IN THE IOWA DISTRICT COURT FOR POLK COUNTY

UNITED FACULTY, **Petitioner,** **v.** **IOWA PUBLIC EMPLOYMENT RELATIONS BOARD,** **Respondent.**	**Case No. CVCV058643** **RULING ON JUDICIAL REVIEW**

This is a judicial review of a decision by the Iowa Public Employment Relations Board (PERB) regarding the remedy imposed on a prohibited practice finding. The matter was heard on January 3, 2020. Nathan Willems represented petitioner United Faculty. Diana Machir represented PERB. Andrew Tice represented intervener Iowa Board of Regents (BOR).

I. STATEMENT OF THE CASE

Statement of facts: There is very little dispute in facts. United Faculty is an employee union representing faculty at the University of Northern Iowa (UNI). In November of 2016, it began negotiating a new two-year collective bargaining agreement with BOR. The new agreement was to start on July 1, 2017. The parties first met on November 18, 2016. Mike Galloway was the primary negotiator for BOR. Nate Willems was the primary negotiator for United Faculty.[1] The parties exchanged initial proposals on a number of topics, including wages. United Faculty proposed a 4 percent increase per year. BOR proposed a .5 percent increase per year.

The parties met a second time on December 15, 2016. United Faculty presented a comprehensive proposed agreement that accepted many of BOR's initial proposals, including the oft-difficult issue of insurance. The only remaining items left to negotiate were evaluation procedures and wages. During this meeting, United Faculty proposed an increase in wages of 2.75

[1] Mr. Willems did not personally attend the first session.

percent per year. After receiving financial information from UNI, United Faculty made a revised conditional offer: a 2.5 percent increase if UNI received a requested additional appropriation of $2.5 million and a 1.5 percent increase if it did not. The Board did not make a new wage offer at this meeting.

There were two political matters overshadowing the negotiations. Following the November of 2016 elections, both parties understood that the legislature might make substantial changes to Iowa Code chapter 20, which is the State collective bargaining act. Also, as alluded above, there were budgetary concerns. The State Revenue Estimating Conference had reported decreased estimated State revenues in December of 2016, which would have impacted agency budgets for the following fiscal year. The Board had asked an overall increase of 2 percent plus an additional $2.5 million for UNI, but it was not clear that would be granted by the legislature. These financial matters were discussed at the December 15, 2016 meeting between the parties.

On December 22, 2016, BOR informed United Faculty that it would provide a proposal on the evaluation issue on the following day.[2] It also informed United Faculty that it was still working on a wage proposal. However, at some point after December 23, 2016, but prior to January 31, 2017, BOR had determined that it would not make any other wage offers to United Faculty due to "financial uncertainties and potential modifications to Chapter 20[.]"[3] This information was not immediately shared with United Faculty. Mr. Galloway and Mr. Willems had conversations on January 11, 2017, to discuss the status of negotiations. Mr. Galloway stated at that time that he was still trying to get a wage proposal from BOR, but there were significant financial issues.

The chief negotiators next talked by phone on January 17, 2017. BOR did not make a wage offer. The parties agreed to move forward by setting a mediation date. On the following day,

[2] BOR apparently never provided an evaluation proposal. *See* PERB Decision, p. 15.
[3] *See* Stipulation between the parties, pp. 1-2.

PERB offered 14 possible dates from January 21 through February 11, 2017. BOR rejected all 14 dates. The negotiators talked by phone again on January 24, 2017. The record is unclear whether Mr. Galloway stated that BOR was waiting out negotiations to see if the legislation on chapter 20 was passed or whether Mr. Willems began to draw that conclusion from the course of the conversation and negotiations. In any event, BOR did not make a wager offer. The parties discussed a potential impasse schedule. On January 25, 2017, they agreed to the schedule, which included a mediation on February 20, 2017, and an arbitration hearing on March 2, 2017. Arbitration had to be completed by March 15, 2017.

On January 31, 2017, Mr. Galloway sent an email to Mr. Willems stating, in part:

> To provide a little more clarity, my client has informed me that I cannot agree to anything until the introduction and subsequent passage of the reforms to Chapter 20. They believe this will all occur in mid-February. This is why we set the United Faculty schedule the way we did so that there is at last some clarity.

United Faculty filed a prohibited practice complaint with PERB on February 3, 2017. In essence, United Faculty alleged that BOR failed to negotiate in good faith by foregoing negotiations until it could receive a favorable change in law. United Faculty's assessment proved correct – BOR received a benefit once the law was passed on February 17, 2017. The amendments dramatically changed the scope of negotiations and limited increases in wages. Further, it required parties in current negotiations to restart bargaining under the new law.

Thereafter, the parties entered into an agreement on the sole issue of wage increases. BOR proposed an increase of 1.1 percent, which was the maximum allowed under the new law. United Faculty accepted the offer based on the restrictions in the new law. The new 2017-19 collective bargaining contract was a total of three paragraphs. In contrast, the prior bargaining contract was approximately 54 pages.

Proceedings before the agency: On June 15, 2017, PERB held a contested case hearing on the prohibited practices complaint before Administrative Law Judge Amber DeSmet (the ALJ). The ALJ issued a proposed decision denying the complaint on April 19, 2018. The ALJ noted that the parties' negotiations started earlier than normal via informal discussions in October of 2016. The first negotiating session occurred in November, which was in accord with prior practice. The December 15, 2016 session was actually earlier than normal, as BOR agreed to move up the meeting at the request of United Faculty. The parties continued to engage in discussions through their negotiators in January of 2017, during which they mutually agreed to a mediation session on February 20, 2017. The ALJ noted that the mediation date was well-within statutory timelines.

The ALJ agreed with United Faculty that BOR's failure to make a counteroffer to the union's wage offer was the biggest issue in the case. She found that both parties expected BOR to make a counteroffer on wages after their meeting on December 15, 2016. BOR did not do so until the scheduled mediation date on February 20, 2017. The ALJ ultimately concluded that BOR reasonably waited to make a counteroffer until after it had more information about the law changes and the State's budget. The negotiations ultimately met historic and statutory timeframes to reach an agreement. Accordingly, the ALJ found that BOR negotiated in good faith.

United Faculties appealed and the oral arguments were heard by PERB on August 8, 2018. PERB entered a written decision on June 12, 2019. PERB used the record as created before the ALJ, but made its own findings of fact. PERB determined that BOR's conduct, when viewed in the totality, showed a lack of good faith during negotiations. As a result, it found BOR had engaged in a prohibited practice.

PERB referenced a number of facts in support of its conclusion. First, it noted that Mr. Galloway had proposed fewer negotiating sessions, which was a change in practice with these

parties.[4] Still, PERB recognized that the sessions in November and December of 2016 showed good faith and were consistent with prior practice. Second, PERB found that it was not consistent with prior practice to have only one bargaining session between November 18, 2016, and February 20, 2017. This did not meet the requirement to "meet at reasonable times" in anticipation of reaching a final agreement. Third, BOR did not actively participate in any substantive deliberations following the December 15, 2016 meeting. PERB cited BOR's failure to return a proposal on evaluation procedures or wages, the rejection of PERB's proposed mediation dates (all of which would have been before the chapter 20 amendments passed), and other examples of failing to respond to communications from United Faculty. BOR's strategy was made clear in the January 31, 2017, email from Mr. Galloway in which he stated that there would be no wage offer until the chapter 20 amendments were passed as expected in mid-February. PERB found that BOR was not motivated by the budgetary concerns, which would not have justified delaying negotiations in any event. Rather, BOR's motivation was to delay until the law changed. PERB noted that BOR did not try to "right the wrong" after United Faculty filed its prohibited practice complaint, but instead, held to the February 20, 2017 mediation date in the hope that the law would pass before then.

PERB then turned to the issue of remedy. PERB employed the standard of attempting to return the parties to the position they would have been but for the prohibited practice. United Faculty argued that required PERB to order the parties back to the bargaining table. PERB declined that option. PERB noted that the parties ultimately reached an agreement that was put into place.[5] PERB also noted that United Faculty agreed to the impasse schedule and did not

[4] Mr. Galloway was an experienced collective bargaining negotiator, but this was his first time as chief negotiator in collective bargaining with these parties.
[5] In fact, the 2017-19 agreement since expired on June 30, 2019.

otherwise object to BOR during the course of the delay. PERB reiterated that its prohibited practice finding was based on the totality of the facts as opposed to one specified violation. As a result, it would have been difficult to determine the timing as to where to place the parties. After considering the options, PERB elected to limit the remedy to a cease and desist order to be posted at various places at UNI for 30 days.

United Faculty filed a petition for judicial review. The union argued that PERB abuse its authority by granting an inadequate remedy. It asked the court to remand the case to PERB with the instruction to the parties to set aside the 2017-19 contract and negotiate pursuant to the law that existed prior to the 2017 amendments to chapter 20. PERB filed an answer and resisted any change in PERB's decision. BOR intervened and likewise resisted the request.

II. STANDARD OF REVIEW

Iowa Code chapter 17A governs judicial review of agency action. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The court may grant relief if the agency action has prejudiced the substantial rights of the petitioner and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n). *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (cite omitted).

The standard of review depends on the aspects of the agency decision that forms the basis for the judicial review. *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 455 (Iowa 2017) (cite omitted). For example, the court can only disturb factual findings if not supported by substantial evidence in the record when viewed as a whole. *Id*.

When reviewing an agency's interpretation of law, the level of deference depends on whether the agency has been "clearly vested" to interpret that law by the legislature. *Id*. If so, the

court can only reverse the agency's interpretation if it is arbitrary, capricious, unreasonable, or an abuse of discretion. *Renda v. Iowa Civil Rights Com'n*, 784 N.W.2d 8, 11 (Iowa 2010) *quoting* Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 62 (1998). If the legislature has not clearly vested the agency with the authority to interpret the law, the court may substitute its judgment for that of the agency if it has made an error of law. *Id*. at 14-15.

When the petitioner does not challenge the agency's findings of fact or conclusions of law, but rather challenges the ultimate conclusion reached by the agency, the standard is whether the agency abused its discretion. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). Abuse of discretion is synonymous with unreasonableness, focusing on whether the agency has made a decision clearly against reason and evidence. *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994).

In this case, petitioner does not challenge the findings of fact or the agency's conclusions of law. It challenges an ultimate conclusion reached by the agency. The parties agree that abuse of discretion is the correct standard.

III. CONCLUSIONS OF LAW

Statutory framework and agency standards: Iowa Code chapter 20 governs public employment collective bargaining. The purpose of the statute, in part, is to "promote the harmonious and cooperative relationships between government and its employees by permitting public employees to organize and bargain collectively[.]" Iowa Code § 20.1(1). PERB was created for the purpose of implementing the statute and adjudicating and conciliating employment-related cases involving the State and other public employers. Iowa Code § 20.1(2). To carry out this purpose, the legislature has empowered PERB to adjudicate prohibited practice complaints and

fashion appropriate remedial relief for violations of the statute. Iowa Code § 20.1(2)(b), (c).

The statute defines a "prohibited practice," as applicable to this case, as follows:

> 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.

Iowa Code § 20.10. Once PERB determines a complaint has a factual basis, it will set the matter for an evidentiary hearing. Iowa Code § 22.11(1). The case may be heard directly by PERB, or it may designate an ALJ to conduct the hearing. Iowa Code § 22.11(2). PERB has the right to review the proposed decision of an ALJ as provided in chapter 17A. *Id*. In the event PERB finds a prohibited practice, the agency may enter into a consent agreement with the party to discontinue the practice or petition the district court for injunctive relief. Iowa Code § 22.11(4). The statute does not provide for other remedies, such as civil penalties, fines, or restitution.

After PERB found that BOR had committed a prohibited practice, it applied the remedial standard of attempting to place the parties in the position they would have been but for the prohibited practice. This standard was apparently developed from administrative case law – the standard is not set forth in the statute or agency regulations.[6] However, the standard is reasonably related to the statutory authority given to PERB to "[f]ashion[] appropriate remedial relief for

[6] The PERB final decision cited to *Brhd. of Clayton Cnty. Secondary Road Emps. and Clayton Cnty.*, 1998 PERB 3218 at 12. See PERB Decision on Appeal, p. 20.

violations of the chapter[.]" Iowa Code § 20.1(2)(c). All parties agreed that the standard was an appropriate means to determine relief. Accordingly, the court will accept that standard the means to evaluate PERB's determination of remedy.[7]

Evaluating PERB's determination of remedy: BOR did not appeal PERB's finding that it committed a prohibited practice. The only question is whether the remedy entered by PERB was an abuse of discretion.

The courts are generally reluctant to interfere with an agency's chosen remedy after finding a violation of law. In one instance, the Iowa Court of Appeals referred to the characterization of review of remedy as follows: "the penalties assessed were not so harsh and unconscionably disproportionate to the offense that the Court could find the agency abused its discretion[.]" *Intlekofer v. Div. of Labor Servs., Iowa Workforce Dev.*, 808 N.W.2d 754 (Iowa Ct. App. 2011) (internal quotations omitted). While the court of appeals did not squarely address the remedy issue in *Intlekofer*, the reasoning appears consistent with other cases. For example, in *Empire Cable of Iowa, Inc. v. Iowa Dep't of Revenue & Fin.*, 507 N.W.2d 705, 707 (Iowa Ct. App. 1993), a sales tax permit holder argued that the Department of Revenue abused its authority by revoking its sales tax permit. The court found the agency's action reasonable and not an abuse of discretion based on the finding of violations and the permittee's history of previous violations. *Id*.

While most cases involve a challenge of the harshness of the remedy imposed, this case involves a claim that the remedy was too lenient. United Faculty has a point. Both parties entered the 2017 negotiations understanding that there might be changes in chapter 20, but neither initially knew when they might take place or how extensive they might be. During the course of

[7] The standard of placing the parties in the position they would have been but for the illegal action is not a novel standard of review in the legal field. For example, that standard is cited as a basis to remedy violations of the exclusionary rule in criminal cases. *See State v. Coffman*, 914 N.W.2d 240, 256 (Iowa 2018).

negotiations, BOR learned that legislative proponents would introduce and attempt to pass the amendments by mid-February, 2017. It is unclear how long BOR knew about the legislative timeframe, but it did not expressly inform United Faculty until January 31, 2017. By that point, BOR had already rejected 14 different mediation dates ranging from January 21 through February 11, 2017. The parties had already agreed to an impasse schedule that set mediation for February 20, 2017. BOR was clearly delaying the process to allow time for the legislative process to work. In contrast, there was little United Faculty could do to speed up the process by the time it learned that the legislation was imminent.

The PERB decisions appeared to place some fault on United Faculty for agreeing to the impasse schedule, but the court believes its agreement was reasonable based on what it knew at the time. The negotiations had been congenial and productive until BOR stopped negotiations in January of 2017. The negotiators continued to talk by telephone during January. The impasse schedule was consistent with legal guidelines and not inconsistent with prior practice. At the time United Faculty agreed to the impasse schedule, the proposed changes to chapter 20 had not even been filed with the legislature. The Iowa Legislative website shows that House File 291 was first introduced on February 9, 2017, and passed on February 17, 2017. That is an uncommonly short period of time for a piece of major legislation to pass both houses and be signed by the governor. So, while United Faculty understood that the then-current negotiations could be impacted by amendments to chapter 20 during the 2017 session, the union had good reason to believe the new law would not be in place by February 20, 2017.

The passage of House File 291 dramatically impacted United Faculty's negotiating position. Following passage of the bill, wages was the only topic of bargaining. All other topics of interest to the union were off the table. Moreover, the bill included a ceiling on pay increases.

The union was limited to 1.1 percent as its best-case scenario under the new law. It is unclear what United Faculty might have negotiated or been awarded under the old law, but the union could have at least argued for a greater amount. It had consistently argued for a greater amount throughout negotiations.

If these facts were the only considerations, the remedy would scream out for something greater than a cease and desist order. This is a clear instance of one party winning by engaging in an illegal practice. BOR learned that it would be advantaged in negotiations if it could delay long enough for the legislation to pass. That is exactly what it did. It reaped the desired reward at Unified Faculty's expense.

Unfortunately, the case is not that simple. United Faculty wants the court to put the parties in the same place that they were at the time BOR engaged in bad faith by refusing to negotiate. Essentially, United Faculty wants the court to wind back the clock to some date in January of 2017 and order the parties to start negotiating again under the old law. However, there is a unique problem with that request. The amendments to chapter 20 passed on February 17, 2017 and became effective on that date. The bill contained a provision requiring any pending bargaining to cease if not complete and begin again under the provisions of the new law. 2017 Iowa Acts, ch. 2, § 25. Even if BOR had negotiated in good faith, the parties may not have reached a final agreement by February 17, 2017. The parties were not required by law to reach an agreement until March 15, 2017, so they were well-within the legal guidelines to negotiate an agreement. *See* Iowa Code § 20.17(9) (requiring negotiations to be complete by March 15). This is not an instance which the court can remedy the violation by ordering an open-end period for negotiations followed by arbitration. In order to truly place the parties in the same position they would have been, the

court must recognize the reality that the parties' rights changed once the law passed on February 17, 2017.

To actually place the parties in the same position they would have been, the court would have to determine a window period for negotiations starting on the date BOR ceased to negotiate in good faith and ending on February 17, 2017. At hearing, United Faculty argued that the start date was, at worse, January 24, 2017. That is the date Mr. Galloway indicated to Mr. Willems by phone that BOR was not going forward with negotiations. Hypothetically, accepting that as the date, the court could set a 24 day period for new negotiations. However, it seems unrealistic that the parties would, two years after the fact, negotiate and reach a new proposed agreement on wages, and obtain the necessary approvals from the union and the members of BOR within that timeframe. *See Serv. Employees Int'l Union, Local 199 v. Iowa Bd. of Regents*, 928 N.W.2d 69, 79 (Iowa 2019) (discussing union ratification and the need for board approval before a final agreement is effective). It is likewise unrealistic to think the parties could negotiate, mediate, arbitrate, and receive an arbitration decision in that timeframe. To this point, the parties' impasse schedule is relevant, as it reflects a 33 day period to reach final resolution had a voluntary agreement not been reached. That schedule reflects the time the parties in 2017 expected to complete each step in the process.

The court considers the timing of the passage of the chapter 20 amendments to be the major obstacle in granting United Faculty's proposed remedy. If the legislature had passed the bill after March 15, 2017, the remedy would have been a moot point because the prior law required the parties to resolve collective bargaining by that date. However, the legislature jumped on its opportunity and passed the law well-before the statutory deadlines for negotiations. This allowed the law to impact any current negotiations with public bodies whether or not they were acting in

good faith. Two years later, there is no real way to put the parties in the same position they would have been in January, 2017 and expect they would have entered into and executed a final agreement by February 17, 2017.

For these reasons, the court cannot find that PERB abused its discretion with regard to remedy. PERB's decision not to order a re-start of negotiations is based on the practicalities of not being able to truly place the parties in the same position they would have been but for the prohibited practice violation. It is unfortunate that some intermediate remedy does not exist to impose consequences on BOR to prevent a similar violation in the future. A cease and desist order is not likely to do that, although 2017 may have presented a unique set of circumstances that will not repeat itself. PERB's decision as to remedy is supported by reason and evidence and must be affirmed.

ORDER

The petition for judicial review is hereby denied. The department's decision is affirmed. Petitioner shall pay any costs.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV058643	UNITED FACULTY VS IOWA PUBLIC EMPLOYMENT RELATIONS BOARD

So Ordered

Jeffrey Farrell, District Court Judge,
Fifth Judicial District of Iowa