

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>AFSCME IOWA COUNCIL 61 and STATE OF IOWA, DEPARTMENT OF ADMINISTRATIVE SERVICES,</p> <p>Petitioners,</p> <p>vs.</p> <p>IOWA PUBLIC EMPLOYMENT RELATIONS BOARD,</p> <p>Respondent.</p>	<p>CASE NO. CVCV 9631</p> <p>RULING ON PETITION FOR JUDICIAL REVIEW</p>
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This is a judicial review proceeding in which the petitioners, AFSCME Iowa Council 61 (AFSCME) and State of Iowa, Department of Administrative Services (DAS) seek judicial review of a decision of the Iowa Public Employment Relations Board (PERB) dated February 8, 2013 in which it determined whether certain contract proposals offered by AFSCME were mandatory or permissive subjects of bargaining under Iowa Code §20.9. The issue presented for review is whether those determinations were correct.

The appropriate standard of review for this court is governed by Iowa Code §17A.19(10). The parties agree that in light of a 2010 amendment to Iowa Code §20.6(1) which provides that PERB now has the express authority to interpret and apply the provisions of Iowa Code chapter 20, PERB has been clearly vested with such authority. See Iowa Code §20.6(1) (2013) (“The board shall...interpret, apply and administer the provisions of this chapter”); Renda v. Iowa Civil Rights Comm’n, 784 N.W.2d 8, 11 (Iowa 2010) (“The question of whether interpretive discretion has clearly been vested in an agency is easily resolved when the agency's enabling statute explicitly addresses the

issue”). Accordingly, PERB’s interpretation of chapter 20 and any related application of law to fact may be reversed only if found to irrational, illogical or wholly unjustifiable. Iowa Code §17A.19(10)(l), (m) (2013).

This dispute has arisen out of contract negotiations between AFSCME and DAS pertaining to the 2013-2015 collective bargaining agreement. Specifically, on January 15, 2013, DAS filed its third amended petition for expedited resolution of negotiability dispute with PERB pursuant to 621 IAC 6.3. The petition sought a ruling on whether certain proposals being made by AFSCME were mandatory subjects of collective bargaining under Iowa Code §20.9. A preliminary ruling was issued by PERB on January 23, 2013; upon a timely request by DAS for a final ruling, PERB issued its final ruling on February 8, 2013 (“Ruling”). Separate timely petitions for judicial review were filed by both AFSCME and DAS from this final ruling. These actions were consolidated into the present proceeding and heard by the court on June 28, 2013.

Iowa Code §20.9 establishes two classes of collective bargaining proposals: mandatory and permissive. Waterloo Educ. Ass’n v. Iowa Pub. Employment Relations Bd., 740 N.W.2d 418, 422 (Iowa 2007) (hereinafter Waterloo II).¹

Whether a proposal is a mandatory or permissive subject of bargaining under section 20.9 is a critical issue. If a subject is within the scope of mandatory bargaining, the parties are required to bargain over the issue, and if agreement is not reached, the statutory impasse procedures, which ultimately lead to binding arbitration, are available. If, on the other hand, the proposal is a permissive subject of bargaining under section 20.9, the public employer may reserve the right to decide the issue unilaterally by declining to participate in bargaining. When the employer declines to

¹ Chapter 20 also establishes that certain subjects are illegal, meaning that bargaining as to them is precluded by law. Charles City Community School Dist. v. Pub. Employment Relations Bd., 275 N.W.2d 766, 769 (Iowa 1979), abrogated on other grounds in Waterloo II, 740 N.W.2d at 429. There is no claim by any party herein that any of the proposals in question are illegal.

bargain over a permissive subject, the impasse procedures in [chapter 20] are not available and decisions related to the subject remain within the exclusive power of the public employer.

Id. at 421-22 (citation omitted). The mandatory subjects for negotiations outlined in §20.9 are “wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training...[and] terms authorizing dues checkoff for members of the employee organization.” Iowa Code §20.9 (2013). The court in Waterloo II reaffirmed a “two-pronged approach to negotiability”:

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

Id. at 429. In reviewing a term provided for in the “laundry list” of subjects found at §20.9, the court should avoid an interpretation that renders subsequent terms in the list redundant; ordinarily, this would be accomplished by giving the term in question its common and ordinary meaning. Id. at 429-30. In the “unusual” circumstance where the predominant topic of a proposal cannot be determined, a “balancing-type analysis” may be used to resolve the negotiability issue. Id. In making a negotiability determination, the court is to look only to the subject matter of the proposal and not its merits. Id. at 431 (citing Charles City, 275 N.W.2d at 769).

While PERB dealt with a total of twelve proposals, only seven are contested for judicial review. AFSCME has requested review of PERB's determination that proposals 2,3,4,6, 7 and 10 are permissive subjects; DAS challenges PERB's determination that proposal 8(B) is a mandatory subject. The court will take up first those subjects challenged by AFSCME, and then consider DAS' challenge to Proposal 8(B).

Proposal 2. This proposal pertains to deduction to be made from the wages of an employee who is a member of AFSCME to an entity known as "PEOPLE." It is undisputed that PEOPLE is a political action committee. AFSCME takes the position that this provision is a mandatory subject of bargaining as coming within that part of §20.9 relating to "terms authorizing dues checkoff." PERB found to the contrary, concluding that "[t]he proposal's primary purpose is to deduct a contribution to a political action committee from an employee's paycheck." Ruling, p. 7. As AFSCME concedes in its brief, the term "dues" ordinarily means amounts "paid...by a member to an organization, usually for the rights of membership." Merriam-Webster Unabridged Dictionary 562 (2nd ed. 1983). The distinction drawn by PERB in this regard between dues and contributions gives the term "dues" its ordinary meaning and properly contrasts it from political contributions. It will be upheld.²

Proposal 3. This proposal provides for DAS to contact AFSCME within fourteen days after a new employee has been hired, and for a union representative to provide up to thirty minutes "for Union orientation during the formal orientation for new employees either as a group or with individuals" or for an alternate orientation if there is no formal

² PERB concluded that this proposal was not illegal when compared to Iowa Code §20.26, which prohibits any direct or indirect contribution out of an employee organization to a political party or organization. This contention is not being challenged on judicial review; therefore, AFSCME's passing reference to a possible constitutional challenge to §20.26 will not be considered by this court.

orientation to allow for either “Union orientation” or distribution of “a packet of information material furnished to [DAS] by [AFSCME].” AFSCME does not argue that this provision comes within the purview of any listed term in §20.9, but that it is mandatory merely because it would allow new employees to be educated on what would otherwise be mandatory subjects of bargaining under that statute. PERB summarily rejected this argument, concluding that “[t]he maintenance or allowance of a union-conducted new employee orientation program, for whatever purpose, is not within the scope of any of the section 20.9 mandatory topics of bargaining.” Ruling, p. 8. In reaching this conclusion, PERB relied upon an earlier Iowa Supreme Court decision, State v. Pub. Employment Relations Bd., 508 N.W.2d 668 (Iowa 1993), which rejected the same argument; namely, that “discussion and study of mandatory bargaining subjects” makes the proposal for such activity a mandatory subject of bargaining:

If incorporated into a collective bargaining agreement, proposals 2, 9, and 16 would require the State to establish and operate labor/management committees. The “establishment and operation of labor/management committees” is therefore the predominant characteristic of these proposals. Whether the “substantive purpose” of the labor/management meeting concerns “health and safety,” “vacations,” or any other mandatory bargaining subject, or whether the “substantive purpose” of the committees impinge on employer rights is not the issue. Rather, the issue is whether proposals to establish and operate labor/management committees are mandatory subjects of bargaining under section 20.9.

The establishment and operation of labor/management committees for any purpose is not specifically listed as a mandatory subject of bargaining under section 20.9.... Therefore, we hold proposals 2, 9, and 16 are permissive subjects of bargaining.

Id. at 675. “New employee orientation” is likewise not within the enumerated mandatory subjects of bargaining found in §20.9. PERB correctly found that Proposal 3 constitutes a permissive subject of bargaining.

Proposals 10 and 4. Proposal 10 refers to Appendix K, which is also referenced in a parenthetical in Proposal 4. Appendix K, entitled “Attendance Policy,” reads as follows:

This document constitutes a letter of understanding between [AFSCME] and [DAS] regarding attendance policies. The parties agree that attendance policies that are currently in place will remain intact unless mutually agreed upon otherwise.

Policies which may be developed during the term of this Agreement will be done with Union input.

Proposal 4, which generally relates to disciplinary actions or measures, refers to Appendix K “for discipline related to attendance.” AFSCME argues that all of Proposal 10 and the parenthetical reference in Proposal 4 should be considered mandatory subjects of bargaining as part of “evaluation procedures.” PERB concluded that on their face, the predominant purpose of these proposals was “the maintenance of an attendance policy.” Ruling, p.16. As attendance is not enumerated as a mandatory subject in §20.9, PERB concluded that it was a permissive subject. Id. It incorporated by reference this same analysis in concluding that Proposal 4 was also permissive. Id. at 9.

PERB correctly concluded that AFSCME’s argument fails to meet the “facial review” required in determining whether a proposal is a mandatory subject of bargaining. See Waterloo II, 740 N.W.2d at 428. As DAS correctly points out in its brief, the predominant purpose of a proposal is established by “determining what the employer would be bound to do if a proposal were taken to arbitration and incorporated into a

collective bargaining agreement.” State, 508 N.W.2d at 675. To stray from this approach would result in artful draftsmanship of proposals that only incidentally touch on mandatory subjects ruling the day and improperly influencing policy or limiting management discretion. Id.; Waterloo II, 740 N.W.2d at 431. All Proposal 10 requires is that current attendance policies remain in force, and that any changes be with union input and mutually agreed to. To bootstrap this language into an “evaluation procedure,” where no specific procedure is identified and there is no express reference to evaluation, flies in the face of how mandatory subjects for bargaining are to be determined. PERB’s analysis regarding Proposals 4 and 10 is neither irrational, illogical nor wholly unjustifiable. Accordingly, it will be upheld.

Proposals 6 and 7. These proposals both pertain to layoff procedures; Proposal 6 general rules that are to apply when a layoff or hours reduction occurs:

When a layoff or hours reduction occurs, the following general rules apply:

....

C. An agency may not layoff permanent employees until they have eliminated all non-permanent employees within the layoff unit in the same classification in the following order: emergency, temporary, provisional, intermittent, trainee, and probationary. Employees in the layoff unit may volunteer for layoff with the agreement of the President of [AFSCME].

Proposal 7 pertains to temporary layoff procedures:

B. Prior to implementing a temporary layoff, [DAS] will first terminate all non-permanent employees who perform similar duties including temporary service (i.e. Manpower, Olsten, etc.) employees.

PERB determined that each of these provisions relate to “the order and manner in which a staff reduction will be carried out,” and as such found them to be mandatory subjects for bargaining. Ruling, p. 10. The issue now is not that determination per se, but rather PERB’s secondary conclusion that these topics were mandatory only as applied to the extent the employees referenced in the proposals (emergency, temporary, provisional, intermittent, trainee, probationary and temporary service employees) are included in the bargaining unit, and permissive to the extent they are not. In so concluding, PERB relied upon an unreported decision of the Iowa Court of Appeals, United Electrical, Radio & Machine Workers of America v. Iowa Pub. Employment Relations Bd., 2011 WL 6062038 (Iowa Ct.App., Case No. 11-0547, filed December 7, 2011) (hereinafter United). AFSCME argues that both of these proposals relate to mandatory subjects of bargaining, even as applied to employees who are not part of the bargaining unit.

In making this argument, AFSCME appears to rely only upon the fact that an unreported appellate decision does not qualify as controlling authority. See IowaR.App.P. 6.904(2)(c). That being said, however, AFSCME offers no counterbalance against the weight the decision in United should be afforded in its undisputed role as persuasive authority. Id. Limiting the outcome of collective bargaining mandated by §20.9 to only those employees that are part of the bargaining unit is not only logical, but an earlier decision by the Iowa Supreme Court suggests that to do otherwise may be illegal. See Marshalltown Educ. Ass’n v. Pub. Employment Relations Bd., 299 N.W.2d 469, 471 (Iowa 1980) (“The proposal illegally seeks to impose mandatory bargaining for the benefit of persons who are excluded...from the bargaining unit”). Affording the

appropriate deference to PERB in this determination, the court concludes that it should be upheld.

Proposal 8(B). This proposal, submitted under the heading of “Contracting and Job Security,” reads as follows:

B. If, as a result of outsourcing or privatization following an Employer initiated competitive activities process, positions are eliminated, [DAS] shall offer affected employees other employment with Iowa State government. Other employment shall first be sought within the affected employee’s department and county of employment. Affected employees accepting other employment shall not be subject to loss of pay nor layoff pending placement in other employment under this Section. Neither shall such employees be subject to a decrease in pay in their new position. However, affected employees will not be eligible for any pay increase until such time as their pay is within their new pay grade range. In the alternative, employees may elect to be laid off.

Employees placed in other employment under this Section, as well as those electing to be laid off, will be eligible for recall to the classification held at the time of outsourcing or privatization, in accordance with Article VI of this Agreement.

PERB concluded that this proposal was a mandatory subject for bargaining, in that its predominant purpose was related to “procedures for staff reduction:”

Subsection B requires the employer to offer employees, whose positions would be eliminated due to outsourcing, the choice of either being laid off or being employed elsewhere within Iowa State government. It includes other procedures and restrictions on where the displaced employee can be employed and how the employee shall be paid. At its core, its predominant purpose is to designate a process for implementing a staff reduction that occurs due to outsourcing. It addresses what will happen to bargaining unit members once the employer has determined it will eliminate positions within the bargaining unit.

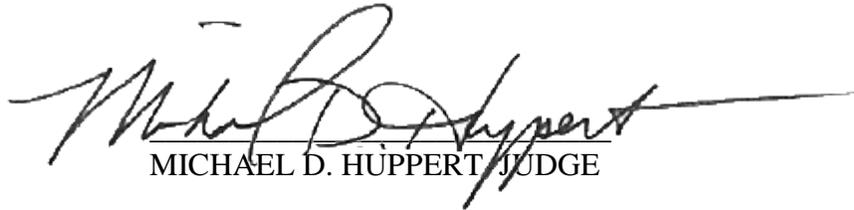
Ruling, p. 13. DAS argues that the proposal is not associated with staff reduction, but rather staff retention, which places it outside the scope of §20.9. As a fallback, DAS makes a two-fold argument: 1) the proposal cannot meet the second prong of the test used to determine negotiability, in that it interferes with its management rights under Iowa Code §20.7; and 3) that in the event this court concludes that the proposal is a hybrid of both mandatory and permissive subjects, this issue be remanded so that PERB can engage in the balancing analysis called for when the predominant purpose of a proposal cannot be determined. See Waterloo II, 740 N.W.2d at 429-30. In response, PERB disputes the need to engage in a balancing analysis, but conceded at hearing that such analysis (if called for) would necessitate a remand.

The court concludes that the statutory phrase “procedures for staff reduction” relates to the manner in which the contemplated reduction will take place, not how to manage the consequences associated with a reduction that has already taken place. In the court’s mind, this conclusion hinges upon the word “for,” which is defined in this context as a function word used to indicate purpose or an intended goal. Merriam-Webster’s Collegiate Dictionary 454 (10th ed. 2001); see also Wiseman v. Armstrong, 269 Conn. 802, 811, 850 A.2d 114, 119 (2004). In other words, for the procedures in question to be considered mandatory under §20.9, they must have as their purpose, goal or object a reduction in staff. As measured by this standard, proposal 8(B) falls short; its predominant purpose relates to the aftermath of a reduction that has already resulted from outsourcing or privatization. It would, therefore, not qualify as a mandatory subject for bargaining under §20.9. Even allowing for the deference PERB is afforded in this case,

its analysis does not comply with the “definitional exercise” reaffirmed in Waterloo II. Its ruling regarding Proposal 8(B) is reversed.³

IT IS THEREFORE ORDERED that the Ruling on Negotiability Dispute issued by the respondent on February 8, 2013 is affirmed in part and reversed in part, as more specifically set forth in this ruling. The costs associated with this proceeding are assessed equally among the parties.

IT IS SO ORDERED this 12th day of July, 2013.


MICHAEL D. HÜPPERT JUDGE

Copies to:

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³ By concluding that the predominant purpose of Proposal 8(B) does not relate to a mandatory subject of bargaining, the court need not engage in either the second prong of the negotiability test or the balancing analysis described in Waterloo II.