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IN THE SUPREME COURT OF IOWA

NO. 18-0018

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 199

Plaintiff-Appellant,
vs.

STATE OF IOWA, IOWA BOARD OF REGENTS,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY,
THE HONORABLE JEFFREY D. FARRELL

PLAINTIFF-APPELLANT'S FINAL BRIEF and REQUEST FOR ORAL SUBMISSION

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.110, the Iowa Supreme Court should retain this case as it presents a significant issue of law where there is no controlling precedent from the Iowa Supreme Court or Iowa Court of Appeals and is an issue of first impression and of public importance that should be determined by the Iowa Supreme Court. Further, this matter presents significant questions regarding an administrative agency's ability to create rules outside the statutory requirements outlined in law.

CASE STATEMENT

This case arose when Service Employees International Union, Local 199 (hereinafter SEIU), on March 10, 2017 filed a petition in District Court to enforce the terms of a collective bargaining agreement between SEIU and the State of Iowa, Iowa Board of Regents (hereinafter Regents). (App. 6)

SEIU and the Regents each filed a motion for summary judgment and the Court sets the motions for hearing on December 6, 2017.

The Court found that the Regents submitted a "final offer" and a complete collective bargaining agreement to SEIU on January 10, 2017, that the offer was accepted by SEIU on January 25, 2017 (App. 212-213), and that SEIU's membership ratified the January 10, 2017 offer on February 7, 2017 (App. 213). The Court further concluded that following the January 10th offer, SEIU did not make a counteroffer,

did not reject the Regents offer of January 10th, nor did the Regents withdraw the offer prior to acceptance (App. 213, 221).

Thus, all statutory requirements for the formation of a collective agreement were completed. The Court still had to determine whether PERB, could by rule, create an additional requirement for contraction formation. PERB Rule 6.5 provides that an employer must meet to accept or reject, even its own offer, within ten days of ratification by the employee organization.

The Court found that PERB could, by rule, create an additional requirement for contract formation and held that since the Regents never met to approve or disprove, the agreement once ratified by SEIU, there was no contract. Thus, the Court granted the Regents' motion for summary judgment and denied SEIU's motion for summary judgment (App. 222).

SEIU appeals from the determination that where all statutory requirements have been fulfilled, that PERB may by rule can add another requirement for contract formation. In the alternative if the rule is valid, then the failure of the Regents to meet to approve the agreement resulted in a collective bargaining contract.

STATEMENT OF THE FACTS

SEIU is an employee organization as defined by Iowa Code Section 20.3(4) and the Regents is a public employer as defined by Iowa Code Section 20.3(10).

SEIU represents approximately 3,500 employees who work at the University of Iowa Hospitals and Clinics (UIHC), a Regents institution (App.211). The Regents, as do all public employees, have an obligation under Iowa Code 20.16 to enter into negotiations with the certified employee organization upon request from the organization, here SEIU.

The Regents can conduct negotiations either through their own board or they may designate a representative to act in their stead. (Iowa Code Sections 20.17(2), 20.17(9). The Regents selected Michael Galloway as their representative. (App. 140). SEIU's lead negotiator was Jim Jacobson (App. 140).

Once Galloway was designated by the Regents as their bargaining representative, SEIU was obligated to negotiate with the Regents through Galloway and could not negotiate with the Regents governing board. Any attempt to negotiate with the governing board would have violated the law and constituted a prohibited practice. (Iowa Code Section 20.10(3)(j)).

The bargaining process in Iowa is commenced through the exchange of initial bargaining proposals which must be done in public and can be done simultaneously. (Iowa Code Section 20.17(3)). Here, SEIU and the Regents met on November 29, 2016 to exchange initial bargaining proposals (App. 8, 70). SEIU and the Regents met again on December 8th and December 14th to negotiate and exchange additional

proposals (App. 8, 70). The Regents then cancelled bargaining sessions scheduled for January 5, 2017 (App. 8, 71) and January 12, 2017 (App. 8, 71).

Mr. Galloway represented to SEIU that the proposal communicated by him was the offer of the Board of Regents. Mr. Galloway stated that he met and "visited" with the Board (App. 119) before the Regents made their January 10th final offer (App. 120-132), and the final offer represented all the approval "authority" he had from the Regents. (App. 120).

Although, Galloway in an after-the-fact affidavit, stated that he informed SEIU representatives that any proposed agreement would have to be approved by the Regents (App. 157). It is clear that the "final offer" presented on January 10th was preapproved by the Regents and the offer was that of the Regents even though it was presented by the representative. (App. 119, 120-132). The Regents proposal was more than simply an offer outlining the terms of an agreement. The "final offer" was a complete collective bargaining agreement, designated as such, stating it was between the Regents and SEIU, and also identifying the term of the agreement (App. 121-132).

The exchange was as follows:

Michael Galloway, on January 9, 2017, stated on behalf of the Board of Regents, in an email to PERB with a copy to Jim Jacobson that:

> "We will be giving the union a final offer in writing this week. Jim is correct that we cancelled the 5th so I could

> **visit with the board** and the hospital regarding my **financial authority**. I am having surgery on the 11th so I cannot make the 12th.
>
> **Our final offer will contain all the financial authority I will have.** If it is not acceptable then we should just schedule mediation. Thanks."

(Emphasis added). (App. 119).

On January 10, 2017 Michael Galloway, the Regents chief negotiator, emailed Jim Jacobson, the chief negotiator for SEIU, as follows:

> "Jim
>
> Please find attached the **Board of Regents' final offer** to SEIU. The offer includes all the items we had agreed previously upon during negotiations. I believe this offer represents a substantial increase to the inpatient nurses and is a fair offer to the other members of the bargaining unit. **This offer contains all the financial authority we have from the board of regents**. Please let us know if this offer is acceptable.
>
> If the offer is not acceptable, we will need to schedule mediation during the week of January 30th."

(Emphasis added). (App. 120).

Board of Regents offer accompanying the January 10th email is a complete collective bargaining agreement (App. 121-132) is not contingent and is definite in its term:

> Board of Regents, State of Iowa and University of Iowa
> Counter Proposal
> January 10, 2017
> Final Proposal

The proposal is entitled "a collective bargaining agreement" between the Regents and SEIU with the effective date of the contract, July 1, 2017 through June 30, 2019 and specifically sets in Article XV, Duration, Section 1 Term. This agreement shall remain in full force and effect for a period of two (2) years from July 1, 2017 through June 30, 2019. (App. 121-132).

On January 17, 2017, Jim Jacobson called Michael Galloway (App. 133-134, 141, 212, 221) and inquired as to whether better terms were available as to only the Weekend Option Program for nurses and a probationary period of new employees (App. 141, 212-213, 221). Mr. Jacobson, however, did not reject the Regents offer of January 10th, nor make a counter proposal. (App. 133-134, 212-213, 221).

On January 18th Mr. Galloway responded to Mr. Jacobson stating that terms different from the January 10th offer were not available. (App. 135). Mr. Galloway further emphasized the need to quickly get an agreement on the Regent's January 10th offer:

> "Jim
>
> Unfortunately, I do not have a response. I know UIHC would be much more comfortable leaving the probationary status current contract and maintaining our position on weekend option. That being said, the biggest issue now is that the Regents have heard rumors regarding the position AFSCME has taken with the State. It is my understanding that the Union's offer was dramatically lower than 2% and increased the insurance contributions.

> I understand these are different units, but there will be grave concerns regarding our offer once it is received/understood by the Governor's office. I knew this could become an issue and was hoping to avoid it by getting this contract complete quickly."

(App. 135).

Jim Jacobson then wrote to Michael Galloway on January 25, 2017:

> "Mike,
>
> I left you a voicemail earlier today. But I thought I better put it in writing. SEIU has agreed to the terms of BOR's final offer sent by email on January 10, 2017.
>
> SEIU will hold a ratification vote as quickly as possible and let you know the results.
>
> Please contact me regarding drafting, clean version of the document."

(App. 136).

On January 31, 2017 the Regents through their representative, Michael Galloway, in an oral conversation with Jim Jacobson, stated that he did not believe the parties had reached an agreement, but never withdrew the Regents offer of January 10th. (App. 142, 144, 212, 213, 221).

Mr. Jacobson then sent an email to Mr. Galloway stating:

> "Mr. Galloway,
>
> In light of our conversation yesterday, I wanted to recap the situation in which SEIU, as the legal representative of approximately 3,500 health care professionals, and the Board of Regents find themselves.

> On January 10, 2017, you sent SEIU, as the chief negotiator for the Board of Regents, a final contract offer.
>
> On January 25, 20217, SEIU accepted the offer with both a voice message and an email message.
>
> On January 31, during a telephone conversation, you and Tim Cook informed me that the Board of Regents believed the parties had not, in fact, reached an agreement.
>
> As I said yesterday, SEIU plans to hold its ratification vote in the very near future. I will inform you of the results.
>
> Please let me know if the Board of Regents' position changes.
>
> Jim Jacobson"

(App. 137).

On February 8, 2017 Jim Jacobson, on behalf of SEIU sent an email to the Regents through its representative, Michael Galloway, stating, "SEIU, Local 199 ratified the tentative agreement with a vote on February 7, 2017." (App. 142, 145). Ratification following offer and acceptance results in a collective bargaining agreement under Iowa Code Section 20.17(4). (App. 213-214).

There is no additional statutory provision stating that the Regents are to vote on their own final offer subsequent to ratification by the employee organization. The Regents did not meet to accept or reject the agreement within ten days of ratification by SEIU. (App. 86,142, 214).

ARGUMENT

I. THE COURT ERRED IN NOT CONCLUDING THAT A COLLECTIVE BARGAINING AGREEMENT EXISTED AFTER FINDING THAT THE REGENTS FINAL CONTRACT OFFER HAD BEEN ACCEPTED BY SEIU AND SUBSEQUENTLY RATIFIED BY ITS MEMBERS.

A. Preservation of Error

SEIU properly raised the issues before the District Court in their motion for summary judgment. SEIU further filed a timely Notice of Appeal, therefore preserving errors on the issues before this Court.

B. Standard of Review

Appellate Courts review a district court's ruling on a motion for summary judgment for the correction of errors at law. See Iowa R. App. P. 6.907. Under Iowa Rule of Civil Procedure 1.981(3), summary judgment is proper only when the record shows no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smidt v. Porter,* 695 N.W.2d 9, 14 (Iowa 2005). A genuine issue of fact exists if reasonable minds can differ on how an issue should be resolved. *Walker v. State*, 801 N.W.2d 548, 554 (Iowa 2011). The court must look at the facts in a light most favorable to the party resisting the motion and must indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question. *Faeth v. State Farm Mut. Auto. Ins. Co*., 707 N.W.2d 328, 331 (Iowa 2005).

C. All Chapter 20 statutory provisions for formation of a collective bargaining agreement were completed.

The Regents through their representative on January 10th presented a preapproved final offer for a collective agreement to SEIU. (App. 119-132). SEIU accepted the final offer for a complete collective bargaining agreement on January 25, 2017 (App. 136). The members of SEIU then ratified the agreement on February 7, 2017 (App. 142, 145). Ratification following offer and acceptance results in a collective bargaining agreement under Iowa Code Section 20.17(4).

D. Between January 10, 2017 and ratification by SEIU, SEIU did not make a counter offer or reject the Regents' proposal, nor did the Regents withdraw their offer of January 10th.

On January 17, 2017 the SEIU representative, Jacobson, spoke with Galloway to inquire as to whether better terms were available on only two areas of a twenty-five-article contract proposal by the Regents, specifically the Weekend Option Program for nurses and the length of the probationary period for new employees (App. 141, 144).

On January 18th Galloway responded that better terms were not available. (App. 135). SEIU at no time presented a counter offer even on the two areas of inquiry or rejected the Regents proposal. (App. 132-133), nor did the Regents ever withdraw their offer. (App. 212-213, 221).

II. APPLICATION OF APPLICABLE COLLECTIVE BARGAINING PRINCPLES ESTABLISH THAT A COLLECTIVE AGREEMENT IS IN EFFECT BETWEEN THE REGENTS AND SEIU.

A. Federal Law

Collective bargaining agreements in Iowa are enforced through an action filed pursuant to Iowa Code Section 20.17(5). *AFSCME Council 61 v. State of Iowa*, 484 N.W.2d 390 (Iowa 1992). There is no equivalent provision in federal law than to what is found in Iowa Code Section 20.17(5). However, the statutory duty to bargain in good faith provisions under Federal and Iowa Laws are nearly identical. In comparing section 8(a)5 and 8(d) of the National Labor Relations Act, the section outlining the "obligation to negotiate in good faith" with the same obligation under the Iowa Public Employment Relations Act, Iowa Code Section 20.9, the section outlining the "obligation to negotiate in good faith" in Iowa, the rules are near reflections:

Federal Duty to Bargain in Good Faith	Iowa Code Chapter 20 Duty to Bargain in Good Faith-
"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages" Section 8(d) of the Act, 29 U.S.C. 158(d)(1976)	"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."

Contracts under the National Labor Relations Act result from either voluntary agreement either at the bargaining table or following a strike. U.S.C. § 158 (d). In Iowa, collective bargaining agreements result from either voluntary agreement, under Iowa Code Section 20.17(4) or an arbitrator's award on the disputed terms, under Iowa Code Section 20.22(10).

The Iowa Supreme Court has looked to and adopted federal case law principles in the *interpretation* of collective bargaining agreements. In *Sergeant Bluff-Luton Education Association v. Sergeant Bluff Luton Community School Dist*., 282 N.W.2d 144 (Iowa 1979), the association sought to enforce an arbitrator's award interpreting the terms of a collective agreement. *Id*. at 145-46. The Court had before it not a question of contraction formation but rather the question of whether to enforce the terms of a collective bargaining agreement following the decision by the grievance arbitrator. *Id*. at 146. The Court adopted federal case law principles in holding that a collective bargaining agreement is much different than an ordinary contract.

> "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. at 150. (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 (1964).

With *Sergeant Bluff* in mind, the seminal case explaining the *formation* of employment law contracts in the federal realm and one which has been consistently followed is *Pepsi-Cola Bottling Co. of Mason City, Iowa v. National Labor Relations Bd.*, 659 F.2d 87 (8th Cir. 1981).

In *Pepsi-Cola Bottling Co. of Mason City, Iowa v. National Labor Relations Board* the Court stated:

> "This case presents an important issue of first impression for this court in the labor relations field: whether in negotiating a collective bargaining contract an unconditional offer remains open to acceptance after the other party has rejected the offer or submitted a counter proposal."

Id. at 90.

Pepsi-Cola provides a framework for how the Courts look at the formation of collective bargaining agreements and how they differ from ordinary contracts. In *Pepsi-Cola*, the union had both rejected the company's offer and made a counter proposal. *Pepsi-Cola,* 659 F.2d 88.

The *Pepsi-Cola* Court relied on the same principles relied on by the Court in *Sergeant Bluff* in explaining that collective bargaining agreements are not like ordinary contracts:

> "The company first asserts that traditional principles of contract law govern the formation of collective bargaining agreements and, therefore, that the union's unequivocal rejection of the company's proposal terminated the July 12th offer. We disagree. The rule has well established that technical rules of contract do

> not control whether a collective bargaining agreement has been reached."

Pepsi-Cola, 659 F.2d 89. (citing *John Wiley,* 376 U.S. 550.)

In explaining the difference, the Court stated:

> "…The National Labor Relations Act compels the employer and the duly certified union to deal with each other and to bargain in good faith. Upon rejection of an offer, the offeror may not seek another contracting party. As explained by the Supreme Court, "the choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations." *Pepsi-Cola Bottling* at 89 citing *United Steel Workers of America v. Warrior and Golf Navigation Company*, 363 U.S. 574, 580.
>
> "Thus, the common law rule that a rejection or counter proposal necessarily terminates the offer has little relevance in the collective bargaining setting."

Id.

The same is true in the public-sector bargaining in Iowa. A contract is going to result either through voluntary agreement (Iowa Code Section 20.17(4)) or an arbitrator's award on the unresolved terms (Iowa Code Section 20.22(10)).

The Eighth Circuit determined:

> "A contract offer is not automatically terminated by the other party's rejection or counter proposal, but may be accepted within a reasonable time unless it was expressly withdrawn prior to acceptance, was expressly made contingent upon some condition subsequent, or was subject to intervening circumstances which made it unfair to hold the offeror to its bargain."

Pepsi-Cola, 659 F.2d 88.

In *Pepsi-Cola,* the Court further rejected arguments that the offer, once made, had to be immediately accepted (not accepted until three weeks later), was rendered void by a counter offer, or that changed circumstances were sufficient to nullify the offer. *Id.* at 90.

Multiple other federal circuits have ruled similarly to that of the Eight Circuit in *Pepsi-Cola*. In *National Labor Relations Board v. Boston Dist. Council of Carpenters*, the First Circuit Court of Appeals held "in the collective bargaining context, an offer will remain on the table unless the offeror explicitly withdraws it or unless circumstances arise that would lead the parties to reasonably believe the offeror has withdrawn the offer." *Boston Dist. Council of Carpenters*, 80 F.3d 661 (1st Cir, 1996). The Court in *Williamhouse-Regency of Delaware, Inc. v. National Labor Relations Bd*., held that a collective bargaining offer may be accepted at any time unless it was expressly withdrawn. *Williamhouse-Regency of Delaware, Inc*, 915 F.2d at 635 (11th Cir. 1990).

Thus, even if SEIU had made a counter offer or rejected the Regents proposal, which they did not (App. 141, 212-213, 221) a contract still would have resulted under the application of federal law principles.

B. State Law

If the court does not apply the federal standard of collective bargaining agreements, the application of traditional contract law principles establishes that a collective bargaining agreement was reached between SEIU and the regents.

In the instant case, there was neither a counter proposal, nor a rejection of the employer's proposal. (App. 141, 212-213, 221). With that in mind, an application of traditional contract law principles results in an agreement. In Iowa, Courts generally rely on traditional notions of contract law found under the Restatement (Second) of Contracts and have adopted the Restatement's position on numerous occasions. *See, e.g., Johnson v. Assoc. Milk Producers, Inc.*, 886 N.W.2d 384, 390 n.2 (Iowa 2016); *Shelby Cty. Cookers, L.L.C. v. Util. Consult. Intern., Inc.*, 857 N.W.2d 186, 191 (Iowa 2014); *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 224 (Iowa 1988).

Further, Iowa Courts have concluded a contract is formed where there is offer, acceptance, and consideration. In order to be bound by a contract, "the contracting parties must manifest a mutual assent to the terms of the contract, and this assent usually is given through the offer and acceptance." *Kristerin Development Co. v. Granson Investment*, 394 N.W.2d 325, 331 (Iowa 1986); *see also Hayne v. Cook*, 252 Iowa 1012, 1021, 109 N.W.2d 188, 192 (1961). An offer is a "manifestation of willingness to enter into a bargain, so made as to justify another

person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981); *Anderson v. Douglas & Lomason Co*., 540 N.W.2d 277, 285 (Iowa 1995). Iowa Courts also look at the existence of an offer objectively, not subjectively. *Anderson v. Douglas & Lomason Co*., 540 N.W.2d 277, 285 (Iowa 1995). The test for an offer is whether it induces a reasonable belief in the recipient that he or she can, by accepting, bind the sender. *Id.* at 286. If an offer is not definite, there is no intent to be bound. *Id.*

Here, the Regent's exclusive bargaining representative made an offer to SEIU on January 10, 2017. (App. 120-132), The Regents have claimed that SEIU made a counter offer by orally asking questions or seeking better terms on January 17th in a conversation between Michael Galloway and Jim Jacobson. This was not a counter offer.

A counter-offer terminates an offer and establishes a new offer. Restatement (Second) of Contracts § 36. However, the undisputed facts of both parties and the case law refute any notation that a counter offer was made by SEIU and the District Court properly so concluded. (App. 212-213, 221).

The legally accepted definition of a counter offer establishes that no counter offer was made. A counter-offer "concerns the same matter as the original offer, but proposes "a substituted bargain differing from that proposed by the original offer."

Washington v. State, 697 N.W.2d 127, N.3 (Iowa 2005) (citing Restatement (Second) of Contracts, § 39(1)).

Likewise, any inquiry or question regarding the Regent's proposal did not constitute a counter offer.

> A mere inquiry regarding the possibility of different terms, a request for a better offer, or a comment upon the terms of the offer, is ordinarily not a counter-offer. Such responses to an offer may be too tentative or indefinite to be offers of any kind; or they may deal with new matters rather than a substitution for the original offer; or their language may manifest an intention to keep the original offer under consideration.

Restatement (Second) of Contracts § 39 cmt. *b.*

"A mere inquiry about different or better terms does not necessarily amount to a counter offer." *Great Lakes Comm. Corp.*, 124 F. Supp. 3d. 824, 849–51(N.D. Iowa 2005) In *Great Lakes Comm. Corp*., Judge Bennett concluded that inquiries about the possibility of better terms did not make a counter offer. *Id*. at 50.

Based on the above caselaw, no counteroffer was made by SEIU on January 17, 2017, nor at any other point. The questions posed on January 17th do not constitute a counter offer.

On January 25, 2017, SEIU, through their exclusive bargaining representative accepted the Regents offer of January 10, 2017. (App. 136).

On February 8, 2017, as required by Iowa Code 20.17(4), SEIU ratified the accepted January 10, 2017 offer from the Regents. (App. 142, 145). Thus, under the application of traditional contract principles the result is a collective agreement.

Therefore, if the Court declines to adopt the federal principles applicable to the formation of collective bargaining agreements, under the traditional principles of contract law, a collective bargaining agreement was made and is in force between SEIU and the Regents based upon offer and acceptance.

III. THE COURT ERRED IN DETERMINING THAT PERB BY RULE COULD CREATE AN ADDITIONAL REQUIREMENT FOR CONTRACT FORMATION AND THAT ACCEPTANCE OF REGENTS' OFFER THROUGH THEIR REPRESENTATIVE DID NOT CREATE A COLLECTIVE BARGAINING AGREEMENT.

The central issue before the Court is whether Iowa's Public Employment Relations Board (hereinafter PERB) can add, by administrative rule, an additional requirement for a collective bargaining agreement to become binding that is not found in statutory law.

A. The Iowa Public Employment Relations Board cannot by rule add an additional requirement for collective bargaining agreement formation not set forth by statute.

Under either the federal standard or traditional contract principles, a collective bargaining agreement in Iowa is created by an offer, acceptance, and ratification by the employee organization pursuant to Iowa Code Section 20.17(4). The Defendants argued in their Motion for Summary Judgment and the District Court agreed that under PERB's administrative rules, a proposed collective bargaining agreement is not completed until accepted by the public employer, subsequent to ratification by the employee organization pursuant to PERB Rule 621-6.5(3). Rule 6.5(3) outlines:

> The public employer shall, within ten days of the tentative agreement, likewise meet to accept or reject the agreement, and shall within 24 hours of the acceptance or rejection serve notice on the employee organization of its acceptance or rejection of the proposed agreement; however, the public employer shall not be required to either accept or reject the tentative agreement if it has been rejected by the employee organization.

Such a requirement is not found in the controlling statute, Iowa Code Chapter 20.

Iowa Code 17A.23(3) outlines:

> An agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency. Unless otherwise specifically provided in statute, a grant of rulemaking authority shall be construed narrowly.

Iowa Code Chapter 20 does not grant PERB an enlarged or expanded authority in creating new rules that go beyond what is in the statute. PERB Rules are in place to effectuate the purposes and provisions of the Public Employment Act. Rule 621-1.2 provides, "The purpose of the Public Employment Relations Board established by the Public Employment Relations Act is to *implement* the provisions of the Act..." (emphasis added). Implementing the provisions of the Act does not include adding provisions to the Act.

While the District Court was correct in finding that they did not have the authority to find the rule invalid, the Court must still determine whether an agency can add by rule a requirement for contract formation not found in the statute. In

Renda v. Iowa Civil Rights Commission, the Iowa Supreme Court discussed at length the judicial deference owed to an administrative agency's statutory interpretation. *Renda*, 784 N.W.2d 8, 10, 15 (Iowa 2010). The Court found that "each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes." *Id*. at 13.

In the District Court's ruling, the Court stated:

> There are no established provisions of law governing union approval of contracts, so it makes sense to set a procedure to clarify how the union will signify acceptance. While there is no comparable language in section 20.17 regarding how the public employer must approve the contract, public boards and commissions are required to provide notice to the public and meet before voting on any action within the scope of its duties. *See generally* Iowa Code ch. 21. Section 20.17 does not contain any language to suggest that a public body divests itself of the ability to meet and approve a contract that is negotiated by its representative and the union. PERB's rule merely spells out when and how that will occur.

(App. 217).

Iowa Code 20.17 outlines the procedures for the negotiations of collective bargaining agreements between public employees and employers in Iowa. There is no comparable language in 20.17 to require the approval or disapproval by a public employer after the ratification by the employee organization. Contrary to the District Court's conclusion, Iowa Code Chapter 20 exclusively sets forth the requirements for collective bargaining agreement formation, ending with ratification by the

employee organization. There is no provision in Iowa Code Chapter 21 that would add an additional requirement for formation of collective bargaining agreements negotiated under Chapter 20.

To the extent that there was, a conflict between Iowa Code Chapter 20 and 21, the more specific provisions of Chapter 20 would prevail. See Iowa Code Section 4.7. "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision."

Alternatively, Iowa Code 20.17(3) clearly explains that "[n]egotiating sessions, strategy meetings of public employers, mediation, and the deliberative process of arbitrators shall be exempt from the provisions of chapter 21." With that being said, it is clear from the reading of Iowa Code 20.17(3) that the legislature intended Iowa Code Chapter 20 to be the sole source for regulation of collective bargaining in Iowa.

In looking at the entirety of the issue regarding PERB Rule 6.5(3), Iowa Code Chapter 20.17(4) clearly requires only ratification by the employee organization, and not subsequent approval by the public employer. With that in mind, the Court is obligated to find that the statute supersedes any conflicting administrative rule. In further looking at this issue, "[t]he plain provisions of a statute cannot be altered

by administrative rule." *Nishnabotna Valley Rural Elec. Coop. v. Iowa P. & L. Co*., 161 N.W.2d 348, 352 (Iowa 1968). Additionally, "[r]ules cannot be adopted that are at variance with statutory provisions, or that amend or nullify legislative intent." *Iowa Department of Revenue v. Iowa Merit Employment Commission*, 243 N.W.2d 610, 615 (Iowa 1976); *see also* 73 C.J.S. Public Administrative Bodies and Procedures 94." It is also true that "[w]hile an administrative agency's construction of statutes and the rules it administers is entitled to weight, '(a)n administrative body may not make law or change the legal meaning of the common law or the statutes.'" *Holland v. State of Iowa*, 253 Iowa 1006, 1010, 115 N.W.2d 161, 164 (1962). Lastly, "[s]ince the central legislative body is the source of and administrative agency's power, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation." *Iowa Merit Employment Commission*, 243 N.W.2d 615.

The decisions of the Iowa Supreme Court are clear that the Court may only apply what the legislature did through the enactment of the statute, not what the legislature could or should have done. The legislature could have stated in Iowa Code Section 20.17(4):…the collective bargaining agreement shall become effective only if ratified by a majority of those voting by secret ballot *and thereafter if approved by the governing body of the public employer*. The legislature did not set

forth such an additional requirement for collective bargaining formation and PERB, by rule, may not add such an additional requirement.

Agency rules *implement* the provisions of the statute, they cannot add to the statute. A contrary holding would allow the agency by rule to make law. This is not a case where there is a conflict between statutory provisions, but one where the statute itself is clear in setting forth the requirement for collective bargaining agreement formation under Iowa Code Chapter 20. A rule which seeks to add to and is in conflict with the statutory provision should be given no weight. In such a case, the statutory provision clearly prevails, and no deference should be given to the agency rule and therefore in this case, a vote by the Regents accepting the collective bargaining agreement is not required after a valid offer, acceptance and ratification.

B. Regents preapproved offer communicated through representative with actual and/or apparent authority is binding on the Regents.

The negotiation of a collective bargaining agreement in Iowa begins with a request from a certified employee organization, here SEIU, to bargain, which triggers an obligation on the part of the employer, the Regents, to engage in the negotiation process pursuant to Iowa Code Section 20.16. Iowa Code Section 20.17(9) provides that the public employer may either negotiate a contract through its own board members or through a representative of its own choosing. Iowa Code Section 20.17(2) provides, "[t]he employee organization and the public employer

may designate any individual as its representative to engage in collective bargaining negotiation."

In the instant case, the Regents designated Michael Galloway as their bargaining representative (App. 141) and SEIU selected Jim Jacobson (App. 140).

Once attorney Michael Galloway was designated by the Regents as their bargaining representative, SEIU, pursuant to Iowa Code Section 20.17(9), was obligated to negotiate with the Regents through Michael Galloway and could not negotiate with the Regents governing board. An attempt by SEIU to meet with the Regents after the designation of a representative would be a prohibited practice (Iowa Code Section 20.10(3)(j)).

In looking at authority given to an individual, the Iowa Supreme Court has concluded:

> "Actual authority to act is created when a principal intentionally confers authority on the agent either by writing or through other conduct which, reasonably interpreted, *allows the agent to believe that he has the power to act.* Actual authority includes both express and implied authority. Express authority is derived from specific instructions by the principal in setting out duties, while implied authority is actual authority circumstantially proved."

Frontier Leasing Corp. v. Links Engineering, LLC, 781 N.W.2d 772, 776 (Iowa 2010) (*citing Dillon v. City of Davenport*, 366 N.W.2d 918, 924 (Iowa 1985)).

Apparent authority is authority the principal has knowingly permitted or held the agent out as possessing. *Frontier Leasing Corp.*, 781 N.W.2d 776.

(*citing Magnusson Agency v. Pub. Entity Nat'l Co. Midwest,* 560 N.W.2d 20, 25-26 (Iowa 1997). Apparent authority focuses on the principal's communications to the third party. Restatement (Third) of Agency §§ 2.03, 3.03, at 113, 173-74.

The Regent's exclusive bargaining representative, Mr. Galloway assured SEIU and PERB that he had met and "visited" with the Regents and had financial approval or "authority" (App. 119) before presenting a final proposal to SEIU (App. 120-132). In an email to PERB and copied to Jim Jacobson, Mr. Galloway states:

> "We will be giving the union a final offer in writing this week. Jim is correct that we cancelled the 5th so I could **visit with the board and the hospital regarding my financial authority**. I am having surgery on the 11th so I cannot make the 12th.
>
> **Our final offer will contain all the financial authority I will have.** If it is not acceptable then we should just schedule mediation. Thanks."

(Emphasis added). (App. 119).

On January 10th Mr. Galloway sends an email to Mr. Jacobson stating in relevant part:

> **"Please find attached the Board of Regents' final offer to SEIU… This offer contains all the financial authority we have from the board of regents.** Please let us know if this offer is acceptable.

(Emphasis added). (App. 120).

Mr. Galloway clearly states that the proposals are offers of the Board of Regents. Offers on which he has previously met, and "visited" with the Regents and

which he has been given full authority, "approval" by the Regents to propose. The offer attached to the email of January 10th is a full and complete collective bargaining agreement (consisting of twenty-five (25) articles) between the Regents and SEIU, setting forth the effective dates of the agreement of July 1, 2017 through June 30, 2019. (App. 121-132). Thus, the offer is (1) preapproved (2) is a final offer (3) is presented as a complete collective agreement (4) if accepted will result in a contract.

Using the Iowa Supreme Court's reasoning in *Frontier Leasing Corp. v. Links Engineering*, based on the Regents having specifically determined to conduct bargaining through a representative, appointed by the Board rather than on their own, gave the representative, Michael Galloway, actual authority.

If the Court finds that actual authority was not granted to the Regent's exclusive bargaining representative, SEIU at minimum could rely upon the representative's apparent authority. SEIU's reliance upon apparent authority is based upon the Regents representative assertions that he had met, "visited" with the Regents and had the approval and authority to make the offer for a complete collective bargaining agreement on January 10, 2017. (App. 119). The offer was accepted on January 25th and ratified on February 7th. (App. 136, 138).

At a minimum, the Regents exclusive bargaining representative, Michael Galloway, held himself out to have apparent authority to bind the Regent's into a collective bargaining agreement. With that being said, it appears from the selection

of Michael Galloway as the Regent's exclusive bargaining representative that he was veiled with actual authority and therefore had the proper authority to bind the Regents to a collective bargaining agreement with SEIU.

IV. IF THE PERB RULE WAS APPLICABLE THEN A CONTRACT RESULTED FROM THE FAILURE OF THE REGENTS TO COMPLY WITH THE RULE.

If the Court concludes that PERB can add an additional requirement for collective bargaining agreement formation by rule, then it is clear that the Regents did not comply with the rule. As previously outlined, Rule 6.5(3) requires

> The public employer shall, within ten days of the tentative agreement, likewise meet to accept or reject the agreement, and shall within 24 hours of the acceptance or rejection serve notice on the employee organization of its acceptance or rejection of the proposed agreement; however, the public employer shall not be required to either accept or reject the tentative agreement if it has been rejected by the employee organization.

The Regents affirmatively state that they did not hold a meeting within ten days of ratification by the employee organization to accept or reject the collective bargaining agreement. (App. 86). The failure to do so results in a collective bargaining agreement. To hold otherwise would allow an employer to escape its obligations under contract by refusing to meet to accept or reject on agreement they wanted to, thus nullifying all the provisions of Iowa Code Chapter 20.

SUMMARY AND CONCLUSION

On January 10, 2017 the Regents representative presented a final offer to SEIU for resolution of the entire agreement (App. 120-132). The representative stated that he had previously met with the Regents and the offer was accompanied by a full and complete collective bargaining agreement entitled, "Collective Bargaining Agreement Between the Regents and SEIU," and consisting of twenty-five articles with the effective dates of July 1, 2017 through June 30, 2019. (App. 119-132). Thus, the "final offer" was preapproved by the Regents and was the offer of the employer, not the representative.

SEIU accepted the offer on January 25, 2017 (App. 136), ratified the agreement through a vote of its members on February 7, 2017 (App. 142, 145), and provided notice to the employer thus resulting in a collective agreement pursuant to Iowa Code Section 20.17(4). (App. 142).

An agency rule, PERB Rule 6.5 provides that an employer within ten days after ratification by the employee organization is to meet to accept or reject the collective bargaining agreement. Iowa Code Chapter 20 does not contain such a provision and the District Court agreed. (App. 217). The Court, however, found that the rule was a proper exercise of the agency's rule making power (App. 217-218). The question presented on appeal is whether PERB may by rule create an additional requirement for contract formation not found in the statute. The District Court's

holding is conflict with the authority of administrative agencies to promulgate rules (Iowa Code Section 17A.23(3) and the established case law holding that while an agency can promulgate rules to *implement* statutory provisions, an agency cannot by rule *add* or *amend* statutory provisions.

Alternatively, if the agency has the authority to promulgate Rule 6.5 then the Regents failure to meet to accept or reject the agreement within ten days of ratification by SEIU results in a collective agreement. To hold otherwise would allow an employer to render the bargaining process meaningless simply by refusing to meet.

Thus, acceptance and ratification of the Regents preapproved final offer for a complete a 2017-19 collective bargaining agreement results in a collective bargaining agreement regardless of the validity of PERB Rule 6.5.

ORAL ARGUMENT NOTICE

Counsel requests to submit this case with oral argument.

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CERTIFICATES OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 6,885 words (less than 14,000 words), excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in font size 14, Times New Roman.

/s/ *Charles Gribble*
Dated: June 6, 2018
Charles Gribble

CERTIFICATES OF FILING AND SERVICE

I hereby certify that I e-filed the Plaintiff-Appellant's Final Brief with the Electronic Document Management System with the Iowa Judicial Branch on the 6th day of June, 2018. The following counsel will be served by Electronic Document Management System:

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I hereby certify that on the 6th day of June, 2018, I did serve the Plaintiff-Appellant's Final Brief on Appellee, listed below, by mailing one copy thereof to the following Plaintiff–Appellant:

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