NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO) LOCAL 226, (OFFICE PERSONNEL) Petitioner, v. DOUGLAS COUNTY SCHOOL DISTRICT 001, Respondent.	)	Case No. 1466 FINDINGS OF FACT AND ORDER
SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO) LOCAL 226, (EDUCATIONAL PARAPROFESSIONALS) Petitioner, v. DOUGLAS COUNTY SCHOOL DISTRICT 001, Respondent.	)	Case No. 1467 NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS FILED SEP 25 2019 CLERK
SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO) LOCAL 226, (TRANSPORTATION DIVISION) Petitioner, v. DOUGLAS COUNTY SCHOOL DISTRICT 001, Respondent.	)	Case No. 1468
SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO) LOCAL 226, (NUTRITION SERVICES DIVISION) Petitioner, v. DOUGLAS COUNTY SCHOOL DISTRICT 001, Respondent.	)	Case No. 1469

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Before Commissioners Carlson, Blake, and Vannoy.

NATURE OF THE CASE

The Petitioner, Service Employees International Union Local 226 ("Local 226") alleges that Respondent, Douglas County School District 001 ("OPS") has committed a prohibited practice of bad faith bargaining in violation of the Nebraska Industrial Relations Act ("Act"), Neb. Rev. Stat. §48-824(1). In the four Petitions filed September 4, 2018, Local 226 alleged on behalf of the Office Personnel (Case No. 1466), Educational Paraprofessionals (Case No. 1467), Transportation Division (Case No. 1468), and Nutrition Services Division (Case No. 1469) bargaining units that:

> "Respondent has failed and refused to negotiate or agree to negotiate regarding the change in the manner and method in which the ten (10) month employees are paid, and said unilateral action on the part of the Respondent constitutes a unilateral change in the terms and conditions of employment with respect to a mandatory subject of collective bargaining, and as such, constitutes a prohibited practice of bad faith bargaining in violation of Nebraska Revised Statute §48-824(1) (Reissue 2004)."

(Petitions in Cases 1466, 1467, 1468, and 1469).

Respondent's Answer and Counterclaim filed on September 12, 2018, in each case captioned above, admits that prior to August 1, 2018, hourly employees in the relevant bargaining units who worked an approximate ten month period were paid on a pro rata basis over twelve months. OPS also admits that on approximately August 1, 2018, it unilaterally changed the manner and method in which the above-described members in the Local 226 bargaining unit are paid, in which the Respondent unilaterally terminated the pro-rated payments over a twelve month period for ten month employees. OPS asserts that it was lawfully entitled to do so when it implemented its Last, Best and Final Offer which included paying ten month employees over a ten month period.

Respondent's counterclaim alleges that Local 226 has committed a prohibited practice of bad faith bargaining in violation of Nebraska Revised Statute §48-824(1). OPS alleges that

Petitioner's behavior in negotiations was an attempt to delay, frustrate and stymie negotiations over payment of ten month employees. Further, Respondent alleges a pattern and practice of behavior designed to deny OPS exercise of its legal right to implement its Last, Best and Final Offer, which constitutes a prohibited practice of bad faith bargaining in violation of Nebraska Revised Statute §48-824(1).

At trial, Petitioner moved to have Petitioner's Amended Issues Presented, filed November 28, 2018, during trial, (17:24-18:20) be an amendment to the Petition in this matter. Over Respondent's objection, Petitioner's motion was granted. (202:19-205:17). Rather than addressing the Petitions' allegations of failure and refusal of the Respondent to negotiate, we address Petitioner's issues as follows:

- Whether there was a custom and past practice of prorating the payment of wages for the ten month employees in the bargaining unit over a twelve month pay period, and if so, did the custom and past practice create a mandatory subject of bargaining?
- Did the Respondent make a unilateral change of a mandatory subject of bargaining?
- Whether the Respondent's conduct in this matter constitutes an unlawful unilateral change of a mandatory subject of bargaining when the Respondent changed the manner and method of how the ten month employees in the respective bargaining units were paid?
- If the Respondent engaged in any bargaining over the change of the custom and past practice of pro rating the payment of wages for the ten month employees in the bargaining units over a twelve month pay period, then did that bargaining constitute surface bargaining?
- Whether the failure to include the change of pro rating the payment of wages for the ten month employees in the bargaining unit over twelve month pay period in the written Last Best and Final Offer of the Respondent preclude the Respondent from unilaterally implementing the change?
- If it is found that the Respondent engaged in a prohibited practice, then what remedies should be afforded the Petitioner?

The parties have agreed to have the four cases heard and decided together. A trial was held before Commissioner Joel E. Carlson on November 28, 2018. Post-trial briefs have been received.

FINDINGS OF FACT

Local 226 is the exclusive bargaining unit representative for OPS employees in the Office Personnel, Educational Paraprofessionals, Transportation Division, and Nutrition Services

Division bargaining units. In these bargaining units, there are some employees that only work ten months throughout the year, whereas there are other employees that work the entire twelve month calendar year. Prior to August 1, 2018, hourly employees in the relevant bargaining units who worked an approximate ten month period were paid on a prorated basis over twelve months. This practice was not contained in the previous Collective Bargaining Agreements between these four bargaining units and OPS. (Exhibits 525, 529, 532, and 535).

During the January 15, 2017, monthly meeting between OPS and Local 226, OPS informed Local 226 that it was buying software and hardware for a time clock system and that no decisions as to the implementation of the system had been made. Issues with the current methods of time-keeping and prorated pay were discussed. The possibility of having both twelve month and ten month employees paid on an "hours worked, hours paid" basis rather than prorating their paychecks was also discussed. (Exhibit 563). As part of the implementation of a new software system, OPS desired to require employees to utilize time clocks, rather than paper time sheets, as the means of tracking hours worked. (Exhibit 30 ¶11).

During the April 25, 2017, monthly meeting between OPS and Local 226, Local 226 President Suzanne Anderson asked "So are we going to be time work, time paid?" (Exhibit 564, 1:23). OPS General Counsel Megan Neiles-Brasch responded:

> "We'd like to move in that direction if that's going to be something that - you know, I don't know exactly where the board's at on that yet, but I'm, you know, that's a huge conversation we think in some ways it would be a lot easier to have time work time paid. And so, is that something the union would be willing to agree to, or?"

(Exhibit 564, 2:1-5).

The discussion continued regarding ten month employees and how hours worked, hours paid could be implemented. Ms. Neiles-Brasch also specifically noted the importance of the Local 226's assistance and support when it was time to implement changes regarding the time keeping and how and when employees would be paid. (Exhibit 564, 3:19-4:3).

OPS and the leadership of Local 226 met again on June 27, 2017. (86:4-8; Exhibit 565). Ms. Neiles-Brasch expressed that OPS wanted to move all employees to two week cycles. She also stated that didn't necessarily mean people would be changed to hours worked, hours paid, it was something being considered. OPS indicated its desire to negotiate the issue with the leadership of Local 226, rather than each individual bargaining unit separately. (Exhibit 565, 1:1-9). During that

meeting, there were extensive discussions between OPS and Local 226 over paying ten month employees as they work. While Local 226 had a number of questions about the overall implementation process, Local 226 did not object or indicate that it was unwilling to continue meeting at the leadership level, rather than the bargaining unit level. (Exhibit 565).

OPS and the leadership of Local 226 met again on August 24, 2017. (Exhibit 566; 90:9-13). During that meeting, OPS first notified Local 226 of its desire to implement its proposed changes in August of 2018, nearly a full year later. (Exhibit 566, 1:1-12, 3:5-7; 91:1-25). At that same meeting, OPS informed Local 226 that it wanted to begin a major communication with Local 226 and the affected employees. (Exhibit 566, 7:6-11; 92:1 6). Doug Bush, an Assistant Steward for Local 226, responded that, "I think most of us is all for it apparently, I have no problem [inaudible]." (Exhibit 566, 7:6-11).

OPS and the leadership of Local 226 met again on October 24, 2017. Local 226 did not raise the issue of changing the pay periods for ten month employees. There was, however, extensive discussion regarding implementation of time clocks and scheduling issues. (Exhibit 567).

On January 25, 2018, OPS and the Local 226 leadership team met once again. (Exhibit 568; 92:22-93:2). At that meeting, OPS provided Local 226 with a draft communication which it intended to send to all employees entitled "OPS Anywhere" (Exhibit 11; Exhibit 544) regarding the changes to time reporting and pay schedules. (Exhibit 568, 1:6-13; 93:3-8). Again, Local 226 did not object to changing the pay periods for ten month employees. (Exhibit 568). Local 226 was given an opportunity to comment and respond to OPS regarding any concerns it might have about the proposed communication. (93:9-16). Ms. Anderson admitted she reviewed the proposed communication. (93:17-19). Neither Anderson nor any representative of Local 226 contacted OPS to express any concerns or reservations about the proposed communication to employees prior to its issuance. (93:20-94:20). On January 29, 2018, OPS sent the OPS Anywhere communication (Exhibit 11; Exhibit 544) to all employees. (220:21-24). Many employees represented by Local 226 were not happy, and they received many calls and emails in response to the OPS Anywhere communication. (96:8-18).

On January 30, 2018, Local 226 sent OPS a letter requesting it cease and desist implementation of time reporting and pay schedules. (Exhibit 14). The letter was the first clear indication from Local 226 that it objected to OPS' conversion to a ten month pay plan, despite

having been notified on August 24, 2017, that OPS planned to implement in August 2018. (Exhibit 30, ¶20; Exhibit 566). The letter also specifically requested meetings with OPS over the proposed change. (Exhibit 14; 98:17-20). OPS offered four meeting dates. (Exhibit 502). OPS and the leadership of Local 226 conducted negotiations on February 13, 2018. (100:13-16; Exhibit 569). Local 226 cancelled the meeting scheduled for February 28, 2018. (100:24-101:1). On March 6, 2018, the leadership of Local 226 and OPS met to continue negotiations. (101:22-102:1). At the end of that meeting, OPS offered to permit local 226 to bring additional people to the meetings in order to represent the individual bargaining units. (102:16-23; Exhibit 570, p. 29:3-30:6). Local 226 and OPS met again on March 7, 2018. (Exhibit 571; 103:6-13). OPS offered to meet with each separate bargaining unit beginning on March 12 and continuing daily through March 15. (103:14-18; Exhibit 571, 1:2-7). OPS and the leadership of Local 226 spent the remainder of that meeting on issues relating to the necessity and timing of the individual bargaining sessions. (Exhibit 571). Upon completion of the meeting, OPS offered specific dates and times for each separate bargaining unit beginning March 12, 2019. (Exhibit 508). In response, Local 226 informed OPS that it would not meet to negotiate on Monday, March 12, 2018. (Exhibit 509). Local 226 also indicated that it would notify OPS on March 12, 2018, whether it intended to attend the remaining sessions scheduled for March 13-15. (Exhibit 509). On March 12, 2018, local 226 notified OPS that Local 226 would attend the scheduled individual bargaining unit negotiation sessions on March 13, 2018, (Exhibit 510). Upon arriving at the March 13, 2018, meeting, Ms. Anderson stated: "Well, we under [sic] we had a meeting with our attorneys and we have been advised that we do not have to do these meetings because we refuse so in our contract right now. Because we are not in negotiations." (Exhibit 572, 1:7-9). Ms. Neiles-Brasch asked "And so you are refusing to bargain with the district?" (Exhibit 572, 1:10). Ms. Anderson replied "We are refusing to open our contract at this time." (Exhibit 572, 1:11). Following extensive discussion, Anderson stated, "I guess what it kind of boils down to, ...you'll have to go back and tell them that we're not going to do this ... we're not going to have no more meetings." (Exhibit 572, 16:17-21). Anderson concluded, "So, I guess really, there's no more to say." (Exhibit 572, p. 22:19).

In a letter dated March 14, 2018, OPS notified Local 226 that it considered Local 226's refusal to bargain as evidence of the existence of impasse and that it intended to implement its proposed change effective August 1, 2018. (Exhibit 511). Despite the fact that OPS considered Local 226's refusals to bargain to be evidence of impasse, OPS raised the issue at the bargaining

table during regular negotiations for each of the four bargaining units affected by this litigation. (Exhibit 30, ¶31). The purpose of raising the issue at the bargaining table was to have an opportunity to talk about the effects of the decision to implement the ten month pay plan and to ensure that Local 226 was clear on OPS's position. (263:11-22). At no time did Local 226 offer a single counter proposal to OPS on the issue of moving from a twelve month to a ten month pay plan. (263:4-7; Exhibits 573 to 587). After the January 30, 2018, cease and desist letter, Local 226's position at the bargaining table never moved from "No." (Exhibit 30, ¶56, see also, e.g. Exhibit 577, 1:9-13). We find portions of the testimony of Ms. Anderson to be not credible. The testimony of Ms. Anderson regarding Local 226 offering counter proposals is directly contradicted by the meeting transcripts received into evidence. (70:1-5 and Exhibit 565, 1:10-12, regarding two week pay cycles, which is a 26 week pay cycle; 70:6-11 and Exhibit 565, 9:7-13:4, regarding a trial period).

On July 18, 2018, Ms. Anderson notified OPS Superintendent Dr. Cheryl Logan that Local 226 intended to file a prohibited practice action with the Commission. (Exhibit 539). This notification occurred more than a week before three of the Local 226 Bargaining Units (Paraprofessionals, Office Personnel and Nutrition) actually voted to reject OPS's contract proposal. (Exhibit 524, Exhibit 527, and Exhibit 533). The previous contracts between OPS and the four units affected by this litigation expired on July 31, 2018. (Exhibits 525, 529, 532, and 535). The previous contracts between OPS and the four Petitioner units did not contain a continuation clause. (Exhibits 525, 529, 532, and 535). On August 3, 2018, OPS notified Ms. Anderson via email that the Board of Education would consider unilateral implementation of the ten month pay schedule at the Board of Education's next regularly scheduled meeting on August 6, 2018. (Exhibit 521). Ms. Anderson responded to the email thanking OPS for the notice. (Exhibit 521). The Board of Education voted unanimously to implement the ten month pay schedule, retroactive to August 1, 2018. (123:18-20).

JURISDICTION

The Commission has been given jurisdiction to adjudicate alleged violations of the Act by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. Both parties assert that the other has committed the prohibited practice of bad faith bargaining in violation of the Nebraska Industrial Relations Act ("Act"), Neb. Rev. Stat. §48-824(1). The parties have properly invoked the jurisdiction of the Commission.

DISCUSSION

Neb. Rev. Stat. § 48-816(1)(a) defines good faith bargaining as the "performance of the mutual obligation of the employer and the labor organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment". The Act does not require parties to agree to any proposals put forth in negotiations, only that the parties "confer in good faith" about those subjects which are mandatory subjects of bargaining. Neb. Rev. Stat. § 48-824(1) states that it is a prohibited practice for any public employer, public employee, public employee organization, or collective-bargaining agent to refuse to negotiate in good faith with respect to a mandatory subject of bargaining.

Mandatory subjects of bargaining are those subjects that relate to "wages, hours, and other terms and conditions of employment, or any question arising thereunder." Neb. Rev. Stat. § 48-816(1)(a). Additional mandatory subjects of bargaining are those which "vitally affect" the terms and conditions of employment. *Fraternal Order of Police, Lodge No. 8 v. Douglas County*, 16 CIR 401 (2010). The Act only requires parties to bargain over mandatory subjects.

To establish working guidelines as to what constitutes a mandatory subject of bargaining, the Nebraska Supreme Court in *Metropolitan Technical Community College Education Association*, 203 Neb. 832 (1979), set forth the following test:

> "A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. However, those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiations even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining."

Metropolitan Tech. Community College Educ. Ass'n v. Metropolitan Tech. Community College Area, 203 Neb. 832, 842 (1979).

In *Fraternal Order of Police, Lodge 26 vs. Sheriff of Lincoln County*, Nebraska, 19 CIR 132 (2015), the Commission considered decisions of the National Labor Relations Board ("NLRB"), which are instructive but not controlling. The NLRB has held that changes in payroll periods are a mandatory subject of bargaining. *Visiting Nurse Services of Western Massachusetts, Inc.*, 325 N.L.R.B. 1125 (1998), enforced 177 F.3d 52 (1st Cir. 1999). In *Visiting Nurse Services,*

the employer unilaterally implemented a new payroll system to change employees from a weekly payroll schedule to a biweekly payroll schedule without bargaining to impasse with the Union. The Commission found that changes in payroll periods are a mandatory subject of bargaining and additionally found that the economic impact a change in the monthly payroll practice would cause was also a mandatory subject of bargaining. *Fraternal Order of Police, Lodge 26 vs. Sheriff of Lincoln County, Nebraska*, 19 CIR 132 at 139 (2015).

Mandatory subjects of bargaining are not just topics for discussion during negotiations. Unless clearly waived, mandatory subjects must be bargained for before, during, and after the expiration of a collective bargaining agreement. *Omaha Police Union Local 101 v. City of Omaha*, 15 CIR 292 (2007). Further, a topic can be established as a subject of bargaining if it has been a past practice between the parties. "An employer has a duty to not change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union." *NLRB v. Katz*, 369 U.S. 736, 745-747 (1962). To establish past practice, the practice must have occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Fraternal Order of Police, Lodge 26 vs. Sheriff of Lincoln County*, 19 CIR 132 (2015) citing *Sunoco, Inc.*, 349 N.L.R.B. 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 N.L.R.B. 349, 353 (2003), enfd. Mem. 112 Fed.Appx. 65 (D.C. Cir. 2004).

Once a topic has been found to be a mandatory subject of bargaining, the burden of proving a waiver falls on the party asserting the waiver. *Washington County Police Officers Ass'n/F.O.P. Lodge 36 v. County of Washington*, 17 CIR 114 (2011). The possibility of waiver can be considered only after we have determined that the dispute was not covered by the relevant collective bargaining agreement." *Service Empl. Internat. v. Douglas Cty. Sch. Dist.*, 286 Neb. 755 (2013). In *Fraternal Order of Police, Lodge 21 v. City of Ralston*, 12 CIR 59 (1987), the Commission stated that the standard of proving waiver of a statutorily protected right must be clear and unmistakable.

Additionally, once a union has notice of a proposed change in a mandatory subject of bargaining, it must make a timely request to bargain. "A union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table." *Id.* (citing *NLRB v. Alva Allen Indus., Inc.*, 369 F.2d 310, 321 (8th Cir. 1966)). "It is well settled Board law that 'when an employer notifies a union of proposed changes in terms and conditions

of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.'" *Id.* (citing *Haddon Craftsmen, Inc.*, 300 N.L.R.B. 789, 790 (1990)). Notice from the employer does not have to be formal, and it is not unlawful for the proposed change to be presented as a fully developed plan. *Id.* In a prior similar case between these same parties, the Nebraska Supreme Court stated:

> "The employer must give the union notice that it intends to make changes to the conditions of employment. But once notice is given, it places an obligation upon the union to request bargaining so as not to waive the employees' right to bargain. The union must act with due diligence in requesting bargaining. Any less diligence amounts to a waiver by the bargaining representative of its right to bargain. A union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain. Under federal case law, as under Nebraska law, the burden of proving waiver rests on the employer: To establish waiver of the right to bargain by union inaction, the employer must first show that the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change. In addition, the employer must show that the union failed to make a timely bargaining request before the change was implemented. (Internal quotations and citations omitted).

Service Empl. Internat. Union v. Douglas Cty. Sch. Dist., 286 Neb. at 767.

In *NLRB v. Katz*, 369 U.S. 736, 737 (1962), the U.S. Supreme Court held that unilateral changes to mandatory subjects of bargaining before impasse are per se violations of the party's duty to bargain in good faith. In *Communication Workers of America, AFL-CIO v. County of Hall, Nebraska,* 15 CIR 95 (2005), the Commission held that

> "an employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) the parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission.(internal citations omitted) If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith."

Id. at 104, *See also, Service Empl. Internat. Union v. Douglas Cty. Sch. Dist.*, 286 Neb. 755 (2013).

The Commission has defined impasse as when parties have reached a deadlock in negotiations. *Fraternal Order of Police, Lodge 41 v. County of Scottsbluff*, 13 CIR 270 (2000). In *County of Scottsbluff*, the Commission found that the following factors should be considered in

determining whether impasse exists: number of meetings, length of meetings, period of negotiations, whether parties have expressed a willingness to modify its position, whether a mediator has been called in, the importance of the issues over which the parties disagree, and the understanding of the parties regarding the state of negotiations. *Id.* The party who claims that negotiations reached impasse has the burden of proof.

The Commission will consider the totality of circumstances reflecting the parties' bargaining intent to determine if the parties are in fact bargaining in good faith. A party violates its duty to bargain in good faith by engaging in surface bargaining - negotiating under the pretense of bargaining while never intending to reach an agreement. *Professional Firefighters Association of Omaha, Local 385, AFL-CIO CLC v. City of Omaha, et al.*, 17 CIR 240 (2012), *see Continental Ins. Co. v. NLRB*, 495 F.2d 44 (2nd Cir. 1974). Following its own decisions and the decisions of the NLRB, the Commission has offered seven activities to serve as guideposts in determining whether an employer has engaged in hard but lawful bargaining or surface bargaining: delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. *Professional Firefighters Association of Omaha, Local 385, AFL-CIO CLC v. City of Omaha, et al.*, 17 CIR 240 (2012); *County of Hall v. UFSW Local 22*, 15 CIR 167 (2006), (citing *Atlanta Hilton & Tower*, 271 N.L.R.B. 1600 (1984)). However, these guideposts are not an exhaustive list.

> "The problem, therefore, in resolving a charge of bad faith bargaining, is to ascertain the state of mind of the party charged, insofar as it bears upon that party's negotiations. Since it would be extraordinary for a party directly to admit a 'bad faith' intention, his motive must of necessity be ascertained from circumstantial evidence, *NLRB v. Patent Trader*, 415 F.2d 190 (2d Cir. 1969). Certain specific conduct, such as the Company's unilateral changing of working conditions during bargaining, may constitute per se violations of the duty to bargain in good faith since they in effect constitute a 'refusal to negotiate in fact,' *NLRB v. Katz*, 369 U.S. 736, 743, (1962). Absent such evidence, however, the determination of intent must be founded upon the party's overall conduct and on the totality of the circumstances, as distinguished from the individual pieces forming part of the mosaic. *NLRB v. General Electric Co.*, 418 F.2d 736, 756 (2d Cir. 1969). Specific conduct, while it may not, standing alone, amount to a per se failure to bargain in good faith, may when considered with all of the other evidence, support an inference of bad faith."

Continental Ins. Co. v. NLRB, 495 F.2d 44, 48. (2d Cir. 1974).

Analysis

The Commission finds that changing the pay periods of the ten month employees represented by Local 226 is a mandatory subject of bargaining. The parties agree that changing the longstanding past pay practice of ten month employees is a mandatory subject of bargaining. Changes in payroll periods and the related economic impact of those changes have previously been determined to be mandatory subjects of bargaining. See *Fraternal Order of Police, Lodge 26 v. Sheriff of Lincoln County, Nebraska,* 19 CIR 132 (2015).

The parties also agree that the payment practice at issue is not contained in the collective bargaining agreements between the Petitioners' and Respondent. The Commission finds that prior to January 28, 2018, Local 226 waived its right to bargain the changes in pay practices detailed in Respondent's OPS Anywhere communication issued January 29, 2018. The Petitioner first had notice that a possible change was being considered over one year before the Respondent sent the OPS Anywhere communication notifying employees of the upcoming change. (Exhibits 11, 544 and 563). Throughout 2017, and into January 2018, Local 226 continued to have monthly meetings with the Respondent where the issue was discussed. The Petitioner and Respondent disagree as to whether the monthly meetings held between January 15, 2017, and January 25, 2018, should be considered "negotiations". The Petitioner states the monthly meetings are separate from negotiations. (47:11-53:19). For purposes of this analysis, we agree with the Petitioner and find that the regular monthly meetings were not negotiation meetings for the purpose of collective bargaining. The parties' usual practices treat the two types of meetings separately. (48:21-49:14). This finding does not purport to hold that collective bargaining cannot occur at these meetings, only that in these cases Local 226's representatives believed that they were not participating in bargaining during these monthly meetings. We note that these same parties, including the same leadership representatives from both parties, have previously negotiated issues not found in within their collective bargaining agreements outside of their regularly scheduled contract negotiations. (*Service Employees International Union Local 226 v. Douglas County School District 001*, CIR Case 1440 (2017); Exhibit 572).

However, on several occasions Local 226 was provided with sufficient notice to have triggered their duty to request bargaining on the issue. Certainly, at the June 27, 2017, monthly meeting Local 226 had clear notice that OPS wanted to pursue an hours worked, hours paid pay practice; as well as what could be described as an invitation to request bargaining on the issue and

an expression of Respondent's willingness to bargain with the Petitioners if so requested. (Exhibit 565). During the August 24, 2017, meeting, Ms. Neiles-Brasch clearly stated OPS's intent to implement the hours worked hours paid plan in August 2018, a year later. (Exhibit 566, 1:1-12). Further, statements made by Local 226's representatives during these monthly meetings were reasonably interpreted by OPS to be acceptance, or at least not an objection, by Local 226 of OPS to continuing to work towards moving hourly employees, including the ten month employees represented by Local 226, to an hours worked, hours paid pay practice. The parties participated in discussions as to how best communicate to and accommodate employees and OPS in making those changes as part of the implementation of the new computer system. This included discussions and requests for the amount of lag time between making the employees aware of coming changes to time keeping and pay practices and the implementation of the same. Local 226 was continuously updated and had the opportunity to ask questions, object, and request negotiations throughout the process of OPS programming and planning for the implementation of its new software system, including the timekeeping and pay schedule aspects. The Commission finds that Local 226's inaction and failure to request bargaining after nearly a year of continued discussions, on both the proposed change itself and the economic impact of implementing the change, to be a waiver of Local 226's right to bargain those issues. By the time Local 226 sent its cease and desist letter, the Respondent was no longer required to bargain regarding changing the ten month employees to an hours worked, hours paid pay practice. As such, we need not address Petitioners' allegations of surface bargaining. We find that the Respondent was permitted to unilaterally change the manner and method in which the above-described members in the Local 226 bargaining unit are paid.

While we have found Petitioners' waived their right to bargain the issue, the evidence is clear that Respondent had thought itself to be in negotiations throughout the relevant time period discussed here. In order to address the counterclaim against Petitioners, we will briefly address the Respondent's impasse claim. Although we find the Respondent was no longer required to negotiate the change in pay practice by the time Local 226 sent its cease and desist letter, it voluntarily did so, at which point both parties were required to participate in good faith bargaining. The Respondent remained open at that time to not implementing the change to ten month employees as previously scheduled should the negotiations come to that result. The Respondent also offered many options to alleviate the economic impact of the changes on the affected employees, including continuation of insurance benefits, financial management training, and deposit options for savings

accounts. Local 226 refused to continue bargaining, at which point OPS considered the negotiations to be at impasse. (Exhibit 572). The Commission finds that OPS' final counter offer was provided at the March 6, 2018, meeting. (Exhibit 512). The March 14, 2018, letter is a final offer for purposes of this impasse analysis. (Exhibit 511). The change was implemented prior to the filing of the petitions. The Respondent raised the issue at the individual bargaining unit meetings, again providing Local 226 an opportunity to negotiate the impact of the implementation of the plan. Again, Respondent was permitted to unilaterally change the manner and method in which the above-described members in the Local 226 bargaining unit are paid.

The above facts and findings do not constitute a convincing basis for the Petitioners' claim that OPS committed a prohibited practice. We therefore find that Respondent did not violate § 48-824(1). The above-captioned petitions are hereby dismissed.

COUNTERCLAIM

Respondent's counterclaim alleges that Local 226 has committed a prohibited practice of bad faith bargaining in violation of Nebraska Revised Statute §48-824(1). The Commission finds that Local 226 bargained in bad faith in violation of Nebraska Revised Statute §48-824(1).

The Petitions in this matter, while later modified over objection at trial, stated completely false allegations that the Respondent failed and refused to negotiate or agree to negotiate. The exhibits and testimony are replete with evidence that OPS was trying to negotiate throughout 2017, and into 2018. OPS detrimentally relied on Local 226's inaction and lack of protest as it proceeded through the planning and programming stages of the larger PeopleSoft implementation plan. There is no evidence that Local 226 leadership addressed the proposed changes with its bargaining unit members prior to the OPS Anywhere communication. (Exhibit 11; Exhibit 544). Throughout 2017, and into January 2018, the Respondent believed it was in negotiations, while Local 226 did not. Yet, Local 226 sat on its right to request bargaining on the issue. Then when faced with backlash from their membership about implementation, Local 226 proceeded to issue the cease and desist letter to the Respondent. Once the parties entered into bargaining, Local 226 quickly refused to bargain in what we infer to be an effort to delay implementation. Later, when individual bargaining unit contract negotiations occurred, Local 226 did not raise the issue that it previously refused to bargain when it claimed it would only negotiate during the individual contract meetings. Taking into account Local 226's overall conduct and the totality of the circumstances, the Commission

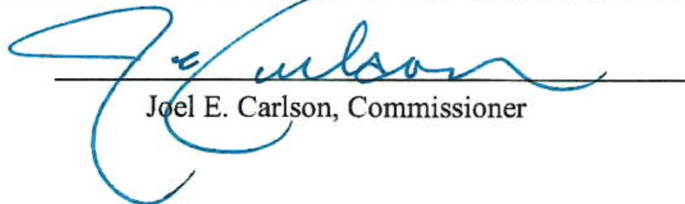
finds the actions of Local 226 to be an attempt to delay, frustrate and stymie negotiations over payment of ten month employees and implementation of the same.

Pursuant to CIR Rule 42, the Commission has authority to award attorney's fees when there has been a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party. The Commission has found it to be an appropriate remedy in cases where a party's misconduct was flagrant, aggravated, persistent, and pervasive. *See Fraternal Order of Police, Lodge No. 8 v. Douglas County, et. al.*, 16 CIR 401 (2010). At this time, the Commission finds that while Local 226 bargained in bad faith, the evidence does not show what rises to a willful pattern or practice of such behavior. As such, Local 226's actions in this case do not rise to the level deemed appropriate for the award of attorney fees. The Commission finds that the parties are to pay their own costs and fees.

All Panel Commissioners join in the entry of this Order.

Entered September 25th 2019.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



Joel E. Carlson, Commissioner