

IN THE SUPREME COURT OF IOWA

No. 22-0790

UE LOCAL 893/IUP,

Appellee,

vs.

STATE OF IOWA,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County
The Hon. Paul D. Scott, District Judge

APPELLANT'S FINAL BRIEF

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ISSUES PRESENTED

- I. Does the text of the collective bargaining agreements support the district court's grant of summary judgment to the Union on its breach of contract claim for dues deductions?**

Authorities

Iowa Code § 20.9 (2017)
Iowa Code § 70A.19 (2017)
Iowa Code § 91A.5 (2017)
Iowa Code § 91A.5(1) (2017)
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First Am. Bank v. Urbandale Laser Wash, LLC, 874 N.W.2d 650 (Iowa Ct. App. 2015)
Kopple v. Schick Farms, Ltd., 447 F. Supp. 2d 965 (N.D. Iowa 2006)

- II. Did the district court err by ordering the State to pay dues as damages, rather than ordering retroactive dues deductions?**

Authorities

UE Local 893/IUP v. State of Iowa, 928 N.W.2d 51 (Iowa 2019)
Sergeant Bluff-Luton Educ. Ass'n v. Sergeant Bluff-Luton Cmty. Sch. Dist., 282 N.W.2d 144 (Iowa 1979)
Royal Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839 (Iowa 2010)
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Iowa Code § 91A.8
Iowa Code § 91A.10(3)
Iowa Code § 20.17(5)
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Iowa Code § 20.8(4) (2017)

III. Did the Union Mitigate its Damages?

Authorities

Kuehl v. Freeman Bros. Agency, Inc., 521 N.W.2d 714 (Iowa 1994)
Iowa R. Evid. 5.408
Iowa R. Evid. 5.408(b)

Farm-Fuel Prods. Corp. v. Grain Processing Corp., 429 N.W.2d 153
(Iowa 1988)

ROUTING STATEMENT

The Supreme Court should keep this case. Whether Iowa's Employer Relations Act and the specific collective bargaining agreements at issue in this case allow a damages award against a public employer for uncollected union dues, rather than retroactive implementation, is an issue of first impression. Whether the State of Iowa has waived sovereign immunity for such damages is also a question of first impression. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

In 2017, the Iowa legislature enacted significant changes to Iowa’s Public Employment Relations Act and related statutes. H.F. 291, 87th G.A., 1st Sess. (2017); 2017 Iowa Acts ch. 2. The governor signed the legislation into law on February 17, 2017. Among other provisions, H.F. 291 prohibited the deduction of union dues from employee paychecks, effective upon the enactment date. However, the legislature carved out dues deductions required by collective bargaining agreements ratified prior to the February 17, 2017 effective date. 2017 Iowa Acts ch. 2, §§ 26, 27. After H.F. 291 was enacted, the State of Iowa (“State”) and UE Local 893/IUP (“UE”) engaged in litigation about whether new collective bargaining agreements for the July 1, 2017–June 30, 2019 contract term had been ratified prior to H.F. 291’s effective date. On May 17, 2019, the Iowa Supreme Court held that two new contracts had been formed. *UE Local 893/IUP v. State of Iowa*, 928 N.W.2d 51 (Iowa 2019) (“*UE Local 893 I*”).

On July 12, 2019, UE filed the current action in district court, alleging that the State breached the terms of the 2017-19 collective

bargaining agreements. The district court concluded that the State breached the collective bargaining agreements because it did not deduct dues during the 2017-19 contract terms. The district court further ordered the State to pay UE damages in the amount of dues UE would have collected from its members. The State now appeals the district court's judgment: (1) that the State breached the collective bargaining agreements when it did not deduct dues; (2) awarding UE damages, instead of ordering retroactive dues deductions; and (3) concluding that UE adequately mitigated its damages, even though UE did not seek to obtain new dues deductions authorizations from its members.

STATEMENT OF THE FACTS

This case arises out of a dispute between the State and UE, an employee organization as defined by Iowa Code section 20.3(4). UE and the State have historically had two collective bargaining agreements: one for the Science Unit and one for the Professional Social Services Unit (collectively, “CBAs”). The dispute arose in 2017 after the Iowa legislature enacted H.F. 291, which made significant amendments to the state laws governing collective bargaining for public employees. *See* H.F. 291, 87th G.A., 1st Sess. (2017); 2017 Iowa Acts ch. 2. The governor signed H.F. 291 into law on February 17, 2017.

One of the changes was to Iowa Code section 70A.19, which previously allowed state employees to elect a payroll deduction for membership dues pursuant to the provisions of a collective bargaining agreement. Iowa Code § 70A.19 (2017). Following the 2017 amendments, section 70A.19 prohibited dues deductions from employee salaries:

70A.19 Payroll deduction for employee organization dues prohibited.

The state, a state agency, a regents institution, a board of directors of a school district, a community college, or an area education agency, a county board of supervisors, a governing body of a city, or any other public employer as defined in section 20.3 shall not authorize or administer a deduction from the salaries or wages of its employees for membership dues to an employee organization as defined in section 20.3.

2017 Iowa Acts ch. 2, Sec. 22. This change was effective upon enactment, except for dues deductions required by collective bargaining agreements ratified prior to the February 17, 2017 effective date. 2017 Iowa Acts ch. 2, § 26, 27.

In accordance with 2017 Iowa Acts ch. 2, sections 26 and 27, the State maintained dues deductions for the two 2015-17 collective bargaining agreements that were in effect when the governor signed H.F. 291 into law. When the 2015-17 collective bargaining agreements expired on June 30, 2017, the State stopped deducting dues in accordance with the new language in Iowa Code section 70A.19. In the meantime, on February 21, 2017, UE filed a petition in Polk County district court seeking to enforce the terms of two successor collective bargaining agreements that UE alleged had been ratified prior to the date H.F. 291 became effective. *See UE Local 893/IUP v. State of Iowa*, Polk County Case No.

LACL137250. The State and UE engaged in litigation about whether they had in fact entered into new collective bargaining agreements. On November 28, 2017, nearly four months *after* the State stopped deducting dues under the CBAs that expired on June 30, 2017, the district court granted summary judgment in favor of UE, concluding that successor agreements were formed prior to the effective date of the new law. *See* Polk County Case No. LACL137250, 11/28/2017 Ruling on Summary Judgment. [App. 17-18]. The State appealed, and the Iowa Supreme Court affirmed the district court's decision on May 17, 2019. *UE Local 893 I*, 928 N.W.2d at 68.

Thus, when the State stopped deducting dues upon the expiration of the prior CBAs on June 30, 2017, there was still a contested and unresolved question about whether the parties had entered into valid successor collective bargaining agreements. If the State was correct and new collective bargaining agreements had not been formed, it would have been unlawful for the State to continue deducting dues after the 2015-17 agreements expired. 2017 Iowa Acts ch. 2, §§ 26, 27, 27 (amending Iowa Code § 70A.19).

After the district court issued its summary judgment ruling in Case No. LACL137250 concluding that successor collective bargaining agreements had been formed, the State filed a notice of appeal and asked the Iowa Supreme Court to stay the district court's decision. A three-justice panel denied the State's request for a stay on February 22, 2018. Iowa Supreme Court Case No. 17-2093, 2/5/2018 Order Denying Mot. to Stay. [App. 24].

Upon the Supreme Court's February 22, 2018 denial of the State's motion to stay, the State promptly began implementing the provisions of the 2017-19 CBAs. Polk County Case No. LACL145049, Def. App. in Support of Resistance to SJ at 27-30; [App. 51-54]; Trial Tr., Day 1, pp. 92-93. As of February 26, 2018, the State provided going-forward guidance to state agencies related to implementation of the grievance, transfer, within-grade increase, and vacation provisions in the CBA. Beginning with the February 23, 2018 pay period, pay increases were implemented for IUP employees on a going-forward basis. Def.'s App. in Support of Resistance to SJ, 27-30. [App. 51-54]. By letter dated March 9, 2018, the State offered to reinstate the dues deductions prospectively and retroactively if UE provided current written authorizations

from employees.¹ Def.'s App. in Support of Resistance to SJ, 59-61 [App. 55-57]; 11/9/2020 Ruling on Pl.'s Mot. for SJ 4 [App. 61]; Trial Tr., p. 147. Over the next several months, the State took additional steps and undertook computer programming to implement the CBAs. Trial Tr., Day 1, p. 92; Day 2, p. 29. Beginning with the April 6, 2018 pay period, the State implemented a program to give step increases to eligible IUP employees. Beginning with the May 4, 2018 pay period, standby rates were corrected for IUP employees. Beginning with the June 29, 2018 pay period, the State made additional adjustments, including correcting employees' salaries, implementing programming related to overtime and compensatory time, providing personal leave for Social Services employees, and updating sick accrual rates for Social Services employees. Def.'s App. in Support of Resistance to SJ, 27-30. [App. 51-54].

¹ At trial, the district court ruled the State's offer letter was inadmissible. Trial Tr., Day 2, p. 48-49. This evidentiary issue is addressed in Section III of this brief.

Despite the State's efforts to work with UE to obtain new dues deduction authorizations, in March 2018, while the district court's summary judgment ruling in Case No. LACL137250 was on appeal to the Iowa Supreme Court, UE filed a motion in the district court to compel specific performance of the dues deduction provision in the collective bargaining agreements. In response to that motion, the State explained why it could not simply reinstate dues deductions:

Importantly, Iowa Code section 91A.5(1) provides that '[a]n employer shall not withhold or divert any portion of an employee's wages unless: (1) [t]he employer is required or permitted to do so by state or federal law or by order of a court of competent jurisdiction; or (2) [t]he employer has written authorization from the employee to so deduct for any lawful purpose accruing to the benefit of the employee.' While the district court in this matter ruled that a valid collective bargaining agreement was formed, it did not specifically order that employees' dues authorizations on file with the State as of July 1, 2017 continued to be valid. Given the positions of the State and UE on [the] underlying merits of this case, currently on appeal, dues have not been deducted from employee wages since July 1, 2017. That is, the deductions of dues from the applicable employee paychecks have not been continuous. It is, therefore, unclear that the State currently has the authority under the previous employees' dues authorizations to, without notice or further written consent by employees, re-start the deductions after almost nine months. Indeed, there may be applicable employees who previously authorized

a dues deduction but did not elect to continue to submit dues directly to UE after July 1, 2017 (i.e., effectively terminating their election by not personally submitting dues payments to UE), would have terminated their authorization for dues deductions but chose not to do so reasonably believing that it was now moot, or understood the then-current collective bargaining agreement expired, thereby voiding their authorizations for deductions. *See* Iowa Code § 70A.19. This request is not a delay tactic, as characterized by UE, but rather a safeguard to the applicable employees and the State to ensure that any deductions going forward are knowing and voluntary.

3/30/2018 Polk County Case No. LACL137250, Def.'s Resistance to Pl.'s Motion to Compel Specific Performance, at p. 3.

The district court denied UE's motion to compel specific performance on the grounds that (1) the district court's summary judgment ruling addressed only the existence of valid collective bargaining agreements, not the terms of those agreements, so the court could not undertake an examination of what was called for by the agreements; and (2) because the summary judgment ruling was on appeal, the district court no longer had jurisdiction over the matter. 4/6/2018 Polk County Case No. LACL137250, Ruling on Motion to Compel Specific Performance. [App. 20-23].

UE then filed the present action as a new case, alleging breach of contract and bad faith. *See* 11/25/2019 Second Amended Petition. Both parties moved for summary judgment. The district court granted the State’s motion for summary judgment on the bad faith claim on sovereign immunity grounds. 12/10/2020 Ruling on State’s MSJ at 7-9. [App. 80-82]. The district court also granted Plaintiff’s motion for summary judgment in part, concluding the State breached the 2017-19 collective bargaining agreements by failing to deduct dues. 11/9/2020 Ruling on Pl.’s Mot. for SJ at 10. [App. 67]. The district court observed that material factual disputes remained on the amount of damages and on liability with respect to compensatory time, overtime, standby pay, call back time, wage and fringe benefits, bulletin board use, union leave, union visitation rights, union orientation time, and grievance language. 11/9/2020 Ruling on Plaintiff’s MSJ at 12. [App. 69]. The district court held a bench trial on these issues from May 11–12, 2021. The court issued Findings of Fact, Conclusions of Law, and Verdict (collectively, “Judgment”) on February 7, 2022.

ARGUMENT

The State appeals the district court's: (1) grant of summary judgment to the Union on its breach of contract claim for dues deductions; (2) judgment ordering the State to pay dues to UE as damages, rather than ordering specific performance through retroactive dues deductions; (3) judgment ordering the State to pay dues to UE as damages, when the State has not waived sovereign immunity; and (4) conclusion that UE adequately mitigated its damages, when UE did not make any effort to obtain new authorization cards from its members.

In a breach of contract action involving a collective bargaining agreement, Iowa courts consider the “essence” of the collective bargaining agreement. *UE Local 893 I*, 928 N.W.2d at 67. “The ‘essence’ of a collective bargaining agreement is an extremely broad concept. It requires a casting aside of traditional views of contract law in favor of a multitude of other considerations, including not only the written and unwritten agreements, themselves, but also the practices of the parties or the industry in general.” *Id.* (quoting

Sergeant Bluff-Luton Educ. Ass’n v. Sergeant Bluff-Luton Cmty. Sch. Dist., 282 N.W.2d,144, 150 (Iowa 1979)).

Iowa’s appellate courts review a district court’s ruling on a motion for summary judgment for correction of errors at law. *UE Local 893 I*, 928 N.W.2d at 59. The evidence is viewed in the light most favorable to the nonmoving party, and “[t]he court must consider on behalf of the nonmoving party “every legitimate inference that can be reasonably deduced from the record.” *Service Employees Int’l Union, Local 199 v. Iowa Bd. of Regents*, 928 N.W.2d 69, 74 (Iowa 2019)(citations and quotations omitted). This Court reviews a breach of contract claim tried at law to the district court for correction of errors at law. *NevadaCare, Inc. v. Dep’t of Human Servs.*, 783 N.W.2d 459, 465 (Iowa 2010). The trial court’s legal conclusions and application of legal principles are not binding on the appellate court. *Id.* (citations and quotations omitted). This Court will reverse a district court’s judgment if the court applied erroneous rules of law that materially affected its decision. *Id.* The district court’s factual findings will be upheld if they are supported by substantial evidence. *Id.*

I. THE DISTRICT COURT’S CONCLUSION THAT THE STATE BREACHED THE COLLECTIVE BARGAINING AGREEMENTS WHEN IT STOPPED COLLECTING DUES IS NOT SUPPORTED BY THE TEXT OF THE AGREEMENTS.

The district court granted the Union’s motion for summary judgment regarding dues deductions, concluding the State breached the 2017-19 CBAs because the State did not deduct dues from employees’ paychecks during the terms of the 2017-19 agreements. 11/9/2020 Ruling on Pls.’ Mot. for SJ, at 10. [App. 67]. But the district court’s conclusion is not supported by the text of the CBAs or the statutes that were in effect at the time. The State preserved error on this issue in its resistance to the Union’s motion for summary judgment. [App. 42].

Prior to the governor signing H.F. 291 on February 17, 2017, Iowa’s Public Employment Relations Act (“PERA”) provided for the negotiation of dues checkoff provisions: “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.” Iowa Code § 20.9

(2017). The statute further provided, “[i]f an agreement provides for dues checkoff, a member’s dues may be checked off only upon the member’s written request and the member may terminate the dues checkoff at any time by giving thirty days’ notice.” *Id.* Iowa Code section 70A.19 modified this provision for state employees by requiring state employees to maintain their dues checkoff election “for a period of one year or until the expiration of the collective bargaining agreement, whichever occurs first.” Iowa Code § 70A.19 (2017). “With respect to state employees, this section supersedes the provisions of section 20.9 allowing termination of a dues checkoff at any time but does not supersede the requirement for thirty days’ written notice of termination.” *Id.* Taken together, sections 20.9 and 70A.19: (1) required public employers and employee organizations to negotiate dues checkoff provisions, (2) provided that a member’s dues could be checked off only upon a member’s written request, and (3) required state employees to maintain their dues checkoff for a period of one year or until expiration of the agreement, “whichever occurs first.” Iowa Code section 91A.5 (2017) further prohibited the State from withholding

any portion of an employee's wages unless (1) "required or permitted to do so by state or federal law or by order of a court of competent jurisdiction"; or (2) "[t]he employer has written authorization from the employee to so deduct for any lawful purpose accruing to the benefit of the employee." Iowa Code § 91A.5(1) (2017).

The pre-H.F. 291 statutory provisions did not contain any language requiring dues checkoff elections to be carried over from contract term to contract term. The parties could have bargained for such a provision, but they did not. Section 2 of the 2015-17 CBAs contained the following provisions regarding dues:

SECTION 2 Dues and Fees Deductions

- A. Upon receipt of a voluntary individual written request from any of its employees covered by this Agreement on forms provided by the Union, the Employer will deduct from the pay due such employee those dues required as the employee's membership in the Union, and fees for Union sponsored credit union and insurance programs.
- B. An employee's request for dues deduction and deductions for fees for Union sponsored credit union and insurance programs shall be effective after the date of delivery of such authorization to the payroll office of the employing unit. Deductions shall be made only when the employee has

sufficient earnings to cover same after deductions for social security, federal taxes, state taxes, retirement, health insurance, and life insurance. Deductions shall be in such amount as shall be certified to the Employer in writing by the authorized representative of the Union.

- C. An employee's dues deductions shall be terminable according to the provisions of Section 70A.19, Code of Iowa.
- D. The dues deduction of an employee who is laid off shall be suspended during the period of the layoff. The Union shall indemnify and save the Employer harmless against any and all claims, demands, suits, or other forms of liability which may arise out of any action taken or not taken by the Employer for the purpose of complying with the provisions of this Section.
- E. No other employee organization shall be granted or allowed to maintain payroll deduction for employees covered by this Agreement.
- F. The Employer shall submit to the Union, with each remittance of deductions, a list of all employees having such deductions, including all information presently provided by each department and agency.
- G. On a monthly basis, and at no cost to the Union, the Employer shall provide the Union with information, in an electronic format agreeable to both parties, which shows every bargaining unit employee's name, home address, payroll number, work location, pay grade, step, hourly wage rate, a header tape with insurance information, union

membership status, and any other information mutually agreed to.

2015-17 CBAs, Art. II, Sec. 2 (Pl.'s Ex. 1, 2). [App. 157-58, 200-01]. The CBAs expressly provided that all provisions would terminate upon expiration unless extended in writing by mutual agreement of the parties: "Upon termination of the Agreement, all obligations under the Agreement are automatically cancelled." CBAs, Art. XV ("Termination of Agreement"); (Pl.'s Ex. 1, 2). [App. 185, 227]. The CBAs did not contain a survival clause for any of the contract provisions. The CBAs did not state that the dues deductions would carry over from agreement to agreement. The CBAs contained an integration clause, stating, "This Agreement represents the entire agreement of the parties and shall supersede all previous agreements, written or verbal." CBAs, Article XV, Section 1 (Pl.'s Ex. 1, 2). [App. 184, 226].

Notwithstanding the plain text of the CBAs and the automatic expiration of the provisions, the district court concluded that the State breached the 2017-19 CBAs by failing to deduct dues during the terms of the 2017-19 CBAs. Notably, UE did not allege, and the district court did not conclude, that the State breached the 2015-17

CBAs by ceasing dues deductions upon expiration of those agreements. Instead, the Court concluded that the State breached the *new* CBAs by failing to deduct dues based on the prior authorizations received from employees. 11/9/2020 Ruling on Pl.’s MSJ at 10. [App. 67].

The district court did not point to any specific contract language requiring the State to carry dues deductions forward from contract term to contract term. The district court instead pointed to the contract provision stating that “[a]n employee’s dues deductions shall be terminable according to the provisions of Section 70A.19, Code of Iowa.” The district court concluded, “If § 70A.19 meant that authorizations expire automatically when those events occur, there would be no conflict with § 20.9 and no need to supersede it, because dues authorizations could be terminable at any time and terminate automatically after one year or the end of a CBA.” 11/9/2020 Ruling on Pl.’s MSJ at 8. [App. 65]. The district court’s reasoning overlooks the main purpose of the dues deduction language in section 20.9: to allow a member to terminate the dues checkoff *at any time* by giving thirty days’ written notice. Iowa Code § 20.9

(2017). That is the language the legislature sought to supersede in section 70A.19 (2017), which prohibited state employees from terminating their dues checkoff at any time, and instead required them to maintain it for at least one year or until the expiration of the contract period. At trial, UE’s representative testified that employees could terminate with 30 days’ notice after they had been there a year, stating, “When they signed the card, they were actually signing the card stating they were going to be a member for a one-year period of time.” Trial Tr., Day 1, p. 94. Thus, the CBAs and section 70A.19 (2017) limited when an *employee* could terminate their dues deductions. Neither the contracts nor the statute spoke to whether the employer was required to carry dues deductions forward from contract term to contract term.

Although the State had not terminated dues deductions upon contract expiration in prior contract years, 2017 was not a typical contract year. In February 2017, the Iowa legislature enacted sweeping reforms to PERA which, among other changes, prohibited public employers from administering payroll deductions for union

dues and prohibited collective bargaining over payroll deductions for union dues. 2017 Iowa Acts ch.2, Sec. 22; *see also Iowa State Educ. Assoc. v. State of Iowa*, 928 N.W.2d 11, 15 (Iowa 2019). When the 2015-17 CBAs expired on June 20, 2017, the State and UE were engaged in litigation about whether new CBAs had been formed. The district court had not yet issued a ruling in Polk County Case No. LACL137250.

Thus, when the State stopped deducting dues at the end of the 2015-17 contract term, a legitimate dispute remained about whether the parties had formed new collective bargaining agreements. If the parties had not formed new agreements, it would have been unlawful for the State to continue to deduct dues under the new language in section 70A.19. The 2015-17 CBAs stated that all contract provisions would be automatically cancelled upon expiration of the contract term unless the parties mutually agreed in writing to extend them. Iowa Code section 20.9 (2017) further required that terms authorizing dues checkoff “shall be embodied in a written agreement and signed by the parties.” Iowa Code § 20.9 (2017). Because of the dispute about whether a contract had been formed, the 2017-19 CBAs were never reduced to writing. Trial Tr.,

Day 1, p. 31. “A writing that clearly that clearly contemplates the subsequent execution of a formal agreement raises the inference that the parties to the writing to did intend to be bound until the subsequent formal agreement is finalized.” *First Am. Bank v.*

Urbandale Laser Wash, LLC, 874 N.W.2d 650, 656 & n.4 (Iowa Ct. App. 2015) (quoting *Kopple v. Schick Farms, Ltd.*, 447 F. Supp. 2d 965, 977 (N.D. Iowa 2006)). Given that the parties had not signed any contract provisions about dues checkoffs for the 2017-19 CBAs as required under section 20.9, and they were actively litigating whether a contract had been formed, it was reasonable to conclude the dues checkoff provisions had expired under the terms of the 2015-17 agreements.

In March 2018, after the district court ruled that a new contract had in fact been formed and the Supreme Court denied the State’s request for a stay, the State promptly began implementing the terms of the 2017-19 agreements. The new agreements only authorized dues deductions “[u]pon receipt of a voluntary individual written request from any of its employees covered by this

Agreement on forms provided by the Union.” CBAs, Article II, Section 2 (Pl.’s Ex. 1, 2). [App. 157-58, 200-01]. The State attempted to work with UE to obtain employee authorizations and reinstate dues deductions. The State had concerns about the legality of simply reinstating dues deductions in light of Iowa Code § 91A.5(1), which prohibits an employer from withholding any portion of an employee’s wages unless (a) the employer is required or permitted to do so by state or federal law or by court order, or (b) the employer has written authorization from the employee. The district court dismissed these concerns, concluding that “[f]ederal and state law permitted the State to deduct dues and employees provided written authorizations to the State to deduct dues.” 11/9/2020 Order on Pl.’s Mot. for SJ, at 10. [App. 67].

By the time the Supreme Court denied the State’s motion to stay the district court’s November 2017 ruling that new CBAs had been formed, employees had not had their dues deducted for nearly nine months. It is quite possible some employees no longer wished to have dues deducted in light of the significant changes to PERA and the narrower set of topics that were subject to bargaining and

grievance procedures. In fact, many employees did not continue to pay dues by check or through the third-party vendor set up by UE during the 2017-19 contract term, calling into question whether they still wanted to pay voluntary union dues. Trial Tr. at 175-76. And the State did not know which employees had continued to pay their dues directly to UE. If the State had deducted dues for those employees, they would have paid twice. The district court erred in concluding that the State breached the collective bargaining agreements when the State did not reinstate dues deductions based upon employee authorizations that were no longer in effect.

II. THE DISTRICT COURT ERRED BY ORDERING THE STATE TO PAY UNION DUES AS DAMAGES, RATHER THAN ORDERING RETROACTIVE DUES DEDUCTIONS.

If the Court affirms the district court's conclusion that the State breached the dues deduction provisions in the 2017-19 CBAs, the State requests reversal of the district court's decision ordering the State to pay union dues as damages, rather than ordering retroactive dues deductions from employees' back pay. The district court ordered every other category of wages and benefits at issue in

this case to be provided retroactively, consistent with the parties' past practices and the essence of the collective bargaining agreements. There is no basis in the collective bargaining agreements to treat the union dues any differently. And the State has not waived sovereign immunity for damages in chapter 20 or by entering into the CBAs. The State preserved error on this issue by raising it in its trial brief, during trial, post-trial brief, and again in its motion to reconsider. 5/4/21 Def.'s Trial Br. at 5 [App. 94]; Trial Tr., Day 1, p. 24; Def.'s Post-Trial Br. at 5-11; [App. 105-111]; Def.'s Mot. to Reconsider at 5 [App. 144]. Preservation of error on the State's sovereign immunity argument is discussed in more detail below.

A. The Award of Union Dues as Damages is not Supported by the Essence of the Collective Bargaining Agreements.

The district court erred by applying traditional breach of contract principles rather than considering the essence of the agreements when fashioning relief. Specifically, the district court erred by ordering the State to pay damages for dues deductions under an "expectation interest" or "benefit-of-the-bargain" theory.

2/7/2022 Judgment at 12. [App. 131]. The district court likewise erred by applying a foreseeability analysis, concluding the State should have foreseen the Union's damages when it stopped deducting dues upon the expiration of the 2015-17 CBAs. Because this is a case involving collective bargaining agreements, the district court should have set aside these traditional contract law principles and instead fashioned relief consistent with the "essence of the agreements." *UE Local 893 I*, 928 N.W.2d at 67. When considering the essence of a collective bargaining agreement, courts may consider factors such as fairness, reasonableness and practicality. *Sergeant Bluff-Luton Ed. Ass'n*, 282 N.W.2d at 150. Here, the essence of the agreements was that the *employees* would pay union dues, not the taxpayers. The State simply facilitated the employees' payment of dues at their request by deducting dues from employees' paychecks upon receipt of a request on forms provided by UE.

Even if the Court applies traditional principles of contract law, UE is required to prove that the damages were in the contemplation of the parties. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 847 (Iowa 2010). The district court was

required to “scrutinize the contract terms to determine whether the damages were within the contemplation of the parties.” *Id.* Here, there is a mismatch between what the parties contracted for and the remedy imposed by the district court. The collective bargaining agreements do not contain any language providing for damages for a failure to deduct dues. In fact, the CBAs contain an express indemnification provision for dues: “The Union shall indemnify and save the Employer harmless against any and all claims, demands, suits, or other forms of liability which may arise out of any action taken or not taken by the Employer for the purpose of complying with the provisions of this Section.” CBAs, Article II, Section 2, subsection D; (Pl.’s Ex. 1, 2). [App. 157-58, 200-01]. While the indemnification is contained within a subsection that addresses dues deductions for laid off employees, the indemnification language on its face applies to any actions taken or not taken for the purpose of complying with the provisions of “this Section.” “This Section” is best read as a reference to Article II, Section 2 of the CBA. This blanket indemnification for all claims arising out of Article II, Section 2 of the CBA—the Dues and Fees Deduction section—make clear that under no circumstances did the parties expect the State

would be responsible for paying union dues.

Courts have upheld retroactive dues deductions in similar disputes. For instance, in *Sauk County v. Wisc. Employment Relations Comm'n*, the Wisconsin Supreme Court considered what remedy should be granted following a county's decision not to deduct fair-share fees and union dues to cover the period of time between the expiration of one contract and the ratification of a successor contract. *Sauk County v. Wisc. Employment Relations Comm'n*, 477 N.W.2d 267, 269 (Wis. 1991). Concluding that fair-share fees and union dues were economic items easily capable of retroactive application, the court concluded that the proper remedy was to order retroactive deduction of those items. The court observed, "Labor contracts are often back-dated for the purpose of retroactive application of economic items such as wage increases. Indeed, as we noted above, 'retroactivity is a way of life in labor negotiations.'" *Id.* at 272. Similarly, in *Int'l Union of Operating Eng'rs Local 571 v. Hawkins Const. Co.*, 929 F.2d 1346, 1350-51 (8th Cir. 1991), the Eighth Circuit Court of Appeals considered a dispute

about an administrative dues checkoff under federal labor law. The court remanded the matter to district court, concluding that if the district court found a portion of the proposed checkoff could be appropriately deducted from wages, the district court should allow the union to collect that portion via checkoff retroactively. 929 F.2d at 1350-51.

Even under traditional contract principles, retroactive dues deductions would make UE whole. In a traditional contract setting, “the measure of damages recoverable for a breach of contract in each case must have relation to the nature and purpose of the contract itself, as viewed in connection with the character and extent of the injury.” *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998) (quoting 22 Am. Jur. 2d Damages § 44 (1988)). Here, the agreements between UE and the State required the State to deduct dues from employee paychecks for those employees who submitted an authorization form. If the State is required to pay the dues, employees who would have otherwise been dues-paying members will have benefitted from the terms of the CBAs without having paid dues. The purpose of the

dues deductions was to make it easier for employees to pay their union dues. The agreement never contemplated that the State itself would pay the dues. If any employees were harmed because they were unable to pay dues easily, the remedy is to facilitate their payment of dues retroactively. Most employees will already be receiving back pay under the contracts, so the dues can be deducted from that back pay for employees who submitted an authorization and did not continue paying their dues by check or through the Union's third-party vendor. Because the essence of the agreements called for the State to deduct dues from employees' paychecks upon request, the proper remedy is for the State to deduct dues retroactively.

B. Chapter 20 does not Support an Award for Damages Where Specific Performance is Available.

Iowa Code chapter 20 does not contain any language authorizing a damages award under these facts. The purpose of PERA is to benefit public employees and their employers. Specifically, it is the policy of the state to “promote harmonious and cooperative relationships between government and its employees

by permitting public employees to organize and bargain collectively . . . ” Iowa Code § 20.1(1) (2017); *see also Iowa State Educ. Ass’n v. State*, 928 N.W.2d 11 (Iowa 2019). PERA also aims to “to protect the citizens of the state by assuring effective and orderly operations of government in providing for their health, safety, and welfare; to prohibit and prevent all strikes by public employees; and to protect the rights of public employees to join or refuse to join, and to participate in or refuse to participate in, employee organizations.” Iowa Code § 20.1(1) (2017).

With respect to disputes involving collective bargaining agreements, PERA provides for enforcement but does not specifically authorize damage awards: “Terms of any collective bargaining agreement may be *enforced* by a civil action in the district court of the county in which the agreement was made upon the initiative of either party.” Iowa Code § 20.17(5) (2017) (emphasis added). This Court has construed section 20.17(5) broadly, concluding it allows an employee to sue a union for breach of the statutory duty of fair representation contained in Iowa Code section 20.17(1), a conclusion that was later abrogated through

legislation. *Norton v. Adair Cty.*, 441 N.W.2d 347, 354 (Iowa 1989); *abrogated by statutory amendments, see O'Hara v. State*, 642 N.W.2d 303, 308 (Iowa 2002). In construing the language in section 20.17(5), the *Norton* court looked to federal case law interpreting section 301 of the Labor Management Relations Act (“LMRA”). *Norton*, 441 N.W.2d at 351 (citing *Vaca v. Sipes*, 386 U.S. 171, 188 (1967)). But the wording in LMRA section 301 is markedly different than the state law analog contained in PERA section 20.17(5). The federal statute states, “Suits for *violation* of contracts between an employer and a labor organization . . . may be brought in any district court of the United States. . . .” 29 U.S.C. § 185 (emphasis added). In contrast, chapter 20 provides that suits “to enforce” the provisions of a collective bargaining agreement may be brought in district court.

The Iowa legislature could have authorized suits “for violation” of a collective bargaining agreement as Congress did in the LMRA, but the legislature instead chose to authorize suits “to enforce” the terms of a CBA. In this case, the district court concluded that the term “enforce” encompasses a suit seeking

damages for breach. 4/11/2022 Ruling on Mot. to Reconsider, at 3-4 [App. 148-49]. But if the legislature had intended to authorize a suit for damages, it would have said so. *Cf. Anthony v. State*, 632 N.W.2d 897, 901 (Iowa 2001) (considering Iowa Code sections 91A.8 and 91A.10, which make employers “liable” to employees and expressly provide for damages); *Stroup v. Reno*, 530 N.W.2d 441, 44 (Iowa 1995) (construing Iowa Code § 87.21 and concluding that the key word was “liable,” not “enforce” or “collect.”). Merriam-Webster defines “enforce” as, “to give force to,” or, as to laws, “to carry out effectively.” Merriam-Webster, online edition.² Under the Black’s Law Dictionary definition, to “enforce” is “[t]o put into execution, to cause to take effect, to make effective; as, to enforce a writ, a judgment, or the collection of a debt or fine.” Black’s Law Dictionary, online edition.³ Given the legislature’s choice of wording, the district court erred in awarding damages, when it

²<https://www.merriam-webster.com/dictionary/enforce>(last visited July 14, 2022).

³ <https://thelawdictionary.org/?s=enforce> (last visited July 10, 2022).

could have awarded retroactive dues deductions, thereby giving effect to the CBA terms as negotiated by the parties.

Cases decided by this Court do not support a damages award payable by the taxpayers for union dues that otherwise would have been paid by employees. In *UE Local 893 I*, this Court concluded that UE was not required to exhaust its administrative remedies with the Public Employment Relations Board (“PERB”), in part because PERB “lacks authority to enforce the collective bargaining agreement through an order for specific performance, award of damages for breach, or some other remedy.” 928 N.W.2d at 66. But the Court did not consider or analyze whether damages for breach are actually available under chapter 20, particularly where, as here, specific performance would make the parties whole. And in *AFSCME/Iowa Council 61*, the Court held the State is bound by its collective bargaining agreements but did not address whether a suit for damages is available under chapter 20. 484 N.W.2d at 395. In that case, the dispute was about employee wage increases that the parties had contracted for. But unlike the union dues at issue in this case, employee wages are traditionally paid out of the public

fisc. Whether the State may be held responsible for paying a contract item that the parties negotiated to have deducted from employees' wages presents a very different question.

The district court erred in ordering the State to pay union dues as damages, when it could have instead fashioned a narrower remedy ordering retroactive dues deductions, consistent with the language in the contracts and Iowa Code chapter 20.

C. The State has not Waived Sovereign Immunity for Monetary Damages.

The State of Iowa enjoys immunity from claims for monetary damages absent an express or constructive waiver of its sovereign immunity. The State has not waived sovereign immunity for damages under the collective bargaining agreements.

1. The State preserved error on this issue.

The district court concluded the State did not preserve this issue because the State raised the issue for the first time in its post-trial brief. 4/11/2022 Ruling on Mot. to Reconsider, at 2. [App. 147]. However, the question whether the State intended to waive its sovereign immunity with respect to a particular type of claim is jurisdictional and may be raised at any stage of the proceedings.

Hyde v. Buckalew, 393 N.W.2d 800, 802 (Iowa 1986); *see also North v. State*, 400 N.W.2d 566, 570 (Iowa 1987) (considering state’s sovereign immunity arguments after trial). This is because the court’s authority to consider a particular category of claims is a matter of subject matter jurisdiction. *See Hyde*, 393 N.W.2d at 802 (citing *State v. Ryan*, 351 N.W.2d 186, 187 (Iowa 1984) (discussing subject matter jurisdiction generally) and *In re Marriage of Carlson*, 338 N.W.2d 136, 140 (Iowa 1983) (same)). Unlike some defenses which must be raised by pre-answer motion to dismiss or they are waived, subject matter jurisdiction may be raised at any time. *See Iowa R. Civ. P. 1.421(4)*.

The State pled lack of subject matter jurisdiction as an affirmative defense in its Answer. 2/25/2021 First Amended Answer. [App. 88]. The State raised the issue of sovereign immunity in its post-trial brief, while the trial record was still open. 8/23/21 Post-Trial Brief. [App. 105]. This is no different than raising it at trial in opening or closing argument. *See 4/11/2022 Ruling on Mot. to Reconsider*, at 2 (“The post-trial briefs were, in effect, closing arguments.”) And the State preserved error on this issue by requesting a ruling in a Rule 1.904(2) motion to reconsider, which

the court ruled on. 2/22/2022 Mot. to Reconsider. [App. 140-45];
4/11/2022 Ruling on Mot. to Reconsider. [App. 146-51].

2. The State did not waive sovereign immunity for money damages by entering into the collective bargaining agreements.

The Iowa Supreme Court has held that the State may constructively waive its immunity for breach of contract suits when it enters into a contract. *Kersten Co., Inc. v. Dep't of Soc. Servs.*, 207 N.W.2d 117, 118 (Iowa 1973). The court has extended this principle to suits to enforce wage provisions in a collective bargaining agreement. *AFSCME/Iowa Council 61 v. State*, 484 N.W.2d 390, 394 (Iowa 1992). There are important limitations to this principle, however. First, the State is only answerable for the legal relationships it voluntarily creates. *Lee v. State*, 815 N.W.2d 731, 740 (Iowa 2012). “If the legislature has developed an exclusive and comprehensive system for private suit on particular types of claims, we have made it clear that we strictly follow the statutory guidelines waiving the State’s immunity.” *Id.* Second, the extent of the waiver is confined to those legal consequences the State has

voluntarily assumed. *Id.* at 742. Thus, in *Lee*, the Court held that the State did not waive sovereign immunity with respect to monetary relief under the FMLA’s self-care provisions even though the Iowa Judicial Branch adopted an employee handbook advising employees of their self-care rights. Although the State was bound to follow the self-care provisions of the FMLA and state employees could seek injunctive relief to enforce those provisions, the State could not be sued for monetary damages. *Id.* at 743; *contrast Anthony*, 632 N.W.2d at 902 & n.2 (Iowa 2001) (concluding Iowa Code sections 91A.8 and 91A.10(3) provided an express consent to suit where made the employer “liable” and provided for attorney’s fees and damages).

The State does not contend that the district court lacked jurisdiction to hear a case to enforce the terms of a collective bargaining agreement under Iowa Code section 20.17(5). Rather, the State’s position is that the court lacked jurisdiction to consider or award Plaintiff’s claim for monetary damages. Here, as in *Lee*, the State has not waived sovereign immunity with respect to claims for monetary damages incurred by unions due to the State’s alleged

noncompliance with a collective bargaining agreement. As with the FMLA in *Lee*, there is nothing in chapter 20 to suggest that the legislature intended to waive the State's sovereign immunity for monetary damages claimed by a union in an action to enforce the provisions of a CBA under chapter 20.17(5). In fact, even an arbitrator's award to enforce the provisions of a CBA, which is generally permissible, may be limited by the availability of funds under Iowa Code section 20.17(6) (2017).

The dues checkoff provisions in chapter 20 also do not provide any basis to conclude the State has consented to be sued for damages. Prior to the enactment of House File 291, the dues checkoff provisions in chapter 20 made clear that any employee had the right to refuse to join or participate in the activities of employee organizations, including the payment of dues. Iowa Code § 20.8(4) (2017). The purpose of the dues checkoff was to benefit *employees* by providing them with a simple way to pay dues at their option, not to ensure a certain level of membership or funding for employee organizations. See Trial Tr., Day 2, p. 17 (Testimony of Rebecca Dawes) (testifying that dues deductions were an important benefit

UE negotiated on behalf of its members). The provision did not contain any language suggesting the State could be liable for damages to a union if it did not check off dues.

The collective bargaining agreements also do not contain any language to support a waiver of sovereign immunity for monetary damages. Article II, Section 2 of the CBAs is silent on remedies and does not mention damages. And, as discussed above, UE expressly indemnified and held the State harmless against claims arising out of Article II, Section 2. The remedies for breach are limited to those remedies authorized under chapter 20 and the agreements themselves. As in *Lee*, while the State may be sued for enforcement of the dues collections provisions under section 20.17(5) (2017), the State has not waived sovereign immunity with respect to claims for monetary damages suffered by the union.

III. THE UNION FAILED TO MITIGATE ITS DAMAGES.

UE did not accept or otherwise engage with the State's offer in March 2018 to reinstate dues deductions and facilitate retroactive dues deductions with written authorization from employees. Because UE did not work with the State to obtain

employee consent for renewed dues deductions, UE failed to mitigate its damages as required by Iowa law.

The district court concluded that UE mitigated its damages by attempting to collect dues through means other than paycheck deductions. [App. 130-31]. But under Iowa law, “[a] person asserting breach of contract has a duty to mitigate the damages.” *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 719 (Iowa 1994). “This duty imposes on the complaining party the obligation to exercise *all* reasonable diligence to lessen the damages caused by the other party’s breach.” *Id.* (emphasis added). The burden rests on the defendant to prove the plaintiff failed to mitigate damages. *Id.*

As a threshold matter, UE objected to the admissibility of the State’s offer to reinstate dues on the ground that it was an offer to compromise under Iowa Rule of Evidence 5.408. Initially the district court did not definitively rule on this question, and the State proceeded with an offer of proof. Trial Tr., Day 1, pp. 102-118, 123-25, 128. Ultimately, the district court ruled that the State’s March 9, 2018 offer letter was inadmissible. State’s Proposed Ex. J., Trial Tr., Day 2, p. 48-49. The State sought to admit its March

9, 2018 offer not to prove the validity or amount of UE's claim, but rather to demonstrate that UE did not mitigate its damages. The letter is admissible for this purpose and the district court should have admitted the State's evidence on this point. Iowa R. Evid. 5.408(b) (allowing compromise offers and negotiations to be admitted for purposes other than proving the validity or amount of a claim); *see also Farm-Fuel Prods. Corp. v. Grain Processing Corp.*, 429 N.W.2d 153, 161 (Iowa 1988).

Regardless of the letter's admissibility, three of UE's representatives testified that they became aware in March 2018 that the State was willing to reinstate dues deductions both prospectively and retroactively with new authorization cards. Trial Tr., Day 1, pp. 106-107, 176; Day 2, pp. 32-33. And the State made its concerns about the legality of reinstating dues without current authorizations clear in its March 2018 resistance to UE's motion to compel specific performance in Polk County Case No. LACL137250. Yet UE did not take any steps to inform employees that they could submit new authorization forms in order to have their dues deducted from their paychecks.

At trial, UE argued it was not required by law or the contract to facilitate the submission of new authorization cards, pointing to the district court's summary judgment ruling. But the question whether UE was required by law to facilitate new employee authorizations is distinct from the question whether doing so was a reasonable step UE could have taken to mitigate its damages. UE's representative testified about the "devastating" effect of the loss of dues to the union and the steps the union took to collect dues from employees directly or through a third-party vendor. Trial Tr., Day 1, p. 61-71. The union communicated extensively with employees to try to get them to pay their dues, including through mailings, email, phone banks, and in-person meetings. UE contracted with a third-party vendor and encouraged employees to sign up for automatic dues payments through its third-party vendor. Trial Tr., day 1, pp. 65, 70-75, 110-12; Ex. 15, 16, 17. But UE did not take the relatively simple step of informing employees, as part of its extensive communications, that they could submit a new authorization card in order to have their dues deducted from their paychecks. And despite sending numerous direct mailings and emails to employees and distributing postcard-sized reminders to

sign up for the union and informing them of their options for payment, UE did not provide local representatives or employees with new authorization cards, which are similarly sized. Ex. 17; Trial Tr., Day 1, pp. 116-117, 176-77; Day 2, pp. 32-33. Taking this relatively simple step would have substantially mitigated UE's damages and could have avoided many of the "devastating" financial losses UE now complains of. The trial court's determination that UE adequately mitigated its damages is not supported by the substantial evidence.

CONCLUSION

The State respectfully requests that the Court reverse the district court's conclusion on summary judgment that the State breached the terms of the collective bargaining agreements by not reinstating dues deductions. If the Court upholds the district court's summary judgment order, the State requests that the Court reverse the district court's judgment directing the State to pay union dues as damages, and remand to the district court with directions to enter an order for specific performance through retroactive dues

deductions. If the Court upholds the district court's conclusion that damages are an appropriate remedy, the State asks that the damages award be reversed or reduced because UE did not take all reasonable steps to mitigate its damages.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

/s/ Emily Willits
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CERTIFICATE OF FILING AND SERVICE

I, Emily Willits, hereby certify that on October 19, 2022, I, or a person acting on my behalf, filed this Brief electronically and served it on all counsel of record to this appeal via EDMS.

/s/ Emily Willits
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