IN THE SUPREME COURT OF IOWA

NO. 17-2093

UE LOCAL, 893/IUP

Plaintiff-Appellee,
vs.

STATE OF IOWA,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY,
THE HONORABLE MICHAEL D. HUPPERT

PLAINTIFF-APPELLEE FINAL BRIEF AND REQUEST FOR ORAL SUBMISSION

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PERB Rule 621-6.4(3)

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.

STATEMENT OF THE CASE

UE Local 893/IUP (hereinafter UE) on February 21, 2017 filed a petition in District Court to enforce the terms of a collective bargaining agreement between itself and the State of Iowa (hereinafter State) pursuant Iowa Code Section 20.17(5). (App. 5).

The State of Iowa (hereinafter the State) filed a pre-answer motion to dismiss arguing that the enforcement of a collective bargaining agreement should first be heard by the Public Employment Relations Board and any appeal then taken pursuant to Iowa Code Chapter 17A. (App. 40-42).

The stipulated facts establish the employer's contract offer had been accepted by UE and ratified pursuant to Iowa Code Section 20.17(4). (App. 67).

PERB promulgated a rule, 623 IAC 6.4(2), providing that within ten days after ratification by the employee organization the employer was to meet to accept

or reject the collective agreement. The State argued first that PERB had the authority to add by rule an additional requirement for contract formation, and then incongruously argued that even though the State never met to accept or reject the agreement within ten days their failure to do so should result in a determination that there is no collective bargaining agreement. (App. 46-47).

The District Court in its ruling on the motion to dismiss held that, "The legislature has seen fit to delegate to the courts the issue of the enforceability of collective bargaining agreements. Iowa Code Section 20.17(5) 2017," And therefore, the concepts of primary jurisdiction did not apply. (App. 62). The court further held that whether PERB could create by rule an additional requirement for contract formation was for the court to decide. (App. 63). The State did not pursue the matter further. (App. 69-91).

The State and UE thereafter filed cross motion for summary judgment based on a stipulation of facts agreed to and filed with the court on September 1, 2017. (App. 65; App. 69; App. 72; App. 92; App. 95).

The district court found that UE had accepted and ratified the State's bargaining proposal resulting in a collective bargaining agreement. (App. 116-117). Likewise, the court rejected the State's argument that because there could have been possible changes to Iowa Code Chapter 20, UE should have known the State's contract offer had been withdrawn. (App. 116).

The court therefore granted UE's motion for summary judgment, denied the State's motion for summary judgment, and ordered, "The collective bargaining agreement between the parties accepted by the Plaintiff and ratified by its members is valid and enforceable on the terms agreed to, and the parties are directed to perform as required under that agreement." (App. 117).

STATEMENT OF THE FACTS

Both parties agree that the facts of this case are relatively not at issue between the parties based upon a stipulation of facts entered into between UE and the State during their dueling motions for summary judgment.

1. The Plaintiff, UE Local 893/IUP (hereinafter UE), is an employee organization as defined by Iowa Code Section 20.3(4). (App. 65).
2. That the Defendant, State of Iowa (hereinafter State), is a public employer as defined by Iowa Code Section 20.3(10). (App. 65).
3. That UE has been certified by the Public Employment Relations Board to represent employees in two bargaining units as follows, UE Local 893/IUP – Science Unit, and UE Local 893/IUP – Social Services Unit. (App. 65).
4. UE and the State negotiated their first collective bargaining agreement for the Social Services Unit that was effective July 1, 1984 for a one year period ending June 30, 1985, and thereafter negotiated successor two year agreements. (App. 65).

5. UE and the State negotiated their first collective bargaining agreement for the Science Unit that was effective July 1, 1995, and thereafter negotiated successor two-year agreements. (App. 66).
6. Pursuant to Iowa Code Section 20.16, upon the receipt by the State of a request from UE to bargain on behalf of public employees, the State has a duty to engage in collective bargaining. (App. 66).
7. UE and the State were parties to collective bargaining agreements which were effective July 1, 2015 through June 30, 2017. (App. 66).
8. In preparation for the negotiations for the successor collective bargaining agreement, in May 2016, UE and the State agreed to a 2017-2019 Negotiation Calendar. (App. 66).
9. UE made an initial bargaining position for a successor collective bargaining agreement to the State of Iowa pursuant to Iowa Code Section 20.17(3) on December 6, 2016. (App. 66).
10. The State made its initial bargaining position to UE pursuant to Iowa Code Section 20.17(3) on December 20, 2016. (App. 66).
11. On January 10, 2017 UE and the State met for a negotiation session. (App. 66).
12. The January 10, 2017 bargaining session began with UE asking questions about the State's initial bargaining position. The State did not deviate from its

initial bargaining position as it was waiting to see whether the Iowa Legislature intended to amend chapter 20 and UE did not deviate from its initial bargaining position as it required more details regarding the State's insurance proposal. (App. 66).

13. UE and the State agreed to cancel bargaining sessions previously scheduled for January 11, 18, and 19. (App. 67).

14. At no time prior to and during the January 10, 2017 bargaining session did UE accept the State's initial bargaining position. (App. 67).

15. The State at no time prior to February 10, 2017 withdrew its initial bargaining position. (App. 67).

16. On February 10, 2017, UE informed the State that their Negotiation Committee had unanimously voted to accept the State's December 20, 2016 initial proposal. (App. 67).

17. On February 14, 2017, UE's members voted unanimously to ratify the State's December 20, 2016 initial proposal. (App. 67).

18. At no time prior to ratification by UE on February 14, 2017 of the State's December 20, 2016 initial proposal did the State withdraw its December 20, 2016 initial proposal. (App. 67).

ARGUMENT

I. TERMS OF A COLLECTIVE BARGAINING AGREEMENT ARE PROPERLY ENFORCED PURSUANT TO IOWA CODE SECTION 20.17(5).

Iowa Code 20.17(5) specifically states "[t]erms 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." There is no equivalent administrative action that can enforce the terms of a collective bargaining agreement and jurisdiction for such a matter is solely within the District Court.

The standard of review for a district court's ruling on a motion to dismiss is for correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). The standard of review for summary judgment cases is well settled. "We review summary judgment motions for correction of errors at law." *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 903 (Iowa 1996). Summary judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* "We review the evidence in the light most favorable to the nonmoving party." *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005).

A. The district court had jurisdiction to hear and enforce the terms of the collective agreement.

UE sought to enforce the terms of a collective bargaining agreement entered into with the State. (App. 5-9). The State, unsurprisingly, claimed that a collective agreement did not exist. (App. 91). The statute and the undisputed facts show otherwise.

Under Iowa Code section 20.16, an employer has an obligation to negotiate with an employee organization upon request. Iowa Code section 20.17(4) establishes that a collective bargaining agreement results from an offer, acceptance and then ratification by the employee organization.

The stipulated facts here establish that the negotiation committee for UE on February 10, 2017, accepted the State's collective bargaining agreement offer of December 20, 2016 and UE's members ratified said agreement on February 14, 2017 (App. 67). Further, the State at not time prior to ratification by UE on February 14, 2017 withdrew their offer of December 20, 2016. (App. 67).

UE thereafter properly sought to enforce the terms of the collective bargaining agreement pursuant to Iowa Code Section 20.17(5), "The terms of any collective 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." (App. 5).

The State is bound by collective agreements that it enters into voluntarily or as a result of an arbitrator's award. *AFSCME Council 61 v. State*, 484 N.W.2d 390,

392 (Iowa 1992). The State claims that the issue of the enforceability of a collective bargaining agreement must first be submitted to the Public Employment Relations Board (hereinafter PERB) under the doctrine of either original or primary jurisdiction. (App. 131-141).

The doctrine of "primary jurisdiction" presupposes an ability of the administrative agency to adjudicate the issues of law or fact which are alleged to be appropriate for administrative resolution. *Rowen v. LaMars Mutual Insurance Company of Iowa*, 230 N.W.2d 905, 913 (Iowa 1975). Not only does PERB not have jurisdiction over an action to enforce the terms of a collective bargaining agreement delegated to the district court by Iowa Code Section 20.17(5), but further, PERB does not even have the power to grant the relief sought by UE in this action.

In virtually any action to enforce the terms of a collective bargaining agreement, the resisting party, for a variety of reasons, will claim, as here, that no collective bargaining agreement exists. However, once a party seeks to enforce the collective agreement, exclusive jurisdiction is with the district court pursuant to Iowa Code Section 20.17(5) and PERB has neither the original or primary jurisdiction over the action.

In *State of Iowa v. AFSME Council 61*, No. PERB 4474, 1991 WL 11692486 (July 19, 1991), the State first sought to have PERB declare, that despite a voluntary agreement on numerous issues and an arbitrator's award on the remaining wage

issue, that a collective bargaining did not exist. *Id*. at 1. The State, in a petition for declaratory ruling, sought a ruling from PERB that no contract existed. *Id*. PERB noted in refusing to rule that, "…an action for enforcement of the arbitrated contract provision is pending in district court pursuant to Iowa Code Section 20.17(5) and we believe that forum is appropriate for the determination of the issues raised here." *Id.* at 6. *AFSCME Iowa Council 61 v. State* was later determined by the Iowa Supreme Court, which found in favor of the AFSCME Iowa Council 61 after AFSCME brought a claim to enforce the terms of the collective bargaining agreement pursuant to Iowa Code section 20.17(5). *AFSCME Iowa Council 61 v. State,* 484 N.W.2d 390, 392 (Iowa 1992). PERB, also much earlier, resolved this question in *City of Keokuk*, 75 PERB 433, by stating, "[t]he board believes that collective bargaining agreements were intended to be and should be enforced in the district court of the state of Iowa. *City of Keokuk*, 15 PERB 433 at 2.

The State has cited *Sioux City Police Officers Association v. City of Sioux City* to support their position. (Appellant's Brief pp. 17, 25). In *Sioux City Police Officers Association,* the employee organization initially sought a declaratory ruling that an anti-nepotism resolution was unlawful. *City of Sioux City,* 495 N.W.2d 687, 690 (Iowa 1993). "The associations urge that the City's anti-nepotism policy is invalid as an excess of the City's 'home rule' powers." *Id*. at 693. "The association argues that the resolution cannot stand because it is irreconcilable conflict with Iowa Code

Section 400.9, 400.16, 400.17, 400.18, and 400.19." *Id*. The trial court initially determined that this, in essence, was a negotiability dispute. *Id*. at 692. A negotiability dispute is essentially a determination of whether a proposal is a mandatory, permissive, or illegal subject of bargaining. *AFSCME Iowa Council 61 v. Iowa Public Employment Relations Board*, 846 N.W.2d 873, 879 (Iowa 2014). The district court therefore declined to rule asserting that exclusive jurisdiction was with the Public Employment Relations Board. *City of Sioux City*, 495 N.W.2d 692. The Iowa Supreme Court disagreed, finding that anti-nepotism policy involved an interpretation of statutory provisions outside of Chapter 20 and that PERB neither had original jurisdiction nor was the most appropriate tribunal to hear the case under the concept of primary jurisdiction. *Id*. at 696.

Here, as the State notes, prohibited practice complaints involving the same parties that have been filed with the Public Employment Relations Board alleging bad faith bargaining under Iowa Code Section 20.10. (App. 140). PERB has stayed these actions pending the outcome of this case (PERB Stay Order 61317). In the prohibited practice complaint, UE seeks a ruling from PERB that during the bargaining process, the State engaged in bad faith bargaining. This has nothing to do with regard to the enforcement of the collective bargaining agreement between the parties. (UE PPC).

The District Court in its ruling on the State's motion to dismiss has already held that "[t]he fact that there are cross filings with PERB alleging prohibited practices does not require the application of the doctrine of primary jurisdiction. To the contrary, the courts and PERB may exercise their respective authorities concurrently." (App. 63).

PERB not only does not have jurisdiction over an action to enforce the terms of a collective bargaining agreement delegated to the court by Iowa Code Section 20.17(5) but further does not even have the power to grant the relief sought by UE in this action. PERB's very limited remedial power is set forth in Iowa Code 20.11(4),

> "If the board finds that the party accused has committed a prohibited practice, the board, may within 30 days of its decision, enter into a consent order with the party to discontinue the practice or after the 30 days following the decision may petition the district court for injunctive relief pursuant to the rules of civil procedure."

Local Union 421 v. City of Epworth, No. PERB 4826, 1993 WL 13651448 (Oct. 18, 1993).

Thus, even if PERB finds that the State engaged in bad faith bargaining, PERB only has the power to order the offending party to cease and desist and engage in good faith bargaining in the future. *See Chauffeurs, Teamsters and Helpers, Local Union No. 238 vs. Fayette County*, No. PERB 5673, 1998 WL 35275874 (Jan. 20, 1998) (finding that the County violated its good faith statutory duty to bargain and

forcing the County and Union to bargain a collective bargaining agreement as required by law); *see also General Drivers & Helpers' Union, Local 421 v. City of Epworth*, No. PERB 4826, 1993 WL 13651448 (Oct. 18, 1993) (finding that the City of Epworth had partaken in bad-faith bargaining and proper remedy was to order "the City of Epworth shall cease and desist from any continuing or future interference with, restraint or coercion of public employees in the exercise of rights granted by the Public Employment Relations Act.").

The State also points out that "[b]ecause the [NLRB] is the sole protector of the national interest in the field of labor-management relations, any action which clearly or arguably involve the rights of employees to organize or unfair labor practices are exclusively within the NLRB's competence, and federal courts must defer to the jurisdiction the NLRB exercises." (App. 140-141). While this may be true, Iowa Code 20.17(5) specifically outlines "[t]erms 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."

There is no applicable federal law that mirrors what is outlined in the Iowa Code. Meaning that jurisdiction solely lies with district court on this action.

Therefore, even if successful on a claim of bad faith bargaining in front of PERB, the only remedy that can be provided to UE by PERB is for PERB to direct the State to cease and desist from interfering with the collective bargaining process

and the rights as outlined by Iowa Code Chapter 20. PERB has no authority to enforce the terms of a collective bargaining agreement and jurisdiction lies with the District Court.

B. Iowa Code section 20.17(5) is appropriate both to enforce the terms of a collective bargaining agreement as well as a term of a collective bargaining agreement.

The State concedes that ultimately a "term" of a collective bargaining agreement is enforceable through Iowa Code Section 20.17(5) while claiming the enforcement of the "terms" of a collective bargaining are for PERB. (App. 132-133).

In reality, Iowa Appellate Courts have held that the terms of a collective bargaining agreement which can be arrived at only through voluntary agreement and/or through interest arbitration are enforceable pursuant to Iowa Code Section 20.17(5). *AFSCME Council 61*, 484 N.W.2d at 394. Further, a "term" of a collective bargaining agreement, as will be discussed in greater detail, is enforceable following a "grievance arbitration" decision. *Sergeant Bluff Education Association v. Sergeant Bluff Luton Community School District*, 282 N.W.2d 144, 148 (Iowa 1979).

The disputed "terms" of a collective bargaining agreement are resolved through "interest arbitration." *West Des Moines Ed. Ass'n v. Public Employment Relations Bd.*, 266 N.W.2d 118, 119 (Iowa 1978). Any dispute over a "term" of a collective bargaining agreement is resolved by a "grievance arbitrator." *Sergeant Bluff Education Association*, 282 N.W.2d at 148. Only thereafter, in either

circumstance, does the district court become involved pursuant to Iowa Code section 20.17(5).

The State's cites to *Maquoketa Valley Community Sch. Dist. v. Maquoketa Valley Ed. Ass'n*, 279 N.W.2d 510, 512 (Iowa 1979) and *Moravia Community Sch. Dist. v. Moravia Educ. Ass'n*, 460 N.W.2d 172, 177 (Iowa Ct. App. 1990) for proposition that "[s]upervision of bargaining . . . is delegated to PERB." (App. 139-140).

Supervision of bargaining including whether someone made a sufficient offer during the course of bargaining or met on sufficient dates to have bargained in "good faith" is a question for PERB. *See AFSCME*, No. PERB 4474, 1991 WL 11692486 (July 19, 1991) and *Humboldt County Board of Supervisors*, 76 PERB 703, pp.5-6. Enforcement of a collective agreement, whether resulting from voluntary agreement and/or arbitration is not. In *Moravia* and *Maquoketa*, following an interest arbitrator's award (unlike the voluntary agreement here) the court equated a private arbitrator's award with action by the Public Employment Relations Board. In the instant case there was no arbitration thus the State's analogy is flawed as it is does not apply.

In *Maquoketa Valley Community Sch. Dist.* and *Moravia Community Sch. Dist.*, the parties did not reach a voluntary agreement and utilized interest arbitration. *Maquoketa Valley Community Sch. Dist.*, 279 N.W.2d at 511; *Moravia Community*

Sch. Dist., 460 N.W.2d at 174-76. The Court found that the statute delegated legislative authority through PERB to the arbitrator. *Maquoketa Valley Community Sch. Dist.*, 279 N.W.2d at 512; *Moravia Community Sch. Dist.*, 460 N.W.2d at 178. Thus, if one party disagreed with the decision of the interest arbitrator, the party was disagreeing with final agency action and had to utilize procedures under Iowa Code 17A. *Maquoketa Valley Community Sch. Dist.*, 279 N.W.2d at 512; *Moravia Community Sch. Dist.*, 460 N.W.2d at 176. In contrast, in the present dispute the parties have not utilized an arbitrator as the parties have not utilized any of the "impasse resolution…delegated to PERB." In fact, UE believes a voluntary agreement was reached between the parties and is here seeking to enforce it. As such, *Maquoketa Valley Community Sch. Dist.* and *Moravia Community Sch. Dist.* provide no guidance.

An argument that based on *Moravia* and *Maquoketa*, Iowa Chapter 17A, rather than Section 20.17(5), is the appropriate means to enforce or vacate a collective bargaining agreement was raised and rejected, although on other grounds by the Iowa Supreme Court in AFSCME. *AFSCME Council 61*, 484 N.W.2d at 392.

Therefore, the cases cited by the State have no applicability to this present dispute and the District Court is the correct forum to bring an action to enforce the terms of a collective bargaining agreement.

C. There was no need for UE to exhaust administrative remedies.

The State argues that UE failed to first exhaust administrative remedies by not first bringing this action in front of PERB. The undersigned agrees with the State that "[i]t is well established that a party must exhaust any ***available*** administrative remedy before seeking relief in the courts." *Shors v. Johnson* 581 N.W.2d 648, 650 (Iowa 1998). What the State fails to mention is that the *Shors* case also discussed that "[t]he exhaustion doctrine applies when (1) an adequate administrative remedy exists, and (2) the governing statute requires the remedy to be exhausted before allowing judicial review." *Id*.

Iowa Appellate Courts have recognized that the doctrine of exhaustion of administrative remedies has never been absolute. *See Salsbury Labs. v. Iowa Dep't of Environmental Quality*, 276 N.W.2d 830, 836 (Iowa 1979); *Matters v. City of Ames*, 219 N.W.2d 718, 719–20 (Iowa 1974) ("Exhaustion is not required before every court challenge."). "If the agency is incapable of granting the relief sought during the subsequent administrative proceedings, a fruitless pursuit of these remedies is not required." *Salsbury*, 276 N.W.2d at 836; *Matters*, 219 N.W.2d at 719; 3 K. Davis, *Administrative Law* § 20.07 (1958).

Here, neither of the elements outlined in *Shors* apply to this case. As previously noted, PERB does not have the power to grant the relief sought by UE in this action. PERB's very limited remedial power is set forth in Iowa Code 20.11(4),

> "If the board finds that the party accused has committed a prohibited practice, the board, may within 30 days of its decision, enter into a consent order with the party to discontinue the practice or after the 30 days following the decision may petition the district court for injunctive relief pursuant to the rules of civil procedure."

See Chauffeurs, Teamsters and Helpers, Local Union No. 238 vs. Fayette County, No. PERB 5673, 1998 WL 35275874 (Jan. 20, 1998) (finding that the County violated its good faith statutory duty to bargain and forcing the County and Union to bargain a collective bargaining agreement as required by law); *see also General Drivers & Helpers' Union, Local 421 v. City of Epworth*, No. PERB 4826, 1993 WL 13651448 (Oct. 18, 1993) (finding that the City of Epworth had partaken in bad-faith bargaining and proper remedy was to order "the City of Epworth shall cease and desist from any continuing or future interference with, restraint or coercion of public employees in the exercise of rights granted by the Public Employment Relations Act.").

Since "PERB cannot provide an adequate remedy for the issues raised by plaintiffs" UE is "correct in invoking the district court jurisdiction initially." *City of Sioux City*, 495 N.W.2d 693.

In looking at the second element for exhaustion of administrative remedies, Iowa Code Chapter 20 explicitly outlines that the "[t]erms 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 section 20.17(5). There is no mention of such administrative exhaustion in Iowa Code Chapter 20.

Therefore, based on the fact that PERB cannot provide an adequate administrative remedy and Iowa Code Chapter 20 specifically outlines the requirement that the" terms of any collective bargaining agreement may be enforced by a civil action in the district court," UE did not have to exhaust administrative remedies and the District Court was the proper forum to hear this matter.

II. APPLICATION OF APPLICABLE COLLECTIVE BARGAINING PRINCPLES ESTABLISHES THAT A COLLECTIVE AGREEMENT IS IN EFFECT BETWEEN THE STATE AND UE AND SHOULD BE ENFORCED.

Under either the application of federal collective bargaining principles or the ordinary contract principles, a collective bargaining agreement was formed between UE and the State of Iowa.

The standard of review for summary judgment cases is well settled. "We review summary judgment motions for correction of errors at law." *Carr*, 546 N.W.2d 903. Summary judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* Iowa Appellate Courts review the evidence in the light most favorable to the nonmoving party. *Mason*, 700 N.W.2d 353.

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 Iowa Code Section 20.17(5). As a result, the State's claim that enforcement questions should start with PERB rather than the NRLB is not applicable to the enforcement of Iowa public sector contracts. 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"	"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."
Section 8(d) of the Act, 29 U.S.C. 158(d)(1976)	

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*., the association sought to enforce an arbitrator's award interpreting the terms of a collective agreement. 282 N.W.2d 144, 145-146 (Iowa 1979). 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-Luton Education Association* 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. *Id.* at 88.

The *Pepsi-Cola* Court relied on the same principles relied on by the Court in *Sergeant Bluff-Luton Education Association* 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. at 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.

Pepsi-Cola, 659 F.2d at 89.

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." 80 F.3d 661, 665 (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. 915 F.2d 631, 635 (11th Cir. 1990).

In lieu thereof, in the instant case, the parties have stipulated to facts establishing that the State's offer of December 20th was accepted by the bargaining team for UE on February 10th and ratified by the members of UE on February 14, 2017. (App. 67). This fulfils all the statutory obligations for contract formation pursuant to Iowa Code Section 20.17(4).

The State's claim in their brief that they were "waiting to see whether the Iowa legislature intended to amend Chapter 20" is insufficient to have somehow placed UE on notice that the State's December 20th offer was somehow withdrawn.

Here, the State admits in a stipulation of facts, that is never withdrew its offer prior to ratification. (App. 67). A claim that the State was uncertain if or what action the Iowa legislature would take with respect to the amendment of Chapter 20 certainly is insufficient to be equivalent to a withdraw of an offer as the District Court so found. (App. 116).

In an advice memo, NRLB associate general counsel advised that an employer's letter to the union stating that it "no longer intended 'final' offer to be on the table" meant that the union "could not in good faith believe" that the offer was available to be accepted. Diaz, Harold J., NLRB Associate General Counsel, Division of Advice, Case No. 19-CA-19160, 1988 WL 228506 (Feb. 4, 1988).

The Ninth Circuit held that circumstances did not support a reasonable belief that the employers offer had been withdraw despite the union presenting two counter proposals, followed by a complete breakdown of negotiations and a strike. *Presto Casting Company v. NRLB*, 708 F.2d 495, 497-98 (9th Cir. 1983).

Thus, the only means by which the State could have withdrawn its December 20th offer was by specifically informing UE that its offer of December 20th was withdrawn. Therefore, due to the actions of UE and their acceptance of the State's December 20th offer, there is a binding collective bargaining agreement in place between the parties.

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 UE and the State.

In the instant case, there was neither a counter proposal, nor a rejection of the employer's proposal. (App. 66). 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 Dev. Co. v. Granson Investment*, 394 N.W.2d 325, 331 (Iowa 1986); *see also Hayne v. Cook*, 109 N.W.2d 188, 192 (Iowa 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.*

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 State and the District Court properly so concluded. (App. 115-116).

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 State'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.

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 UE and the State based upon offer and acceptance.

III. THE IOWA PUBLIC EMPLOYMENT RELATIONS BOARD CANNOT BY RULE ADD AN ADDITIONAL REQUIREMENT FOR COLLECTIVE BARGAINING AGREEMENT FORMATION NOT SET FORTH BY STATUTE.

There is a question as to whether the State has preserved error as to the application of PERB Rule 621-6.4(3). Counsel for the State, prior to Jeff Thompson, informed counsel for UE that the argument had been withdrawn. Further, this argument was not raised in the State's Motion for Summary Judgment, nor on a Motion to Enlarge, Amend or Reconsider the District Court's findings.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on

appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (citing *Peters v. Burlington N. R.R.*, 492 N.W.2d 399, 401 (Iowa 1992) ("issues must be raised and decided by the [district] court")). "There is no procedural rule solely dedicated to the preservation of error doctrine, and a party may use any means to request the court to make a ruling on an issue. Furthermore, we treat a motion by its contents, not its caption." *Id.*

Here, the State has argued in its Appellate Brief that the District Court did not have subject matter jurisdiction to hear this matter and that there is not a binding collective bargaining agreement in place between the parties because the State did not accept the agreement pursuant to PERB Rule 6.4(3). (App. 133).

The State also raised this argument in the pre-answer motion to dismiss before the district court. The Court concluded that "[t]he ability of the defendant to challenge the existence of an enforceable collective bargaining agreement based on rule 6.4(2) will be for the court to decide." (App. 63). The State never attempted to direct the District Court to rule on this issue. "The rule requires a party seeking to appeal an issue presented to, but not considered by, the district court to call to the attention of the district court its failure to decide the issue." *Meier*, 641 N.W.2d at 540. Further, the Court never expanded there reasoning or ruling on topic. The State then failed to argue PERB Rule 6.4(3) in their motion for summary judgment. The State further failed to request or file a motion for enlarged ruling. *See id.*

("Our preservation of error doctrine requires a party to make a request for a ruling, and [Rule 1.904. Findings by court] establishes a procedure to use under some circumstances to make the request.").

Due to the District Court's limited notation of the rule in its Ruling on Defendant's Motion to Dismiss and the failures by the State to raise this issue in the Motion for Summary Judgment or on a Motion for Enlarged Ruling, UE believes this issue has not been properly preserved by the State.

To the extent that the issue has been preserved then the following argument applies.

The standard of review for a district court's ruling on a motion to dismiss is for correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012).

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).

According to the State, in its brief, the State did not, following ratification by the employee organization, vote to accept or reject the collective bargaining agreement, and therefore, the State argues there is no collective agreement. (App. 133). This is a matter outside the stipulated facts and thus, not a factor in which the

State should be allowed to rely in arguing there is no contract. Again, to the extent this court considers that argument, the following would apply.

PERB Rule 6.4(3) does provide:

> 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.

Iowa Code 20.17 outlines the procedures for the negotiations of collective bargaining agreements between public employees and employers in Iowa, concluding with ratification by members of the employee organization. There is no comparable language in 20.17 for approval or disapproval by a public employer following ratification by the employee organization.

In looking at the entirety of the issue regarding PERB Rule 6.4(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 statute supersedes any conflicting administrative rule.

Iowa Appellate Courts have found that state agency rules are usually given the "the force and effect of law." *Stone Container Corp. v. Castle*, 657 N.W.2d 485, 489 (Iowa 2003) (quoting *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 835 (Iowa 2002)). With that in mind, "agencies have 'no inherent power and [have] only such authority as [they are] conferred by statute or is necessarily inferred from the power expressly given.' " *Wallace v. Iowa State Bd. of Education*, 770 N.W.2d 344, 348 (Iowa 2009) (alterations in original) (quoting *Zomer v. W. River Farms, Inc*., 666 N.W.2d 130, 132 (Iowa 2003)). Administrative rules also need to be adopted validly. To do so, such rules "must be within the scope of the powers delegated to [the agency] by statute." *Id*. (quoting *Iowa Power & Light Co. v. Iowa State Commerce Comm'n*, 410 N.W.2d 236, 239 (Iowa 1987)).

Therefore, when rules adopted by an administrative agency exceed the agency's statutory authority, the rules are void and invalid. *See Motor Club of Iowa v. Dep't of Transp.*, 251 N.W.2d 510, 517–18 (Iowa 1977).

"[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 at 615.

The decisions of the Iowa Appellate Courts 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 requirements for the formation of a collective bargaining agreement under Iowa Code Chapter 20 and PERB's rule tries to add an additional step. 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 State, accepting the collective bargaining agreement is not required after a valid offer, acceptance and ratification by the employee organization pursuant to Iowa Code Chapter 20.17(4).

IV. IF THE PERB RULE WAS APPLICABLE THEN A COLLECTIVE BARGAINING AGREEMENT RESULTED FROM THE FAILURE OF THE STATE TO COMPLY WITH THE ADMINISTRATIVE RULE.

If the Court concludes that PERB can add an additional requirement for the formation of collective bargaining agreement by rule administrative rule, then it is clear that the State did not comply with the rule. As previously outlined, Rule 6.4(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 State affirmatively states in its brief 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. 133). The failure to do so results in a collective bargaining agreement between the parties. To hold otherwise would allow an employer to escape its obligations by refusing to meet to accept or reject on agreement, thus nullifying all the provisions of Iowa Code Chapter 20.

SUMMARY AND CONCLUSION

Original and exclusive jurisdiction to enforce the terms of a collective bargaining agreement is through an action in District Court to enforce the terms of the agreement filed pursuant to Iowa Code Section 20.17(5).

A contract in the instant case was created through the State's offer of December 20, 2016 which was accepted and ratified by UE on February 14, 2017. The State admits its offer was never withdrawn. The State's argument that UE presented a counter offer on meeting held on January 10, 2017 is refuted both by the stipulation of facts and the case law. The stipulation clearly provides that UE did not in any way alter its initial proposal of December 6, 2016 and merely left the proposal on the bargaining table. The restatement and case law establish that a counter offer must alter in some manner the terms of the original offer. The stipulation makes clear that UE made no such alternation to its initial proposal. Therefore, there is a collective bargaining agreement in place between UE and the State.

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 8,175 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: May 31, 2018
Charles Gribble

CERTIFICATES OF FILING AND SERVICE

I hereby certify that I e-filed the Plaintiff-Appellee's Final Brief with the Electronic Document Management System with the Iowa Judicial Branch on May 31, 2018. The following counsel will be served by Electronic Document Management System:

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I hereby certify that on May 31, 2018, I did serve the Plaintiff-Appellee's Final Brief on Appellee, listed below, by mailing one copy thereof to the following Plaintiff–Appellant:

UE Local 893/IUP
Plaintiff–Appellee

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