

PROHIBITED PRACTICES

PUBLIC EMPLOYMENT RELATIONS BOARD
Prairie Meadows Conference Center
September 22, 2014
2:00 – 3:00 p.m.

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PROHIBITED PRACTICES

- **Relevant Statutes and Rules:**

chapter 17A

- Iowa Code section 17A.10A Contested cases – no factual dispute.
- Iowa Code section 17A.11 Presiding officer, disqualification, substitution.
- Iowa Code section 17A.12 Contested cases – notice – hearing – records.
- Iowa Code section 17A.13 Subpoenas – discovery.
- Iowa Code section 17A.14 Rules of evidence – official notice.
- Iowa Code section 17A.15 Final decisions – proposed decisions –
conclusiveness – review by agency.
- Iowa Code section 17A.16 Decisions and orders – rehearing.
- Iowa Code section 17A.17 Ex parte communications and separation of
functions.

chapter 20

- Iowa Code section 20.8 Public employee rights.
- Iowa Code section 20.9 Scope of negotiations.
- Iowa Code section 20.10 Prohibited practices.
- Iowa Code section 20.11 Prohibited practice violations.
- Iowa Code section 20.17 Procedures.

PERB administrative rules

- Chapter 2 – General Hearing Procedures.
- Chapter 3 – Prohibited Practice Complaints.

Iowa Rules of Civil Procedure

- 1.421(1) Motions to dismiss.
- 1.981 Motions for summary judgment.

- **Navigating the Prohibited Practice Proceeding**
- **Unilateral Change Claims**
- **Weingarten Rights**

Navigating the Prohibited Practice Proceeding:

1. Filing Complaint: Rule 621—3.1

- a. Use the prohibited practice form provided on the PERB website:
<https://iowaperb.iowa.gov/sites/files/perb/PPC%20formfillable.pdf>
- b. Consider which sections of 20.10 may have been violated.
 - i. List only the applicable sections
- c. Try to be as specific as possible, including dates, names of persons involved, what conduct is being complained of and how it was a violation of the act.
- d. Include the specific remedy you seek

2. Serving Complaint: Rules 621—3.4 & 621—2.15

- a. You must serve the complaint on the respondent within a “reasonable time” after filing the complaint. PERB does not serve the complaint.
- b. Who do you serve?: Rule 621—2.15(1)
 - i. Municipal entity: serve mayor or city clerk
 - ii. County entity: serve county auditor or chairperson of board of supervisors
 - iii. School entity: President or secretary of the school board
 - iv. State entity: Director of the Department of Administrative Services or state court administrator if a judicial branch entity
 - v. Employee Organization: President, secretary or person designated as service agent in the organization’s annual report
- c. How do you serve?: Rules 621—3.4 & 621—2.15(2)
 - i. Personal service or certified mail, return receipt requested
- d. Don’t forget - Proof of service must be filed with PERB. Rule 621—3.4
 - i. What is proof of service?: the certified mail receipt or a statement certifying service was made. Rule 621—2.15(3)

3. Answer: Rule 621—3.5

- a. Respondent must file an answer within 10 days of receiving the complaint or request an extension from the Board. 621—3.5(1), (2)
- b. State specific admission or denial of each allegation or that respondent is without knowledge to admit or deny the allegation. Rule 621—3.5(3)
- c. Failure to file a timely answer may be deemed to be an admission by the respondent and deemed to be respondent's waiver of a hearing. Rule 621—3.5(4)
- d. Respondent may file a pre-answer motion to dismiss. Consult Iowa Rule of Civil Procedure 1.421(1)

4. Pre-hearing:

- a. An ALJ will be assigned as a case processor. She or he will contact you to see if you would like to mediate the case and assist with narrowing the issues for hearing. Rule 621—3.10
- b. Be upfront about whether there is room for movement or if it should go straight to hearing.
- c. Communicate with the case processor about
 - i. plans to file prehearing motions.
 - ii. discovery issues.
 - iii. facts that can be stipulated by both parties.
 - iv. whether the complaint needs to be amended. See Rule 621—2.9
 - v. whether subpoenas are needed. See Rule 621—2.12
 - vi. the number of witnesses you plan to call and how long you believe the hearing will take.
- d. When you have questions, check the FAQs link on PERB's webpage and contact the case processor, not the hearing officer. Avoid ex parte communications. Rule 621—2.20
- e. Notice of Hearing: An ALJ will be assigned as a hearing officer. He or she will generally schedule a conference call to discuss hearing dates. He or she will send you a notice of hearing stating the issue in dispute, the applicable statutes and rules, and the date, time and location of the hearing. Rules 621—2.1, 621—2.2
- f. Pre-hearing motions: If you wish to file a pre-hearing motion, such as a motion for summary judgment, follow the rules of civil

procedure. See Iowa Rules of Civil Procedure 1.981 (motion for summary judgment); 1.421 (motion to dismiss).

- i. Motions for summary judgment should be filed no less than 60 days prior to hearing. Rule of Civil Procedure 1.981
- g. Motion for Continuance: If the hearing needs to be rescheduled, notify the hearing officer right away by emailing him or her and copying the other parties. File a motion requesting a continuance as soon as possible. Rule 621—2.5. Consult with the other side to see if they would agree to a continuance or resist it.
- h. Subpoenas: Submit requests for subpoenas to the hearing officer well in advance of the hearing, stating who you wish to appear and their addresses. The hearing officer will prepare the subpoenas and you must serve them upon the witnesses. Rule 621—2.12.

5. Hearing Procedures: Rules Chapter 2

- a. Certified Shorthand Reporter: A certified shorthand reporter will be present and transcribe the hearing. Iowa Code § 20.11(3).
- b. Sequestration of Witnesses: At the start of the hearing, let the hearing officer know if you want witnesses sequestered. Rule 621—2.11.
- c. Evidence: Rules of evidence do not apply. The only objections that will be considered are objections to evidence as irrelevant, immaterial, unduly repetitious or privileged. See Iowa Code § 17A.14; Rule 621—2.7. Evidence of proposed settlement offers made during negotiation or mediation of the prohibited practice complaint are also inadmissible. Rule 621—3.11.
- d. Exhibits: Have 4 copies of exhibits. 1 for yourself, 1 for opposing counsel, 1 for the hearing officer, and 1 to show witnesses. Have the exhibits clearly labeled and organized in a folder or binder and number the pages
- e. Order of Procedure: The complainant presents its case first, the respondent presents its case second and then the complainant will have an opportunity to present rebuttal. Rule 621—2.8
- f. Burden: The complainant carries the burden of establishing that the respondent committed a prohibited practice. The complainant must also present proof of damages when applicable. Rule 621—2.8

6. Post-hearing

- a. Post-hearing Briefs: At the close of the hearing, the hearing officer will ask whether the parties wish to provide closing arguments and/or written briefs and will determine a due date. Rule 621—2.10.
- b. Copy of Hearing: You may request a copy of the recorded hearing from the hearing officer. You will be charged \$5 per CD/DVD. You may order a copy of the transcript directly from the court reporter.
- c. Costs: The costs of the certified shorthand reporter and cost of a transcript for the Board will be taxed to the nonprevailing party. See Iowa Code § 20.11(3); proposed Rule 621—3.12
- d. Appeal: After the hearing officer issues a proposed decision, a party has 20 days to file an appeal. If it is not appealed, the hearing officer's decision becomes final. Rule 621—9.1
 - i. If appealed, the appealing party must serve notice of the appeal on the opposing parties by ordinary mail. Rule 621—9.2(1)
 - ii. If appealed, the Board generally reviews the record as presented to the hearing officer. Parties are usually given an opportunity to give oral argument and briefs on their positions. Rule 621—9.2(3)
 - iii. However, if a party requests that more evidence be presented and demonstrates good reasons why it was not presented to the hearing officer, the Board may order that additional evidence can be presented for the Board's review. Rule 621—9.2(3)
- e. Rehearing and Judicial Review: After the Board issues its decision, a party may:
 - i. File an application for rehearing with the Board within 20 days of the decision. Iowa Code § 17A.16
 - ii. Appeal the decision by filing a petition for judicial review in district court within 30 days of the decision. Iowa Code § 17A.19 governs this process.

PROHIBITED PRACTICES – UNILATERAL CHANGE:

The employer's duty to bargain in good faith arises in two contexts. First is the duty to prospectively bargain a collective bargaining agreement with the certified employee organization pursuant to the procedures set forth in Iowa Code chapter 20. The second is the employer's duty to bargain in good faith before an employer can implement changes to mandatorily negotiable subjects during the term of an existing collective bargaining agreement.

An employer's implementation of a change in a mandatory subject of bargaining without first fulfilling its bargaining obligation constitutes a prohibited practice under section 20.10(1) and 20.10(2) (a), (e) and (f).

20.10 Prohibited practices.

1. It shall be a prohibited practice for any public employer, public employee, or employee organization to refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.

2. It shall be a prohibited practice for a public employer or the employer's designated representative to:
 - a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

 -

 - e. Refuse to negotiate collectively with representatives of certified employee organizations as required in this chapter.
 - f. Deny the rights accompanying certification granted in this chapter.

The complainant bears the burden to establish that the respondent committed a prohibited practice.

Elements: In order to prevail in a unilateral change case, a complainant must show that (1) the employer implemented a change; (2) that the change was to a mandatory negotiable matter, and (3) that the employer had not fulfilled the applicable bargaining obligation before making the change.

1. Did the employer implement a change?

The “status quo,” or the procedures, policies and practices that were in operation at the time of the alleged change are identified to determine whether a change actually occurred. The determination of whether a change occurred often cannot be made solely by reference to terms in the collective bargaining agreement. In some instances, changes are made to procedures, policies and practices not addressed by the contract or are peripheral to the contract’s terms.

2. Was the change to a mandatory negotiable matter?

The matter at issue must be a mandatory subject of bargaining within the meaning of Iowa Code section 20.9. A complaint alleging a unilateral change in a permissive subject is not a prohibited practice and fails to state a claim upon which relief can be granted. However, a party’s conduct concerning a permissive topic may be a prohibited practice if, for example, an employer threatened to terminate employees should they so much as initially propose discussion of a permissive topic.

3. Did the employer fulfill its bargaining obligation?

The employer’s bargaining obligation differs depending upon whether the mandatorily negotiable term is “contained in” the collective bargaining agreement or not. If the subject is a mandatory topic of bargaining and “contained in” the parties’ collective bargaining agreement, the employer must obtain the certified employee organization’s consent prior to implementing the policy change. If the proposed change is to a mandatory term not contained in the contract, the employer can implement the change only after it has given the certified representative notice of the contemplated change and the opportunity to negotiate about it to impasse.

The Board determines whether a matter is “contained in” a collective bargaining agreement on a case by case basis.

The employer must provide sufficient notice of the contemplated change. Once the employer provides notice of the contemplated change, the employee organization bears the burden of requesting bargaining on the change. The employer must bargain the matter once bargaining is requested by the employee organization. If the employee organization does not request bargaining, the employer cannot change a mandatory subject of bargaining “contained in” the parties’ collective bargaining agreement because it requires the consent of the employee organization. CAVEAT: It may not be readily apparent if the matter is “contained in” or not “contained in” the parties’ CBA.

PERB’s role is not to enforce collective bargaining agreements or decide when a contract is violated. See Iowa Code section 20.17(5). PERB does have authority to interpret a contract’s terms when necessary to resolve a prohibited practice.

See Cases:

AFSCME Iowa Council 61 & State of Iowa (DOC), 14 H.O. 8693;
Int'l Union of Operating Engineers, Local 234 & Chickasaw Co., 13 H.O. 8600;
Neil Kenneth Greenwald, JR & Muscatine Cmty. Sch. Dist., 12 H.O. 8419;
AFSCME Iowa Council 61 & Louisa County, 11 PERB 8146;
Black Hawk Co. & Public Prof. & Maint. Employees, Local 2003, 08 PERB 7929
AFSCME Local 231 & Linn Co., 07 H.O. 7148;
Service Employees Int'l Union, Local 199 & Broadlawns Med. Ctr., 05 PERB 6894;
Teamsters Local Union No. 147 & City of Ottumwa, 00 H.O. 6004;
Cedar Rapids Ass'n of Fire Fighters, Local 11 & City of Cedar Rapids, 97 PERB 5129 & 5179;
Cedar Rapids Ass'n of Fire Fighters, Local 11 & City of Cedar Rapids, 95 PERB 4898;
AFSCME Iowa Council 61 & Howard Co. Public Safety Center, 89 PERB 3776;
AFSCME/Iowa Council 61 & State of Iowa (DOC), 89 PERB 3499;
North Tama Educ. Ass'n & North Tama Co. Sch. Dist., 80 H.O. 1691;
Des Moines Ed Ass'n. & Des Moines Indep. Cmty. Sch. Dist., 78 PERB 1122;
Des Moines Ed. Ass'n. & Des Moines Indep. Cmty. Sch. Dist., 75 PERB 516.

Weingarten Right: the right to insist upon the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action.

Iowa Code section 20.8(3) gives public employees the right to, “[e]ngage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the state.”

PERB has recognized that this section includes the right to insist upon the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action. This is also known as the Weingarten Right as adopted in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Denying a public employee’s right to union representation in an investigatory interview is an interference, restraint or coercion of a public employee’s rights and a prohibited practice in violation of Iowa Code section 20.10(2)(a).

Certain conditions must exist before an employee’s Weingarten right is triggered:

1. The employer must be conducting an **investigatory interview**; and
 - a. Investigatory Interview: means a meeting where the employer is interested in hearing the employee’s account of a particular matter and there is a significant purpose to gather facts from an employee in order to support disciplinary action that is being seriously considered.
 - b. Not all meetings with employers are investigatory but a meeting that is not initially investigatory, may turn into one.
2. The employee must **reasonably believe** that the interview **may result in disciplinary action**; and
3. The employee must **request union representation** at the interview.
 - a. Requesting an attorney is not sufficient.

See Cases: *Sherrie Peters & Waterloo Community School District*, 2012 PERB 8218; *AFSCME/Iowa Council 61 & State of Iowa*, 2012 PERB 8075; *AFSCME/Iowa Council 61 & State of Iowa*, 1992 PERB 4348, 4440.

Nuances of Weingarten Right under the NLRA¹

1. Investigatory Interview
 - a. Does not include giving of instructions, training or explanation of how to correct work technique unless the meeting becomes a conversation where discipline could reasonably be expected to result.
 - b. Does not include a meeting that only informs employee of discipline being imposed.
2. Reasonable Belief That Discipline Will Result
 - a. Based on an “objective standard” of what the employee would “reasonably believe” when evaluating “all of the circumstances.”
 - b. It is not based on the employee’s actual or subjective belief of whether discipline is likely to occur.
3. Requesting a Union Representative
 - a. Employee must make the request. The employer has no duty to inform the employee of the right to union representation.
 - b. If the employee requests union representation, the employer must:
 - i. Grant the request, OR
 - ii. Discontinue the interview, OR
 - iii. Advise the employee that he or she has a choice between
 1. Continuing the interview without representation OR
 2. Having no interview at all
 3. The employer must advise the employee of these two choices to continue the interview without a union representative present.
4. Role of the Union Representative
 - a. Employer must allow the specific union representative requested to attend if that person is available.
 - b. Employer does not need to postpone the interview to allow the requested representative to attend but must allow an available representative to attend.
 - c. If employer wants interview to take place immediately, it must give employee and representative an opportunity to confer in private before conducting the interview.
 - d. Representative is allowed to speak during interview because employee is entitled to “meaningful representation” including “assistance” and “counsel.”
 - e. Employer cannot tell representative that he or she must remain silent.
 - f. But, representative cannot interfere with the employer’s ability to conduct the interview by disrupting, obstructing and repeatedly interrupting during the interview.

¹ Note: This information was gathered from John E. Higgins, *The Developing Labor Law* at 241-51 (6th ed. 2012). These principles are based on NLRB case law, not PERB cases.

STATE OF IOWA

THE PUBLIC EMPLOYMENT RELATIONS BOARD

PROHIBITED PRACTICE COMPLAINT

INSTRUCTIONS: submit an original and one (1) copy of this complaint to the Board.
The party filing this complaint must serve the party against whom the complaint is
Brought as specified in PERB rules 2.15 and 3.4.

FOR PERB USE ONLY

Case No. _____

1. PARTY AGAINST WHOM THIS COMPLAINT IS BROUGHT

a. NAME (Give full name of agency, organization or person charged)

b. ADDRESS (Street Number, City, State, Zip Code)

2. BASIS OF COMPLAINT – The undersigned alleges that the above-named party has engaged in or is engaging in prohibited practices within the meaning of section(s) _____ of the Public Employment Relations Act as follows:
(Briefly state the facts supporting this complaint including names, dates and places involved in the alleged violation. Use additional sheets if needed.)

3. REMEDY SOUGHT

4. NAME OF EMPLOYER (if different from item 1)

5. PARTY FILING THIS COMPLAINT

a. NAME

b. ADDRESS

c. TELEPHONE

Signature

Date