

IN THE SUPREME COURT OF IOWA

No. 22-0790

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UE LOCAL 893/IUP,

Appellee,

vs.

STATE OF IOWA,

Appellant/Cross-Appellee.

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

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**APPELLANT/CROSS-APPELLEE'S REPLY BRIEF AND  
BRIEF IN RESPONSE TO CROSS APPEAL**

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## ISSUES PRESENTED

- I. Did the text of the collective bargaining agreements require the State to carry dues deductions forward?**

### Authorities

Iowa Code § 91A.5 (2017)  
Iowa Code § 70A.19 (2017)  
*Janus v. Am. Fed. of State, Cty. and Mun. Employees*, 138 S. Ct. 2448, 2486 (2018)  
Iowa Code § 731.5 (2017)  
29 U.S.C.A. § 186(c)  
*Valley Hospital Med. Ctr., Inc. d/b/a Valley Hospital Med. Ctr.*, 368 NLRB No. 139, 2019 WL 6840790 (N.L.R.B. 2019)  
Iowa Code § 20.9 (2017)

- II. Did the district court err when it awarded dues as damages?**

### Authorities

*Amalgamated Meat Cutters and Allied Workers of N. Am., Local No. 593 v. Shen-Mar Food Prod., Inc.*, 405 F. Supp. 1122, 1123 (W.D. Va. 1975)  
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Iowa Code § 20.17(5)

- III. Did the union mitigate its damages?**

- IV. Did the district court correctly deny the union's request for attorneys' fees?**

### Authorities

*Baldwin v. City of Estherville*, 929 N.W.2d 691 (Iowa 2019)

*Remer v. Bd. of Medical Exam.*, 576 N.W.2d 598 (Iowa 1998)  
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Iowa Code ch. 20  
*UE Local 893/IUP v. State*, 928 N.W.2d 51 (Iowa 2019)

## ARGUMENT

### I. **THE 2017-19 COLLECTIVE BARGAINING AGREEMENTS DID NOT REQUIRE THE STATE TO CARRY DUES DEDUCTIONS FORWARD FROM THE PREVIOUS AGREEMENT.**

UE Local 893/IUP (“UE”) contends that the State of Iowa (“State”) failed to perform its obligations under the Collective Bargaining Agreements (“CBAs”) after the district court in the first lawsuit (Polk County Case No. LACL137250) ruled that the parties formed valid contracts. Appellee Br. at 20. That is simply untrue. The district court granted UE’s motion for summary judgment in the first lawsuit on November 28, 2017. The State filed a notice of appeal and asked this Court to stay the district court’s decision. A three-justice panel denied the State’s motion for a stay on February 5, 2018. [App 24-25]. After this Court denied the State’s request for a stay, the State promptly began implementing the provisions of the 2017-19 CBAs. Beginning in February 2018, the State provided going-forward guidance to state agencies regarding implementation of grievance, transfer, within-grade increase, and vacation provisions in the CBAs. Beginning with the February 28, 2018 pay period, the State implemented pay increases on a going-



forward basis. Over the next several months, the State undertook computer programming to implement merit increases, standby rates, overtime, compensatory time, personal leave, and sick leave under the new CBAs. Tr. Day 1, pp. 92-93, Def.'s App. in Support of Resistance to SJ, 27-30. [App. 51-54].

During that time frame, the State and UE disagreed about the amounts of back pay due to employees and whether new employee authorizations were required to resume paycheck deductions—the exact subjects that have been litigated in the present lawsuit. With respect to back pay, some employees received more pay for certain pay categories when the CBAs were not in effect than they would have received under the CBAs. The State contended the back pay owed to those employees should be adjusted accordingly.<sup>1</sup>

With respect to dues deductions, the CBAs required the State to deduct dues from employee paychecks “[u]pon receipt of a voluntary individual written request . . . on forms provided by the

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<sup>1</sup> The district court agreed with the State on this issue, which is not a subject of this appeal.

Union.” CBAs, Art. II, Sec. 2. [App. 157-58, 200-01]. Although the State’s prior practice was to carry dues deductions forward with each new contract term without obtaining new authorization forms, when the 2015-17 CBAs expired on June 30, 2017, the State stopped deducting dues because the State did not believe a successor agreement had been formed. House File 291 had significantly changed the legal landscape, outlawing dues deductions for agreements formed after the new law’s effective date. By the time the district court granted UE’s motion for summary judgment on contract formation in the first lawsuit on November 28, 2017, the State had not deducted dues from employees’ paychecks for nearly five months. Not all of the employees who had previously signed up for dues deductions continued to pay union dues directly during that five-month period, calling into question whether they wished to remain dues-paying members. And some employees had begun paying UE directly, so resuming deductions from their paychecks without their consent would have resulted in them paying dues twice. Tr. Day 1, p 77. Against that backdrop, the State informed the Union in March 2018 that it would require new authorization

cards to ensure that dues deductions were voluntary and compliant with Iowa Code section 91A.5 (2017).<sup>2</sup>

The Union contends that the dues deduction authorizations were irrevocable by the employer. Appellee Br. at 23. But the contracts were silent on the question of employer revocation. The 2015-17 CBAs and the then-operative language in Iowa Code section 70A.19 required an employee who elected a payroll deduction to “maintain the deduction for a period of one year or until the expiration of the collective bargaining agreement, whichever occurs first.” Iowa Code § 70A.19 (2017). This language was similar to language in the National Labor Relations Act

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<sup>2</sup> While the State and the Union were engaged in discussions about how to implement the contract provisions in the spring of 2018, the U.S. Supreme Court was considering whether the First Amendment allows states to deduct union fees from employee paychecks without their affirmative consent. *Janus v. Am. Fed. of State, Cty. and Mun. Employees*, 138 S. Ct. 2448, 2486 (2018). In June 2018, the Supreme Court held that deducting union fees from nonconsenting employees violates the First Amendment. *Id.* (holding that “States and public-sector unions may no longer extract agency fees from nonconsenting employees.”). Under the *Janus* standard, employee consent must be clear and affirmative. *Id.* Even before *Janus*, Iowa law made it a misdemeanor to deduct union dues without an individual written order signed by the employee. Iowa Code § 731.5 (2017).

“NLRA”), which allows dues deductions if an employee has provided the employer with “a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner . . .”. 29 U.S.C.A. § 186(c). Construing that language, the National Labor Relations Board has concluded that an employer may unilaterally cease dues checkoff after a collective bargaining agreement expires. *Valley Hospital Med. Ctr., Inc. d/b/a Valley Hospital Med. Ctr.*, 368 NLRB No. 139, 2019 WL 6840790 (N.L.R.B. 2019) (corrected opinion at 2020 WL 2994242). In so holding, the NLRB reaffirmed nearly fifty years of precedent and concluded that “a dues-checkoff provision properly belongs to the limited category of mandatory bargaining subjects that are exclusively created by the contract and are enforceable through section 8(a)(5) of the [NLRA] only for the duration of the contractual obligation created by the parties.” *Id.*, 2019 WL 6840790, at \*1. Similarly under Iowa law, although dues checkoff was a mandatory subject of bargaining prior to the 2017 amendments, *see* Iowa Code section 20.9 (2017), the statute did not require the parties to include

a dues checkoff provision in the contract: “*If* an agreement provides for dues checkoff, a member’s dues may be checked off only upon the member’s written request . . .” Iowa Code § 20.9 (2017) (emphasis added). Moreover, any dues checkoff provision was required to be “embodied in a written agreement and signed by the parties,” which had not occurred for the 2017-19 contract term when the State stopped deducting dues. *Id.* Thus, the dues checkoff provisions were a creation of the contracts and nothing in the contracts prohibited the State from terminating the checkoff upon contract expiration.

UE argues that the State and UE did agree to extend the contracts in writing. Appellee Br. at 22-23. But the union dues provision that the parties agreed to required the State to deduct dues “[u]pon receipt of a voluntary individual written request from any of its employees covered by this Agreement on forms provided by the Union . . .”. The provision was triggered upon the receipt of voluntary requests, and the State did not have current requests on file due to the dispute about contract formation.

## **II. THE DISTRICT COURT ERRED WHEN IT AWARDED DUES AS DAMAGES.**

### **A. The Award of Dues as Damages was not Foreseeable.**

UE argues that the Court need not look beyond the four corners of the agreements because the contracts were clear. Appellee's Br. at 32. But the contracts did not say anything about damages. In fact, the only contract provision addressing liability for dues deductions required UE to indemnify and hold the State harmless for any actions or inactions taken under "this Section"—the dues deduction section—of the contract. CBAs, Article II, Section 2, subsection D. UE argues that the nature and purpose of the contract supports a damages award. Appellee Br. at 33-34. But the nature and purpose of the contract was to foster cooperative relationships between the State and its employees. And the nature and purpose of the dues deduction provision was to facilitate the employees' payment of union dues in a convenient manner. Neither the text of the agreements nor the prior practice of the parties suggested the taxpayers would be responsible for paying union dues.

**B. Federal Law does not Support the Damages Award.**

UE points to federal cases in which courts awarded damages. Appellee Br. at 38. The cases cited by UE are distinguishable. In *Amalgamated Meat Cutters*, the federal district court ordered the employer to pay union dues where the employer stopped deducting dues after employees submitted revocations outside the allowed window for doing so. In that case, the dues checkoff authorization cards signed by the employees included a narrow window when the authorizations could be revoked and stated that the dues checkoff authorization “shall be automatically renewed for successive periods of one (1) year...”. *Amalgamated Meat Cutters and Allied Workers of N. Am., Local No. 593 v. Shen-Mar Food Prod., Inc.*, 405 F. Supp. 1122, 1123 (W.D. Va. 1975). In this case, there was no contract language or other evidence that the dues checkoffs were automatically renewable. The bankruptcy case cited by UE also does not support a damages award for dues. In fact, the portion of the bankruptcy judgment that UE relies on was modified on appeal to the district court. *See In re U.S. Truck Co., Inc.*, 89 B.R. 618, 629 (E.D. Mich. 1988). Rather than affirming the bankruptcy court’s

award of union dues as damages, the district court directed that the dues be deducted from sums awarded to individual employees:

[T]he court has awarded rejection damages to individual employees as well as to the Union for the lost dues. It is these same employees that actually owe the dues. The court believes the proper course here is to remand the case and order the bankruptcy court to amend its judgment. The court below shall deduct the union dues from each individual employees' damages awards. The Union will still receive the union dues which have not been paid. The employees, who undisputedly owe the dues, will be paying them, rather than U.S. Truck.

*Id.* Similarly here, even if the court affirms the district court's judgment that a breach occurred, the Court should modify the judgment to require dues to be paid by the employees. UE contracted for dues to be deducted from employees' paychecks. The same employees who owe the dues will be receiving back pay under the district court's judgment. If the dues are deducted from the employees' back pay, UE will still receive the union dues that have not been paid. The employees, who undisputedly owe the dues will be paying them, rather than the State.



**C. Retroactive Dues Deduction is the Proper Remedy Regardless of the Court's Ruling on Sovereign Immunity.**

UE spends much of its brief discussing the State's sovereign immunity argument and asserting that the State did not preserve error on that question. To be clear, the State's position is that retroactive dues deductions, rather than damages, are the proper remedy regardless of whether the State enjoys sovereign immunity. The two arguments are independent of one another.

**D. Practical Considerations do not Support the Damages Award.**

UE argues that the State's proposed remedy is impractical and would not make UE whole. Appellee's Br. 39-40. UE states that many employees employed in late June 2017 are no longer employed by the State. But most former employees will be receiving back pay under the district court's judgment, so the dues can be deducted from that pay. UE also argues that retroactivity does not account for interest. Although the CBAs do not provide for interest, if interest is due the district court could have fashioned a more tailored remedy directing that dues be deducted from back pay retroactively and directing the State to pay interest. Retroactive

dues deductions would more accurately capture the amount of dues actually owed to the union because the dues amount would be based on actual deductions from the back pay of those employees who were dues-paying members and did not otherwise pay their union dues. In contrast, the district court's damages award was based on the Union's estimates of what it *might have* received based on prior contract years, not on any concrete numbers based on how many employees had actually signed up for dues deductions as of the beginning of the 2017-19 contract term. Tr. Day 1, p. 61, p. 82-83.

**E. Sovereign Immunity May be Raised at any Time.**

UE asserts that the State waived sovereign immunity. UE first argues that the State waived sovereign immunity by not raising it in the first lawsuit. However, the district court in the first action only addressed contract formation and did not reach the question of breach or damages. 4/6/2018 Order on Motion to Compel Specific Performance at 2. [App. 20-23]. In this case, 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]. The sovereign immunity argument is a legal argument that did not require any further factual development at trial. 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].

The underlying purpose of this Court's error preservation rule is to ensure that issues are raised and decided prior to appeal. *Lee v. State, Polk County Clerk of Court*, 815 N.W.2d 731, 739 (Iowa 2012). UE had an opportunity to respond to the State's argument and the district court decided it. *See id.* The State did not waive this issue.

**F. The State has not Waived Sovereign Immunity for Monetary Damages.**

When the State has constructively waived its sovereign immunity by entering into a contract or where, as in Iowa Code section 20.17(5), the legislature has authorized suit, the extent of the waiver of sovereign immunity is confined to the consequences the State has voluntarily assumed. This Court strictly follows the

statutory guidelines waiving the State's immunity. *Lee*, 815 N.W.2d at 740.

UE argues that the statutory framework and remedies available under chapter 20 are not relevant to this lawsuit because this is an action to enforce a contract under Iowa Code section 20.17(5), rather than an action pending in front of PERB. To the contrary, chapter 20 is relevant because it contains the extent of the legislature's waiver of sovereign immunity for civil actions to enforce the terms of a collective bargaining agreement. And chapter 20 does not contain any language authorizing or implying that the legislature intended to allow monetary damages against the State. Instead, chapter 20 merely states that "Terms of collective bargaining may be enforced by a civil action in the district court . . .". Iowa Code § 20.17(5). Nor does the contract itself contain any language suggesting the State agreed to waive sovereign immunity for money damages.

UE asserts that the State's position is inconsistent because the State has raised sovereign immunity for dues deductions, but not with respect to its obligation to pay back pay and overtime

compensation. Appellee's Br. at 57. UE misses the distinction between damages, on one hand, and retroactive performance, on the other. The back pay awarded by the district court is not a damages award—it is simply an order to perform the contract retroactively, which the State has never disputed it should do; the only real dispute had to do with the amounts owed to employees. Likewise, every other category of relief ordered by the district court and agreed to by the State on topics ranging from sick leave to bulletin board use is consistent with retroactive performance, which is the standard remedy in labor disputes. In contrast, the district court's order for the State to pay the union's dues from the public fisc, rather than ordering retroactive performance of the State's obligation to deduct dues from employees' paychecks, is a damages award that is barred by the doctrine of sovereign immunity.

### **III. THE UNION FAILED TO MITIGATE ITS DAMAGES.**

UE recounts the various steps it took to collect dues from employees after the expiration of the 2015-2017 CBAs, but UE does not explain why it did not take the relatively simple step of asking

employees to complete new dues deduction authorizations. The State had communicated its concern about lack of employee authorization to UE, and UE was aware of the State's willingness to reinstate dues deductions with new authorization forms. Had UE included a request for new dues authorizations among its many communications to employees, it could have substantially mitigated its damages.

#### **IV. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ATTORNEY FEES ARE NOT WARRANTED.**

On cross-appeal, UE asks the Court to reverse the district court's decision that attorney fees were not warranted. The district court denied UE's request for attorney fees, concluding that the State did not act in bad faith, observing, "[t]here were legitimate issues of fact that required further litigation." 2/7/2022 Judgment at 19. [App. 138].

In the absence of a statutory or contractual provision authorizing fees, attorney fees are awarded at common law only "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Baldwin v. City of Estherville*, 929 N.W.2d 691, 700 (Iowa 2019) (citations omitted). The allowance

of attorney fees for bad faith is an exception to the common law rule prohibiting attorney fees, and fees should only be awarded as a “rare exception.” *Remer v. Bd. of Medical Exam.*, 576 N.W.2d 598, 603 (Iowa 1998). This Court has required “at the very least a showing that the defendant’s culpability exceeded” the standard for punitive damages. *Hockenberg Equip. Co. v. Hockenberg’s Equip. & Supp. Co.*, 510 N.W.2d 153, 159 (Iowa 1993). The conduct must have been “oppressive,” or “difficult to bear, harsh, tyrannical, or cruel.” *Id.* “These terms envision conduct that is intentional and likely to be aggravated by cruel and tyrannical motives.” *Id.* The court’s review of a district court’s attorney fee decision is de novo. *Remer*, 576 N.W.2d at 159.

This Court should affirm the district court’s decision denying attorney fees. In the first lawsuit, the parties had a legitimate dispute about whether contracts had been formed in February 2017 after the legislature enacted sweeping changes to Iowa Code chapter 20. After the district court ruled in the first lawsuit that contracts had been formed and this Court denied the State’s motion to stay, the State promptly began performing under the contracts.

UE asserts that the State refused to comply with this Court's May 17, 2019 ruling in the first lawsuit. Appellee's Br. at 64. But this Court only ruled that a contract had been formed, affirming the district court's summary judgment ruling in the first case. *UE Local 893/IUP v. State*, 928 N.W.2d 51, 68 (Iowa 2019). As the district court explained in the first lawsuit, its summary judgment ruling only addressed formation:

It must be remembered what this court held in its earlier ruling and what that ruling did not address. All this court dealt with on the aforementioned cross-motions for summary judgment was whether the negotiations between the parties yielded an enforceable collective bargaining agreement; the terms of the purported agreement were not part of the record considered in ruling in favor of the plaintiff. In other words, when the court directed the parties to "perform as required under the agreement," all it meant was that there was an agreement to perform under. What the parties' respective obligations were under the agreement was not before the court and was not adjudicated in its ruling on summary judgment.

Case LACL137250, 4/6/2018 Order Denying Motion to Compel Specific Performance at 2. [App. 20-21].

As the State began performing the contracts, the parties disputed the amounts of back pay owed and how dues should be handled in light of the fact that they had not been deducted from



employees' paychecks for some time. As the district court observed, these were legitimate disputes that required judicial resolution. The State has not disputed at any time that it owed back pay to employees; rather, the dispute was about the proper amounts owed and whether the State should be credited for wages it paid in excess of what the contracts required. At trial in this case, although UE had the burden of proof, the State undertook the laboring oar to provide the court with documentation and testimony about what amounts were due to each employee for each category of pay. Tr. Day 2, pp. 81-82. The State did this to facilitate the district court's resolution of the issues and to ensure that the district court's ultimate judgment reflected amounts that were accurate and fair to employees and the State. And, as the district court noted, the State agreed to most non-economic remedies. 2/7/2022 Judgment at 19. [App. 138].

## **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 without new authorizations. 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. Finally, the State requests that the Court affirm the district court's denial of attorney fees.

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  
Assistant Attorney General

## **CERTIFICATE OF COMPLIANCE**

This Reply Brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 3,643 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Emily Willits  
Assistant Attorney General

## **CERTIFICATE OF FILING AND SERVICE**

I certify that on October 5, 2022, this Reply Brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal via EDMS.

/s/ Emily Willits  
Assistant Attorney General