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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CEDAR RAPIDS ASSOCIATION OF FIREFIGHTERS, LOCAL 11, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, Petitioner,	)	CASE NO. AA 2936
vs.	)	
IOWA PUBLIC EMPLOYMENT RELATIONS BOARD, Respondent,	)	RULING ON PETITION FOR JUDICIAL REVIEW
CITY OF CEDAR RAPIDS, IOWA, Intervenor.	)	

On September 26, 1997, Petitioner's petition for judicial review came on for hearing before the Court. All parties appeared through counsel, Charles E. Gribble for Petitioner, Jan V. Berry for Respondent and William J. Wright for Intervenor. After hearing the arguments of counsel, reviewing the agency record and the parties' briefs, and being fully advised in the premises, the Court now enters the following Ruling.

NATURE OF THE CASE

This is a proceeding for judicial review of final agency action of the Public Employment Relations Board ("PERB" or "Board") pursuant to Iowa Code section 17A.19. The Cedar Rapids Association of Firefighters, Local 11, International Association of Firefighters ("Association" or "Union") petitions for the Court's review of PERB's final agency decision of May 1, 1997, which dismissed the Association's prohibited practice complaint (PERB Case No. 5179) against the City of Cedar Rapids.

RELEVANT FACTS

Although the Association's petition alleges, *inter alia*, that the PERB decision is unsupported by substantial evidence in the agency record, from its arguments to the Court it appears that the facts of the case are essentially undisputed. Rather, the Association challenges the Board's legal conclusions drawn from those facts, which may be summarized as follows:

The Association has been certified by PERB pursuant to Iowa Code chapter 20 as the exclusive collective bargaining representative for a group of non-supervisory employees of the City's fire department.

The City and the Association have been parties to a series of collective bargaining agreements since July 1, 1977. Each contract through the 1993-94 contract year contained the following language concerning employee "time trades":

> An employee may have the privilege to change a work day with another employee on a different shift upon their mutual agreement and with the approval of the employee's company officer and district chief.

While changes in the way this contractual language was administered occurred throughout the years, since 1980 time trades were granted routinely and liberally by the City. No restrictions were applied as to how far in advance a time trade could be requested, and time trade days could be utilized immediately before or after a vacation.

Beginning in about 1991, the City attempted to place greater restrictions on the use of time trades, and the Association responded in each instance by filing prohibited practice complaints with PERB or contractual grievances. The City lost at least two grievance cases involving such issues as whether the City could eliminate partial-day time trades and whether the

City could deny time trades during training periods, based at least in part on the weight given by the grievance arbitrators to the parties' established past practices concerning trades.

In the fall of 1993 the City and the Association began negotiating for a new collective agreement to become effective July 1, 1994. Among the matters being negotiated were the City's proposals to add a requirement that time trades be requested at least 24 hours in advance, and to add language which would effectively preclude partial work day time trades. On January 12, 1994, while negotiations were continuing, Judith Perkins, the City's bargaining representative, directed a memorandum to the Association's bargaining committee. It provided:

> This is to inform you, so there is no doubt, of the City's position regarding time-trades in the labor agreement beginning July 1, 1994.
>
> Unless specific language is included to allow partial day time-trades, none will be allowed. It is also the intent of the department to continue to exercise its right to approve/disapprove all time-trades.
>
> This written position is intended to make very clear to you and any third party that regardless of what the past practice on time-trades has been, there is nothing implied under time-trades except exactly what the language says.

Association president/chief negotiator Rick Scofield realized the purpose of Perkins' memo was to convey the City's intent to "break" past practices dealing with time trades, and to inform the Association that the City was "going to break our past practice and go exactly with contract language." There were discussions between the Association's bargaining committee and Perkins at subsequent bargaining sessions concerning the meaning of the memo, during which the City's position was explained. The Association did not act on this notice that the City intended to do away with the parties' past practices concerning time trades, and made no effort to bargain specific language reflecting past practices on time trades into the new 1994-95 contract.

Although the parties continued to negotiate concerning time trading and other issues, they failed to reach agreement and their dispute proceeded to fact-finding pursuant to Iowa Code section 20.21. Both parties ultimately accepted the fact-finder's subsequent recommendations on time trade language, with the result that their new contract provided as follows:

> An employee may have the privilege to change a work day or partial work day with another employee on a different shift upon their mutual agreement and with the approval of the employee's company officer and Chief or his designee.

When the new 1994-95 collective agreement became effective the City, without further notice to the Association, adopted new guidelines for its supervisors' use in deciding whether to approve or disapprove time trade requests. The new guidelines effectively imposed four restrictions on the availability of time trades: (1) only one day could be added to either side of a vacation; (2) only two days in a row could be traded; (3) at least 24-hour notice of the request was required and (4) time trade requests would not be accepted earlier than 10 days prior to the trade. Beginning on July 1, 1994, the City denied some time trade requests on the basis of the new restrictions.

On July 29, 1994, the Association filed its prohibited practice complaint with PERB, alleging that the City had committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(a), (c), (e) and (f) by making unlawful unilateral changes in the time trade provisions of their collective bargaining agreement. Following an evidentiary hearing before a PERB-appointed ALJ and an appeal and cross-appeal to the full PERB from the ALJ's proposed decision, the Board rendered the challenged decision which dismissed the Association's complaint, concluding that the City had not committed the prohibited practices alleged.

STANDARD OF REVIEW

On judicial review of an agency action, the district court functions in an appellate capacity to apply the standards of Iowa Code section 17A.19(8). Iowa Planners Network v. Iowa State Commerce Commission, 373 N.W.2d 106, 108 (Iowa 1985). The Court has no original authority to declare the rights of the parties. Office of Consumer Advocate v. Iowa State Commerce Commission, 432 N.W.2d 148, 156 (Iowa 1988). Nearly all disputes in the field of administrative law are won or lost at the agency level. Iowa-Illinois Gas and Electric Co. v. Iowa State Commerce Commission, 412 N.W.2d 600, 604 (Iowa 1987). Judicial review of agency action is confined to the correction of errors of law. Farmers Coop Oil Ass'n v. Den Hartog, 475 N.W.2d 7, 9 (Iowa App. 1991).

An agency action that is affected by an error of law or violative of constitutional or statutory provisions is subject to reversal under Iowa Code sections 17A.19(8)(a) and (e). Northwestern Bell Telephone Co. v. Iowa Utilities Board, 477 N.W.2d 678, 682 (Iowa 1991). In deciding whether the agency made errors of law, the Court gives weight to the agency's construction of its statute but is not bound by it. Woodbine Community School District v. PERB, 316 N.W.2d 862, 864 (Iowa 1982). It is the duty of the Court to determine matters of law including the interpretation of a statute or agency rule interpreting a statute. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 10 (Iowa 1982).

Iowa Code section 17A.19(8)(f) provides that, in a contested case, the court shall grant relief from an agency decision which is unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole. Neil v. John Deere Component Works, 490 N.W.2d 80, 82 (Iowa App. 1992). Review is not *de novo*. Hussein v. Tama Meat Packing Corp., 394 N.W.2d 340, 341 (Iowa 1986). Evidence is substantial to support an agency's

decision when a reasonable person would find it adequate to reach a conclusion even though a reviewing court might reach a contrary inference. Mercy Health Center v. State Health Facilities Council, 360 N.W.2d 808, 811-12 (Iowa 1985); Langley v. Employment Appeal Board, 490 N.W.2d 300, 302 (Iowa App. 1992). The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. Neil, 490 N.W.2d at 82-83; Langley, 490 N.W.2d at 302. The mere possibility the record might support another conclusion does not permit the reviewing court to make a finding inconsistent with the agency finding so long as there is substantial evidence to support it. City of Davenport v. PERB, 264 N.W.2d 307, 311-12 (Iowa 1978).

In determining whether substantial evidence exists, the court is to consider all the evidence together, including the body of evidence opposed to the agency's review. Burns v. Board of Nursing, 495 N.W.2d 698, 699 (Iowa 1993). In considering all the evidence, including that offered in opposition to the agency's finding, the court does not compromise the limitation on its scope of review. *Id.* When review is not *de novo*, the reviewing court must not usurp the fact finding function of the agency. The agency decision should be affirmed when there is no error of law and the decision is supported by substantial evidence. Heatherly v. Iowa Department of Job Service, 397 N.W.2d 670 (Iowa 1986).

ANALYSIS AND CONCLUSIONS

The divisive issue in this case is the correctness of PERB's finding that the new guidelines adopted and implemented by the City to govern its approval or denial of time trade requests did not change express (or, in the vernacular of the parties, "contained in") provisions of the collective bargaining agreement. Although the Association's petition asserts numerous Iowa Code section 17A.19(8) grounds for reversal of the PERB decision, its arguments to the Court

focus on the single ground that PERB's finding in this regard is legally erroneous and that its decision is thus "affected by error of law" within the meaning of Iowa Code section 17A.19(8)(e).[1]

The narrow question of labor law which is thus central to this case is whether the City's actions amounted to changes in express or "contained in" provisions of the parties' contract. Whether a matter is expressly addressed or "contained in" the agreement is significant because a public employer's duty regarding contemplated changes in mandatory subjects of bargaining differs depending upon whether the matter is "contained in" the collective agreement or not. PERB has previously discussed these different duties:

> First, during the life of the contract, neither party has a duty to discuss any proposed modification of any term "contained in" that contract, and the Board has held it a corollary that neither party may lawfully insist on such discussion. Thus, a midterm modification of any such "contained" term may be lawfully made only after the consent of the opposing party has been voluntarily given.
>
> Second, even if not "contained in" the contract, neither party may lawfully during the contract term implement a change in wages or other working conditions unless it has first bargained with the other party, that is, has given notice of the change and an opportunity to negotiate about it to impasse. . . .

See, e.g., Charles City Community School District, 90 PERB 3764; Des Moines Community School District, 78 PERB 1122, *citing* GORMAN, LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING, p. 457 (West 1976).

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[1]The Court has nonetheless considered all claims asserted by the Association, and concludes that it has failed to demonstrate that the PERB decision in violation of statutory provisions, it is in excess of the agency's statutory authority, is unsupported by substantial evidence in the record or is unreasonable, arbitrary, capricious or characterized by an abuse of discretion, as it alleged in its petition.

In this case, PERB found that although many aspects of time trading had been administered by the City pursuant to guidelines and practices which had been in place for a number of years, those practices had never been "contained in" the parties' contracts. While acknowledging that the City had changed the criteria it applied to time trade requests, thus effectively imposing the new restrictions previously mentioned, PERB also found, with substantial evidentiary support in the record, that the City had fulfilled its bargaining duty by giving the Association prior notice and an opportunity to bargain over anticipated changes in its administration of time trades, but that the Association, by its inaction, had waived its right to bargain concerning those changes.

The Association does not appear to contest the findings that it received notice and had the opportunity to bargain for specific contract language preserving the parties' past practices. Instead, it argues that PERB erred in concluding that the aspects of time trading addressed by the City's new guidelines were not "contained in" the collective agreement. Since those matters should have been deemed to be "contained in" the contract, the Association's argument goes, the City was obligated to obtain the Association's consent before the new guidelines/restrictions could be legally implemented. The Association thus views PERB's imposition of the less-stringent "notice and opportunity to bargain" duty applicable to "not contained in" cases as legally erroneous.

It seems clear that the parties' collective agreements have never contained express provisions concerning the specifics addressed by the City's new guidelines—when time trade requests must be submitted, how time trades could be used in conjunction with vacations and how many consecutive-day trades would be permitted. This fact is of no consequence, according to the Association, because the parties' unwritten "past practices" concerning these specific

aspects of time trading must, it insists, be deemed to be "contained in" the contract as much as is express contract language.

In support of this proposition, which would elevate unwritten past practices to the status of express contract language, the Association cites, *inter alia*, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) and Sergeant Bluff-Luton Education Association v. Sergeant Bluff-Luton Community School District, 282 N.W.2d 144 (Iowa 1979).

Those cases, the Court concludes, do not support or require a conclusion that PERB erred in holding that the aspects of time trading affected by the City's new guidelines were not "contained in" the parties' contract. Both Warrior & Gulf and Sergeant Bluff-Luton deal with contractual grievances (disputes over the application and interpretation of collective agreements) and the authority of grievance arbitrators. Those topics are not involved in the present case. The cited cases reveal that a grievance arbitrator's decision concerning the proper interpretation or application of a collective bargaining agreement must be drawn from "the essence of the agreement," and that this "essence" is an extremely broad concept which is not confined to the express provisions of the contract, but also includes the practices of the industry and the shop (the "industrial common law").

As the Iowa Supreme Court noted in Sergeant Bluff-Luton, on review of a grievance arbitrator's award the question to be determined by the Court often is whether the award "drew its essence" from the collective bargaining agreement. In view of the breadth of that concept, a Court will not fault an arbitrator's award because the arbitrator received evidence of and considered the parties' established past practices, since those practices are properly viewed as part of the contract's essence.

However, as PERB suggests in its decision and argues on appeal, the role of a grievance arbitrator in resolving disputes concerning the interpretation and application of the parties' agreement appears to be distinguishable from the Board's examination of the agreement for the purpose of determining the extent of a party's collective bargaining obligation. The grievance arbitrator attempts to interpret the contract, and may consider the entire "essence of the agreement" as a aid to that interpretation. PERB, on the other hand, does not attempt to construe the agreement to determine the extent of the parties' contractual rights, as does an arbitrator, but instead examines the agreement only to see what is and what is not expressed or "contained in" it, so as to then determine the extent of the parties' bargaining obligations.

Acceptance of the Association's premise that all the parties' past practices are deemed to be "contained in" their collective agreement, even though not expressed therein, would place unwritten past practices on a par with express contractual provisions, creating the seemingly-anomalous result that while the parties expend great energy and time in negotiating the details of their agreement, they also equally commit themselves to unstated conditions which may have never been negotiated, but which may have instead developed out of mere convenience, without any design or deliberation. The Court does not read Warrior & Gulf, Sergeant Bluff-Luton, or any other authority cited by the Association as requiring such an interpretation.

The Court is mindful that PERB is entitled to a reasonable range of informed discretion in the interpretation of its statute. Office of Consumer Advocate v. Iowa State Commerce Comm'n, 419 N.W.2d 373, 374 (Iowa 1988). The distinctions drawn by the Board between its function and that of grievance arbitrators and between the express provisions of the agreement and the broader concept of "the essence of the agreement" are reasonable and are entitled to the Court's deference.

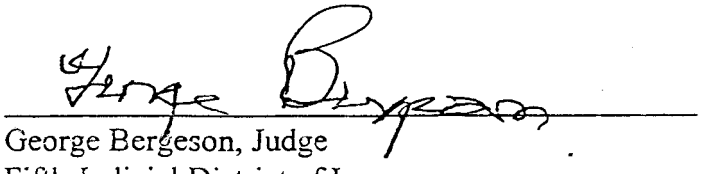
This Court can find no legal error in the agency's final decision. Provisions concerning when time trade requests must be submitted, how time trades could be used in conjunction with vacations and how many consecutive-day trades would be permitted, were not expressed or "contained in" the parties' agreements. Although practices concerning these aspects of time-trading had developed over time, because of their extra-contractual nature those practices could be altered by the City provided it gave the Union notice and an opportunity to bargain to impasse over the changes. The record clearly supports the PERB conclusion that such notice and opportunity to bargain was provided the Association, but that the Union made no effort to negotiate contractual provisions which preserved the past practices. The City was thus free to implement the new time trade guidelines.

The Court has considered all of the arguments asserted by the Association, whether specifically addressed herein or not. Concluding that the Association has failed to demonstrate that the PERB decision suffers from any of the grounds for judicial relief specified in Iowa Code section 17A.19(8), the Court enters the following

RULING

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the Public Employment Relations Board is AFFIRMED. Costs are taxed to Petitioner.

DATED this 30th day of January, 1998.



George Bergeson, Judge
Fifth Judicial District of Iowa