inadequate in *Davenport* because the content "supplies nothing more than an indication that the employer will bargain the topics mentioned during the course of future negotiations." *Id.* at 6. The Board concluded such "proposals" do not comply with section 20.17(3) "due to the failure to include any substantive content which defines the issues and informs the public of the outside parameters of the dispute, and the failure to include

any specifics which would allow the employee organization to agree to the employer's 'proposals' at the time of their presentation." *Id.*

In affirming the district court and PERB on judicial review of a PERB decision, the Iowa Supreme Court further explained the requirements pertaining to a party's initial bargaining position in the following way:

> We believe that section 20.17 requires that the parties' initial statement of position be a meaningful one, giving reasonable notice of their proposals to the other side and to the public. If the initial proposal is so devoid of meaningful information that it does not give reasonable notice, the offending party might well be found to have violated section 20.17. If the effect is to frustrate the negotiating process, it might even amount to a willful refusal to negotiate and thus a prohibited practice under section 20.10(1).

Cedar Rapids Ass'n of Fire Fighters, Local 11, Int'l Ass'n of Fire Fighters v. Iowa Pub. Emp't Relations Bd., 522 N.W.2d 840, 842–43 (Iowa 1994).

The Board subsequently incorporated the Court's pronouncement in *Cedar Rapids* within existing agency authority regarding 20.17(3) by noting that "in order to be 'meaningful' and to provide 'reasonable notice,' proposals must necessarily be stated clearly and specifically, and responses to the proposals of the other side must be given." *Sioux City Educ. Ass'n. and Sioux City Cmty. Sch. Dist.*, 98 PERB 5842 at 13-14.

Mootness of AFSCME's Complaints

Prior to addressing the merits of the instant complaints, it is necessary to first address the State's position that both complaints at issue here have been rendered moot by subsequent events. In regards to its November 23, 2016 initial bargaining position on insurance, the State argues that the H.F. 291 directive to cease and restart bargaining under the amended chapter 20

"obviat[ed] the justiciable nature of this controversy." In regards to the sufficiency of its February 22, 2017 initial bargaining position, the State contends that issue was similarly rendered moot by the subsequent negotiability proceeding and interest arbitration award that resolved the parties' dispute over the terms of the successor agreement.

"A case is moot if it no longer presents a justiciable controversy because the issues involved are academic or nonexistent." *Iowa Bankers Ass'n v. Iowa Credit Union*, 335 N.W.2d 439, 442. The test is whether the decision "would be of force or effect in the underlying controversy." *Id.*

Applying this standard to the complaint in case number 100797 does not lead to the conclusion the State seeks. On November 23, 2016, when the State presented its initial bargaining proposal on insurance, section 20.17(3) was in effect and imposed certain requirements on the parties when presenting their initial bargaining positions. The "underlying controversy" in case 100797 is whether the State's initial proposal as presented on that date failed to meet the provisions of 20.17(3) and, if such violation is determined, whether the violation amounts to a prohibited practice within the meaning of 20.10(1), 20.10(2)(*e*) and (*f*). As such, whether the State complied with those statutory provisions in presenting its November 23 initial bargaining position is still a live controversy. Any subsequent amendments to the scope of bargaining available to the parties, even if those amendments required the parties to "restart" negotiations, does not render the inquiry whether a violation occurred under the prior law academic or

nonexistent. For those reasons, AFSCME's complaint in 100797 was not rendered moot by the "restart" directive of H.F. 291.

I similarly find that AFSCME's complaint in 100817 was not rendered moot by the parties' resolution of the negotiability dispute or the collective bargaining agreement. PERB has held that "prohibited practice complaints are not mooted by the subsequent consummation of a collective bargaining agreement between the charging party and the party whose alleged unlawful conduct was the basis of the charge." *Sioux City Educ. Ass'n and Sioux City Cmt'y Sch. Dist.*, 80 PERB 1560 at 2; *Oelwein,* 80 H.O. 1593 at 11 ("A complaint that is otherwise found to be a violation of the Act does not cease to be a violation upon the settlement of the underlying contract negotiations which gave rise to the complaint.").

The issue in case 100817 regarding the State's compliance with 20.17(3) in presenting its February 22, 2017 proposal is similarly a live controversy regardless if the parties reached agreement on the successor contract through arbitration. It is not required for the bargaining process to come to a "screeching halt" to find a violation of 20.17(3). *Sioux City Educ. Ass'n*, 98 PERB 5843 at 18. In this instance, the parties utilized the negotiability proceeding and the available impasse procedures under chapter 20 to resolve the disputes that arose during their contract negotiations. However, as PERB has consistently held, subsequent contract settlements do not render moot potential violations of the Act that may have been committed during the negotiations.

Case No. 100797, State's November 23, 2016 Initial Bargaining Position

The initial determination in case 100797 is whether the State's proposal "to provide health and dental benefits, as determined by the State, to eligible

bargaining unit members" is an adequate initial bargaining position under 20.17(3). The State proposed to delete all existing contract language regarding health and dental benefits and replace it with only the language above. At the time, insurance was a mandatory subject of negotiation pursuant to section 20.9 (2017), which provided in relevant part:

> **20.9 Scope of Negotiations.**
>
> The public employer and the employee organization shall meet at reasonable times ... to negotiate in good faith with respect to ... insurance ... and other matters mutually agreed upon.

AFSCME contends the State's insurance proposal lacked the required specificity and failed to include any substantive content, including the benefits that would be provided or the cost to employees. AFSCME further alleges the lack of specific content did not allow AFSCME or the public to understand the parameters of the parties' dispute over insurance. As such, the proposal was not specific enough for AFSCME to accept it at the time of introduction.

The State maintains its November 23 initial proposal over insurance was specific enough to inform AFSCME and the public of what the State was proposing, *i.e.* the State would provide health and dental benefits, as determined by the State, to eligible bargaining unit members, and such proposal was specific enough to be accepted at the time it was introduced. The State asserts its proposal provided more than "a willingness to negotiate," as was found inadequate in *Davenport*, because the State agreed to provide "health and dental benefits" but sought "to reserve the right to devise those plans and universally apply those [plans] to the employees." The State argues that to find a prohibited practice violation in this circumstance is to essentially hold that "a valid proposal

related to insurance could not include an employer requesting agreement from the employee organization that [the employer] determine the benefits provided."

Considering the content of the State's initial bargaining position on insurance in light of the precedent previously outlined, I find the proposal was not sufficient to comply with the requirements imposed by 20.17(3). It is true the State's proposal provided a response on the subject of insurance that was more than "a willingness to negotiate" which was found inadequate in *Davenport*. However, the content of the State's proposal still did not comply with section 20.17(3) because it was not made in accordance with the customary language used by the negotiating teams, it lacked substantive and meaningful information that would allow AFSCME to accept the proposal at the time of introduction, and as such, failed to provide reasonable notice to AFSCME and the public regarding the State's position on insurance and the "outside parameters of the [parties'] dispute."

A prior PERB case factually similar to the instant case is *PPME Local 2003 and Johnson County*, where the hearing officer considered the adequacy of an employer's initial bargaining position on insurance. 04 H.O. 6571. The current agreement between the parties in that case indicated the employer would provide health and dental insurance to full-time employees with the employer paying the full premium cost except for family dental, that "Iowa 500" was the only health insurance plan available, and that an employee had thirty days to sign up for coverage once the employee attained full-time status. *Id.* at 4. In negotiating the successor agreement, however, the employer's initial bargaining position on

insurance indicated it was "the Employer's intent to negotiate health care coverage" but did not provide any indication as to what coverage the employer would provide. In terms of cost, the proposal specifically indicated the employer would pay the full cost of the health insurance premium for fiscal year '03 and sixty percent of future increases for single and family plans, and pay the full cost of single dental plans with the same contribution toward the family dental plan. *Id.* at 5. The hearing officer found the employer's proposal on insurance coverage inadequate under 20.17(3), concluding it did not use the language customarily used by the negotiating teams and it was not specific enough for the employee organization to agree upon it at the time of introduction. *Id.* at 11.

In the instant case, the State's proposal over insurance provided even less information than the employer's proposal in *PPME Local 2003/Johnson County.* Not only did the State's proposal fail to include any information regarding the "health and dental benefits" that would be provided, it also failed to include any information regarding the cost to employees for having employer-provided health and dental benefits. The State's proposal only answered the initial question whether the employer will provide insurance benefits. The failure to include any specific content regarding the "health and dental benefits" that would be provided and the cost to employees for those benefits was not in line with the customary language the State and AFSCME have used when negotiating over insurance and it was not a proposal that AFSCME could have accepted.

The manner in which AFSCME and the State customarily negotiated over insurance benefits is by putting forth their positions on the specific plans that

would be available and the cost the employees would be expected to contribute in order to have employer-provided insurance benefits. In negotiating prior agreements, the parties spent considerable time specifically discussing the plan design and the cost to employees. Their specific proposals over these components of health and dental benefits is how the parties framed their respective positions and thus understood the parameters of their dispute over insurance. For example, in negotiating the 2015-2017 agreement, the parties arbitrated the amount the employees would be required to contribute toward the cost of insurance premiums. Their different positions on the amount the employees should contribute framed their dispute over that component of insurance. The State's November 23 initial proposal is plainly without any information regarding the share of the cost that employees would be expected to contribute for the employer-provided insurance or the "health and dental benefits" that would be provided in exchange for that cost. As such, the State's November 23 initial proposal was not made in accordance with language customarily used by the parties in negotiating over insurance.

Additionally, a proposal that is devoid of any information regarding the "health and dental benefits" that would be provided or the cost to employees for such benefits is a "proposal" that no employee organization, that sought to bargain over insurance, could have accepted.

The *Oelwein* standard that an employer must "clearly set forth its position on all areas at issue" contemplates that an employer's "position" is more than just the threshold indication whether the employer will provide a

benefit, *e.g.* insurance, wage increase, vacation, etc. Thus, the State's assertion that its proposal complied with section 20.17(3) because it specified the State will provide "health and dental benefits" is unpersuasive. As subsequent cases interpreting 20.17(3) held, a party's bargaining position must include "substantive content" that is specific enough to "define the issues between the parties" and the "outside parameters of the dispute." The content of the State's proposal provided no notice about the parties' dispute over insurance. Whether the State would provide health and dental insurance was not in dispute in this case since both proposals included the State providing health and dental benefits. However, while AFSCME put forth a specific position on the benefits to be provided and the employees' share of the cost for having employer-provided insurance, the State failed to do the same. The State's position on what those benefits would be or how much employees would have to pay is unknown based on its November 23 proposal.

As the State concedes, its proposal was seeking unilateral discretion to devise, outside of bargaining with AFSCME, the "health and dental benefits" the State would provide. In essence, the State was seeking AFSCME's waiver of its right to bargain over insurance. The State attempts to frame the "parameters of the dispute" in this case as the parties' differing positions on whether the State should have discretion to unilaterally devise the insurance plans and cost to employees outside of bargaining. In line with that reasoning, the State asserts that AFSCME's real "contentions relate to the reasonableness of the proposal," not its lack of substantive content required by 20.17(3), because the question of

whether the State should have unilateral discretion goes to the merits of the proposal and it is for the parties to determine what proposals to agree upon. I find the State's position unavailing for several reasons.

The "parameters of the dispute" in negotiations as contemplated by *Davenport* in interpreting 20.17(3) requirements is not whether an employer has an obligation to bargain with the employee organization over the benefits it will provide. Any such "dispute" is resolved by the section 20.9 directive that the parties "shall meet ... to negotiate in good faith with respect to" the listed mandatory subjects and those subjects mutually agreed upon. In November 2016, insurance was a mandatory subject of bargaining. As such, there was no question that the State was obligated to negotiate with respect to insurance. The State was within its rights under 20.9 and 20.17(3) to put forth a position that it will not provide any health or dental benefits going forward. However, when the State took a position that it would provide those benefits, section 20.17(3) required the State to include enough information in its insurance proposal to inform the public and AFSCME of the parties' dispute over the subject of insurance.

As recognized in *Oelwein* and successor cases, the purpose of 20.17(3) is to inform the employee organization and the public of the parties' disagreement over the issues in negotiation. This disclosure must be made in a public meeting as part of its initial bargaining position. To accept the State's position that it is sufficient under 20.17(3) to propose a benefit, without negotiating over the essential components of that benefit, would undermine the purpose of that

section. Under the State's interpretation, it would be acceptable to propose a wage increase in its initial bargaining position without providing the employer's position on the amount of that increase. The State's insurance proposal in this case was framed the same way. Accepting such interpretation of 20.17(3) would mean an initial bargaining position could become a litany of proposals that an employer will provide general benefits, *e.g.* insurance, vacation, holidays, without including any other information regarding those promised benefits. Such interpretation is not only contrary to the purpose of 20.17(3) because it would fail to provide notice to the employee organization and the public of the employer's position, but it would also undermine the bargaining rights that employee organizations have under the PERA. The obligation to negotiate as directed by section 20.9 necessarily requires that an initial bargaining position provide, not just a statement that general benefits will be provided, but a position on the parameters of those benefits.

My conclusion is not altered by the State's claim that if PERB finds in favor of AFSCME with respect to this claim, "it would be holding that a valid proposal related to insurance could not include an employer requesting agreement from the employee organization that it determines the benefits provided." The State's provided reason for putting forth such a proposal is to have the ability to devise plans and apply them equally to all State employees, not just AFSCME-covered employees. This position similarly disregards the section 20.9 directive that, prior to February 17, 2017, the State had to negotiate with respect to insurance. While employers will always prefer for

efficiency of administration to have discretion to unilaterally devise insurance benefits, such preference to have benefits equally applied to all employees does not override the organized employees' bargaining rights under the PERA. In this case, at the time, the bargaining rights included negotiating with the employer with respect to insurance benefits that would be provided to the AFSCME-represented employees at issue here.

This conclusion does not necessarily mean, as the State contends, that the employer can never seek discretion to unilaterally devise insurance plans and costs to employees outside of bargaining. The bargaining representative is within its rights to waive or limit the bargaining rights it has under the PERA, including its rights to negotiate over mandatory subjects. But when such limitations or waivers are sought from the employee organization, it must be done in a manner that recognizes it is the employee organization's statutory right to waive, not the employer's right to insist upon such a waiver under the guise of differing "positions" over a subject of bargaining.

In the instant case, neither the bargaining history nor AFSCME's conduct during negotiation gave any indication that AFSCME would agree to limit or waive its bargaining rights over insurance. To the contrary, once bargaining started, AFSCME's initial bargaining position affirmatively indicated that AFSCME sought to negotiate with respect to insurance. Had the State initiated discussions with AFSCME prior to bargaining and secured its agreement that the State can unilaterally devise insurance plans and set employee costs outside of bargaining, there would be no issue to resolve

because it would be up to the bargaining representative to waive or limit its bargaining rights. Absent such agreement from the employee organization, the employer must put forth a proposal that meets the requirements of 20.17(3).

For the reasons discussed, I find the State's initial bargaining position on insurance as presented on November 23, 2016 was not made in accordance with the customary language used by the parties, it lacked substantive information that would allow AFSCME to accept it at the time of introduction, and, as such, failed to provide reasonable notice to AFSCME and the public of the State's position over insurance.

Whether the State's deficient initial bargaining position over insurance amounts to a prohibited practice within the meaning of 20.10(1), 20.10(2)(*e*) and (*f*) is a separate inquiry. AFSCME, as the complainant, bears the burden of establishing a prohibited practice occurred. *See, e.g., Int'l Ass'n of Prof'l Firefighters, Local 2607 and Cedar Rapids Airport Comm'n*, 2013 PERB 8637 at 10.

PERB has recognized that a party's failure to meet the requirements of 20.17(3) may constitute a prohibited practice but that such determinations are made on a case-by-case basis by examining the totality of conduct. *PPME Local 2003 and Johnson Cty.*, 06 PERB 6662 at 8. A violation of 20.17(3) will amount to a prohibited practice if, based on a totality of conduct, the impact of the employer's inadequate bargaining proposal was significant or substantial enough "to thwart or frustrate the negotiations process." *PPME Local 2003*, 04 H.O. 6571 at 13; *Sioux City Educ. Ass'n*, 98 PERB 5842 at 15-16. An

employer's subsequent proposal during bargaining can minimize the impact a deficient initial proposal has on the bargaining process. *PPME Local 2003*, 04 H.O. 6571 at 13-14.

In *PPME Local 2003/Johnson County*, 04 H.O. 6571, after presenting a deficient initial proposal on insurance, the employer subsequently proposed specific health care coverage that would be provided and the costs to the employees. *Id.* at 6. Based on the employer's subsequent proposal, the hearing officer concluded the impact of the deficient initial bargaining position was not "significant or substantial enough to thwart or frustrate the negotiations process" because, after the employer's subsequent proposal, the parties "began exchanging meaningful health insurance proposals." *Id.* at 13.

In the instant case, the record demonstrates the State was not bargaining with respect to insurance. The State's initial proposal gave no indication as to the "health and dental benefits" the State planned to provide and similarly failed to provide any indication as to the cost the employees would have to pay in order to have employer-provided insurance. The State's only other proposal with respect to insurance was to completely delete all insurance-related provisions from the successor agreement while the subject was still mandatorily negotiable. During the entirety of negotiations, the State never put forth a proposal that did not involve AFSCME waiving its right to bargain with respect to insurance. For those reasons, based on a totality of conduct, the State's violation of 20.17(3) was significant enough to thwart and frustrate the parties' negotiations with respect to insurance. Consequently, I

find the State's conduct in bargaining over insurance amounts to a violation of the duty to bargain in good faith under 20.10(1) and a denial of the employee organization's right to negotiate collectively with the employer over insurance within the meaning of 20.10(2)(*e*) and (*f*).

"In fashioning appropriate remedies in prohibited practice cases, the Board generally attempts to place the parties in the position they would have been in had no violation occurred." *Sioux City Educ. Ass'n*, 98 PERB 5842 at 20. However, as prior cases have recognized, this is a difficult task to accomplish given the passage of time since the violation occurred and the likelihood that the parties have concluded the negotiations process with an agreement despite a flawed initial bargaining position. *Id.* Thus, while a remedy ordering the parties to start negotiations over with initial bargaining positions that comply with 20.17(3) would most directly address the violation, such a remedy is impractical. Particularly in the instant case where the law governing the scope of the parties' negotiations significantly changed since the violation occurred and insurance is now an excluded subject of bargaining.

AFSCME seeks a remedy that orders all impasse items ruled permissive in the parties' negotiability dispute, decided after the enactment of H.F. 291 in PERB case number 100813, to be included in the 2017-2019 agreement. In support of its position, AFSCME cites to *Sioux City* where the Board found such remedy was appropriate. *Id.* at 20-21. Under the circumstances presented here, I find AFSCME's requested remedy is not appropriate for several reasons.

As an initial matter, the distinction between *Sioux City* and the instant case is that the 20.17(3) violation in *Sioux City* was specifically regarding the employer's failure to identify the permissive provisions it sought delete from the successor agreement. *Id.* at 19. Here, the violation concerning the initial bargaining position involved insurance, a mandatorily negotiable subject at the time. Furthermore, for AFSCME's requested remedy to have any relevance to the founded violation, the record would have to demonstrate that, absent the State's deficient initial proposal on insurance, the parties would have reached and ratified their agreement prior to February 17, 2017 when H.F. 291 was enacted. On this record, I am unable to reach that conclusion. The record demonstrates the parties were still negotiating other provisions of the agreement and had interest arbitration scheduled for February 22, which was a date after the enactment of H.F. 291 amendments that changed the status of the now-permissive provisions AFSCME seeks to include in the 2017-2019 agreement as an appropriate remedy. For those reasons, AFSCME's requested remedy is not appropriate under the facts of the instant case.

Instead, under the circumstances presented here, I conclude the appropriate remedy for the State's violations in case 100797 is to direct the State to cease and desist from further violations of the PERA and to post the Notice to Employees contained below for a period of thirty (30) days.

Case No. 100817, State's February 22, 2017 Initial Bargaining Position

AFSCME's complaint in case 100817 regarding the State's February 22, 2017 initial bargaining proposal also alleges a violation 20.17(3). AFSCME asserts the State was not only required to specifically identify which provisions it

sought to delete in the successor agreement, but to also identify whether the State was deleting those provisions because it considered them to be permissive or excluded subjects of bargaining. AFSCME contends the proposal was "not specific enough to educate the public what was being deleted and why they were being deleted." Because the State failed to specify the reason for the proposed deletions, AFSCME argues the initial proposal was insufficient to comply with 20.17(3) requirements and that violation amounts to a prohibited practice within the meaning of Iowa Code section 20.10(1), 20.10(2)(*e*) and (*f*).

In response, the State contends its initial bargaining position as presented on February 22 specifically responded to each one of AFSCME's proposals and indicated the State's position on those proposals as required by 20.17(3). It asserts that identifying the specific contract provisions and writing "delete" next to each one was sufficient to inform AFSCME and the public that the State's position was to delete those provisions from the successor agreement.

PERB has addressed a party's obligation under 20.17(3) in regard to permissive topics of bargaining. In *Iowa State Education Association*, the Board explained:

> We believe that when a position concerning the deletion of all of "the permissive language currently contained in the contract" is put forth, the party assuming such a position is under an obligation to identify with specificity the language proposed to be deleted. This is not because a party is under a duty to provide a reason for advancing any component of its initial bargaining position, but instead because such a disclosure is necessary in order to enable the public to clearly discern the submitting party's actual opening position on the issue at the public meeting.

89 PERB 4020 at 7.

In *Sioux City Education Association*, the case AFSCME primarily relies upon, the Board determined that the employer's proposal "to delete all permissive language" without identifying which provisions of the existing agreement the employer deemed permissive was not specific enough under 20.17(3). In so holding, the Board stated:

> In order to give the phrase "and other matters mutually agreed upon" meaning, it appears obvious and necessary that either party has the right to at least initially propose discussions on permissive subjects, and that the other side has a duty to respond in its initial position, even if the response is "No" or "Delete," in order to frame the parameters of the dispute and define the issues at stake in the negotiations. ... We believe this good faith obligation applies not only to the negotiation of "other matters mutually agreed upon" but also to the identification of such matters. Without knowledge of the subjects the District believes to be permissive, the Association is unable to determine whether a negotiability dispute exists, i.e. whether the District may in fact be proposing deletion of subjects the Association believes to be mandatorily negotiable.

98 PERB 5842 at 19-20.

Having considered the Board's reasoning in *Sioux City*, I disagree with AFSCME's assertion that it stands for the proposition that an initial bargaining proposal seeking to delete existing contract provisions must indicate "why" the employer seeks those deletions.

In *Sioux City*, the employer's initial bargaining position proposed to delete all permissive topics from the successor agreement but its proposal never identified what provisions of the current agreement it considered permissive. *Id.* As such, the Board's conclusion that the employer in *Sioux City* had to identify which provisions were permissive is because such identification was necessary to provide notice to the employee organization and the public as to what provisions the employer was including in its proposal to delete "all permissive topics."

Contrary to AFSCME's assertion, a party is not required under 20.17(3) to provide a reason for deleting language so long as the proposal makes it clear which provisions the employer seeks to delete. *Iowa State Educ. Ass'n*, 89 PERB 4020 at 7. In the instant case, unlike the proposal in *Sioux City*, the State's written proposal specified each provision the State sought to delete by identifying the provision and noting "delete" next to it. If AFSCME had accepted the State's initial bargaining position, there would be no ambiguity as to which provisions would be omitted in the successor agreement. Under the facts of this case, whether the State considered the deleted provisions permissive or prohibited is not a disclosure the State was required to make under section 20.17(3). As such, the content of the State's proposal as presented on February 22 was specific enough to inform both AFSCME and the public which provisions the State would not agree to include in the successor agreement.

Based on the foregoing, I find the State's initial proposal as presented on February 22, 2017 complied with section 20.17(3) and therefore did not violate section 20.10(1), 20(10)(2)(*e*) or (*f*).

In accordance with the findings of fact and legal conclusions reached in case 100797 and 100817, I hereby propose the following:

ORDER

Finding a violation of the PERA in case number 100797, the State of Iowa is ordered to cease and desist from further violations of section 20.17(3), 20.10(1), 20.10(2)(*e*) and (*f*). The State is furthered ordered to post copies of the Notice to Employees contain below in locations customarily used for the

posting of information to employees for a period of thirty (30) days commencing on the date this proposed decision and order becomes final agency action.

The prohibited practice complaint in case number 100817 is DISMISSED.

The costs of reporting and the agency-requested transcript in the amount of $276.65 are assessed equally against the State of Iowa and AFSCME Iowa Council 61 pursuant to PERB rule 621—3.12. A bill of costs will be issued to the parties in accordance with PERB subrule 621—3.12(3).

DATED at Des Moines, Iowa, this 23rd day of October, 2018.

/s/ Jasmina Sarajlija
Administrative Law Judge

Electronically filed.
Parties served via eFlex.

NOTICE TO EMPLOYEES

FROM THE PUBLIC EMPLOYMENT RELATIONS BOARD

The Public Employment Relations Board (PERB) has determined that the State of Iowa violated section 20.17(3) of the Public Employment Relations Act, Code of Iowa, chapter 20, by failing to provide a specific proposal on insurance during the negotiation of the 2017-2019 collective bargaining agreement between the State of Iowa and AFSCME Iowa Council 61. PERB has further determined that the State's violation of 20.17(3) also constitute a violation of section 20.10(1), 20.10(2)(*e*) and (*f*), 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:
>
> ***
>
> (*e*) Refuse to negotiate collectively with representatives of certified employee organizations as required in this chapter.
>
> (*f*) Deny the rights accompanying certification granted in this chapter.

To remedy this violation, the State has been ordered to cease and desist from further violations, to post this notice, and to comply with its provisions.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.