



Employment Issues

PERB Highlights

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sector bargaining with labor organizations representing public employees. The main feature of the Iowa PERA is that there is limited mandatory bargaining. *IOWA CODE* Chapter 20 includes a list of topics about which the parties are required to bargain. Section 20.9 provides in part:

The public employer and the employee organization shall meet at reasonable times, including meetings reasonably in advance of the public employer’s budget-making process, to 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. Negotiations shall also include terms authorizing dues checkoff for members of the employee organization and grievance procedures for resolving any questions arising under the agreement, which shall be embodied in a written agreement and signed by the parties.

Negotiability Under the Public Employment Relations Act

The Public Employment Relations Act (PERA) sets up the framework for public

IOWA CODE Section 20.7 lists those items over which management has exclusive control, including managing and directing the work of employees. If there is a dispute about the negotiability of a contract proposal, the Public Employment Relations Board (PERB) has the responsibility for reviewing the proposal and

declaring whether or not it contains a mandatory subject of bargaining.

The party disputing the negotiability of the proposal has the responsibility of filing a petition with PERB. Once a petition is filed, PERB will usually make a preliminary determination of negotiability, and if the parties want a final, binding decision, a request must be made to PERB.

There is a substantial body of case law concerning the negotiability of contract proposals. The following is a summary of those decisions.

General Contract Terms

Preamble

A proposal placing a preamble into the collective bargaining agreement (CBA) is permissive. (Charles City CSD, 76 H.O. 661) “Nowhere within the mandatory items listed in Section 9 can the subject of a preamble be logically found....”

The hearing officer in that case further stated:

It is, however, unfortunate that disagreement over such a subject should ever reach the stage of fact-finding and contribute to preventing the parties from reaching a contract. A preamble should introduce the parties and generally explain the purpose of the contract, just as any formal document, but should not be a stumbling block to the execution of a collective bargaining agreement.”

Union Recognition

A proposal recognizing the union as the exclusive bargaining agent for the employees covered is permissive and the absence of such a provision does not result in decertification. The absence or inclusion of such a provision has no legal consequences. (City of Cedar Falls, 81 PERB 1911; Ft. Dodge CSD, 84 PERB 2650 and 2655)

Association Rights

There is no mention in *IOWA CODE* Section 20.9 of “union rights,” thus it is a permissive subject of bargaining. (Charles City CSD, 76

H.O. 661; Bettendorf-Dubuque, 76 PERB 598 and 602; North Scott CSD, 77 PERB 931)

Items included in the list of union rights that are considered permissive include:

- Use of the employer’s facilities for union business.
- Communications through the district’s mail.
- Access to members on school property.
- Provision of copies of the board agenda.
- Access to bulletin boards.
(Marion Independent School District, 78 PERB 1173)

A provision requiring the employer to provide information necessary to process grievances is considered mandatory under the topic of “grievance procedures.” (Bettendorf-Dubuque, 76 PERB 598 and 602)

A proposal that employees will be allowed to wear union pins to work was held to be permissive. (Andrew CSD, 85 PERB 2629)

Management Rights

The topic of “management rights” is clearly permissive. (Marion Independent School District, 78 PERB 1173) This holding also applies to a union’s attempts to limit an employer’s Section 7 rights. (City of Iowa Falls, 83 PERB 2558)

Employee Rights

A proposal imposing a “just cause” standard for employee discipline is permissive. (Great River AEA 16, 83 PERB 2372 and 2384)

A provision prohibiting reprisals for participating in grievance procedures, while an accurate statement of the law, is permissive. (Western Hills AEA 12, 81 PERB 1848)

A proposal prohibiting discrimination on the basis of age, race, sex, etc. is permissive. (State of Iowa, 91 PERB 4393 and 4394)

A proposal recognizing the right of employees to defend themselves was considered mandatory under the topic of health and safety

in Marion Independent School District, 78 PERB 1173, notwithstanding the inclusion of the permissive proposal recognizing an employee's right to defend students. This ruling was expressly overruled in Burlington CSD, 94 PERB 4925 and 4931, where the board held that a combined proposal would be permissive because it included the permissive topic. Today's PERB Board would likely split its ruling, requiring bargaining over the mandatory portion of such a combined proposal.

No Strike – No Lockout

A proposal acknowledging that it is illegal for a public employee organization to strike or a public employer to lock out employees was clearly permissive. (Marion Independent School District, 78 PERB 1173)

Election of Remedies

A proposal that "contract grievances arising from staff reduction can only be processed under Chapter 279" was permissive because it was not limited to mandatory topics of bargaining, since Chapter 279 contains permissive subjects of bargaining. (Atlantic CSD, 86 PERB 3140)

A proposal that would limit an employee's right to file a grievance under the CBA if the employee had also filed a claim or complaint outside the grievance procedure if the same set of facts are involved is permissive because it includes any "claim or complaint" arising outside the scope of the labor agreement. It is not illegal as long as it does not preclude an employee from exercising a statutory right outside the scope of the CBA. (Marion CSD, 88 PERB 3644)

In dicta, the Iowa Supreme Court stated that, in the case of discharge of a teacher for just cause as provided in section 279.27, statutory appeal procedures provided by *IOWA CODE* chapter 279 would take precedence. The court distinguished a just cause discharge, which is not a mandatory subject of bargaining, from teacher contract termination due to layoff, which is mandatory. *Shenandoah Education Association v. Shenandoah CSD*, 337 N.W.2d 477 (Iowa 1983).

The Iowa Supreme Court has also held that if the CBA provides for binding arbitration of just cause terminations, it appears that the arbitration procedures would take precedence, at least for poor performance terminations. *Atlantic Education Association v. Atlantic CSD*, 469 N.W.2d 689 (Iowa 1991).

The question left unanswered by these cases is whether a court would order arbitration of a teacher discharge for just cause where a section 279.27 proceeding has already been initiated.

Duration of the Collective Bargaining Agreement

PERB continues to hold that the duration of a CBA is a permissive topic of bargaining. (Laurens-Marathon CSD, 99 PERB 6034 preliminary ruling). See also Sheldon CSD, 85 PERB 2918.

However, where circumstances existed that required a change in fiscal year, the obligation to bargain during the interim period continued, and a new agreement must include the interim period. This rule made it mandatory for the employer to negotiate a 15-month CBA in City of Davenport, 84 PERB 2676, where the city's fiscal year had been April 1 - March 31, and a statutory requirement existed to change the fiscal year to July 1 – June 30.

The employer is required to notify a union of the intended term to allow negotiation of wages. (Area I Vocational Technical School District, 76 PERB 650)

"Zipper Clause"

(Also known as the "finality and effect" clause)

This type of clause waives bargaining for the term of the CBA and provides that the CBA supersedes all previous agreements. These clauses usually provide that the parties may mutually agree to amend the CBA and that the waiver does not outlast the duration of the contract.

The zipper clause has been held mandatory if it is restricted to Section 20.9 items, although PERB has also stated that no restriction is

necessary because the definition only applies to mandatory topics. (Sac City CSD, 82 PERB 2179)

PERB has held to be permissive the language “past practices shall not constitute a part of this agreement, unless expressly stated to the contrary herein, and a subsequent or supplementary agreement must be reduced to writing and executed by the parties,” because it was not restricted to Section 20.9 items. (Northeast CSD, 83 PERB 2390 & 2414)

Compliance Clause and Individual Teaching Contracts

A proposal providing that individual contracts shall be subject to and consistent with the CBA, and that the CBA supersedes if there is a conflict, is permissive because individual teaching contracts are outside the scope of Section 20.9 – even though they cannot be inconsistent with the terms of the CBA. (Western Hills AEA 12, 81 PERB 1848)

Savings Clause

(Also known as the “severability” or “separability” clause)

This clause provides that if any part of the CBA is determined to be in violation of the law, it shall be null and void, but all other sections of the CBA remain in force. It is advised to also include language that no negotiations shall be required over such illegal contract terms during the life of the agreement.

IOWA CODE section 20.28 provides that its provisions supersede collective bargaining agreements if they are inconsistent unless otherwise provided in the *IOWA CODE*.

PERB has held savings clauses to be permissive. (Northeast CSD, 83 PERB 2390 & 2414; Great River AEA 16, 83 PERB 2372 & 2384)

Signature Clause

The signature clause is a provision requiring that the CBA be signed by the parties.

While not characterizing it as mandatory, PERB held that either party could insist on inclusion of such a clause as long as it deals with no other matters. The authority for this

holding is found in Section 20.9 language that any agreement “shall be embodied in a written agreement and signed by the parties.”

In a nonbinding preliminary ruling, PERB concluded that the signature clause is permissive. (Laurens-Marathon CSD, 99 PERB 6034) The case was not appealed, and cannot serve as precedent, but it shows the current leaning of PERB.

Bargaining Conduct

Bargaining Procedures

Proposals setting forth procedures for bargaining are permissive (i.e. requiring parties to bargain in good faith, impasse procedures, etc.). (Western Hills AEA 12, 83 PERB 2337; Western Hills AEA 12, 83 PERB 2360) If the proposals simply set out existing law, that alone does not bring them within the Section 20.9 mandatory topics of bargaining. If the proposals differ from statutory impasse procedures, not only are they permissive, but as long as one party rejects the proposal, they also fail to meet the statutory requirement of mutual agreement.

A proposal that negotiations occurring on work time with no loss of pay is permissive because it encroaches upon the employer’s exclusive right to assign work. If the proposal provided a paid leave of absence for bargaining, however, it would probably be considered mandatory under leaves of absence. (Great River AEA 16, 83 PERB 2372 & 2384)

Costs of Printing the Collective Bargaining Agreement

The use of school facilities and equipment is a permissive subject, therefore PERB has held that the issue of who pays for printing the CBA is also permissive. (Western Hills AEA 12, 83 PERB 2337; Great River AEA 16, 83 PERB 2372 & 2384) PERB would still adhere to this reasoning. (Laurens-Marathon CSD, 99 PERB 6034 preliminary, nonbinding ruling)

Permissive Topics/Reserved Exclusively for Management

Class Size

Proposals attempting to regulate class size through collective bargaining have consistently been held to be permissive. (Bettendorf-Dubuque CSD, 76 PERB 598 & 602) While workload assignments of employees is within the employer's exclusive management rights to assign work, pay for workloads is mandatory under wages. (Camanche CSD, 90 PERB 4141)

Personnel Files

Proposals intending to regulate the contents and confidentiality of a personnel file, or allowing employee access to view or to make copies of personnel files are generally permissive. (Iowa Western Community College, 76 PERB 706) To the extent that such proposals involve performance evaluations (access, copying, etc.), PERB has held them to be mandatory. (Andrew CSD, 84 PERB 2629)

A proposal requiring grievance materials to be kept separate from the personnel file was permissive. (West Des Moines CSD, 82 PERB 2156)

A proposal establishing an evaluation file, and dealing solely with evaluation materials, was mandatory under evaluation procedures because it had narrow application and did not restrict what documents may be kept in personnel files. (Eddyville CSD, 83 PERB 2402)

Substitute Teachers

A proposal dealing with how an employer covers a teacher's absence when a substitute is not available is permissive as an attempt to regulate the assignment of work to employees. However, a proposal requiring additional wages be paid to a teacher who covers for the absent teacher could be mandatory as wages or supplemental pay. (Woodward-Granger CSD, 77 PERB 1016)

School Calendar Year and Vacations

PERB has long held that the determination of the school calendar year is a permissive subject of bargaining, exclusively reserved for

management. (Bettendorf-Dubuque, 76 PERB 598 & 602; Woodward-Granger CSD, 77 PERB 1016)

Labor-Management Committees

The Iowa Supreme Court held in *State of Iowa v. PERB*, 508 N.W.2d 668 (Iowa 1992), that labor-management committees are permissive subjects of bargaining. This case overruled many PERB cases holding that a labor-management committee on a mandatory subject of bargaining would be considered mandatory. Now, any labor-management committee, whether it concerns a mandatory subject of bargaining or not, is permissive.

Curriculum

Any proposal dealing with the curriculum of a school district will certainly be considered permissive by PERB, since implementation of curriculum is a matter of inherent educational policy. (Sergeant Bluff-Luton CSD, 77 PERB 1149)

Student Discipline

PERB has also been consistent in reserving the issue of student discipline to management's exclusive right; therefore, a proposal concerning student discipline would be permissive. (Bettendorf-Dubuque CSD, 76 PERB 598 & 602)

It is well established that proposals dealing with student evaluation are permissive. (Marion Independent School District, 78 PERB 1173)

PERB confirmed that proposals about student discipline were permissive and reserved for educational policy considerations when the proposals go beyond a teacher's right to defend himself or herself (which would be mandatory under health and safety), and also encompass a teacher's right to protect other students. (Burlington CSD, 94 PERB 4925 & 4931)

Work Assignments

PERB has been willing to look closely at work hour proposals, which are mandatory, to determine whether they actually include work assignment language, which is permissive. Therefore, the number of daily teaching

periods, amount of daily student contact time, class size, preparation time and attempts to restrict them are considered to invade the employer's exclusive right to assign work. (Bettendorf-Dubuque CSD, 76 PERB 598 & 602) Overload pay is mandatory. (See wages section.)

The general rule about work assignments, however, is subject to limited exceptions. For example, requiring preference in supplemental assignments to be given according to seniority is mandatory. (Sioux City CSD, 80 PERB 1600) In this regard, PERB has often turned to the mandatory topics of seniority or transfer procedures to justify their findings.

Proposals that make acceptance of work assignments by employees voluntary are permissive. (Earlham CSD, 77 PERB 934) The rationale is that such a provision could ultimately leave management without the ability to have work performed.

A proposal requiring the employer to divide work equally among membership of the employee association was illegal in City of Marion, 81 PERB 1913. This proposal restricted off-duty assignment and employment to members of the union in violation of Iowa's right-to-work laws.

Although it was argued to affect the manner of work assignments, PERB held that a proposal prohibiting work assignments outside the eight-hour work day without mutual agreement was mandatory under the subject of bargaining hours of work. (Marion Independent School District, 78 PERB 1173)

A proposal allowing teachers to refuse the placement of student teachers was permissive. (Great River AEA, 83 PERB 2372 & 2384)

Work Rules

Work rules are clearly permissive. (Bettendorf-Dubuque, 76 PERB 598 & 602; City of Burlington, 80 PERB 1633)

Secondary employment involves work rules and is not a mandatory subject of bargaining. (City of Sioux City, 78 PERB 1216; State of

Iowa, 81 PERB 1846 & 1855; City of Mason City, 82 PERB 2128)

And work rules concerning illegal drug involvement were not considered "directly related" to employee health and safety, therefore they were permissive in City of Burlington, 91 PERB 3876.

However, where the work rule is implemented to protect employee safety, a change in the work rules concerning smoking was a prohibited practice because it was a change in a mandatory subject of bargaining. (City of Clinton, 88 PERB 3391)

*Note: It is hard to reconcile the City of Clinton with other work rules cases and health and safety cases. If the motivation for the no-smoking policies were in compliance with the law or ordinance, rather than health of the employees, would the result change? PERB's attempt to distinguish Clinton, based upon a perceived lack of impediment to the employer's ability to deliver services to the public in the no-smoking case, may not apply in situations where there are legal prohibitions against smoking in public areas.

A proposal requiring the school board to notify employees of board policy changes was permissive. (Bettendorf-Dubuque CSD, 76 PERB 598 & 602)

Subcontracting and Bargaining Unit Work

Where a public employer refused to bargain a successor CBA, instead subcontracting all the work formerly performed by the employees represented by the union, PERB held that subcontracting is not a mandatory subject of bargaining. (Stagehands Local No. 67 & Veteran's Memorial Audit Commission, 87 H.O. 3311) However, because the employer still had employees working that were represented by the union at the time of the refusal to negotiate, the employer did commit a prohibited practice by refusing to negotiate even if the contract would not have taken effect because of the subcontracting.

In the union's argument that its status as exclusive representative gave it exclusive jurisdiction over work normally performed by bargaining unit personnel, a hearing officer concluded that the unique element in the Iowa PERA granting management exclusive rights over work assignments, etc. required the conclusion that subcontracting be considered a permissive subject of bargaining. *Iowa City Education Association v. Iowa City CSD*, 82 PERB 2049.

A proposal defining "bargaining unit work" and restricting assignment of bargaining unit work to bargaining unit members was permissive because it substantially limited management's exclusive right to assign work and direct its operations. (Sioux City CSD, 79 PERB 1600)

Likewise, proposals requiring management to offer job assignments to bargaining unit members first was permissive in West Des Moines CSD, 82 PERB 2156. (See also Andrew CSD, 84 PERB 2629)

Discipline & Discharge

PERB has consistently held that discipline and discharge provisions are permissive. Therefore, a proposal setting just cause as a standard for discipline or discharge is permissive. (City of Cedar Rapids, 92 PERB 4701)

Also, a proposal making discipline or discharge grievable is permissive. (Keystone AEA 1, 77 PERB 928)

A proposal allowing the employer to retain the current salary level of an employee for just cause is permissive because its predominant characteristic is discipline and discharge. The fact that wages are involved was considered incidental. PERB distinguished this type of situation from proposals requiring educational credits for advancement on the salary lane. (Western Hills AEA 12, 83 PERB 2360)

Early Retirement Programs

The Iowa Supreme Court has held that early retirement incentives constitute a permissive subject of bargaining, as long as the "service"

rendered by early retirement is not included within the type of services covered by wages and supplement pay. *Ft. Dodge CSD v. PERB*, 319 N.W.2d 181 (Iowa 1982).

A proposal for a cash severance benefit based upon age and length of service is also permissive. (Great River AEA 16, 83 PERB 2372 & 2384)

Retirement and Severance

A proposal requiring the employee to pay insurance premiums of employees retiring after 10 years of service was permissive. (Waterloo CSD, 2000 PERB 6017; *City of Mason City v. PERB*, 316 N.W.2d 851 Iowa 1982)

A proposal allowing employees who retire to participate in the employer's group health insurance plan at the employee's own cost was held to be an illegal topic of bargaining because it directly augments or supplements the statutory retirement system. (City of Ft. Dodge, 83 PERB 2415)

A provision allowing retiring employees to convert accrued, unused sick leave to an account from which health insurance premiums may be paid was held to be legal and mandatory under insurance in State of Iowa, 82 PERB 2263. Special statutory circumstances existed at the time of this ruling, however, which only applied to state employees. The question remains, whether this provision would now be considered an illegal topic of bargaining under Chapter 20, in light of the changes in the statute relied upon by PERB in the 1982 ruling.

On the other hand, PERB determined that a proposal to pay out all or part of an employee's accrued, unused sick leave at termination was considered permissive because it was not pay for labor or services rendered, nor is an employee's return to work contemplated. (Western Hills AEA 12, 83 PERB 2337) Thus, it was not mandatory as wages, supplemental pay or leaves of absence. Proposals providing severance pay are permissive. They are not wages because no labor is exchanged for pay. Because employment is terminated, there is no

temporary absence from work. (Woodbury County, 83 PERB 2343)

Qualifications

Proposals attempting to dictate minimum qualifications of new employees are permissive. (Bettendorf & Dubuque, 76 PERB 598 & 602; Western Hills AEA 12, 83 PERB 2360)

A union proposal requiring employees with less than a master's degree to earn credit hours and encouraging but not requiring employees with masters degrees to earn credit hours was considered permissive as an employee qualifications proposal. (Woodward-Granger CSD, 77 PERB 1016)

A proposal requiring a school district to recognize certain courses as reasonably related to a teaching assignment was permissive because it invaded management's exclusive rights. (Andrew CSD, 84 PERB 2629)

An employer may be required to bargain over the identification of criteria used to determine promotions within a bargaining unit, just as it is mandatory to bargain criteria for staff reduction and transfer. (*City of Dubuque v. PERB*, 444 N.W.2d 495 Iowa 1989)

Wages

The Iowa Supreme Court has defined "wages" for purposes of the PERA as "a specific sum or price paid by an employer in return for services rendered by an employee." Therefore, a proposal that required payment of a specific sum for employees accepting early retirement was permissive because no labor would be performed. (*Ft. Dodge CSD v. PERB*, 319 N.W.2d 181, 183 Iowa 1982)

A proposal to reward employees with one hour of incentive pay for each month of perfect attendance was not mandatory under wages, supplemental pay or leaves of absence. (Washington CSD, 97 PERB 5691)

A proposal converting sick leave to "wellness leave" as a reward for not using sick leave

would be mandatory under "leaves." (Scott County, 87 PERB 3418)

A proposal dividing the day into "active work time" and "ready time" was permissive because it acted to define, restrict or differentiate the types of assignments that could be made. (*Iowa City Firefighters Association v. PERB*, 554 N.W.2d 707 Iowa 1996)

Parity wage clauses, (i.e. "me too" proposals) which set wages for employees based upon the results of another bargaining unit's final contract, are illegal. (Iowa City CSD, 85 PERB 2909)

Where a legislative appropriations bill enacted during the second year of a two-year contract included instructions that \$275,000 be allotted for teaching excellence awards to faculty, as well as an instruction that the moneys appropriated shall not result in a negative impact upon a collective bargaining agreement, even though wages are a mandatory subject of bargaining. The employer was not required to bargain distribution of the \$275,000 because *IOWA CODE* section 20.15(6) provides that a collective bargaining agreement or arbitration award shall not require renegotiation of salaries in the second year of the agreement, and the appropriations bill did not specifically require negotiation of the distribution of the \$275,000. (Iowa State Board of Regents, 93 PERB 4278)

Sometimes during bargaining, a dispute may arise concerning which impasse item a proposal falls under. The answer is significant because arbitrators may not split impasse items unless the parties agree to do so. In State of Iowa, 97 PERB 5666, PERB held that a proposal establishing how much employees are to be paid when they are required to work on designated holidays constitutes a wage proposal. "Holiday" proposals, in contrast, concern the designation of days to be observed as holidays or whether employees are to be paid for such nonwork days.

Merit Pay

Proposals establishing merit pay adjustments are generally mandatory. In Grundy Center CSD, 86 PERB 3164, the association argued that a proposal for merit pay was illegal because it established individual bargaining with employees over merit raises based on non-contractual evaluation criteria. PERB held that, in order for a merit pay proposal to be mandatory, it must specify the amount of merit pay, including the rate or formula for computing merit pay, the timing of merit payments, the procedural aspects of a merit pay plan, and the substantive criteria used to evaluate employees for merit pay.

In order to be considered mandatory, however, the merit pay proposal must apply within the fiscal bargaining year, since multi-year contracts are not a mandatory subject of bargaining. (Urbandale CSD, 88 PERB 3702 & 3705)

Unused Insurance Contributions

A proposal to apply an employee's unused portion of the employer's insurance contribution to a tax-sheltered annuity is mandatory as part of wages because it satisfies the requirement that it be a cash payment of a specific sum for services rendered during a particular time period. (Anamosa CSD, 87 PERB 3441)

A proposal requiring an employer to pay to an employee the difference between the employer's single and family health insurance contribution is mandatory as wages and insurance. (Clay County, 89 PERB 3999)

Credit for Experience/Placement of New Hires on Salary Schedule

In Area IV Community College, 76 PERB 663 & 674, PERB held a proposal mandatory which set an employee's salary placement with allowance of credit for prior training, teaching and work experience.

A longevity pay proposal, that limited to five years credit for past teaching for purposes of placement on a salary schedule was mandatory in Andrew CSD, 84 PERB 2629.

In Maquoketa CSD, 83 PERB 2371, PERB noted that there is a distinction between a

proposal addressing benefits for statutorily excluded individuals, which would be permissive, and a proposal addressing benefits for prospective employees, which would be mandatory. Therefore, a proposal for a starting salary for future employees constitutes a mandatory subject of bargaining.

It seems logical, given PERB's willingness to find proposals dealing with the pay of new hires to be mandatory, that it would also find the issue of a hiring bonus to be mandatory. However, this specific issue has not yet been tested.

Overload Pay

Although workload and assignments are permissive subjects of bargaining, "overload" proposals - proposals regarding compensation where student load or teaching loads exceed certain levels - are mandatory. (Camanche CSD, 90 PERB 4141) In order to be considered mandatory, however, a proposal must not contractually establish a "normal" or "maximum" teaching load or in any way restrict management's right to assign any workload it deems appropriate. In the Camanche case, the mandatory proposal simply established a benchmark for establishing overload compensation with the following language:

Secondary employees assigned an extra teaching period in addition to what the administration has considered a normal teaching load (5 classes), will be compensated an additional one-fifth of the individual assigned teachers salary.

The distinction drawn is a fine line. Proposals should be scrutinized to see if they directly or indirectly demand a contract provision establishing maximum or normal workload. If so, the proposal would be permissive. See also, Sioux City CSD, 99 PERB 5994; Woodward-Granger CSD, 77 PERB 1016, where employee assigned duties in excess of regular workload was deemed permissive.

An overload pay proposal setting premium rates of pay for defined assignments was mandatory. It did not require the employer to negotiate workload or work assignments; it

simply set the pay for the additional assigned teaching loads. However, the portion of the proposal setting a seven-period day with a specific period of time daily devoted to specific assignments was permissive because it interfered with management's right to assign work. (Sioux City CSD, 99 PERB 5994 appeal to Iowa Supreme Court pending).

A proposal providing additional pay based upon class size was mandatory. (Marion Independent School District, 78 PERB 1173)

A proposal setting maximum class size was permissive. (Bettendorf-Dubuque, 76 PERB 598 & 602)

The general principle derived from these overload pay cases is that PERB will find a proposal mandatory if it simply sets a benchmark for overload pay. The benchmark must be neutral and not restrictive upon management's right to assign work. For example, a proposal that provides overload pay for 'student contact hours worked over five in a day' is mandatory, but a proposal that provides overload pay for "student contact hours over the maximum or normal workload" is permissive.

Reopener/Escalator/De-escalator Clauses

This type of proposal required the parties to reopen negotiations if the district has funds over the anticipated amount (Burlington CSD, 82 PERB 2157) or under the anticipated amount. (Marion Independent School District, 86 PERB 3237) Salary reopeners are mandatory, despite the fact that the duration of a CBA is permissive. (Andrew CSD, 84 PERB 2629) The rationale is that the proposal falls within the topic of wages.

PERB has also relied upon Section 20.17(6) to support renegotiation of wages in the event a public employer is allocated insufficient funds. (State of Iowa, 81 PERB 1846 & 1855) Section 20.17(6) is limited to a contingency of insufficient funds, not the possibility of unanticipated extra funds.

"Turnover Money" Clauses

A proposal that the decreased payroll costs resulting from turnover or attrition be

distributed among remaining employees was considered mandatory in Charles City CSD, 79 PERB 1395.

Barrier Credit/Lane Credit

Although a proposal stating that teachers must earn "X" number of credits in "X" period of time to be considered for advancement is mandatory, (*Woodbine CSD v PERB*, 316 N.W.2d 862 Iowa 1982) the nature and quality of the hours to be earned in order to advance is permissive. (*Charles City Education Association v. PERB*, 291 N.W.2d 663 Iowa 1980) The Iowa Supreme Court rejected the employer's argument that such a proposal is disciplinary or constitutes a work rule. The decision to freeze a teacher who does not act to sharpen teaching skills, teaching standards, etc. is simply a recognition of the fact that those who are better qualified should be advanced along the salary scale. How much and when is subject to negotiations, but what constitutes "better qualified" is reserved for management and is permissive.

Tax Sheltered Annuity

PERB has held that proposals requiring an employer to apply any unused portion of the employer's insurance contribution toward the purchase of a tax-sheltered annuity is mandatory under the topic of wages. It is an economic enhancement of employee wages. (Anamosa CSD, 87 PERB 3441; Lenox CSD, 87 PERB 3451)

The fact that the payment is made to a deferred compensation program does not alter the conclusion that it meets the definition of wages because it is a specific sum paid to an employee in consideration for an employee's services during a particular time period. Although an annuity may be used for retirement purposes, it is not per se a "retirement system." The board did not consider whether the proposal was also mandatory under insurance.

Method of Payment

PERB has held that the method of payment of wages is a mandatory topic of bargaining under wages. Included in "method of payment" is the date of payment and the

option of receiving the remaining salary at the end of the school year in one payment. (Waterloo CSD, 2000 PERB 6014 & 6023, 6017) Excluded was a proposal that employees receive checks at their regular building on regular school days.

A proposal requiring the employer to pay interest on escrowed money where nine-month employees were paid on a twelve-month basis was mandatory in Western Hills AEA 12, 81 PERB 1848.

Substitute Teachers

A proposal dealing with how an employer covers a teacher's absence when a substitute is not available is permissive as an attempt to regulate the assignment of work to employees. However, a proposal to require additional pay to a teacher who covers for the absent teacher could be mandatory as wages or supplemental pay. (Woodward-Granger CSD, 77 PERB 1016)

Hours of Work and Overtime

The topic of "hours of work" includes the number of hours to be worked and starting and quitting times. (Sergeant Bluff-Luton Education Association, 76 PERB 715)

Proposals establishing break time during the workday, or time in which no duties are assigned, are mandatory. (Western Dubuque CSD, 78 PERB 1393 & 1394; Western Iowa Tech Community College, 85 PERB 3033)

Proposals setting aside certain periods of the work day as preparation time are permissive because they interfere with management's right to assign work, (Des Moines Education Association, 76 PERB 894) as well as proposals limiting teachers to a certain number of student-contact hours. (Great River AEA 16, 83 PERB 2372 & 2384)

A proposal dividing the workday into "active work time" and "ready time" was permissive because it sought to regulate work assignments, a topic exclusively reserved for management. (*Iowa City Firefighters*

Association v. PERB, 554 N.W.2d 707 Iowa 1996)

A proposal allowing accrual of compensatory time in lieu of cash overtime payments, as allowed in the Fair Labor Standards Act, was mandatory under the topic of "overtime." (City of Newton, 94 PERB 5077 & 5079)

The question of whether the employer can reduce the number of Saturday overtime hours of employees was considered a mandatory subject of bargaining in West Delaware County CSD, 88 HO 3246.

The employer's change in assignments for weekend firefighters, which did not change the number of hours in a workday or work week, was not prohibited practice because work assignments are permissive. (City of Dubuque, 86 HO 3203)

In a non-binding preliminary ruling, PERB held that job-sharing proposals are permissive. No reasoning was provided. (State of Iowa, 84 PERB 2632)

A proposal allowing employees to leave the building during lunch was mandatory in Andrew CSD, 84 PERB 2629.

Insurance

PERB has held the following types of proposals mandatory:

- A proposal requiring the employer to pay an employee the cash difference between the employer's single and family health insurance. (Clay County, 89 PERB 3999)
- A proposal requiring the employer to provide liability insurance protection for employees who use their personal automobiles for work. (Great River AEA 16, 84 PERB 2372)
- A proposal requiring the employer to provide worker's compensation insurance coverage consistent with state law is mandatory, even if it is

superfluous since the law mandates coverage. (Andrew CSD, 84 PERB 2629)

- A proposal requiring the employer to provide family medical insurance coverage is mandatory. Even though other family members may not be employees, family medical coverage does benefit an employee. (*Charles City CSD v. PERB*, 275 N.W.2d 766 Iowa 1979)
- A proposal establishing a flexible spending account having tax advantages for medical expenses is permissive. (City of Dubuque, 95 PERB 5293)
- Proposals requiring the employer to provide liability insurance covering job-related acts and omissions and requiring coverage for punitive damages are mandatory. (*Waterloo Police Protective Association v. PERB*, 497 N.W.2d 833 Iowa 1993) However, where a proposal required indemnification to employees for liability in the absence of insurance, it did not fall within the meaning of “insurance.”
- A proposal requiring the employer to provide a clear description of the terms of the insurance is mandatory. (Great River AEA 16, 83 PERB 2372 & 2384)

The identity of an insurance carrier is a permissive subject of bargaining, (Sioux City CSD, 80 PERB 1600) To the extent the choice of an insurance carrier affects benefits, coverage and administration, it would be mandatory. (Great River AEA 16, 83 PERB 2372 & 2384)

If an employer utilizes self-insurance, the level of coverage, method of resolving dispute about coverage and access to information by unit members are still mandatory subjects of bargaining. (Union County, 84 PERB 2668)

A proposal requiring the employer to continue insurance coverage during leaves of absence and during a period of layoff is mandatory as insurance. (Waterloo CSD, 2000 PERB 6014, 6023 & 6017) But requiring the employer to continue insurance coverage after retirement was not mandatory because it would directly augment or supplement the benefits a public employee would receive under a statutory retirement system.

Because parity clauses are illegal, a failure on the part of the employer to offer the same insurance plans to all bargaining units would not be considered a prohibited practice. (Davis County CSD, 96 H.O. 5557)

Worker’s Compensation

Worker’s compensation insurance is a mandatory topic of bargaining under the general category of “insurance” (Andrew CSD, 84 PERB 2629) despite the fact that *IOWA CODE* Chapter 85 provides the exclusive remedy for worker’s compensation injuries. However, a provision that would supplement worker’s compensation, for example, by requiring use of accumulated leave for work-related injuries, would be illegal under *IOWA CODE* section 85.38(3), unless there is also a provision for notification and employee approval.

A proposal prohibiting deduction of sick leave for on-the-job illness or injury was mandatory. (City of Marion, 81 PERB 1913)

Vacations, Holidays and Leaves

School Calendar Year and Vacations

PERB has long held that the determination of the school calendar year is a permissive subject of bargaining, exclusively reserved for management. (Bettendorf & Dubuque CSD, 76 PERB 598 & 602; Woodward-Granger CSD, 77 PERB 1016)

Where a proposal sets vacations and holidays during the school calendar year, however, PERB has held it to be mandatory. (Sergeant Bluff-Luton CSD, 76 PERB 715; Andrew CSD, 85 PERB 2629)

Proposals for days off between quarters, or paid holidays, are mandatory and to hold otherwise would have the practical effect of restricting teachers to bargaining holidays and vacations during time periods when they are not under contract, effectively rendering the statutory right to negotiate vacations and holidays meaningless. (Ft. Dodge CSD, 84 PERB 2650 & 2655)

Although the length of the school year is a decision exclusively reserved for management, it is management's obligation to establish it prior to bargaining in order to allow the unions to meaningfully bargain wages. (Area I Vocational Technical School District, 76 PERB 650) A unilateral change in the length of the school year would require re-negotiation of the salary schedule. (Woodward-Granger CSD, 77 PERB 1016)

A proposal requiring management to discuss with the union the number of employees who can be on vacation at the same time was permissive because it invaded the employer's exclusive right to maintain the efficiency of government operations, etc. The Iowa Supreme Court analyzed the proposal by balancing the interests of management and the union and determined that the predominant characteristic of the proposal was staffing, and when weighed against the union's rights, the employer's exclusive right to maintain efficiency of governmental operations during vacations must take precedence. (*State of Iowa v. PERB*, 508 N.W.2d 668, 676 Iowa 1993)

Where the collective bargaining agreement provided for a 190-day school calendar year and employees had worked 186 days in years past, the employer's addition of a 187th workday did not violate Chapter 20 because:

- Length of the school year is a permissive subject of bargaining.
- The collective bargaining agreement specifically provided that the in-school work year would not exceed 190 days.

The fact that management had not required work on all 190 days in the past did not waive its right to do so. Although PERB noted it did not condone the action, the employer was not

duty bound to inform the union that it decided to require work on 187, rather than 186, of the 190 days. (Turkey Valley CSD, 89 PERB 3463)

Leaves of Absence

The term "leaves of absence" includes types of leave, duration, frequency and conditions under which an employee is allowed to return. Therefore, it was a prohibited practice for an employer to change its rules about conditions to be satisfied for employees to return to work following sick leave. (City of Cedar Rapids, 93 PERB 4610)

A proposal requiring payment of cash when an employee has not taken sick leave in a calendar year was permissive. (City of Newton, 94 PERB 5077 & 5079)

Proposals requiring employees to use applicable paid leave for situations under the Family and Medical Leave Act (FMLA) were mandatory. It was not preempted by the FMLA, nor did it authorize or empower the employer to violate the FMLA. (City of Newton, 94 PERB 5077 & 5079)

Provisions allowing time trades are mandatory. (City of Cedar Rapids, 93 PERB 4715)

A proposal allowing employees to earn a "wellness day" when they have a certain number of months with no sick leave usage was mandatory. It simply turns a sick leave day into a vacation day. Both fall under "leaves of absence." (Scott County, 87 PERB 3418)

Payment of unused sick leave upon termination of employment is permissive. (*Professional Staff Assoc. of AEA 12 v. PERB*, 373 N.W.2d 516 Iowa App. 1985)

PERB relied upon a statute allowing certain state employees to convert unused sick leave to a bank used for payment of health or life insurance premiums upon retirement. It found the proposal mandatory under insurance and not illegal. (State of Iowa, 82 PERB 2263) This case clearly does not extend to other public employees, and since the statute no

longer exists, it is not clear if it still applies to state employees.

A proposal prohibiting the employer from deducting sick leave due to on-the-job illness or injury was mandatory in City of Marion, 81 PERB 1913. But see Andrew CSD, 84 PERB 2629, where a proposal would supplement worker's compensation by requiring use of accumulated leave for work-related injuries. It was found illegal unless there was also a provision for notification and employee approval.

Holidays

The mandatory subject of bargaining of "holidays" refers to identification of days as non-working holidays and whether employees will be paid on those non-working days. (Sergeant Bluff-Luton CSD, 76 PERB 715 & 734) Pay for employees who work holidays falls within "wages." (State of Iowa, 97 PERB 5666)

Supplemental Pay

"Supplemental pay" has been defined by the Iowa Supreme Court as "pay based upon extra services and directly related to the time, skill and nature of those services." (*Ft. Dodge CSD v. PERB*, 319 N.W.2d 181, 183 Iowa 1982) Therefore, a proposal for pay upon retirement was permissive because no services were to be rendered.

Proposals requiring an employer to pay a minimum guarantee to employees who are called to work on their day off or sent home early on regular workdays for reasons of no work were mandatory as supplemental pay. Since employees are to be paid regardless of whether they actually worked, it would not fall directly under wages. However, since extra service is provided to the employer, that is, being available to perform services (in the case of days off, outside their normal work schedule), PERB determined it fit within the category of supplemental pay. (City of Waterloo, 93 PERB 4882)

The following proposals were considered economic fringe benefits, not supplemental pay, and were therefore permissive:

- Tool allowance – (City of Dubuque, 95 PERB 5293)
- In-kind clothing allowance – (*City of Ft. Dodge v. PERB*, 275 N.W.2d 393 Iowa 1979)
- Cash-clothing allowance – (Woodbury County, 83 PERB 2343)
- Mileage reimbursement – (Great River AEA 16, 83 PERB 2372 & 2384)
- Transportation furnished – (Ft. Dodge CSD, 84 PERB 2650 & 2655)
- Expenses incurred in the course of in-service training – (Ft. Dodge CSD, 84 PERB 2650 & 2655)
- Costs of physical examinations – (Great River AEA 16, 83 PERB 2372 & 2384)
- Payment of professional dues – (Western Hills AEA 12, 83 PERB 2337)

Payment for extracurricular coaching duties does fall within "supplemental pay." (Great River AEA 16, 83 PERB 2372 & 2384)

PERB held that a cash per diem payment (in lieu of paid meals) was mandatory in State of Iowa, 81 PERB 1846 & 1855. Note that this case was decided prior to the Iowa Supreme Court's holding that cash payment for fringes (mileage, clothing, etc.) was permissive. It is questionable whether per diem would be held mandatory now, since the payment is to cover the cost of meals on the road, not directly for services rendered.

Payment or relocation expenses upon involuntary transfer was ruled mandatory under "transfer procedures" in Western Hills AEA 12, 81 PERB 1848. This case predates *Ft. Dodge*, 319N.W.2d 181, but because

"procedures" is construed broadly, it is probably still good law.

Seniority

Seniority is clearly a mandatory subject of bargaining. The Iowa Supreme Court has held that bargaining proposals attempting to extend the definition of seniority to employees not covered by the CBA are permissive. (See *Marshalltown Education Association v. PERB*, 299 N.W.2d 469 (Iowa 1980); *State of Iowa v. State Police Officers Council*, 525 N.W. 2d 834 (Iowa 1994) overruling Marshalltown's holding that such a proposal was illegal and declaring it permissive instead.)

However, PERB has held that a definition of seniority must be limited to rights under the CBA, and a proposal defining seniority for "departmental rights and privileges" was permissive because it was too broad. (*City of Marion*, 81 PERB 1912)

PERB has held proposals mandatory that simply specify what types of experience should be credited to employees once they are included in the bargaining unit. For example, a proposal might define seniority as time spent in positions not exempt by statute from collective bargaining. The rationale is that such a proposal does not attempt to affect the rights of employees not covered, as in proposals prohibiting supervisors from bumping into the bargaining unit. (*State of Iowa*, 93 PERB 4857 & 4872; distinguishing *State of Iowa*, 85 PERB 2796)

In *Maquoketa CSD*, 83 PERB 2371, PERB noted that there is a distinction between a proposal addressing benefits for statutorily excluded individuals, which would be permissive, and a proposal addressing benefits for prospective employees, which would be mandatory. Thus, a proposal for a starting salary for future employees constitutes a mandatory subject of bargaining. PERB affirmed the test stated in *Maquoketa CSD*, 82 PERB 2082, that a proposal "granting bargaining rights" to supervisors is permissive unless clearly limited to "present teachers in the bargaining unit who may later become

administrators" and/or "administrators who were in the bargaining unit as teachers in the past when a clause was negotiated regarding seniority of teachers who thereafter became administrators." *The negotiability of the proposal is dependent upon the employee's status at the time the proposal is negotiated.* Note that PERB did not mention these cases in *State of Iowa*, 93 PERB 4857 & 4877.

Because the topic of promotions is reserved exclusively for management, a proposal requiring the employer to consider seniority when making promotions is a permissive subject of bargaining. (*City of Creston*, 80 PERB 1636 & 1637) However, an employer may be required to bargain over the identification of criteria used to determine promotions within a bargaining unit, including seniority, just as it is mandatory to bargain criteria for staff reduction and transfer. (*City of Dubuque v. PERB*, 444 N.W.2d 495 Iowa 1989)

Transfer Procedures

The employer's proposal that skill, ability and experience be considered along with seniority in connection with transfer procedures was a mandatory subject of bargaining. (*Saydel Education Association v. PERB*, 333 N.W.2d 486 Iowa 1983) Saydel has been broadened to stand for the position that the identification of criteria used by the employer to determine staff reductions, transfers and promotions is mandatory. (*City of Dubuque v. PERB*, 444 N.W.2d 495 Iowa 1989)

A proposal requiring the designation of a bargaining unit member and extra pay in the event a supervisor is absent from the workplace for three hours or more was permissive because it required management to assign work to a bargaining unit member and interfered with management's exclusive right to assign work. (*City of Cedar Rapids*, 92 PERB 4701)

A proposal requiring the employer to provide each employee with written notification of employee salary schedule placement, room

and subject assignment was too broad to fall under the mandatory subject of bargaining of transfer procedures because it implied whether or not there was a transfer. The salary schedule placement portion was mandatory under wages. (Andrew CSD, 84 PERB 2629)

A proposal for coverage of moving expenses in the event of an involuntary transfer was mandatory in Western Hills AEA 12, 81 PERB 1848. Note that this decision predates cases holding that economic fringe benefit proposals are permissive under supplemental pay, which may or may not lead to a different result today. (*Ft. Dodge CSD v. PERB*, 319 N.W.2d 181 Iowa 1982)

A proposal prohibiting employees from bumping (transfer in lieu of layoff) into the bargaining unit if the employee held a position exempt from bargaining was held illegal in State of Iowa, 85 PERB 2296 because it constituted an absolute bar and applied to employees not covered by Chapter 20. However, PERB has held that it is mandatory to bargain over proposals that require consideration of time spent in positions not covered by Chapter 20 into the computation of seniority for transfer or layoff purposes. (State of Iowa, 93 PERB 4857 & 4877)

The Iowa Supreme Court originally held that a proposal intended to apply to employees not covered by the CBA was illegal. (*Marshalltown Ed. Assoc. v. PERB*, 299 N.W.2d 469 Iowa 1980) That holding was revised so that a proposal intended to apply to employees not covered by the CBA is merely permissive. (*State of Iowa v. State Police Officers Council*, 525 N.W.2d 834)

Job Classifications

PERB has relied on *Robert's Dictionary of Industrial Relations* in defining job classifications as:

A method of arranging jobs into various categories or classes...

The arrangement may be based on training, experience or skill or other factors. Excluded from the definition

of job classifications are assignment of employees, notification of those assignments, qualification for employment, job content, or job description. Some of these items may form the basis for wages or job classifications, however.

Therefore, proposals attempting to dictate minimum qualifications of new employees are permissive. (Bettendorf & Dubuque, 76 PERB 598 & 602)

A proposal requiring the employer to provide a job description for all classifications was permissive. (City of Marion, 81 PERB 1913) However, proposals establishing job titles are mandatory. (City of Ames, 82 PERB 2153)

Weekend duties, work assignment and job content are outside the scope of mandatory bargaining. (City of Dubuque, 86 HO 3203 & 86 HO 3204)

The Iowa Supreme Court has set a strict standard for determining whether a proposal falling within the Section 9 mandatory subjects of bargaining might be excluded elsewhere. Therefore, where the State of Iowa had argued that there existed a special statutory exclusion of job classification from the mandatory subjects of bargaining that applied to state government, the Supreme Court held that the language must clearly indicate legislative intent to remove a topic from the laundry list of mandatory subjects of bargaining. (*State of Iowa v. PERB*, 508 N.W.2d 668, 678 Iowa 1993)

Comparable Worth

A proposal requiring the employer to hire an outside consultant to study comparable worth or a job classification analysis was permissive when it did not provide a formula or other definition for determining pay. (Western Hills AEA 12, 84 PERB 2659) It was also permissive because it designated who would represent management (an outside consultant in this case) for the study.

A proposal defining "comparable worth" as the value of work measured by skill, effort, responsibility and working conditions

normally required in the performance of work was considered mandatory under job classifications in Iowa City CSD, 85 PERB 2909. In that case, PERB held that a labor-management committee to study job classifications and comparable worth, which did not designate who would represent management and labor on the committee, was mandatory. However, because the Iowa Supreme Court has subsequently held that labor-management committees are permissive, this holding in Iowa City CSD has effectively been overruled. (*State of Iowa v. PERB*, 508 N.W.2d 668 Iowa 1992)

A proposal to study and implement comparable worth recommendations, which restricted comparison to other bargaining units within the same district, was actually an illegal parity proposal (Iowa City CSD, 85 PERB 2909) because it sought to shift responsibility for the unit's wage rates to other bargaining units. Another problem noted by PERB was that it was permissive because the committee's recommendations must be implemented during the life of the CBA, requiring submission of disputes to an arbitrator beyond the statutory deadlines for bargaining, thus requiring bargaining outside the statutory framework of the PERA. Deviation from the statutory bargaining procedures require mutual agreement.

Health and Safety

Health and safety proposals are quite case-specific. The general rule is that the health and safety proposal must bear a *direct* relationship to the health and safety of employees during their employment, but not involve the ordinary hazards inherent to the job. Further, if the proposal drafted is too broad or too vague, it will be considered permissive. It appears that PERB will often resort to a balancing test in examining proposals that affect health and safety, and often (but not always) defer to management's rights.

In order to be mandatory, a health and safety proposal must bear a direct relationship to the

health and safety of employees during their employment. Therefore, the following proposals were mandatory:

- Requiring an established procedure to deal with bomb threats and prohibiting the employer from requiring employees to search for a bomb.
- A proposal requiring the employer to staff each building with properly trained personnel on call to give first-aid treatment.
- A proposal requiring the employer to include in its bloodborne pathogens exposure control plan a Hepatitis B vaccination and provide exposure protection materials, including antibacterial soap.

(Waterloo CSD, 2000 PERB 6014 & 6023, 6017 district court appeal pending)

A proposal requiring the employer to "provide safe working conditions as required by federal and state laws and regulations" was too broad and therefore permissive. (Waterloo CSD, 2000 PERB 6014 & 6023, 6017)

Proposals dealing with student safety are not mandatory. (Waterloo CSD, 2000 PERB 6014 & 6023, 6017; Burlington CSD, 94 PERB 4925 & 4931)

A proposal prohibiting the employer from requiring employees to remain in a building when student attendance is not required because the building is uninhabitable was permissive because it was too vague. (Waterloo CSD, 2000 PERB 6014 & 6023, 6017)

A proposal prohibiting the employer from requiring attendance when weather conditions result in unsafe travel was permissive because it interfered with the employer's exclusive right to determine when school should be closed due to inclement weather. (Waterloo CSD, 2000 PERB 6014 & 6023, 6017)

A proposal requiring that standard first-aid equipment be maintained in all buildings is

mandatory. (Burlington CSD, 94 PERB 4925 & 4931)

A hearing officer ruled that a no-smoking policy affected the health and safety of employees and, therefore was mandatory in Ottumwa CSD, 92 HO 4510. The hearing officer appeared to balance the employees' health and safety against the employer's policy-making responsibilities and held that since any negotiated CBA could not violate Iowa's no-smoking laws, a requirement to bargain over non-smoking areas would not interfere with the employer's obligation to provide smoke-free areas. (See also City of Clinton, 88 PERB 3391)

In City of Clinton, 88 PERB 3391, PERB rejected the employer's requirement that newly hired employees be nonsmokers and sign a no-smoking pledge as a condition of employment. It was simply a qualification for employment because it did not concern an employee's job duties, job content or job responsibilities. It did not infringe upon the employer's basic right to determine qualifications for the job.

PERB used the balancing test to find that a policy prohibiting illegal drug use on or off the job was permissive. The part of the policy dealing with illegal drug possession, manufacture and sale was not considered to have a direct relationship to the health and safety of employees. Although illegal drug use was seen to be directly related to employee health and safety, the employer's exclusive right to prevent illegal drug use by employees outweighed any potential employee right to use illegal drugs. PERB distinguished City of Clinton (no-smoking policy) because the employer's interests were not seriously affected by mandatory bargaining. (City of Burlington, 91 PERB 3876)

If PERB stays with its reasoning in City of Burlington, it should reach a different result on no-smoking policies if the public employer is located in a city with an ordinance prohibiting smoking in public areas. This is because the employer's right to prevent the violation of such an ordinance by its

employees at the workplace would certainly outweigh the employees' rights to violate the ordinance by smoking.

A proposal allowing grievances where "there exists a condition which adversely affect(s) the health and safety of an employee" was too broad because it could include even the slightest occurrence that was not directly related to employee safety. (Ft. Dodge CSD, 84 PERB 2650 & 2655)

A proposal requiring the employer to pay for physical examinations was permissive and not closely enough related to health and safety. (Great River AEA 16, 83 PERB 2372 & 2384)

A proposal to suspend school based on building temperatures was permissive as a matter of district policy. (Ft. Dodge CSD, 84 PERB 2650 & 2655)

Using the "direct relationship" test, PERB found the following in City of Iowa City, 82 PERB 1892:

- A proposal that the employer keep vehicles in proper working order was mandatory.
- A proposal that all vehicles involved in patrol duties have externally mounted bicycle transportation equipment was permissive.
- A proposal requiring the employer to provide proper radio equipment (as defined in the proposal) was mandatory since it did not adversely affect the employer's basic policy-making power.
- A proposal requiring sirens, lights, etc. on normal patrol vehicles was mandatory.
- A proposal requiring a plastic barrier between the front and back seats of patrol vehicles was mandatory.

- A requirement that patrol vehicles contain a special rack to hold firearms was mandatory.
- A proposal requiring certain flashlights be provided by the employer was mandatory.
- The decision whether to arm, and with what type of weapon and ammunition is permissive as a policy decision reserved for management. Proposals dealing with training and requiring adequate, usable ammunition, once the decision to arm was made, was mandatory.
- A proposal that the employer provide bulletproof vests was mandatory.
- A proposal requiring the employer to provide a reversible raincoat was mandatory.

In Western Hills AEA 12, 81 PERB 1848:

- A proposal requiring the employer to provide the union's bargaining committee with eight hours of sleep between bargaining and work was permissive.
- A proposal requiring a clean, well-lighted and well-ventilated work area was mandatory.
- A proposal that the employer provide a certain size workplace free from interruption and traffic that distracts children was permissive because those are not health and safety issues.

Proposals setting minimum staffing standards and requiring emergency backup assistance are permissive. (*City of Clinton v. PERB*, 397 N.W.2d 764 Iowa 1986)

Wellness

A proposal that the employer provide a wellness program to employees allowing wellness activities to be performed during employees' workdays went beyond protecting employees from the normal hazards inherent in work and was permissive. (*Dike CSD*, 87 PERB 3167)

Fitness Testing

PERB ruled that fitness testing and assessments are mandatory subjects of bargaining. Unilaterally implementing fitness testing and assessments was a prohibited practice. (*City of Cedar Rapids*, 93 PERB 4610, 4712, 4715 & 4729)

Evaluation Procedures

A proposal requiring the employer to conduct orientation with employees on evaluation procedures was mandatory. (*Marion Independent School District*, 78 PERB 1173) However, the question of how students are evaluated is a permissive subject of bargaining.

The Iowa Supreme Court has held that the requirement to bargain over evaluation procedures also requires bargaining over evaluation criteria, including substantive criteria. The Court relied on *Saydel Ed. Assoc. v. PERB*, 333 N.W.2d 486 (Iowa 1983) in its decision, which had held that evaluation criteria for transfer procedures and reduction-in-force procedures are mandatory subjects of bargaining. The Iowa Supreme Court held it would have been inconsistent to hold that public employers were not required to bargain evaluation criteria for evaluations. (*Aplington CSD v. PERB*, 392 N.W.2d 495 Iowa 1986) Further, because evaluation criteria are mandatory, so is the right to grieve performance evaluations. (*Northeast Community School District v. PERB*, 408 N.W.2d 46 Iowa 1987)

On the issue of remediation, however, PERB has held that the mandatory bargaining requirement extends only to the right of employees to demand that the public employer offer suggestions for improvement. A proposal requiring the employer to formulate and carry out extensive training and restricting imposition of discipline went too far and was permissive. (*Burlington CSD*, 94 PERB 4925 & 4931) The question of who performs the remediation is permissive. (*Northeast Community School District v. PERB*, 408 N.W.2d 46 Iowa 1987)

A proposal requiring periodic follow-up evaluations to an unsatisfactory performance evaluation and allowing the employee the opportunity to jointly devise suggestions for improvement was mandatory in West Liberty CSD, 2000 PERB 6067. (Decision on appeal to district court still pending.)

It has been held that the evaluation procedures used to determine promotions was mandatory in *City of Dubuque v. PERB*, 444 N.W.2d 495 (Iowa 1989). Note, however, that the position to which employees would be promoted was also covered by the CBA.

IOWA CODE Section 279.14(2) was recently amended, providing that “the determination of standards of performance....shall be reserved as an exclusive management right of the school board and shall not be subject to mandatory negotiations under Chapter 20.” Even with this amended language, evaluation criteria continues to be subject to mandatory bargaining. PERB and a district court on appeal held that “evaluation criteria” and “standards of performance” are not synonymous. For example, whether attendance is an evaluation criteria would be mandatorily negotiable, but the standard of performance required for attendance (e.g. how many absences is acceptable) is reserved exclusively for management. (*IASB v. ISEA*, Case No. AA 3417, Polk Co. Dist. Ct; affirming 99 PERB 6002)

Reduction in Force Procedures

As it is specifically listed in Section 20.9, reduction in force (RIF) procedures are mandatory. The issue has usually come up when the employer proposes the criteria to be used in considering reduction in force (or transfers), and the union objects to the proposed criteria. Where the union argued that it could only be required to bargain over RIF procedures that used seniority as the consideration, and not the additional considerations of experience, education, and relative skill and ability, the Iowa Supreme Court disagreed. Therefore, it was mandatory for the union to bargain over a proposal that

allowed the employer to consider seniority, experience, education and relative skill and ability. (*Saydel Education Association v. PERB*, 333 N.W.2d 486 Iowa 1983)

Recognizing that an employer faces a very heavy burden of justification to include affirmative action/race-based considerations in a layoff plan under United States Supreme Court precedent, PERB declined to find a blanket legal prohibition against bargaining over such considerations. (Waterloo CSD, 94 PERB 5027)

A proposal defining the organizational unit for purposes of layoff and requiring that unions and management agree which organizational unit to place employees whose salaries are equally funded by two different departments was mandatory in State of Iowa, 91 PERB 4393 & 4394.

The mandatory subject of bargaining of RIF procedures necessarily includes recall procedures. (Woodward-Granger CSD, 77 PERB 1016)

Inservice

The number of days and hours to be applied to inservice training is a mandatory subject of bargaining. (North Scott CSD, 77 PERB 931; Area I Voc-Tech School District, 76 PERB 650)

A proposal requiring early dismissal for inservice training is permissive. (Ft. Dodge CSD, 84 PERB 2650 & 2655)

PERB has held that a proposal creating a labor-management committee for inservice training was mandatory in Andrew CSD, 84 PERB 2629. In light of the Iowa Supreme Court’s holding that labor-management committees for whatever purpose are permissive, this portion of Andrew has effectively been overruled. (*State of Iowa v. PERB*, 508 N.W.2d 668 Iowa 1993)

Reimbursement of expenses incurred in the course of inservice training is permissive because it is considered to be an economic

fringe benefit other than wages. (Ft. Dodge CSD, 84 PERB 2650 & 2655) There is no indication how PERB reconciles its finding that payment of expenses for inservice training is permissive and does not fall under the mandatory subject of bargaining of inservice, while payment of expenses for involuntary transfers (i.e. moving expenses) is mandatory under transfer procedures. (Western Hills AEA 12, 81 PERB 1848)

A proposal requiring “professional days” off was permissive because it was too broad and could include permissive topics, even if it was intended to provide inservice days. (Ft. Dodge CSD, 84 PERB 2650 & 2655)

A proposal setting the number of inservice training days within the school year is mandatory. (Area I Voc-Tech School Dist., 76 PERB 650)

Dues Deductions and Other Deductions

While dues deductions are clearly mandatory, a proposal that the employer will make payroll deductions for annuities, credit union, United Fund, savings bonds, health insurance and term life insurance are not mandatory under a general category of payroll deductions. Health insurance and life insurance deductions are mandatory under insurance, but the remaining do not fit under any other topic, including wages. (Marion Independent School District, 78 PERB 1173)

A proposal for a flexible spending account pursuant to IRS section 125 (allowing for pretax deductions to pay for noncovered medical expenses) was permissive. (City of Dubuque, 95 PERB 5293)

A proposal providing for indemnification and a hold-harmless clause is permissive. (Ft. Dodge CSD, 84 PERB 2650)

The termination of dues deductions is governed by *IOWA CODE* section 731.5, which requires 30 days written notice from the employee. Therefore, proposals dealing with

the termination of dues deductions are considered permissive.

It appears that PERB continues to adhere to the idea that pretax contributions are a permissive topic of bargaining. (See preliminary ruling on negotiability in Waterloo CSD, 99 PERB 5996) The ruling has no precedential value because it was not finalized. However, given other PERB decisions, PERB may be willing to find pretax deductions for family insurance coverage to be mandatory under insurance.

Grievance Procedures

A proposal seeking to limit or detail what documents must be kept in personnel files is permissive, in spite of the union’s argument that it should be considered part of the grievance procedure. (Keystone AEA 1, 77 PERB 928)

Section 20.9 provides for negotiability of “grievance procedures for resolving any questions arising under the agreement,” not of resolution of disputes of any kind. Therefore, a proposal allowing the grievance of a board policy, rule or practice, if the CBA is not involved, is permissive. (City of Cedar Rapids, 92 PERB 4701; Marion Independent School District, 78 PERB 1173)

PERB has distinguished proposals for paid time to investigate and process grievances held to be permissive under *Charles City CSD v. PERB*, 275 N.W.2d 766 (Iowa 1979), from proposals for “paid union business leave,” which PERB has held to be mandatory under the topic of leaves of absence. (City of Burlington, 80 PERB 1633; Saydel Consolidated School District, 79 PERB 1500 and 1504)

A proposal requiring that employees “shall be released” during the workday to meet regarding grievance processing was overly broad and therefore distinguishable from the Section 9 topic “leaves of absence.” Therefore, it was held to be permissive. (Andrew CSD, 85 PERB 2629) Likewise, an

employer's requirement that grievants' steward meetings during work hours be held at the workplace was a permissive topic of bargaining. (State of Iowa, 98 H.O. 5632) Note that the issue here is simply the wording. If the proposal does not provide a "leave of absence" for grievance matters, but simply seeks to allow work time to process grievances, the proposal invades management's exclusive right to assign work, and would therefore be permissive. If the proposal does use the "leave of absence" terminology, then it would fit within the mandatory topic of "leaves of absence."

A proposal allowing employees to use the employer's vehicles to attend grievance meetings was permissive. (State of Iowa, 81 PERB 1846 and 1855)

A proposal that the failure to file a grievance would not set a contract interpretation precedent if a grievance is subsequently filed for similar circumstances by another employee is mandatory under the topic of grievance procedures. (Western Hills AEA 12, 81 PERB 1848)

Because a proposal confirming the association's right to be present during grievance processing is a procedural criteria to be used in establishing a grievance procedure and is mandatory, a proposal requiring representation by the association is considered to be mandatory, although the same proposal's requirement that the union notify the employer of the identity of the union representatives is permissive. (Andrew Community School District, 85 PERB 2629)

PERB has held that a proposal allowing employees to use the grievance procedure to address what the employee believes to be an inappropriate, erroneous, false or unfair performance evaluation was mandatory under the topic of grievance procedures because the use of the term "procedures" must necessarily include some substantive criteria. (Ft. Dodge CSD, 84 PERB 2650 and 2655)

A proposal requiring the employer to notify the union of any decision pertaining to any interpretation of the CBA was permissive

because it was too broad. (Western Hills AEA 12, 83 PERB 2337)

A proposal defining "grievance" may be mandatory under the grievance procedure if it is limited to the four corners of the CBA. It is mandatory so long as it does not also allow grievances of matters considered permissive. (Ft. Dodge CSD, 84 PERB 2650 & 2655)

Proposals where the definition of grievance leaves the granting of leave to the discretion of an administrator are mandatory. (Ft. Dodge CSD, 84 PERB 2650 & 2655) Note that this could be covered under either grievance procedures or leaves of absence.

A proposal prohibiting retaliation against employees who participate in a grievance procedure, while an accurate statement of the law, is permissive. (Western Hills AEA 12, 81 PERB 1848)

A proposal making the decision whether to grant one-year good-cause leave nongrievable was mandatory. Definition of grievance is mandatory as long as it only includes topics incorporated in the terms of the agreement, whether the topic to be grieved is mandatory or permissive. (Ft. Dodge CSD, 84 PERB 2650 & 2655)

Bargaining Suggestions

Do not make a proposal to strike all permissive sections of a CBA without specifically identifying every one. (Sioux City Education Association, 98 PERB 5842)

Do not include language in a contract that "there shall be no change from previous years," because any subsequent change in even a permissive topic not contained in the CBA may result in a prohibited practice finding or contract violation. (City of Dubuque, 86 H.O. 3154)

Do be sure your final fact-finding or arbitration proposal has been offered at least once before, even if bargaining has continued

after the exchange of final offers. (Iowa Central Community College, 98 H.O. 5846)

You **are not** required to agree to a proposal that incorporates a pending grievance arbitration decision by reference into a new contract, even if the subject matter of the grievance may be mandatory. (Washington CSD, 97 PERB 5691)

If you intend to strike permissive language from a CBA, be sure all bargaining conduct is consistent with that position. In AFSCME & Howard County Public Safety Center, 89 PERB 3776, after the employer representative notified the union that it intended to strike a sick leave payout provision, and the union responded by stating management rights would be stricken, no further discussion was held on the topic. The parties went to fact-finding on two issues, but the sick leave payout was not included as a disputed issue by the employer. No negotiability dispute petition was filed with PERB. When the employer printed the CBA without the sick leave payout provision and insisted the provision had been withdrawn, (but a modified form of the management rights provision was still included), management committed a prohibited practice because its conduct during bargaining indicated that it acquiesced to inclusion of the provision. PERB found that an implicit, although unwritten, agreement was in fact reached.

You *do not* have to offer the same proposals to all bargaining units. Because parity clauses are illegal, a failure on the part of the employer to offer the same insurance plans to all bargaining units would not be considered a prohibited practice. (Davis County CSD, 96 H.O. 5557)

It may be strategically valuable to insist that final offers be submitted to an interest arbitrator based upon the statutory impasse items, since an arbitrator may not split impasse items. (State of Iowa, 97 PERB 5666)

PERB Ruling Summary - English Valleys Community School District and English Valleys Education Association

February 27, 1998

Issue

Should the teacher associates be included in the bargaining unit that includes teachers, guidance counselor and librarian?

PERB Ruled for Association

The PERB Board ordered an election involving only all full time and regular part-time professional personnel (including but not limited to teachers, guidance counselor, librarian) and all teacher associates who were employed during the payroll period immediately preceding February 27, 1998 and are members of the existing bargaining unit on election day. The district was ordered to submit to the board, within seven days, an alphabetical list of the names, addresses and job classifications of all eligible voters. If separate majorities of professional and non-professional employees do not agree to include teacher associates in the existing bargaining unit, the board will dismiss the proceeding. If separate majorities agree to the inclusion, the board will amend the bargaining unit to include the teacher associates.

PERB Analysis

The Association proposed adding teacher associates to their bargaining unit and the District argued that the existing bargaining unit is not appropriate for the teacher associates. The PERB Board found that the 10 teacher associates currently employed by the English Valleys School District are not licensed by the state, nor do they receive special training for their positions. Similar to teachers, their hiring process consists of an interview and superintendent recommendation to the board. Teachers and teacher associates work similar hours, share the common

mission of properly educating the district's students and interact with each other on a daily basis. All district employees hold individual contracts and, with the exception of health insurance, receive similar benefits.

Historically, none of the district's classified employees have been represented by the English Valleys Education Association or any other employee organization. The English Valleys Board of Education has, in some years, given the teacher associates a higher percentage wage increase than that in the teachers' settlement.

The PERB Board reviewed IOWA CODE Section 20.13(1) and found that it provides boards the authority to determine appropriate bargaining units and lists the following relevant factors upon which these decisions should be made: a) Existence of interest among public employees, b) History and extent of public employee organization, c) Geographical location, d) Principles of efficient administration of government and e) The recommendations of the parties involved. They felt factors a, c and d above weighed in favor of including teacher associates in the existing bargaining unit while factors b and e weighed against it.

The PERB Board also felt that district size was a relevant factor and referred to the Anthon-Oto Community School District v. PERB, 404N.W.2d 140 (Iowa 1987), where the Iowa Supreme Court upheld PERB's determination that it is appropriate to include professional and non-professional employees in a single unit where the district is very small in size.

Considering the relevant factors, the Anthon-Oto case and the belief that the teacher associates share a sufficient community of interest with teachers due to their common educational mission, similar duties and frequent interaction, the PERB board found the Association's proposal appropriate.

PERB Ruling Summary - West Liberty Community School District v. PERB

Muscatine Co. District Court

January 2001

Negotiability dispute

Issue

Whether the Association's proposals allowing the employee the opportunity to jointly devise suggestions for improving his/her professional performance is a mandatory topic of bargaining.

Facts

The West Liberty Education Association made a performance evaluation proposal which required the employer to offer the opportunity for the employee to jointly devise suggestions for improving his/her professional performance. In PERB's preliminary ruling, it held that the language was permissive. Upon reconsideration in its final ruling PERB held that it was mandatory. The District appealed to the Muscatine County District Court.

PERB and Association Position

The amendments to Chapter 279 did nothing to negate the Section 20.9 mandatory requirement that public employers negotiate evaluation procedures or grievance procedures.

District Position

The language interferes with the District's exclusive right to determine "standards of performance expected of school district personnel," as found in IOWA CODE §279.14, which was amended in 1998.

Award

The proposal is a mandatory subject of bargaining.

Analysis

Using the two-step analysis used by the Iowa Supreme Court, the District Court found that the proposal was within the Section 20.9 mandatory subject of evaluation procedures, since employee remediation and grievance

procedures have been held by the Iowa Supreme Court to be mandatory.

The District's reliance on Chapter 279 that the proposal is not mandatory is misplaced. In order to agree with the District's reasoning, the Court would have to find that the term "standards of performance" found in Section 279.14 was the equivalent of the term "evaluation criteria" in the same code section. The legislature did not define "standards of performance," but the statute does not suggest that "standards of performance" and "evaluation criteria" are the same thing.

Furthermore, the District's argument that the term "evaluation procedures" must be defined with reference to Section 279.14 has no merit. PERB is not charged with the duty to interpret any Code section other than Chapter 20. The fact that PERB went no further than it did to glean the legislature's intent in Chapter 279 was not irrational, illogical or a wholly unjustifiable application of law to fact within its discretion.