IN THE COURT OF APPEALS OF IOWA

No. 1-720 / 11-0547
Filed December 7, 2011

UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA,
Petitioner-Appellant,

vs.

IOWA PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

The United Electrical, Radio & Machine Workers of America appeal from a district court order on judicial review affirming in part and reversing in part the Iowa Public Employment Relations Board's decision that a proposal was not a mandatory subject of bargaining under Iowa Code section 20.9 (2009). **REVERSED.**

Charles Gribble of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for appellant.

Jan Berry, Des Moines, for appellee.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

DANILSON, P.J.

The United Electrical, Radio & Machine Workers of America (UEW) appeals from a district court order on judicial review. The district court affirmed in part and reversed in part the Iowa Public Employment Relations Board's (PERB) decision that a UEW proposal was not a mandatory subject of bargaining under Iowa Code section 20.9 (2009). Upon our review, we conclude the proposal in question does not fall within the parameters of section 20.9 because it references temporary employees not included within the employee organization bargaining unit. We reverse the district court's ruling.

I. Background Facts and Proceedings.

The UEW is an employee organization certified by the PERB as the exclusive collective bargaining representative of a group of employees of Western Tech Community College, a public employer. During the course of collective bargaining between UEW and the college, a dispute arose regarding the negotiability status of certain portions of the proposal advanced by UEW. The dispute focused on the following staff reduction portion of UEW's proposal and its definition of "Temporary Employee":

> **ARTICLE 1. RECOGNITION AND DEFINITIONS**
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> . . . .
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> G. Temporary Employee
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> As used in this agreement and unless otherwise indicated, the term "temporary employee" shall mean an employee who works subject to an appointment of less than six (6) continuous months. Temporary employees shall not be entitled to any of the benefits set forth in this Agreement.
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> **ARTICLE 12. STAFF REDUCTION PROCEDURES**
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> . . . .
>
> If the College decides to lay employees off, employees in the affected job classification shall be laid off in the following order:

> 1. Temporary employees[1] shall be laid off first.
> 2. If the layoff cannot be fully accomplished by laying off temporary employees, then limited part-time employees shall be laid off next.
> 3. If the layoff cannot be fully accomplished by laying off temporary employees and limited part-time employees, then probationary employees shall be laid off next.
> 4. If the layoff cannot be fully accomplished by laying off temporary employees, limited part-time employees, and probationary employees, then part-time employees shall be laid off next starting with the least senior employee in the affected job classification.
> 5. If the layoff cannot be fully accomplished by laying off temporary employees, limited part-time employees, probationary employees, and part-time employees, then full-time employees shall be laid off next starting with the least senior employee in the affected job classification. . . .

In June 2009, the college filed a petition with PERB for expedited resolution of the negotiability dispute. Following oral arguments, PERB issued a preliminary ruling in August 2009, stating the staff reduction portions of the proposal at issue were non-mandatory subjects of bargaining. UEW subsequently requested a final ruling from PERB. In April 2010, PERB issued its final ruling, expanding on its preliminary ruling and again concluding the staff reduction portions of the proposal were non-mandatory subjects of bargaining:

> Since the temporary employees referenced in the proposal . . . are not included in the bargaining unit, we thus conclude that the references to them in the proposal do not fall within the mandatory topic of "procedures for staff reduction" and are not mandatory subjects of bargaining.

In May 2010, UEW filed a petition for judicial review with the Polk County District Court.[2] PERB filed a responsive brief.[3] Following oral arguments, the

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[1] Temporary employees within this meaning are non-bargaining unit personnel.

[2] Thereafter, UEW filed a motion for leave to amend petition (which was granted by the district court) and an amended petition.

district court entered its ruling in March 2011. The district court reversed in part and affirmed in part PERB's final ruling, concluding the proposal's references to temporary employees were a mandatory topic of bargaining to the extent those employees *were included* within the UEW-represented bargaining unit but the proposal's references to temporary employees were merely permissive to the extent those employees *were not included* within the bargaining unit. Because it is undisputed that none of the temporary employees referred to in the proposal are within the UEW-represented bargaining unit, the district court's ruling, in effect, affirmed PERB's final conclusion. UEW now appeals.

II. Scope and Standard of Review.

Iowa Code section 17A.19(10) governs judicial review of agency decision making. *Evercom Sys., Inc. v. Iowa Utils. Bd.*, ___ N.W.2d ___, ___ (Iowa 2011). At issue here is PERB's interpretation of section 20.9. Our review of PERB's interpretation of statutory language depends on whether such interpretation has "clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(10)(c). If such discretion has been clearly vested in PERB, we will only reverse if PERB's interpretation of the statutory language is "irrational, illogical, or wholly unjustifiable." *Id.* § 17A.19(10)(*l*); *Waterloo Educ. Ass'n v. Iowa Pub. Emp't Relations Bd.*, 740 N.W.2d 418, 419-20 (Iowa 2007) ("*Waterloo II*"). However, if such discretion has not been clearly vested in PERB, we must reverse PERB's decision if it is based on "an erroneous interpretation" of the law. Iowa Code § 17A.19(10)(*c*). Whether a proposal is a mandatory subject of

[3] The college was not a party to the petition for judicial review and did not participate in proceedings.

collective bargaining, as defined by section 20.9, has not been explicitly vested in PERB's discretion. *Waterloo II*, 740 N.W.2d at 420. Therefore, our review is for correction of errors at law. *Id*.; *see also* Iowa Code § 17A.19(10)(c). We will apply the standards of section 17A.19(10) to determine whether we reach the same results as the district court. *Evercom*, ___ N.W.2d at ___.

III. Discussion.

A. Applicable Law.

Iowa Code chapter 20 governs collective bargaining between public employers and public employee organizations. *See Waterloo II*, 740 N.W.2d at 421. Specifically, a determination of whether a proposal is a permissive or mandatory subject of bargaining implicates Iowa Code sections 20.7 and 20.9. Section 20.7 grants certain rights exclusively to public employers. *See id*. (describing section 20.7 as "a contrapuntal management rights clause preserving exclusive, public management powers in traditional areas"). In contrast, section 20.9 enumerates seventeen topics as mandatory subjects of collective bargaining between public employers and employee organizations. *See id*. (acknowledging "[t]hese seventeen topics are sometimes referred to as the 'laundry list' of mandatory subjects of collective bargaining"). "[T]he subjects of mandatory bargaining delineated in section 20.9 should be viewed as exceptions to management rights reserved in section 20.7." *Id*. at 429.

Pursuant to section 20.9, the public employer and the employee organization "shall" negotiate in good faith with respect to "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 other matters mutually agreed upon." (emphasis added). As our supreme court has explained:

> This court has recognized that section 20.9 establishes two classes of collective bargaining proposals: mandatory and permissive. Mandatory subjects are those matters upon which the public employer is required to engage in bargaining. Permissive subjects are those that the legislature did not specifically list in section 20.9, but are matters upon which both the public employer and the employee organization simply agree to bargain.

Waterloo II, 740 N.W.2d at 421.

"The determination of whether a proposal is a mandatory subject of collective bargaining is an issue of law based upon a facial review of the proposal." *Id.* at 428. The court has recently clarified how these sections should be interpreted. *Id*. at 428-29.

> 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. Ordinarily, this two-step process is the end of the matter. Only in unusual cases where the predominant topic of a proposal cannot be determined should a balancing-type analysis be employed to resolve the negotiability issue.

Id. at 429.

B. Temporary Employee.

The term "temporary public employees" is statutorily defined as employees that have been "employed for a period of four months or less," and are excluded from the chapter 20 collective bargaining provisions. Iowa Code § 20.4(5); *see also id.* § 20.9 (requiring collective bargaining with employee

organization unit members). UEW's proposal defines the term "temporary employee" for purposes of its proposal as follows:

> As used in this Agreement and unless otherwise indicated, the term "temporary employee" shall mean an employee who works subject to an appointment of less than six continuous months. Temporary employees shall not be entitled to any benefits set forth in this Agreement.

Here, the PERB ruling was premised upon the conclusion that UEW sought their proposal to apply to non-members of the bargaining unit who were defined as a temporary employee under the proposal.[4] The district court's ruling also hinged on the definition of temporary employee, reaching the same conclusion as PERB pertaining to the non-members, but determining mandatory bargaining was required for temporary employees who were members of the unit.

C. Application of Law to Non-Bargaining Unit Employees.

The district court and PERB agreed the UEW proposal does not fall within the purview of section 20.9 (requiring mandatory bargaining) if the temporary employees are not included within the bargaining unit. As the district court observed:

> [The issue is] not merely whether those portions of the proposal set forth by the UEW referencing "temporary employees" constitute a mandatory or permissive subject of bargaining, but rather whether or not "temporary employees" not members of the employee bargaining unit are part of the bargaining process at all. [The employer] must engage in mandatory bargaining with the employee organization regarding staff reduction procedures and specifically, "temporary employees" who are members of the employee

[4] As PERB stated in its final ruling:

> The parties seemingly agree that "temporary employee" within the Article I section G contractual definition, i.e., those who work less than six continuous months, are not within the bargaining unit. Thus, for purposes of this decision, we assume that all of the "temporary employees" referenced in the provisions at issue are not within the bargaining unit.

> organization. Those employees who are not members of the employee organization are neither subject to permissive or mandatory negotiations with the public employer as they are not part of the employee organization by definition.

UEW argues this finding gives an unduly narrow meaning to the section 20.9 term "procedures for staff reduction." UEW points out that PERB has previously recognized in *Bettendorf-Dubuque Community School District*, 76 PERB 598 & 602 (1976), that "procedures for staff reduction under section 20.9 include matters such as 'the order and manner in which a staff reduction will be carried out.'" UEW states because that issue is "the entirety of what is to be reviewed" in this case, it follows that the subject matter of the proposal comes "within section 20.9 [as] a mandatory subject of bargaining, regardless of the merits of the proposal."

The parties agree the proposal topic in this case would be classified as a procedure for staff reduction, a mandatory bargaining topic under section 20.9, if the temporary employees were members of the bargaining unit. Indeed, PERB acknowledged its finding in *Bettendorf-Dubuque* that the order and manner in which a staff reduction will be carried out is a mandatory bargaining topic pursuant to section 20.9 "procedures for staff reduction." However, as PERB distinguished:

> We think it is axiomatic that the mandatory subjects of bargaining listed in section 20.9 apply to employees included within the bargaining unit represented by the employee organization doing the negotiating—not to employees outside the unit—since the employee organization is the exclusive bargaining representative of only those employees included in the unit. *See, e.g*., Iowa Code §§ 20.14(1), 20.15(2). It follows that the scope of the mandatory bargaining duty is limited to the section 20.9 subjects as they apply to the employees listed in the bargaining unit.

> Accordingly, although not stated in this way in *Bettendorf-Dubuque*, we think it apparent that the mandatory section 20.9 topic "procedures for staff reduction" is properly interpreted as meaning procedures for staff reduction of employees in the bargaining unit, and includes such matters as the order and manner in which a staff reduction will be carried out for those employees. Since the temporary employees referenced in the proposal at issue are not included in the bargaining unit, we thus conclude that the references to them in the proposal do not fall within the mandatory topic of "procedures for staff reduction" and are not mandatory subjects of bargaining. Although the portion of the proposal requiring the layoff of temporary employees before any bargaining unit employees may certainly impact the staff reduction of unit members, its predominant characteristic is the establishment of a condition with must be met, *i.e*., the layoff of certain non-unit employees, before procedures for reducing staff within the unit may be instituted. Like the Board in *Bettendorf-Dubuque*, we conclude such proposals are permissive, and not mandatory subjects of bargaining.

1. Definition of Topical Words.

In determining whether the threshold topics test has been met, the issue cannot be resolved by simply looking for the topical word listed in section 20.9. *State v. Pub. Emp't Relations Bd.*, 508 N.W.2d 668, 675 (Iowa 1993). Thus, the fact the proposal heading is described as "Staff Reduction Procedures" does not fully answer the question.

The topical words or listed terms describing the mandatory subjects must be given their "common and ordinary meaning within the structural parameters of section 20.9." *Waterloo II*, 740 N.W.2d at 430. The terms also "cannot be interpreted in a fashion so expansive that the other specifically identified subjects of mandatory bargaining become redundant," but are not to be given the "narrowest possible interpretation." *Id*. at 429-30.

Here, PERB contends the word "staff" only encompasses members of the bargaining unit. This term, as used in section 20.9, has not previously been

interpreted by our supreme court nor is it otherwise defined in Iowa Code chapter 20. We also note the definitional issue to be addressed is not resolved by the determining the common meaning of the term "staff," but rather how the term is defined within the structural parameters of section 20.9. *Id*. at 430.

In our review of section 20.9, we first observe the section limits the scope of negotiations to employers and employee organizations, defined in section 20.3(4) as "an organization of any kind in which public employees participate and which exists for the primary purpose of representing employees in their employment relations." We also note that in reference to the National Labor Relations Act, 29 U.S.C. §§ 151-169, "[i]t is settled that labor representatives may not insist on bargaining for employees whom they do not, in fact, represent." *Minnesota Mining & Mfg. Co. v. N. L. R. B.*, 415 F.2d 174, 176 (8th Cir. 1969). Moreover, "the scope of the bargaining unit controls the extent of the right and duty to bargain." *Marshalltown Ed. Ass'n v. Pub. Emp't Relations Bd.*, 299 N.W.2d 469, 471 (Iowa 1980). This principle has been described by one court as a "general rule of labor relations law." *Connecticut Educ. Ass'n v. State Bd. of Labor Relations*, 498 A.2d 102, 112 (Conn. Ct. App. 1985).

Clearly, defining the term "staff" to include non-members of the unit would be in contravention of these basic labor law principles. We also conclude the scope of negotiations would be expanded beyond that contemplated by section 20.9, as the employer is not bound to negotiate issues beyond the scope of the bargaining unit. Accordingly, we agree with PERB that the definition of "staff" within the structural parameters of section 20.9 is limited to members of the bargaining unit.

2. Ambiguous and Hybrid Proposals—Predominant Purpose.

Notwithstanding the apparent simplicity of the first prong threshold topics test, our supreme court has acknowledged a proposal may incorporate more than one topic. *Waterloo II*, 740 N.W.2d at 430 (citing *Waterloo Cmty. Sch. Dist. v. Pub. Emp't Relations Bd.*, 650 N.W.2d 627, 634 (Iowa 2002) ("*Waterloo I*") (distinguishing the facts where an additional pay for additional work was joined in proposal that sought employees who also had the right to refuse performance of extra work.)) The topic of a proposal may also be "ambiguous or hybrid." *State*, 508 N.W.2d at 674; *see also Waterloo II*, 740 N.W.2d at 427. Our supreme court has also observed that "artful negotiations may attempt to craft proposals that incidentally involve a mandatory topic but which are really designed to influence" management policy or discretion. *Waterloo II*, 740 N.W.2d at 431. Thus, resolving the definition of the terms of the mandatory subject does not end our analysis.

In this regard, we believe the district court was correct in observing UEW's proposal has elements of both a mandatory subject and a permissive subject. In its ruling, the district court effectuates a division of the proposal into sub-parts, separating the mandatory and permissive subjects. However, because only one proposal was submitted, we are required to determine if the proposal in its entirety is a mandatory bargaining subject.

After defining the terms, consideration must be given to the predominant purpose of the proposal and "the scope of the topic of a disputed proposal [to determine] what the proposal, if incorporated into the collective bargaining contract would bind an employer to do." *State*, 508 N.W.2d at 673; *see also*

Waterloo II, 740 N.W.2d at 427. In most cases, these two considerations permit a conclusion to be drawn as to whether the proposal as a whole is a permissive or mandatory subject. These considerations do not entail a balancing of the employer's interest in management rights established in section 20.7 against the interest of employees in mandatory bargaining, with one exception. *Waterloo II*, 740 N.W.2d at 429. A balancing analysis is performed only in unusual "hybrid" cases, where "the predominant purpose of a proposal cannot be determined," and the proposal includes both mandatory and permissive subjects that "are inextricably interwined." *Id*. at 429, 431.

Here, PERB concluded that the predominant purpose of UEW's proposal was "the establishment of a condition which must be met, *i.e*., the layoff of certain non-unit employees, before procedures for reducing staff within the unit may be instituted." We believe PERB's recitation of the proposal's purpose more aptly describes what the employer would be bound to do if the proposal became part of the contract. We find the predominant characteristic of the proposal is the order and manner of reducing both "staff" and certain non-staff (non-member) employees, with the requirement all non-staff employees (temporary employees as defined by the proposal) be laid-off before any staff members. Because the employer is not required to bargain with the unit regarding the manner or order of layoffs of non-members of the unit, the proposal is a permissive, not mandatory, subject of bargaining.

We believe UEW's proposal is an example of an "artful" proposal, *see Waterloo II*, 740 N.W.2d at 431, that incidentally involves staff reduction, but as observed by PERB, is really designed to require the employer to lay-off certain

non-member employees before the employer may institute lay-offs of unit members. Even if the proposal is more akin to a hybrid proposal, we do not find it necessary to balance the mandatory and permissive elements of the proposal because these elements are not inextricably interwined. *See id*. The UEW can easily submit a new proposal for staff reduction procedures without reference to non-members of the unit.

Here, UEW's proposal would require mandatory bargaining of a public employer relative to the rights of employees it does not represent and employees that are excluded from Iowa Code chapter 20. The proposal in question does not fall within the parameters of section 20.9 and is therefore a permissive bargaining subject. PERB's ruling should have been affirmed by the district court. Because the district court affirmed in part and reversed in part, and separated the proposal into two subparts, we reverse the district court's ruling.

REVERSED.

Mullins, J., concurs; Tabor, J., dissents.

TABOR, J. (dissenting)

I respectfully dissent. I think our legislature meant to include all staff—bargaining unit and non-bargaining unit members alike—when it listed "procedures for staff reduction" as a mandatory subject of collective bargaining in Iowa Code section 20.9. (2009).

In *Waterloo Education Association v. Public Employment Relations Board,* 740 N.W.2d 418, 428-29 (Iowa 2007), our supreme court embraced the "topics test" for determining whether a proposal is subject to mandatory bargaining, disavowing previous Iowa cases that engaged in a threshold balancing of management rights and public employees' interests in negotiations. *Waterloo* explained that the legislature's use of a "laundry list of negotiable subjects" did not mean that the listed terms should be given the narrowest possible interpretation. 740 N.W.2d at 429-30.

In the instant case, the majority's conclusion that the term "staff" is limited to members of the bargaining unit is inconsistent with the word's common and ordinary meaning[5] within the structural parameters of section 20.9. If the legislature had wanted to restrict the topic of "procedures for staff reduction" to members of the bargaining unit, it could have referred to layoffs of employees represented by an "employee organization." *See* Iowa Code §§ 20.3(4)(defining employee organization), 20.10(2)(d) (prohibiting an employer from discharging or discriminating against "a public employee because the employee has . . . joined or chosen to be presented by any employee organization").

[5] The dictionary defines "staff" as "the personnel who carry out a specific enterprise." The American Heritage Dictionary 1186 (2d ed. 1985).

This case differs from *Marshalltown Education Association v. Public Employment Relations Board*, 299 N.W.2d 469 (Iowa 1980) in which the union tried to negotiate benefits for non-bargaining unit members. Here, the union is seeking to place its own members in a more advantageous position by having the brunt of any staff reduction fall on temporary employees. An employer's reduction in staff poses less of a threat to bargaining unit members if the jobs of non-union members are targeted first for layoffs. Reduction in staff does not cease being a mandatory topic of collective bargaining under section 20.9 just because the proposal has an impact on non-members. *Cf. Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179-80, 92 S. Ct. 383, 397-98, 30 L. Ed. 2d 341, 357-58 (1971) (holding that National Labor Relations Act (NLRA) requires parties to negotiate terms of relationship between employer and third party if matter "vitally affects" conditions of employment of the bargaining-unit employees).

Although the "vitally affects" test is generally discussed in conjunction with the broader NLRA language for determining mandatory subjects of collective bargaining, our supreme court has mentioned the concept. In *Charles City Education Association v. Public Employment Relations Board*, 291 N.W.2d 663, 669 (Iowa 1980), the majority narrowly construed the term "wages" in section 20.9 to exclude a salary scale based on post-graduate education hours and held that determining such teacher qualifications was the exclusive right of public employers under section 20.7. The dissent in that case found the union's proposal concerning teacher education hours to be "integrally related" to a topic listed in section 20.9, citing with approval the *Pittsburgh Plate Glass* "vitally

affects" test. *Charles City*, 291 N.W.2d at 670 (Rees, J., dissenting). *Waterloo* discredited the *Charles City* majority's efforts to "harmonize" management rights under section 20.7 with mandatory subjects of collective bargaining in 20.9. *Waterloo*, 740 N.W.2d at 429. The "topics test" adopted and applied in *Waterloo* echoes the sentiments of the *Charles City* dissent. *Waterloo*, 740 N.W.2d at 428-29; *Charles City*, 291 N.W.2d at 670.

In this case, the union's proposal to require the employer to lay off temporary employees before bargaining unit members vitally affects bargaining unit members. The priority given to workers holding temporary positions cannot be logically extracted from the overall procedures- for-staff-reduction topic listed in section 20.9. I would hold that the subject matter of the union's proposal concerning temporary employees is a mandatory topic for collective bargaining.